



Victorian
Law Reform
Commission

Neighbourhood Tree Disputes

CONSULTATION PAPER DECEMBER 2017



A COMMUNITY LAW REFORM PROJECT



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Preface

'The tree which moves some to tears of joy is in the eyes of others only a green thing that stands in the way.'—William Blake, *The Letters* (1799).

Neighbour proximity brings with it commendable values and benefits: existence of community; mutual help and assistance; sharing of resources; and safety by the defeat of isolation. Trees bring with them commendable values and benefits also: cooling and shading; biodiversity; birdlife; cover and privacy; and aesthetics. The quantifiable, shared, health and amenity benefits of living in leafy environments mean that trees and the 'urban forest' are valued and protected.

And yet neighbour proximity and trees are not always a happy meld. In an increasingly urbanised environment, people's decisions about their land and the trees on it can have significant effects on their neighbours' homes and lives. Neighbour tree disputes are the third largest category of dispute that comes before the Dispute Settlement Centre of Victoria.

Many people are involved in disputes about trees each year, including disputes about encroaching roots and branches and about trees which cause damage or harm. The methods for resolving such disputes—ranging from informal negotiation to litigation—can be unclear and unnecessarily confusing. A number of Australian states have recently enacted specific legislation to provide processes for resolution, and to identify more clearly parties' rights and responsibilities.

The Victorian Law Reform Commission is examining the current operation of the relevant laws and processes in Victoria governing neighbourhood tree disputes. The inquiry forms part of the Commission's community law reform program, which enables members of the community to contribute their ideas on how to improve Victorian law, and which is a valuable and important part of the Commission's functions. In order to contain the size of the inquiry as required by the *Victorian Law Reform Commission Act 2000* section 5(1)(b), the inquiry does not consider disputes about light or views, important though they are to those affected, nor does it consider disputes concerning trees situated on public land. The Commission's priority is upon effective and efficient resolution of disputes between neighbours about trees on neighbouring private land that cause interference, damage or harm.

The Commission has undertaken this inquiry following suggestions from community members, a number of which were based on their own experience of trying to resolve a neighbourhood tree dispute.

The Commission will now consider whether the current law and processes, as well as available information and support, are effective and, if not, what type of legal regime should take their place.

I encourage anyone with an interest in the issues discussed in this paper to make a submission to the Commission by 28 February 2018. Your submissions will be taken into account in the formulation of recommendations by the Commission to government as to reform of the law.



The Hon. P. D. Cummins AM

Chair

Victorian Law Reform Commission

December 2017

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains questions, listed on pages xi–xiii, that seek to guide submissions.

You do not have to address all of the questions to make a submission.

You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, online through our website, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing, and we encourage you to answer the questions contained in each chapter and set out on pages xi–xiii.

Submissions can be made by:

Completing the online form at www.lawreform.vic.gov.au

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

Confidential submissions are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au

Submission deadline: 28 February 2018.

Terms of reference

Matter initiated by the Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 8 June 2017.

The Victorian Law Reform Commission will examine the current legal framework for resolving disputes between neighbours about trees on private neighbouring land that cause damage and/or harm ('neighbourhood tree disputes'), and consider whether the law should be amended to provide just, effective and timely methods for resolution of neighbourhood tree disputes.

In conducting this review, the Commission will have particular regard to:

- recent legal developments in Australian and international jurisdictions, including the relevant statutory schemes in New South Wales and Queensland; and
- any alternative schemes for resolving neighbourhood tree disputes.

The Commission will not consider:

- disputes concerning trees situated on public land
- disputes concerning the obstruction of sunlight and views by neighbouring trees.

The Commission will report to the Attorney-General by 9 May 2019.

Glossary

Abatement	A common law self-help remedy that allows affected neighbours to remove parts of a tree that encroach onto their land up to their boundary line.
Affected neighbour	The person whose land (or use of the land) is affected by the neighbour's tree; usually the plaintiff (aggrieved party) in court proceedings.
Alternative dispute resolution (ADR)	Any formal process, other than court or tribunal proceedings, in which an impartial person assists parties to resolve their disputes.
Arborist	A qualified professional trained in cultivating, caring for, and maintaining trees.
Cause of action	The facts that give rise to a legal claim and entitle a person to take someone to court.
Dispute Settlement Centre of Victoria (DSCV)	Government-funded provider of free dispute settlement services to the Victorian community.
Encroachment	When a tree (or parts of a tree) on the tree owner's land crosses over boundary lines and enters the affected neighbour's land.
Jurisdiction	The authority of a court or tribunal to hear cases brought before it.
Local laws	Laws passed by local councils to protect public health, safety and amenity. Tree protection laws are an example of local laws.
Mediation	A method of dispute resolution that involves bringing parties together to discuss a dispute and reach an agreement.
New South Wales Land and Environment Court (NSWLEC)	In New South Wales, the court that hears neighbourhood tree disputes.

Online dispute resolution (ODR)	A range of technology-assisted methods for resolving disputes.
Queensland Civil and Administrative Tribunal (QCAT)	In Queensland, the tribunal that hears neighbourhood tree disputes.
Resource Management and Planning Appeal Tribunal (RMPAT)	In Tasmania, the tribunal that hears neighbourhood tree disputes.
Standing	The right to bring proceedings before a court. To have standing in a case a person must be able to show that they have sufficient interest in the case because, for example, of possible effects on their property or activities.
Statutory scheme	A scheme based on specific legislation passed by Parliament, rather than on the common law.
Tort	A civil wrong, and type of cause of action. Nuisance, negligence and trespass to land are types of torts.
Victorian Civil and Administrative Tribunal (VCAT)	In Victoria, the tribunal that hears civil and administrative claims.
Victoria Planning Provisions (VPPs)	A set of standard planning provisions that may be incorporated into local planning schemes.

Questions

- 1 Have you been involved in a neighbourhood tree dispute? What was it about and what was the outcome?
- 2 Have you been involved in a DSCV mediation about a neighbourhood tree dispute? What was your experience?
- 3 Have you been involved in a Victorian court case about a neighbourhood tree dispute? What was your experience?
- 4 Are the current law and process for resolving neighbourhood tree disputes in Victoria satisfactory? If not, why not?
- 5 Are there any aspects of international jurisdictions' approaches to resolving neighbourhood tree disputes that should be considered in Victoria?
- 6 If the existing system is retained, are there any specific changes necessary to improve it?
- 7 Should a statutory scheme for resolving tree disputes be adopted in Victoria? What should the overarching aims of a new scheme be?
- 8 What type of vegetation should be covered by a statutory scheme? Is there any vegetation that should not be covered?
- 9 Should the application of a statutory scheme be limited to land in particular zones? If so, which zones?
- 10 Should there be a requirement that the affected neighbour's land adjoin the tree owner's land? If so, how should the relevant degree of proximity be defined?
- 11 How should trees that are partially on the tree owner's land be dealt with under a statutory scheme?
- 12 Who should have standing to bring a legal action in tree disputes under a new scheme?
- 13 Who should be liable for harm or damage caused under a new scheme?
- 14 Should interference (not causing damage) be actionable under a new scheme? If so, what degree of interference?
- 15 What degree of damage should be sufficient to bring an action under a new scheme?
- 16 What kind of damage should be covered under a new scheme? Should damage include damage to land itself, or only to property on the land?

- 17 Should future damage be actionable under a statutory scheme? If so, should a particular time period be specified?
- 18 What degree of harm should be sufficient to bring an action under a statutory scheme?
- 19 How should the relevant subject of the harm be determined? Should harm include harm to occupiers only, to others on the land, or to anyone at all?
- 20 Should future harm be actionable under a statutory scheme? If so, should a particular time period be specified?
- 21 Which court/s or tribunal should have jurisdiction over neighbourhood tree disputes under a statutory scheme?
- 22 What preconditions, if any, should parties have to satisfy under a statutory scheme before any orders are made?
- 23 What factors should be taken into account by the decision maker before making any determinations under a statutory scheme?
- 24 Should there be a hierarchy or relative weight for each of these factors? If so, how should this be determined?
- 25 What types of orders should be available under a statutory scheme?
- 26 How should these orders be enforced?
- 27 Should the common law right of abatement remain available to affected neighbours under a statutory scheme? Should it be modified in any way?
- 28 To what extent, if any, should orders made under a statutory scheme override or modify:
 - (a) local laws?
 - (b) other legislation?
- 29 What factors should be taken into account in relation to the appointment or qualifications of experts giving evidence about neighbourhood tree disputes?
- 30 Should the decision-making body issue guidelines or model reports to guide expert evidence?
- 31 Should new owners of land who take the place of the affected neighbour be bound by the outcome of legal action regarding relevant trees on the land?
- 32 Should new owners of land who take the place of the tree owner be bound by the outcome of legal action regarding relevant trees on the land?
- 33 At what point during the sale and/or transfer of land process should a purchaser become bound by the outcome of legal action:
 - (a) on transfer of title?
 - (b) on entering into a contract of sale?
 - (c) at some other time?
- 34 Should new owners be joined as a party to a proceeding that is already underway? If so, at which point of the sale and/or transfer of land process?

-
- 35 Should a searchable database of orders relating to trees be made available in Victoria?
 - 36 What types of resources should be made available to community members to complement a statutory scheme?
 - 37 Should an online dispute resolution platform dedicated to neighbourhood tree disputes be introduced in Victoria? If so, what tools should be made available on this platform and who should administer it?
 - 38 Are there any other specific features of a statutory scheme that the Commission should consider?
 - 39 Do you have an alternative option for reform that you would like to see introduced in Victoria?

Structure of this paper

This consultation paper is divided into seven chapters. Each chapter deals with a distinct aspect of law and policy, and some pose questions to inform the Commission’s research recommendations in that area.

Chapter 1 introduces the paper, and provides background to the project and the issues raised. It explains the scope of the project, and includes information on how to participate in the inquiry.

Chapter 2 outlines the many different types of tree dispute that may occur, and sets out examples of each in case studies.

Chapter 3 sets out the law governing tree disputes in Victoria, and explains the processes typically undertaken to resolve disputes. It also notes where Victorian legislation may affect action taken in tree disputes.

Chapter 4 examines the regulation of vegetation in Victoria, and sets out the structure of Victorian planning law and relevant local controls, including overlays. It also provides examples of tree protection and management from local government areas, where they have the potential to affect the management of private trees.

Chapter 5 canvasses approaches to resolving tree disputes in other jurisdictions, including the statutory frameworks in New South Wales, Queensland and Tasmania, and highlights some notable approaches in international jurisdictions.

Chapter 6 examines both the criticisms and the benefits of the current system in Victoria, and provides options for reform for public comment and input. The majority of questions about change to the current Victorian system are in this chapter.

Chapter 7 briefly concludes the paper.

Key chapters	
For information about the current law and process of resolving tree disputes in Victoria	For information about this review, alternative approaches and options for change
Chapter 1	Chapter 1
Chapter 2	Chapter 5
Chapter 3	Chapter 6
Chapter 4	

Defining neighbourhood tree disputes

2	The issue
5	Scope of the issue
5	Origin of the project
5	Interstate reviews
7	Relevant Victorian review
8	Community input

1. Defining neighbourhood tree disputes

The issue

- 1.1 Many people have strong and valuable relationships with their neighbours. Living near neighbours can be beneficial, and can allow for sharing of resources, keeping an eye out for one another's safety and wellbeing, and creating a sense of community. However, people living near each other can be affected by each other's decisions and property.
- 1.2 Trees on private land are usually privately owned, but the benefits of living in a treed environment are shared. Neighbours may enjoy the increased shade, cooling properties, biodiversity and aesthetic value of a neighbour's tree.¹ Particular trees may be valued for the privacy they provide, or for their noise-reducing qualities. Properties in leafy suburbs have stronger property values than those without trees.
- 1.3 Sometimes, however, trees on private land and the way they are (or are not) maintained can cause disturbance to neighbours' use and enjoyment of their own land. Neighbours need not directly interact with one another to have an impact on each other's lives.
- 1.4 Common issues that may lead to disputes between neighbours about trees include:
 - branches hanging over boundary lines
 - roots causing damage to foundations, drainage and sewer pipelines
 - the spread of weeds and creeping plants
 - leaf litter causing damage or creating hazards (eg slippery pathways or clogged gutters)
 - unsafe trees and branches creating hazards (eg poisonous fruit or leaves, or insecure branches)
 - trees impeding a view and/or blocking sunlight, and/or affecting the neighbour's ability to use solar panels.²
- 1.5 These disputes can be generally characterised as a competition of rights, namely the tree owner's right to use and enjoy the land in any lawful manner they see fit, and the affected neighbour's right to enjoy their land without unreasonable interference.
- 1.6 Tree disputes, whether based on minor impositions, such as trees dropping leaf litter or branches beginning to grow over a property border, or more significant ones, such as damage to property or harm to people, can inspire passionate and uncompromising reactions.

1 The quantifiable economic benefit of trees is also increasingly well recognised. See, eg, the discussion in Greg M Moore, 'The Importance and Value of Urban Forests as Climate Changes' (2012) 129(5) *The Victorian Naturalist* 167.

2 Government of Queensland, *What to Do if a Neighbour's Tree is Affecting You* <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/what-to-do-if-a-neighbours-tree-is-affecting-you/>; Dispute Settlement Centre of Victoria, Department of Justice and Regulation (Vic), *Know Your Rights* <www.disputes.vic.gov.au/know-your-rights-0>; Community law reform proposals received by the Commission between 2010 and 2016.

- 1.7 The fact that tree disputes may affect people's property rights, their home life and their interactions with neighbours exacerbates their impact.
- 1.8 Where a tree owner refuses to remedy the issue, neighbourhood tree disputes can escalate quickly, and can undermine a good neighbourly relationship.
- 1.9 Personal security and safety within a private home-space are important, and an ongoing dispute with a neighbour can threaten individuals' enjoyment of this space.
- 1.10 The probability of this type of dispute escalating may be higher because of neighbours' close proximity to one another, resulting in more encounters in their day-to-day lives.
- 1.11 Tree disputes can also escalate into further disputes, such as vandalism or other matters.³
- 1.12 The need for clear rules and simple processes to resolve neighbourhood tree disputes has been recognised since the beginning of written law.
- 1.13 Early documentary evidence of this can be traced back to around 455 BC and the Laws of the Twelve Tables, often cited as the beginning of European law. Representing the written code of the Roman Republic, the laws were drawn up by a commission of ten (*Decemviri*), and recorded on twelve bronze tablets.⁴ Designed to apply across the entire society, regardless of class, the laws included these rules about trees' impact on neighbours justifying legal action and attracting penalties:⁵
- If a tree from a neighbour's farm has been felled by the wind over one's farm, ... one rightfully can take legal action for that tree to be removed.⁶
- If an overhanging tree causes injury by its branches or its shade, let it be cut off 15 feet from the ground.⁷
- For each illegal cutdown of trees that belong to someone else the culprit shall pay 20 asses.⁸
- 1.14 In Victoria, people usually begin by trying to resolve their disputes with neighbours informally. However, this is often not practicable or effective, particularly where neighbours disagree over who is responsible for taking action to mitigate risks or damage.
- 1.15 Neighbours involved in tree disputes may not have a clear sense of their rights and responsibilities, making informal dispute resolution difficult. The Dispute Settlement Centre of Victoria (DSCV), a unit of the Department of Justice and Regulation, deals with a large number of tree-related disputes. Its mediation services are often the first external assistance sought.⁹
- 1.16 If mediation is unsuccessful, parties involved in tree disputes may choose to take their dispute to court.¹⁰ These disputes are currently governed by the common law, specifically the torts of nuisance and negligence. Common law rules in this area are often complex, difficult to define, and lack clear statements of rights and responsibilities.

3 Gregory Moore, 'Acts of Arborial Violence: Tree Vandals Deprive Us All', *The Conversation* (online), 2 June 2015 <<https://theconversation.com/acts-of-arborial-violence-tree-vandals-deprive-us-all-41342>>; Dan Jervis-Bardy, 'Vandals graffiti Unley home after owners gain approval to cut down river red gum tree', *The Advertiser* (online), 26 July 2017 <www.adelaidenow.com.au>; Lynda Cheshire and Robin Fitzgerald, 'From Private Nuisance to Criminal Behaviour: Neighbour Problems and Neighbourhood Context in an Australian City' (2015) 30(3) *Housing Studies* 100, 101, 115–6.

4 Oliver Thatcher (ed), *The Library of Original Sources, Vol. III: The Roman World* (Milwaukee University Research Extension Co, 1901) 9–11.

5 Translations sourced from a number of sites (see footnotes 6–8). Tablets VII and VIII appear to have been used interchangeably.

6 Tablet VIII, 9: Allan Chester Johnson, Paul Robinson Coleman-Norton, and Frank Card Bourne, *Ancient Roman Statutes* (University of Texas Press, 1981). Reproduced in The Avalon Project, *Documents in Law, History and Diplomacy* (2008) Yale Law School Library <http://avalon.law.yale.edu/ancient/twelve_tables.asp>.

7 Tablet VIII, 5: The Romans EU, *The 12 Tables* <www.the-romans.eu/books/The-12-tables.php>.

8 Tablet III, 12: *ibid*.

9 Victoria Law Foundation, *Neighbours, the Law and You* (March 2015) Everyday Law <www.victorialawfoundation.org.au/publication/neighbours-the-law-and-you/read>.

10 Typically in the Magistrates' Court: *Magistrates' Court Act 1989* (Vic) s 100. VCAT does not have jurisdiction to hear common law complaints.

- 1.17 The main remedies for tree disputes are court orders for an injunction and/or damages. These tortious remedies ‘aim to rectify specific personal losses, but do not address the interests of the public at large in the aesthetic, historical, cultural or environmental values associated with trees’.¹¹
- 1.18 The options currently available for resolving disputes are either non-compulsory and non-binding (informal resolution, DSCV mediation and private mediation) or litigious and not very accessible (court-based legal action).
- 1.19 The Commission has been told by community members that the current mechanism for addressing tree disputes in Victoria is confusing, ineffective and costly.
- 1.20 Proposals and comments received in favour of reviewing the law call for the implementation of a statutory scheme that clearly sets out the rights and responsibilities of parties involved in tree disputes.¹²

Defining a tree

- 1.21 Disputes between neighbours can arise over a wide variety of vegetation, including trees of different sizes, bushes, creepers and vines, overhanging branches, roots, products of trees (needles, leaf litter and pollen) and dead trees.
- 1.22 Although most people have a common understanding of what a tree is, there are very few definitions of ‘tree’ in Victorian legislation.¹³ Existing definitions include:
- The *Forests Act 1958* (Vic) provides that a ‘tree or trees includes trees shrubs bushes seedlings saplings and reshoots whether alive or dead’.¹⁴
 - The *Country Fire Authority Act 1958* (Vic) defines ‘scrub or vegetation’ to include ‘trees bushes plants and undergrowth of all kinds and sizes whether living or dead and whether standing or not standing, and also includes any part of any such trees bushes plants or undergrowth whether severed or not severed’.¹⁵
- 1.23 At the local government level, trees are defined in different ways. For example, the Melbourne City Council’s definition includes ‘the trunk, branches, canopy and root system of [a] tree’.¹⁶ Nillumbik Shire Council defines a tree as a ‘long lived woody perennial plant greater than (or usually greater than) 3 metres in height with one or relatively few main stems or trunks’.¹⁷
- 1.24 The *Macquarie Dictionary* defines a tree as ‘a perennial plant having a permanent woody, self-supporting main stem or trunk, usually growing to a considerable height, and usually developing branches at some distance from the ground’.¹⁸ Further definitions are set out at [6.17]–[6.27].
- 1.25 For the purposes of this review, the Commission is seeking community views about disputes over trees and vegetation broadly. Other jurisdictions provide different definitions of what constitutes a tree, and the options for this in Victoria are discussed in Chapter 6.

11 Margaret Davies and Kynan Rogers, ‘Tale of a Tree’ (2014) 16 *Flinders Law Journal* 43, 52.

12 Information provided by the Dispute Settlement Centre of Victoria to the Commission on 18 May 2016; Community law reform proposals received between 2010 and 2016.

13 There is no definition of ‘tree’ in the *Catchment and Land Protection Act 1994* (Vic); *Conservation, Forests and Lands Act 1987* (Vic); *Flora and Fauna Guarantee Act 1988* (Vic); *Planning and Environment Act 1987* (Vic); *Heritage Act 1995* (Vic); *Aboriginal Heritage Act 2006* (Vic). *Forests Act 1958* (Vic) s 3.

14 *Country Fire Authority Act 1958* (Vic) s 3.

15 Melbourne City Council, *Activities Local Law 2009*, 1.11.

16 Nillumbik Shire Council, *Nillumbik Tree Management Guidelines*, September 2015, 7 <www.nillumbik.vic.gov.au/Council/Council-property/Maintenance>. This definition is drawn from Standards Australia *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007) [2].

17 Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) ‘tree’.

Scope of the issue

- 1.26 Many residential properties have trees growing within their boundaries. The potential for neighbourhood tree disputes to arise is high. Data from the DSCV shows that a large number of people experience disputes with neighbours over trees.
- 1.27 In preliminary consultations, senior staff at DSCV told the Commission that tree disputes were the third most common type of dispute referred to their centres.
- 1.28 Data supplied by the DSCV shows that in the 5.5-year period spanning December 2011 to May 2017, 18,727 of the 109,039 disputes referred related to tree disputes. This represents an average of 17.2 per cent of the total workload. The highest percentage of tree disputes (19.2 per cent) occurred in 2012, with 2014 recording the lowest figure (15.7 per cent). It is clear that disputes about trees are a consistently significant proportion of the DSCV's work.¹⁹
- 1.29 Given the volume and frequency of neighbourhood tree disputes, the Commission has determined that a review of the current law governing the resolution of these disputes is timely.

Origin of the project

- 1.30 As well as inquiring into matters referred to it by the Attorney-General, the Commission has the power to initiate its own projects under its community law reform function.
- 1.31 This function involves inquiring into 'relatively minor legal issues that are of general community concern'.²⁰ The term 'relatively minor' means limited in size and scope. It does not mean that the subject matter of the project is insignificant. These projects are referred to as 'community law reform projects', and are often initially suggested to the Commission by community members or groups.
- 1.32 The terms of section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) mandate that community law reform projects 'will not require a significant deployment of the resources available to the Commission'. Accordingly, the Commission considered the priorities of subject matter, and concluded that the subject matter should be:
- disputes between neighbours about trees on private neighbouring land that cause damage and/or harm ('neighbourhood tree disputes').
- 1.33 To limit the size of the inquiry, the Commission decided not to investigate disputes concerning trees situated on public land, nor disputes concerning the obstruction of sunlight and views by neighbouring trees. The full terms of reference are set out at vii of this consultation paper.

Interstate reviews

- 1.34 Disputes between neighbours have been the subject of reviews by government agencies and state law reform bodies.
- 1.35 While the scope and subject matter of each review have been different, each has been of substantial assistance to the Commission in its preliminary investigation.
- 1.36 The law reform bodies of Queensland, New South Wales and Tasmania have completed significant reviews. The New South Wales review dealt more generally with issues relating to neighbour relations, of which tree disputes was one. The Queensland review explored issues common to tree and fence disputes.

- 1.37 The Tasmanian review focused on rights to sunlight and views. While this type of dispute is not being explored in this project, the Commission will be dealing with similar themes.
- 1.38 Each of these reviews recommended a statutory scheme for resolving tree disputes and made recommendations about which forums would be most appropriate to bring an action under the proposed legislation. They all recommended that neighbours be required to attempt to resolve disputes themselves before pursuing legal remedies.

New South Wales Law Reform Commission—*Neighbour and Neighbour Relations Report (1998)*

- 1.39 The New South Wales Law Reform Commission (NSWLRC) review preceded the introduction of the statutory scheme for resolving tree disputes in New South Wales. The review considered disputes over damage and harm caused by trees, and the obstruction of sunlight and views.
- 1.40 The NSWLRC found that the common law of nuisance and abatement did not provide an adequate dispute resolution process. The NSWLRC made eight recommendations, including that remedies be made available for such damage or harm and obstructions of sunlight and views and that, before seeking relief, neighbours be required to attempt to resolve disputes themselves.²¹
- 1.41 The report recommended that tree owners should have greater responsibility for any damage trees may cause. It proposed new legislation which would make tree owners responsible for ensuring that their trees do not cause damage to neighbouring property or interfere unreasonably with a neighbour's enjoyment of land.²²
- 1.42 As a result of the NSWLRC recommendation for a simple, inexpensive and accessible process for resolving tree disputes, the separate statutory scheme under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) was enacted in 2006.²³

NSW Department of Justice and Attorney-General—*Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW) (2009)*

- 1.43 The *Trees (Disputes Between Neighbours) Act 2006* (NSW) provided for a review of the Act two years after it was assented to.
- 1.44 The statutory review, conducted by the NSW Department of Justice and Attorney-General, found that the policy objectives of the Act (simplicity, affordability and accessibility) had remained valid,²⁴ and that the procedure established by the Act and implemented by the Land and Environment Court was meeting those objectives.²⁵

Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) (2015)*

- 1.45 The 2015 Queensland review was a statutory review of the existing Act by the Queensland Law Reform Commission (QLRC) to determine whether it was meeting its original objectives. It looked at the whole Act, which includes a scheme for addressing tree disputes about both damage and harm caused by trees, and the obstruction of sunlight and views.
- 1.46 The QLRC concluded that, overall, the objects of the Act remained valid, and that the Act was meeting its objectives. It reaffirmed the 'continuing need in the community for a State-wide statutory framework to assist neighbours to resolve issues and disputes in relation to ... trees'.²⁶

21 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) viii–x.

22 Ibid 36 (Recommendation 5(1)).

23 New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2006, 4594–4596 (Henry Tsang).

24 Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (2009) 10.

25 Ibid 15–16.

26 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) i.

Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (2016)

- 1.47 The Tasmania Law Reform Institute (TLRI) review was limited to tree disputes about the obstruction of sunlight and views. The Institute made 18 recommendations, including that remedies be made available for such obstructions and that, before seeking relief, neighbours be required to attempt to resolve disputes themselves.
- 1.48 Notably, the TLRI stated that ‘a model similar to the Victorian model of dispute resolution for resolving neighbourhood disputes about trees and hedges [should] not be implemented in Tasmania’.²⁷
- 1.49 The recommendations have formed the basis of the *Neighbourhood Disputes About Plants Act 2017* (Tas). Although the TLRI review dealt only with sunlight and views, in drafting the legislation ‘it was considered sensible for the statutory scheme to also address matters that would otherwise be dealt with under a common law nuisance’.²⁸ The new Act therefore also covers trees causing damage or injury.

Relevant Victorian review

- 1.50 As a number of jurisdictions have enacted similar (or combined) schemes for the regulation of neighbourhood and tree disputes, the 2014 reforms to the *Fences Act 1968* (Vic) have some relevance to this project.

Review of the *Fences Act 1968* (Vic)

- 1.51 The *Fences Act* was subject to a major review by the Victorian Parliamentary Law Reform Committee in 1998.
- 1.52 The Committee’s report made recommendations to make fencing processes more comprehensive and transparent, and to give parties clearer guidance about their obligations. Informed by the Committee’s work, the government undertook a further review of the *Fences Act* in 2011 and conducted public consultation on a discussion paper in late 2012.
- 1.53 Changes brought in by the resultant *Fences Amendment Act 2014* clarified and simplified the dispute resolution process in relation to shared fences.
- 1.54 Prior to the changes, the *Fences Act* contained separate processes to manage construction of a dividing fence and the maintenance and repair of a current fence. The amended Act provides for one simplified process.
- 1.55 The amended Act also clarifies issues of long-term tenants’ liability, the contributions of owners and, importantly, introduces a simple and clear Notice to Fence, which forms the basis for owners to negotiate over proposed fencing works.
- 1.56 In the Second Reading Speech for the Bill, the then-Assistant Treasurer explained the extent of the problem, and the importance of the changes to this seemingly small area of law:

Although the monetary amounts in dispute may be relatively small, fencing disagreements can create tension between neighbours. In 2012–13, fencing disputes represented the greatest number of calls to the Dispute Settlement Centre of Victoria, with 6611 inquiries made. The amount in dispute in a fencing matter is also likely to be significantly less than the cost of consulting legal representatives, pursuing court

proceedings and enforcing small judgement debts. For these reasons, clear and streamlined processes that assist neighbours to undertake fencing works and resolve disputes are essential.²⁹

Community input

- 1.57 The Commission invites the views and experiences of the community on the questions posed in this paper. A complete list of questions can be found on pages xi–xiii.
- 1.58 Some chapters in this paper cover detailed, technical elements of the relevant law, while others deal with the process of dispute resolution. The Commission encourages anyone with a view on the issues to make a submission. Submissions may cover any or all aspects of the paper, and need only deal with those elements you wish to comment on. Accordingly, you may wish to read only those parts of the paper that relate to your areas of interest.
- 1.59 While you are welcome to share any information you think relevant, the Commission’s inquiry, and subsequent recommendations, will be limited by the parameters set out in the terms of reference, reproduced on page vii.
- 1.60 Specifically, the Commission will not be inquiring into:
- disputes concerning trees situated on public land
 - disputes concerning the obstruction of sunlight and views by neighbouring trees.
- 1.61 The Commission invites written submissions by 28 February 2018. There is no set requirement for the layout, length or content of a submission, although topics should fall within the terms of reference. More details on how to make a submission are set out on page v. The Commission places all submissions on its public website, unless there is a substantial reason not to. If you do not wish your submission to be published, please inform the Commission.
- 1.62 The Commission will also meet with individuals and groups with experiences or knowledge in the area of tree disputes. Please contact the Commission if you would like to be involved in a consultation meeting.
- 1.63 In addition, the Commission has created a short online survey to canvass views and experiences. Some of the survey questions are similar to the consultation questions in this paper. All are welcome to take the survey at www.surveymonkey.com/r/treedisputes to share their views and experiences.
- 1.64 After holding consultation meetings, considering submissions and examining survey results, the Commission will write a report detailing its recommendations for law reform in the area of neighbourhood tree disputes in Victoria.
- 1.65 The report will be presented to the Attorney-General for consideration, and then tabled in Parliament.

Examples of tree disputes

- 10** Introduction
- 11** Impact on neighbours' relationships
- 12** Damage and interference to land and property
- 17** Harm to people
- 19** Conclusion

2. Examples of tree disputes

Introduction

- 2.1 Tree disputes vary in character and complexity because of ecological and interpersonal factors. For a tree owner, a tree might provide shade, privacy, support for wildlife and amenity to their property. However, for a neighbour, the same tree may become a cause for concern if it is likely to damage their property or cause harm to its occupants.¹ The opposite is also true: a neighbour may enjoy the shade or amenity provided by a neighbouring tree which drops litter and branches into its owner's garden.²
- 2.2 Trees are not intrusive or hazardous in and of themselves. However, as a tree grows, it can interact with neighbouring land. A common issue occurs when a tree 'encroaches' over boundary lines: parts of the tree, such as branches or roots, overhang or grow into neighbouring land. Trees growing close to boundary lines are more likely to encroach in this way.
- 2.3 Minor encroachment can be remedied by cutting away the branch or root, or erecting a root barrier.³ More significant or pervasive encroachments, potentially posing greater risks to property or people, may require the specialist skills of arborists to mitigate risks and to maintain the structural integrity of the tree.⁴
- 2.4 Although encroachment is an aspect of many tree disputes, it is not always a factor. Damage or harm can result without encroachment, such as when leaf litter or pollen is blown onto neighbouring property, or when an entire tree falls across boundary lines onto neighbouring land.
- 2.5 This chapter uses case studies to explore common ways trees may damage or interfere with neighbouring property or cause harm,⁵ and the variety of ways tree disputes can escalate and adversely affect neighbours' relationships.
- 2.6 Some of the cases mentioned in this chapter include trees on public land that are owned by local councils. Although disputes involving publicly owned trees are outside the scope of this inquiry, these cases provide useful examples of damage or harm which may also occur between neighbouring private landowners.

1 See, eg, *Rogerson v Dean* [2017] NSWLEC 1209.

2 See, eg, Matthew Condon, 'The Day a New Neighbour Called in the Chainsaws to Destroy a Giant Tree and Changed Our Lives Forever', *The Courier Mail* (online), 15 October 2014 <www.couriermail.com.au/news/queensland>.

3 This is called abatement, a common law self-help remedy: see [3.17]–[3.26].

4 See, eg, *Campbell v Blackshaw* [2017] ACAT 64 [10] (30 August 2017).

5 Although damage and harm are discussed separately in this chapter for reasons of clarity, it is important to note a tree dispute may be based on claims of both: see, eg, *Yang v Scerri* [2007] NSWLEC 592 (31 August 2007); *Leonardi v Watson* [2015] QCATA 192 (22 December 2015).

Impact on neighbours' relationships

- 2.7 As noted in Chapter 1, tree disputes can compound existing conflict, or even ruin once amicable relationships.⁶ While this can be true of many types of legal dispute, tree disputes can give rise to particularly impassioned responses because they can seem to challenge a person's ownership and enjoyment of their land and any sentimental attachment they may have to their tree.
- 2.8 Tree disputes can create stress and anxiety for neighbours and can significantly impair their experience of living in their homes.⁷ According to Victoria Legal Aid, these types of disputes 'can have a serious effect on everyday life.'⁸ The breakdown of a harmonious relationship due to a lack of cooperation, unresponsiveness or hostility and, in extreme cases, trespass and criminal damage, may delay or prevent the resolution of a tree dispute.⁹ Tree disputes can also lead to applications for a personal safety order.¹⁰
- 2.9 Some examples of tree disputes causing a breakdown of neighbourly relations or compounding pre-existing conflict are given below.¹¹
- 2.10 In *Owners Corporation SP020030 v Keyt*,¹² the owners of a property next to a block of units managed by an Owners Corporation (OC) planted two Leyland cypresses along their dividing fence, which abutted the driveway of the block of units. Over time, the concrete of this driveway started to lift and become uneven. This structural damage was attributed to root damage from the trees.
- 2.11 The tree owners ignored the OC's multiple attempts to resolve the issue and on one occasion became verbally abusive when approached. The OC then took legal action for trespass, negligence and nuisance, and applied for damages of \$61,392 for rectification works. The tree owners decided to sell their property at auction but the property did not sell. The tree owners still did nothing about the trees.
- 2.12 In court the tree owners denied the allegations and knowledge of the damage. They later sold their property by private sale to buyers who were not informed about the legal dispute. Just before signing the contract of sale the buyers were told by the tree owners that they had been informed 'out of the blue' that they were being sued, and asked the buyers to increase their purchase price to cover the cost of the damages being sought. The buyers agreed and, on assurances from the tree owners that they would rectify the tree problem before they took possession, eventually settled.
- 2.13 The tree owners did not rectify the problem by the time the buyers moved in and all attempts to contact the tree owners were ignored or lost between the three different law firms the tree owners had engaged. In court, it was determined that the damage to the driveway resulted from the tree owners' negligence. They were ordered to pay the OC \$61,780 in damages.
- 2.14 In another case, as reported in the media, a couple were convicted and fined for criminal damage in the Geelong Magistrates' Court after they pleaded guilty to poisoning 40 cypress trees on neighbouring properties. The couple were witnessed treating the soil near the trees with hydrochloric acid, a substance known to kill most plant species.

6 See, eg, *Cacopardo v Woolcock* [2017] QCAT 214 (12 June 2017); *R v Stenberg* [2013] NSWSC 1858 (13 December 2013); *Marshall v Berndt* [2011] VCC 384 (7 April 2011) [229].

7 Lynda Cheshire and Robin Fitzgerald, 'From Private Nuisance to Criminal Behaviour: Neighbour Problems and Neighbourhood Context in an Australian City' (2015) 30(3) *Housing Studies* 100, 101; Mediation SA, *Preventing Conflicts in the Modern Neighbourhood: Tips on Being a Good Neighbour* (2015) 61.

8 Victoria Legal Aid, *Disputes With Neighbours* <www.legalaid.vic.gov.au/find-legal-answers/disputes-with-neighbours>.

9 Ibid.

10 Ibid.

11 These are given as general examples of how disputes about trees can affect relationships. They are not square examples of trees causing damage or harm.

12 [2016] VCC 1656A (24 October 2016).

The couple were believed to have poisoned the trees following longstanding disputes over the trees which they believed had caused root damage to their land and property.¹³

- 2.15 Parties to a tree dispute are not always residential neighbours. They may also be a neighbouring community establishment such as a school or local business. Disputes between such establishments and residential neighbours may be influenced by an uneven balance of financial and legal resources, and may therefore require a different approach to resolution.

Damage and interference to land and property

- 2.16 Encroachment of branches or tree roots is the most common cause of tree-related impacts on neighbouring property that are reported in cases brought before a court. This likely reflects the seriousness of the damage, which would justify the expense and time involved in taking court action.¹⁴ Entire trees or branches may also fall onto neighbouring land.
- 2.17 Overhanging branches can affect neighbouring properties by taking up space or dropping leaf litter, and by causing damage to property by exerting pressure on or falling onto structures.¹⁵
- 2.18 Encroaching roots may cause damage to structures and foundations, as well as to other plants, and may pose a safety hazard.¹⁶

Leaf litter

- 2.19 The accumulation of leaf litter on neighbouring land is a common cause of tree disputes. Leaf litter can be made up of flowers, fruit, leaves, bark or small pieces of deadwood. All trees shed this type of matter. Deciduous trees shed their leaves all at once, usually in winter, while evergreen trees shed their leaves all year round.¹⁷
- 2.20 Leaf litter which has dropped onto neighbouring land can cause blockages in gutters and drains, and affect other parts of the property. Leaf litter can also be blown onto neighbouring land by wind and other natural forces.
- 2.21 In *Wilson v Farah*,¹⁸ the affected neighbour brought an application against her neighbours who owned a fiddlewood tree which overhung her pool and deposited flowers and leaves in it. The leaf litter caused algae to grow in the pool. The affected neighbour sought the removal of the tree in the New South Wales Land and Environment Court (NSWLEC) on the basis that the pool required an unreasonable level of maintenance, up to three times a day, in order to be useable. She also claimed that the leaf litter had damaged her pool and was likely to cause further damage. The tree owners disagreed with the removal of the tree but were prepared to remove the overhanging branches subject to permission from the local council, which enforced a tree protection order over the tree.

13 Karen Matthews, 'Geelong Court: ... Couple Pleads Guilty to Poisoning Neighbours' Trees', *Geelong Advertiser* (online), 20 January 2016 <www.geelongadvertiser.com.au/news/crime-court/geelong-court-lovely-banks-couple-pleads-guilty-to-poisoning-neighbours-trees/news-story/e65a9b00bdf98c5f7938c4e88ce2d2ba>.

14 See generally *City of Richmond v Scantelbury* [1991] 2 VR 38; *Yang v Scerri* [2007] NSWLEC 592 (31 August 2007); *Hiss v Galea* [2012] VCC 2010 (21 December 2012); *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 (24 October 2016); *Rogerson v Dean* [2017] NSWLEC 1209 (24 April 2017).

15 See, eg, *Wilson v Farah* [2017] NSWLEC 1006 (10 January 2017); *Yang v Scerri* [2007] NSWLEC 592 (31 August 2007).

16 John Roberts, Nick Jackson and Mark Smith, *Tree Roots in the Built Environment* (Arboricultural Association, UK, 2005) 369.

17 Bob Thomas, *Abscission: The Reason Why Leaves Fall*, (25 November 2007) Loyola University New Orleans <www.loyno.edu/lucec/natural-history-writings/abscission-reason-why-leaves-fall>.

18 [2017] NSWLEC 1006 (10 January 2017).

- 2.22 The NSWLEC determined that although the tree contributed substantially to the leaf litter in the pool,¹⁹ the maintenance required formed part of the ordinary 'exterior house and grounds maintenance' expected in urban environments.²⁰ Furthermore, it was determined that the leaf litter in the pool had not caused any damage and was not likely to do so in the future. The application was dismissed.²¹
- 2.23 In *Leonardi v Watson*,²² the affected neighbours sought the removal of an Indian raintree on their neighbour's land in the Queensland Civil and Administrative Tribunal (QCAT). One of the complaints concerned a large amount of leaf litter, including flowers that left a sticky residue, on their roof and gutters, causing them to become blocked and to overflow. They claimed the cost of professional cleaners caused them financial hardship. They also pointed to the difficulty of removing small trees that grew in their garden as a result of seedlings deposited by the tree. The Appeal Tribunal decided that the cleaning of the roof and gutters formed part of the ordinary level of maintenance required in urban environments, and that the leaf litter could also be from other trees in the area.²³ The original application was dismissed.

Encroaching branches

- 2.24 Branches that overhang boundary lines can cause damage to property by interfering with a structure.
- 2.25 Branches may also cause damage by falling into neighbouring property. The falling of a branch from an otherwise healthy tree is commonly known as 'sudden limb failure' or 'summer branch drop'.²⁴ The cause of this tendency is unclear, however, some species of tree are more likely to drop branches in this way.²⁵
- 2.26 Certain stressors may increase the likelihood of branches and trees falling, such as: windy conditions, extreme temperatures or changes in temperature, drought, fire, flooding or excessive branch weight. Branches may also break off and drop when a tree dies or when the branch itself begins to decay or die.²⁶
- 2.27 In *Yang v Scerri*,²⁷ the affected neighbour sought the removal of a Sydney blue gum on her neighbour's property on the basis that it was likely to cause damage or injury in the near future. One of the tree's trunks and some branches had already broken away without warning and fallen, damaging her unit. The affected neighbour sought compensation for the cost of legal action and for the insurance excess incurred in the most recent incident. The tree owner opposed the tree's removal and argued, on the basis of an arboricultural report, that the tree was in good health, and that it was likely to live for another 15–20 years. The tree owner also submitted that maintenance orders for pruning and removal of deadwood, and annual inspections, were preferable to the removal of the entire tree.
- 2.28 The NSWLEC, after inspecting the tree, agreed that there were no structural weaknesses in the tree and determined that removal was not necessary as the tree was not likely to cause damage or injury in the future. Instead, the Court made orders for the pruning of branches, removal of deadwood and inspections of the tree.²⁸

19 The Court noted there were other trees on the affected neighbours land and other adjoining properties that could have contributed to the leaf litter in the pool.

20 See Tree Dispute Principle in *Barker v Kyriakides* [2007] NSWLEC 292 (24 May 2007).

21 In the recent case of *Fang v Li* [2017] NSWLEC 1503 (19 September 2017) [26], Acting Commissioner Galwey reiterated the NSWLEC's consistent position that where 'damage could usually be avoided by [neighbours] undertaking reasonable maintenance of their properties', tree owners will not be held responsible for resulting damage.

22 [2015] QCAT 192.

23 *Leonardi v Watson* [2015] QCAT 192 (22 December 2015) [54], [59]; cf *Ferraro v Body Corporate of 'Omaru' Brisbane City Council* [2013] QCAT 343; *Oberhoffer v Tarlton* [2013] QCAT 495 (19 September 2013).

24 *Huggett v Burrowes* [2015] NSWLEC 1057 (18 March 2015) [12].

25 Richard W Harris, 'Summer Branch Drop' (1983) 9(4) *Journal of Arboriculture*, 111–13; *Rogerson v Dean* [2017] NSWLEC 1209 (24 April 2017).

26 Parks Victoria, *Tree Risk* <<http://parkweb.vic.gov.au/safety/be-safe-plan-ahead/tree-risk>>.

27 [2007] NSWLEC 592 (31 August 2007).

28 *Ibid* [16].

Falling trees

- 2.29 A tree may cause damage to neighbouring property by falling across boundary lines. Even healthy trees can be completely uprooted during strong winds.²⁹ It can be difficult to predict when and which way a tree is likely to fall.³⁰
- 2.30 *Robson v Leischke*,³¹ the leading case in New South Wales, provides an example of a tree falling across boundary lines onto neighbouring property. On a windy evening, an 80-year-old ironbark tree, 16 metres high and situated on private land, fell onto neighbouring land, causing significant damage to the roof, ceilings, windows and other parts of the house and consequential water damage to the interior.
- 2.31 As a result of the damage, the house was unable to be occupied for 15 weeks. The tree owner's insurance company denied liability, as it claimed the tree had fallen in a storm, not as a result of the tree owner's negligence. The insurer told the affected neighbour it would 'vigorously defend' any claims for compensation. The affected neighbour brought legal action in the NSWLEC for compensation for loss of rent during this time, as well as expenses for rectification works.
- 2.32 The tree owner defended these claims primarily on the basis that the tree's fall was not his fault. He also argued that the claims for compensation were excessive and inappropriate.
- 2.33 The tree owner engaged an arborist who examined the tree as well as photographs taken at the time it fell. Based on the photographs, the arborist did not observe any of the usual indications of poor health³² but physical inspection of the fallen tree revealed that the lower tree trunk had minor fungal damage due to a root disease. The damage was located underground and had only become visible because the tree had fallen.
- 2.34 The arborist determined that the tree fell due to a combination of storms, water-logged soil and root damage. The presence of the root disease was attributed to the construction of a retaining wall and other site modifications that had impacted the tree's root zone. The arborist considered that the root disease, although usually a cause for concern, would not have been obvious on inspection before the tree fell. Furthermore, the tree was not known to be a problematic species and no one, including the affected neighbours, had ever reported any problems with it.
- 2.35 Chief Justice Preston determined that the tree owner had no knowledge about the state of the tree and was thus not at fault for its failure or the loss suffered by the affected neighbour. He determined: 'In these circumstances, the justice of the situation is to leave the loss where it falls, namely on [the affected neighbour]'.³³ The application was dismissed.

Encroaching roots

- 2.36 While branches that overhang boundary lines can be easily seen, the extension of a tree's root system into neighbouring land at a subterranean level is not as visible. Encroaching roots can cause structural damage by putting pressure on built structures or affecting their foundations, either directly or by changing the water content of the subsoil.³⁴ Roots can also create hazards by cracking concrete walkways or creating uneven ground.

29 Coroners Court of Victoria, *Finding into Death without Inquest of Eli Ian Marnock*, (COR 2015 1006) (14 July 2017), 5 n. 14.

30 Parks Victoria, *Tree Risk* <<http://parkweb.vic.gov.au/safety/be-safe-plan-ahead/tree-risk>>.

31 (2008) 72 NSWLR 98.

32 Such as a 'lack of foliage, reduction in canopy, epicormic growth, fungal infestation, borer or termite activity': *ibid* [10]. Epicormic growth refers to the growth of epicormic buds (dormant underneath bark until the tree's health is compromised) into epicormic shoots. Larger limbs that grow from epicormic buds can be more poorly attached than branches, and may fall more easily: Andrew R Meier, Michael R Saunders and Charles H Michler, 'Epicormic Buds in Trees: A Review of Bud Establishment, Development and Dormancy Release' (May 2012) 32(5) *Tree Physiology* 565–84.

33 *Robson v Leischke* (2008) NSWLR 98 [228].

34 Joel Silver, *Nuisance by Tree – Who's the Guilty Tree?* (18 May 2015) Gordon & Jackson, [27] <www.gordonandjackson.com.au/resources_uploads//documents/articles/Nuisance_by_Tree_Joel_Silver_May_2015_2.pdf>.

- 2.37 It is a common myth that the root system of a tree is found deep in the soil and extends as far as the edge of its canopy. In fact, root systems grow in the shallower layers of soil and can extend far beyond the equivalent reach of a tree's canopy.³⁵
- 2.38 The growth of roots can depend on the soil conditions.³⁶ Uncompacted soil is well-aerated and ideal for root growth. Compacted soil of the kind commonly found in built, urban environments contains lower levels of oxygen and water. Roots in this kind of soil search for more favourable conditions to find oxygen, water and other nutrients. More favourable conditions can include the water-rich soil around cracked or leaking sewers, drains and pipes.³⁷
- 2.39 The amount of pressure tree roots are able to put on built structures depends on many environmental factors. While tree root pressure can affect pavements and walls, it is not strong enough to penetrate significant structural obstructions, such as pipes. If tree roots encounter an obstruction that cannot be penetrated, they will usually grow around it.³⁸ Tree roots sometimes enter pipes and cause blockages by growing in them if the pipe is already weakened or cracked.³⁹ Roots also grow along the exterior of a pipe to access water condensation that has gathered on its surface.⁴⁰
- 2.40 Tree roots can also cause the swelling and shrinking of subsoil underneath the topsoil. Changes in moisture brought about by the water intake of the tree can cause volume changes in the soil which in turn can lead to cracked or uneven foundations.⁴¹
- 2.41 The extent to which tree roots encroach depends on complex ecological factors. Moreover, whether or not damage to property is attributable to encroaching tree roots may be difficult to prove.
- 2.42 In *Cacopardo v Woolcock*,⁴² the affected neighbours noticed problems with the plumbing in their main bathroom. They contacted a plumber who found roots believed to be from their neighbour's fig tree in their pipe system. A short while later, they noticed further problems caused by the growth of the same roots in the pipes of their ensuite. The plumbing work required cutting away the concrete foundations, leaving both bathrooms in significant disrepair.
- 2.43 The affected neighbours engaged an arborist who confirmed that the roots found in the pipes were from the neighbouring fig. The affected neighbours wrote to the tree owner's lawyers and demanded to be paid compensation for the root damage. The tree owners responded that the fig tree had been cut down and removed, and that they had been advised by their own expert plumbers that the issues experienced by the neighbours were due to pre-existing cracks in the pipes. They also queried whether the roots did in fact belong to their fig tree and not another tree.
- 2.44 The affected neighbours carried out further excavation works to identify the tree the roots belonged to, removing concrete from footpaths and incurring further expense. By the time the matter was brought before QCAT, the affected neighbours were seeking compensation of over \$20,000.
- 2.45 At the hearing, parties relied on the expert evidence of their respective arborists. The tree owners relied on the additional expert evidence of a plumber. All experts agreed that the pipes had cracked before the entry of tree roots but did not agree on its cause. The tree owners' experts stated that the moisture level of the ground following rainfall was

35 Nelda Matheny and James R Clarke, *A Photographic Guide to the Evaluation of Hazard Trees in Urban Areas* (International Society of Arboriculture, 2nd ed, 1994) 5. Roots usually grow within the top 60 cm of soil.

36 John Roberts, Nick Jackson and Mark Smith, *Tree Roots in the Built Environment* (Arboricultural Association, UK, 2005) 375.

37 Ibid.

38 Ibid 371.

39 Most experts agree that tree roots do not exert enough pressure to penetrate pipes of sound quality but some disagree with this: Ibid 398.

40 Ibid 398.

41 Ibid 359. See, eg, *City of Richmond v Scantelbury* [1991] 2 VR 38; *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 (24 October 2016).

42 [2017] QCAT 214 (12 June 2017).

- the main factor leading to the ground movement that caused the cracking. The affected neighbours' expert stated that moisture levels causing soil movement had 'ultimately cause[d] the pipes to break, due to the roots drawing moisture from the soil, and thereby contributing to the contraction of the soil as it lost moisture'.⁴³
- 2.46 The Tribunal determined that the roots did indeed belong to the fig tree but that, as expressed by the majority view of the experts, 'the pipes failed in consequence of soil movement, caused by soil moisture attributable to rainfall patterns; and, that it was only after the pipes had already failed that the fig tree roots then gained access to them, thus eventually causing a blockage'. The Tribunal went on to say that the blocking of the pipes by roots was 'merely the event that informed the [affected neighbours] that they had a longstanding problem with their drains'.⁴⁴ The application was dismissed.
- 2.47 In *Smith v Zhang*,⁴⁵ the affected neighbours noticed cracks in the external and internal brick wall of their study. An engineer attributed this damage to a large root belonging to a Sydney blue gum on their neighbour's property. They could not make an insurance claim as they were not covered for damage from tree roots. The couple tried to negotiate with the tree owners but these negotiations failed. This tree was also protected by the local council; unauthorised works would result in a fine of \$1.1 million dollars.
- 2.48 The affected neighbours took the matter to the NSWLEC to seek removal of the tree and rectification costs of almost \$50,000. After a site inspection and excavation, the Court agreed with the tree owners' expert witnesses who claimed the damage was not due to the tree root but other structural and ecological factors.
- 2.49 In *Marshall v Berndt*,⁴⁶ the affected neighbour was an amateur botanist. In her backyard were many aquatic tanks, used to grow water lilies and goldfish for sale.
- 2.50 She and her neighbour had had disputes over tree root damage to her land and boundary fence for more than 10 years. Their relationship was described as 'frosty'.
- 2.51 The longstanding dispute culminated in a month-long trial in the County Court of Victoria. The affected neighbour brought legal action against the tree owner for the encroachment of trees, vines and creepers that caused damage to brick paving, aquatic tanks, and plants and fish in the tanks. She stated that she had tried to cut off as much encroaching ivy as she could but that the aquatic tanks were in the way.⁴⁷ She claimed that the encroachment constituted a nuisance and that the tree owner had been negligent, and sought \$95,700 in compensation for rectification works and for the replacement of her plants.
- 2.52 The tree owner told the Court that he had planted some trees in the past to block out the view of the affected neighbour's aquarium tanks and conceded that although he removed some of the subject trees and took care to trim them, he had at times ignored the affected neighbour's claims of root damage and had delayed their removal.
- 2.53 The Court determined that, because the tree owner ignored early communication with the affected neighbour about the root encroachment, he was liable for some of the root damage, namely to the pavement and minor damage to the tropical house and garden shed. The Court awarded the affected neighbour \$5,000 for this damage. Other damage to her back porch and lounge was attributed to structural defects and geological causes.

43 *Cacopardo v Woolcock* [2017] QCAT 214 (12 June 2017) [33].
44 *Ibid* [34].
45 [2011] NSWLEC 29 (4 March 2011).
46 [2011] VCC 384 (7 April 2011).
47 *Ibid*.

Harm to people

- 2.54 Trees may cause harm (known as ‘injury’ in some jurisdictions) to neighbours⁴⁸ by affecting their health or causing injuries, including by triggering allergies, causing injury from falling branches or trees,⁴⁹ or creating trip hazards from structures compromised by root growth.⁵⁰

Health conditions

- 2.55 Health conditions may be caused or exacerbated by pollen, leaf litter, flowers or fruit from a tree.
- 2.56 Pollen is a known cause of allergies. The pollen of a tree is disseminated by wind, bees and birds. Pollen can trigger allergies such as hayfever or respiratory conditions such as asthma.⁵¹ The timing of pollination changes depending on the tree species.⁵²
- 2.57 In *Leonardi v Watson*,⁵³ the affected neighbour sought the removal of their neighbour’s Indian raintree due to her allergies. She claimed that the ‘pollen affects her breathing; causes a burning sensation down her throat; her eyes swell and become infected; she develops blotches on her skin similar to measles; it affects the skin between her fingers and her toes and the soles of her feet’. A pollen test returned positive results and also indicated that she was allergic to plastics. The tree was ordered to be removed because of these allergies. However, on appeal, the original decision was overturned and the application dismissed. The Appeal Tribunal determined that:
- The affected neighbour’s allergies did not satisfy the ‘serious injury’ threshold as evidenced by her doctor’s assessment,⁵⁴ her own assessment,⁵⁵ and the fact that her medication was recommended to her rather than prescribed.⁵⁶
 - It could not be conclusively proven that the tree was the sole cause of her allergies⁵⁷ or that the tree’s removal would prevent the reaction.⁵⁸
- 2.58 Other health conditions may result when leaf litter and other tree products cause contamination, for example, of a neighbour’s water supply.
- 2.59 In the 1917 New Zealand case *Matthews v Forgie*,⁵⁹ the tree owner had some *Macrocarpa* trees which grew close to the boundary of his land.
- 2.60 The tree owner’s land and the affected neighbour’s land were separated by a road. However, during southerly and south-westerly winds, leaf litter from the trees was blown across the road onto the affected neighbour’s land.
- 2.61 The leaf litter polluted the neighbour’s rainwater tanks which were his only water supply for drinking and domestic uses. The neighbour alleged that, as a result of the contamination, he contracted dysentery. He brought legal action against the tree owner for damages.

48 As well as causing harm to people, subject trees may also harm pets and livestock on an affected neighbour’s land. For example, in the English case of *Crowhurst v Amersham Burial Board* (1878) 4 Ex D 5, branches of a tree, whose leaves and branches were poisonous to stock, projected over the neighbour’s land and were eaten by the neighbour’s horse, which later died from poisoning. This was found to constitute nuisance.

49 See [2.25]–[2.27], [2.29] for further information about the causes of falling branches and trees.

50 John Roberts, Nick Jackson and Mark Smith, *Tree Roots in the Built Environment* (Arboricultural Association, UK, 2005) 369.

51 See, eg, *Tuft v Piddington* [2008] NSWLEC 1249 (3 June 2008); *Hurditch v Staines* [2008] NSWLEC 1351 (22 August 2008); *Oakey v Owners Corporation Strata Plan 22678*; *Oakey v Owners Corporation Strata Plan 5723* [2009] NSWLEC 1108 (19 March 2009); *Turner v O’Donnell* [2009] NSWLEC 1349 (9 October 2009).

52 Australasian Society of Clinical Immunology and Allergy, *Information for Patients, Consumers and Carers: Pollen Allergy* (2017), ASCIA <www.allergy.org.au/patients/allergic-rhinitis-hay-fever-and-sinusitis/pollen-allergy>.

53 *Leonardi v Watson* [2015] QCATA 192 (22 December 2015). This case is also discussed above at [2.23] in relation to leaf litter. The affected neighbour’s allergies were the primary reason for the claim.

54 *Ibid* [39], [42].

55 *Ibid* [40].

56 *Ibid* [41].

57 *Ibid* [44], [45].

58 *Ibid* [43], [47], [68].

59 *Matthews v Forgie* [1917] NZLR 921.

- 2.62 Initially, the New Zealand Magistrates' Court determined that the affected neighbour was entitled to recover damages for his suffering and loss of earnings during the two weeks he was ill.⁶⁰ However, on appeal, the Supreme Court of New Zealand determined that the tree owner was not liable for the harm suffered because the trees themselves were not noxious,⁶¹ nor did they constitute a nuisance. The appeal was allowed and judgment in favour of the tree owner was recorded in the Magistrates' Court.

Falling branches or trees

- 2.63 Dropping branches or falling trees can pose risks to health and safety, and cause injury or even death.⁶²
- 2.64 In *Huggett v Burrowes*,⁶³ the affected neighbour sought the removal of a lemon-scented gum, arguing that it was likely to cause injury by dropping branches. The tree was located on neighbouring land close to the boundary, with over half of its canopy overhanging the affected neighbour's land.
- 2.65 Two other trees of the same species and size had previously been removed after they had fallen on the affected neighbour's land following windy conditions and prolonged rain, causing damage to the affected neighbour's land.
- 2.66 The remaining tree had previously dropped three large branches. These branches were healthy and fell without warning in calm conditions. The second fell on the affected neighbour's clothes line. The affected neighbour told the NSWLEC that had 'anyone been hanging out the washing at the time then serious injury could have occurred'.⁶⁴
- 2.67 The Court determined that given the previous multiple episodes of branches dropping unpredictably, it was likely the same could occur again in the near future and cause injury. The tree was ordered to be removed.
- 2.68 In a United States case, *Kurtigian v City of Worcester*,⁶⁵ a large elm tree located on public land caused serious injury to a neighbour on adjacent private land. The tree had an elm disease, and although it had died, it remained on the land with only three large branches protruding from its trunk.
- 2.69 When one of the remaining branches broke away from the tree on a windy day and fell onto the neighbour's land, the City of Worcester inspected the tree and determined that, although the tree had died, there was no indication that its remaining parts were structurally unsound. The tree was not removed.
- 2.70 A year later, on another windy day, while outside in his yard with his young nephew, the neighbour 'heard a cracking sound, looked up, and saw a heavy [branch] falling toward him'.⁶⁶ The two were knocked down by the branch. The neighbour lost consciousness, sustained a fracture to his skull and left wrist, and had his left arm broken in two places.

60 Ibid 922.

61 As per the rule in *Rylands v Fletcher* [1868] UKHL 1 (17 July 1868), which has been overturned in Australia: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

62 See discussion of causes above at [2.25]–[2.29]. See, eg, *Timbs v Shoalhaven City Council* (2004) 132 LGERA 397—this case illustrates how death may be caused by falling trees, although it is not a neighbourhood dispute as defined by the terms of reference of this inquiry. In this case, a subject tree protected by council fell on the tree owner's own land, killing him in the process. See also State Coroners Court of New South Wales, *Inquest into the Death of Bridget Wright* (2014/56521) (20 November 2015) and Coroners Court of Victoria, *Finding into Death with Inquest of Patiya May Schreiber*, (2013/6032) (10 September 2015), where the deceased persons were each killed by a falling branch.

63 [2015] NSWLEC 1057 (18 March 2015).

64 Ibid 10.

65 *Kurtigian v City of Worcester* 348 N.E.2d 284 (Mass, 1964–1965).

66 Ibid 290.

- 2.71 The neighbour took legal action against the City. On hearing the matter, the Court considered that the City, following inspection of the tree after the first branch fell, should have realised that ‘the remaining limbs were likely to fall at any time and obviously might be blown onto the [affected neighbour’s] land. They were large enough to cause serious personal injury, as was demonstrated by the one which struck the [affected neighbour]’.⁶⁷ The Court determined that the tree constituted a nuisance and the City was held responsible for the affected neighbour’s injuries.⁶⁸

Conclusion

- 2.72 Tree disputes can escalate quickly and damage neighbourly relations beyond repair if neighbours do not approach or respond to each other in respectful and constructive ways.
- 2.73 Trees can adversely affect neighbouring land or cause harm in many ways, particularly from encroachment of branches or roots.
- 2.74 However, trees are not by nature intrusive or hazardous. Trees need to grow, and therefore take up space, to stay alive. There are complex biological and ecological factors that affect the way a tree grows.⁶⁹ It is important to take these factors into consideration when planting and maintaining trees, particularly in built environments where neighbours live in close proximity to one another. The Commission invites community members and stakeholders to share examples of neighbourhood tree disputes in Victoria, and whether and how they were resolved.

Question

- 1 Have you been involved in a neighbourhood tree dispute? What was it about and what was the outcome?

67
68
69

Ibid.
Ibid 291.
Commissioner Judy Fakes, ‘Tree Disputes—Managing Expectations’ (Speech delivered at the 17th National Street Tree Symposium, Adelaide, 1 September 2016) <www.treenet.org/resources/tree-disputes-managing-expectations/>.

Resolving neighbourhood tree disputes in Victoria

<u>22</u>	Introduction
<u>22</u>	Process in Victoria
<u>31</u>	Law in Victoria
<u>48</u>	Conclusion

3. Resolving neighbourhood tree disputes in Victoria

Introduction

- 3.1 In Victoria, neighbours are encouraged to resolve their tree disputes informally, through negotiation and discussion. Parties to a dispute can access online resources, or contact legal and government agencies for guidance in understanding their rights and responsibilities, and resolving their dispute.
- 3.2 Where the informal approach is ineffective, formal dispute resolution is available, with court proceedings as the final step to seeking a binding resolution of the dispute.
- 3.3 However, navigating these steps can be confusing, as it is difficult to find definitive statements of rights and responsibilities relating to tree issues. In Victoria, the law is based on the common law, including the torts of nuisance, negligence and trespass.¹ This is true for other states and territories in Australia with the exception of New South Wales, Queensland and Tasmania, which have enacted legislation. A table setting out the common law torts and their equivalent interstate statutory provisions is set out at the Appendix.
- 3.4 This chapter sets out the steps that neighbours in Victoria can take to resolve tree disputes.

Process in Victoria

- 3.5 In Victoria, the resolution of tree disputes can be approached in a number of ways. The process is made up of several independent stages. These can include, depending on the cause of the dispute:
- making an insurance claim
 - self-help and tree trimming
 - attempting informal resolution
 - engaging in formal alternative dispute resolution, or
 - court proceedings.
- 3.6 Each of these stages is discussed in more detail below.

Insurance claims

- 3.7 One of the first steps an affected neighbour may take when a tree on neighbouring land damages their property is to contact their insurance company.
- 3.8 This is commonly the case when there has been major damage to property, especially during storm events which can cause trees to fall.
- 3.9 Household insurance may cover damage caused by trees.² These policies generally cover 'the cost of rebuilding or repairing your home' when damage occurs in circumstances that are out of the policy holder's control, including natural disasters and storms.³ However, the scope of the cover differs from one insurer to another. Coverage details are contained in the individual policy's product disclosure statement.⁴
- 3.10 Generally speaking, a householder's insurance will only cover damage to *their property* from *their trees*. Where a tree falls across boundary lines and damages a neighbour's property, the likely course of action is for the affected neighbour to claim on their own insurance.⁵
- 3.11 Where the tree owner can be shown to be at fault (for example they have knowledge of the poor condition of the tree), the affected neighbour's insurance company may seek to recover from the tree owner's insurance company.
- 3.12 For parts of a house not generally included in standard household cover, for example a garden shed, insurance providers may require the purchase of additional cover for damage caused to them.
- 3.13 Common insurance exclusions relevant to damage caused by trees include damage caused by the growth of tree roots, and by the lopping or removal of trees or branches that have fallen onto the land without causing any damage.⁶
- 3.14 Access to an insurance payout may not affect legal liability if an affected neighbour then pursues legal action. It may, however, 'affect to whom the payment is made': the insurance company may be reimbursed, rather than the affected neighbour receiving damages as well as an insurance payout.⁷
- 3.15 Additionally, where legal action is pursued, a tree owner's household public liability insurance may cover legal costs, or the amount of compensation they are required to pay, where the condition of their property, including any subject tree, caused damage to neighbouring property or injury to a person.
- 3.16 Insurance cannot, however, prevent damage, with a claim only possible once damage or injury has occurred. An insurance provider cannot enforce pre-emptive measures such as trimming, pruning or removing a tree to prevent damage.

Abatement/'self-help'

- 3.17 Affected neighbours may sometimes take matters into their own hands, and trim back neighbours' trees that overhang their property. This type of self-help is called 'abatement', a remedy developed under the common law.

2 For example, homeowners' insurance; home and contents insurance; and household public liability insurance, among others. Homeowners also bundle their home insurance policy with contents insurance into a combined 'home and contents insurance' policy: Australian Securities and Investments Commission (ASIC), *Home Insurance* (7 July 2017) Moneysmart <www.moneysmart.gov.au/insurance/home-insurance>.

3 Ibid.

4 ASIC encourages consumers to carefully examine each provider's Product Disclosure Statement (PDS) before purchasing and relying on their insurance coverage: Ibid.

5 See generally Financial Rights Legal Centre, *Factsheet: When a Tree Falls in a Storm, Who Pays for its Removal?* (February 2017) <<http://insurancelaw.org.au/factsheets/when-a-tree-falls-in-a-storm-who-pays-for-its-removal-factsheet/>>.

6 See, eg, AAMI, *Home Building Insurance Product Disclosure Statement* (10 October 2013), 23, 39 <www.aami.com.au/policy-documents/personal.html#home-building-insurance>; NRMA Insurance, *Home insurance Claims—Am I Covered?* <www.nrma.com.au/home-insurance-claims-am-i-covered>.

7 See, eg, *Giallousis v Malcolm* [2014] QCATA 337 (8 December 2014).

- 3.18 The common law allows ‘this private and summary method of doing one’s self justice ... because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy and cannot wait for the slow progress of the ordinary forms of law’.⁸
- 3.19 In some cases, abatement may be a timely solution to a tree dispute. In other cases, trimming back to the boundary line and returning the branches can cause further conflict.
- 3.20 There are two ways in which an affected neighbour can abate a nuisance caused by a tree:
- by removing encroaching parts of the tree, usually branches or roots, up to the boundary line or installing preventative measures such as underground root barriers,⁹ or
 - by physically entering the tree owner’s property to remove the interference caused by the tree.¹⁰
- 3.21 Abating up to the boundary line is advised and encouraged where appropriate.¹¹ It is useful in situations where a part of a tree has encroached over boundary lines but has not caused the level of interference—unreasonable interference—needed to establish nuisance, or has not yet caused actual physical damage. Such action can potentially prevent damage. However, there is no right to anticipatory action without encroachment. That is, a neighbour cannot trim branches to *prevent* encroachment.¹²
- 3.22 Any encroaching branches or roots that are removed remain the property of the tree owner, and must be returned, in order to avoid liability for the separate tort of conversion.¹³ An affected neighbour does not need to give notice to the tree owner to abate up to the boundary line.¹⁴
- 3.23 Abatement by entering the tree owner’s property is justified only where ‘there is immediate danger to life or health so as to render it unsafe to wait’,¹⁵ and it is considered prudent to notify the property owner before entering their land.¹⁶ Abating in this way also means that the affected neighbour will lose their right to claim damages for the nuisance, because of ‘the degree of self-help and potential damage to the other party involved in going on to the land of the other party, and interfering with it’.¹⁷
- 3.24 An affected neighbour must abate cautiously to avoid damage and ensure that they do not trespass or act negligently.¹⁸

8 William Blackstone, *Commentaries on the Laws of England, Book III* (Cadell and Davies, 15th ed, 1809) 6.

9 ‘There are several cases where either the applicant or the respondent has installed a root barrier in an attempt to limit root growth from either their neighbour’s or their own tree—see *Nolan v Psaltis* [2007] NSWLEC 764 (24 October 2007) [9]; *Lewis v Tilney* [2009] NSWLEC 1042 (20 February 2009) [24]’: New South Wales Land and Environment Court, *Annotated Trees (Disputes Between Neighbours) Act 2006* (14 January 2013), 24 <www.lec.justice.nsw.gov.au/Documents/annotated_trees_act_january_2013%20-250313.pdf>. Root barriers can be physical structures, chemicals or a combination of the two, and their design will vary on the nature of the damage to be controlled. See, eg, City of Wollongong, *Root Barriers Fact Sheet* (September 2013) <www.wollongong.nsw.gov.au/factsheets/Root%20Barriers.pdf>.

10 Adrian J Bradbrook and Susan V MacCallum, *Easements and Restrictive Covenants in Australia* (LexisNexis Butterworths, 3rd ed, 2011) [18.1]; Naomi Saligari (ed), *The Law Handbook 2017: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 39th ed, 2016) 529.

11 See, eg, Dispute Settlement Centre of Victoria, *Trees* (25 September 2017) <www.disputes.vic.gov.au/trees>; Naomi Saligari (ed), *The Law Handbook 2017: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 39th ed, 2016) 529.

12 Joel Silver, *Nuisance by Tree—Who’s the Guilty Tree?* (18 May 2015) Gordon & Jackson <www.gordonandjackson.com.au/resources_uploads//documents/articles/Nuisance_by_Tree_Joel_Silver_May_2015_2.pdf>.

13 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 152; *Robson v Leischke* [2008] NSWLR 98; Naomi Saligari (ed), *The Law Handbook 2017: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 39th ed, 2016) 529.

14 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.14]; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478.

15 *Traian v Ware* [1957] VR 200, 207.

16 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.14].

17 *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478.

18 Paula Giliker, ‘Nuisance’ in Carolyn Sappideen and Prue Vines (eds) *Fleming’s The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.280].

- 3.25 The costs of abatement cannot generally be recouped.¹⁹ Furthermore, a tree preservation order will limit the ability of an affected neighbour to abate.²⁰
- 3.26 Where it is not possible or appropriate to abate,²¹ an affected neighbour may bring proceedings in court to seek an injunction or damages.²²

Neighbour-led dispute resolution

- 3.27 Neighbours may seek to resolve problems relating to trees informally, without the involvement of lawyers or formal dispute resolution. Abatement may be carried out as a result of successful informal dispute resolution.
- 3.28 People with concerns about trees or who are experiencing tree disputes will often seek out information about their rights and responsibilities in order to resolve the problem for themselves. They may also engage a tree professional, such as an arborist, for an expert assessment before or after approaching their neighbour informally to discuss the situation and negotiate a resolution.
- 3.29 Some government and community organisations have published useful resources aimed at helping neighbours resolve their tree dispute. Most emphasise resolving disputes informally wherever possible. These resources are guides only, providing general information. They are also not intended to provide legal advice. Some neighbours in more complex circumstances may find limited support for informally resolving their dispute.
- 3.30 The following paragraphs contain advice on information resources available to neighbours, informal communication methods, and the role of arborists in tree disputes.

Information sources

- 3.31 There are a number of Victoria resources available that explain the law and provide tools for resolving disputes.
- 3.32 Most resources, such as those provided by the Dispute Settlement Centre of Victoria (DSCV), Victoria Law Foundation, and Victoria Legal Aid²³ emphasise maintaining harmonious neighbour relationships so that conflict can be avoided and a constructive resolution may be reached.²⁴
- 3.33 The DSCV website gives a general outline of the law, sets out answers to frequently asked questions about trees, and provides a step-by-step guide to seeking a reasonable resolution.²⁵

19 *Young v Wheeler* [1987] Aus Torts Reps 80–126. But see *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478, where it is stated that the affected neighbour has a duty to mitigate damages and, where abatement is carried out to do so, then cost is recoverable. Hodgson J quotes Jenkins LJ in *Davey v Horrow Corporation* [1957] 2 All ER 305, 'Is there any duty to mitigate? Can a person who sees encroaching roots on his land build a house and wait for it to fall down?' and continues that, in his view, an affected neighbour 'does, nevertheless, have the usual obligation to mitigate damages; and accordingly, he has the obligation to take reasonable steps to keep these damages to a minimum, and has the corresponding right to claim from the adjoining owner the expenses associated with these reasonable steps.' [487]. See also Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 525 [21.280].

20 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.22]. See paragraphs [4.71]–[4.88] of this paper for more on tree preservation orders.

21 See, eg, *Campbell v Blackshaw* [2017] ACAT 64 (20 August 2017) where the Tribunal stated that abating overhanging branches in this case 'is not a practical option where the centre of the trunks of the trees are between 18 cm and 67 cm from the boundary. To trim the trees to the boundary would almost certainly render the trees highly unstable and perhaps kill them.' [10].

22 Discussed below at [3.65]–[3.80].

23 Dispute Settlement Centre of Victoria, *Can't I Just Fix It Myself? Do I Have to Talk to My Neighbour First?* (Video) (23 February 2010) YouTube <www.youtube.com/watch?v=HfIFyZ5Ldf0&index=5&list=PL9AA04FDC58FB138B>; Victoria Law Foundation, *Neighbours, the Law and You: Your Guide to Neighbourhood Laws in Victoria* (March 2015) <www.victorialawfoundation.org.au/sites/default/files/resources/neighbours_the_law_and_you_2016_web.pdf>; Victoria Legal Aid, *Disputes with Neighbours* (8 March 2017) <www.legalaid.vic.gov.au/find-legal-answers/disputes-with-neighbours>.

24 Similarly, the Queensland Government advises on its website that 'whenever possible resolve any issues before they damage your relationship with your neighbour' and that '[b]eing on good terms with your neighbour will make it easier to discuss problems and resolve any issues before they get out of hand': Queensland Government, *Avoiding Disputes About Trees (30 October 2015)* <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/avoiding-fence-tree-and-building-disputes/avoiding-disputes-about-trees>.

25 Dispute Settlement Centre of Victoria, *Trees* (25 September 2017) <www.disputes.vic.gov.au/trees>.

- 3.34 The Victoria Law Foundation brochure *Neighbours, the Law and You* gives a general overview of issues to be aware of, including what local councils can help with and the practicalities of abatement, as well as providing links to the DSCV and to the Magistrates' Court websites.²⁶
- 3.35 Victoria Law Foundation promotes informal dispute resolution, noting that:
- constructively working out any problems together with your neighbour is the best way to maintain a good relationship with them so you can deal with any future issues. Whatever the problem, in most cases your best option is to try to resolve it by talking with your neighbour and sorting it out in a friendly and informal way. This approach is most likely to result in the best solution for you both.²⁷
- 3.36 The Fitzroy Legal Service's *Law Handbook* explains nuisance and 'self-help' (abatement), and offers practical tips.²⁸
- 3.37 Local council websites and customer service centres often provide a range of information and links, with significant variation in detail between councils.
- 3.38 Other points of contact for information include Arboriculture Australia, the Victorian Tree Industry Organisation, individual community legal centres, the Federation of Community Legal Centres, Victoria Legal Aid, the Law Institute of Victoria and private lawyers.

Communication advice

- 3.39 Common themes contained in the information sources outlined above include:
- approaching neighbours calmly and respectfully
 - explaining concerns clearly and openly
 - considering the neighbours' point of view
 - workshopping possible solutions
 - seeking professional advice and quotations where necessary, so each party can negotiate from an informed position
 - the desirability of reaching a solution, as neighbour disputes can easily escalate and have detrimental effects on both parties' living situation.
- 3.40 DSCV also provides conflict coaching and dispute resolution advice over the phone, including options, strategies and negotiation techniques to help people resolve their disputes between themselves.

Engaging a tree professional

- 3.41 Public information on tree disputes often recommends that people engage a tree professional, usually an arborist, to conduct an assessment of the tree in question.²⁹
- 3.42 The Commission was informed by arborists that they have varying levels of engagement in private disputes. Where the neighbours' relationship is amicable, an arborist may discuss with the non-commissioning neighbour the extent of any issue, and their reasoning for coming to conclusions about the tree's health or risk profile. This type of informal advice from a tree professional may help to bring the neighbours to an agreement.
- 3.43 Commonly, however, by the time an arborist is engaged by one neighbour, the relationship has soured to the extent that the commissioning neighbour does not want the arborist to speak to the other neighbour, or even to be seen to be inspecting the tree. The Commission has heard anecdotal stories about arborists being asked to park around the corner, or to assess a tree when the neighbour is away from home. This presents

26 Victoria Law Foundation, *Neighbours, the Law and You: Your Guide to Neighbourhood Laws in Victoria* (March 2015) <www.victorialawfoundation.org.au/sites/default/files/resources/neighbours_the_law_and_you_2016_web.pdf>.

27 Ibid 4.

28 Naomi Saligari (ed), *The Law Handbook 2017: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 39th ed, 2016) 528–9.

29 See discussion of these materials above at [3.31]–[3.38].

some difficulties where the tree is on neighbouring land. In these situations, arborists are unable to make a full physical inspection, and have to make a visual assessment from across a fence. In this case, where evidence about the tree's health or its potential to cause damage or harm cannot be gathered direct from the tree, the arborist may be limited to general statements of opinion.

- 3.44 Arborists will often be wary of providing any opinion on legal matters to clients, and may instead refer them to DSCV, the Magistrates' Court or their local council if the tree is protected under local laws. The same is true for industry organisations which frequently receive calls from neighbours asking about their rights and responsibilities.³⁰
- 3.45 Instead, arborists can provide a report setting out their observations of the tree's condition, health and recommendations for, typically, management or removal of a tree.
- 3.46 While there is no standard definition of 'arborist', most are qualified in accordance with various levels of the Australian Qualifications Framework (AQF).³¹ For example, an AQF Level 3 arborist would hold a Certificate III in arboriculture and have the skills and knowledge to work as an arboricultural tradesperson and provide basic tree care and management, amongst other things. An AQF Level 5 arborist would hold a diploma and be able to work independently as a consultant or in a supervisory role.
- 3.47 More highly qualified arborists may have a better understanding of how a tree's health can be properly managed in the long term. It is not clear how much weight community members give to whether or not an arborist is suitably qualified to carry out tree works or assessments. Information on what level of qualification is advisable is not easily accessible to private members of the community.³²
- 3.48 Arboricultural organisations commonly advise that arborists of minimum AQF Level 3 should be engaged for tree works, such as pruning or lopping.³³ However, if the tree's health and associated risks need to be assessed, then engaging an arborist with minimum AQF Level 5 qualifications is necessary because these are more complex assessments that 'require a high level of training, knowledge and experience'.³⁴
- 3.49 Where informal neighbour negotiations are not successful, the next step is often to undertake a form of structured dispute resolution, such as mediation.

Alternative dispute resolution

- 3.50 Alternative dispute resolution (ADR) refers to any formal process, other than judicial (court) determination, in which an impartial person assists parties to resolve their dispute. There are many forms of ADR, ranging from the facilitative and exploratory (mediation), active and advisory (conciliation), through to processes that decide the result (arbitration).
- 3.51 There are many private practitioners working in each of these forms of ADR, who may be engaged by people experiencing a dispute.
- 3.52 The primary means of resolving tree disputes in Victoria is through the voluntary mediation service provided free of charge, by DSCV.

30 Preliminary consultations with Arboriculture Australia (17 August 2017) and Victorian Tree Industry Organisation (VTIO) (22 August 2017).
31 The Australian Qualifications Framework (AQF) is the policy for regulated qualifications in the Australian education and training system. The AQF is the agreed policy of Commonwealth, State and Territory ministers: Australian Qualifications Framework, *What is the AQF?* <www.aqf.edu.au/what-is-the-aqf>.

32 Despite the framework of qualifications, the arboricultural industry is unregulated, which has led to instances of underqualified people performing low-quality assessments and works. For this reason, Arboriculture Australia, the national peak body for arborists, has introduced a voluntary industry licence to promote quality of practice: Arboriculture Australia, *Australian Arborist Industry Licence Information Brochure* (2017) <<http://arboriculture.org.au/>>.

33 Preliminary consultations with Arboriculture Australia (17 August 2017) and Victorian Tree Industry Organisation (VTIO) (22 August 2017).
34 City of Kingston, *Arboricultural Reporting Guidelines for Planning and Developments* (25 June 2013) 1 <www.kingston.vic.gov.au/Home>.

Dispute Settlement Centre of Victoria

3.53 DSCV is part of the Victorian Department of Justice and Regulation and provides dispute resolution services across 14 metropolitan and regional locations in Victoria.

Services and process

3.54 As noted above, DSCV maintains a comprehensive and informative website with general information on dispute resolution techniques and resources. It also provides clear and simple guidance on the law and processes involved in the resolution of common tree disputes, including links to other information sources such as those discussed above at [3.31]–[3.38]. The site lists frequently asked questions about tree issues in Victoria, addressing common issues in simple and accessible language.³⁵

3.55 Dispute Assessment Officers (DAOs) within DSCV are the first point of contact for those seeking to resolve disputes. When a client makes initial contact, the DAO provides general support and advice on dispute resolution, including:

- listening to clients' concerns
- helping to clarify the issues
- answering questions
- providing techniques and strategies for resolving the dispute
- referring clients to other specialist services where needed.

3.56 With the client's consent, DAOs may also contact the other party to the dispute.³⁶ Where the other party agrees to participate, the DAO will work to identify the issues in the dispute, suggest options to parties and try to resolve the matter separately with each party over the phone. If this fails, the dispute may be referred to accredited mediators within DSCV.

3.57 If a dispute is assessed as suitable for mediation,³⁷ it can be scheduled quickly (generally within two weeks of referral) and held at a location suitable to the parties. Mediation is voluntary and proceedings are confidential. The mediator will invite the parties to share their views, and explain what has led them into dispute, and what they propose will resolve the issue. Parties may be in the same room, or in separate rooms, with a mediator acting as an intermediary.

3.58 This mediated assistance in exploring the issues, developing options and assessing alternative outcomes, if successful, results in a written agreement. A high proportion of DSCV mediations end in agreements,³⁸ although these agreements reached in DSCV mediations are not otherwise binding.³⁹

3.59 DSCV also administers a Magistrates' Court Civil Claims Program, handling referrals for mediation from the Court.⁴⁰ If mediation is successful, a court hearing is avoided. After mediation, DSCV communicates the outcome back to the Court. The mediated agreements generally take the form of consent orders, terms of settlement, or the filing of a notice of discontinuance.⁴¹

35 Dispute Settlement Centre of Victoria, *Frequently Asked Questions: Trees* (January 2017) <www.disputes.vic.gov.au/information-and-advice/trees/frequently-asked-questions-trees>.

36 'The DSCV will send a letter with a Department of Justice & Regulation letterhead requesting that the person call the centre to discuss the issue further': Dispute Settlement Centre of Victoria, *DSCV FAQs* (19 September 2017) <www.disputes.vic.gov.au/information-and-advice/dscv-faqs>.

37 Considerations include: whether both parties genuinely want to resolve the dispute; whether the parties are able to understand and participate in the mediation process; the level of vulnerability of either party, eg mental health issues; whether either party has expressed fear of the other party, or has been harmed or threatened with violence by the other party; any previous failed attempts at mediation; whether the issue is substantial enough to mediate: Dispute Settlement Centre of Victoria, *Mediation* (27 September 2017) <www.disputes.vic.gov.au/about-us/mediation>.

38 The DSCV site explains that mediations are 'highly successful', noting that 85 per cent of mediations result in agreements: Dispute Settlement Centre of Victoria, *About Us* (2 October 2017) <www.disputes.vic.gov.au/about-us>.

39 Parties are informed by DSCV that their written mediation agreements may be drawn up into a formal written contract by an external legal practitioner: email from Dispute Settlement Centre of Victoria to Victorian Law Reform Commission, 16 October 2017.

40 This is only available for some Magistrates' Courts, and is limited to civil claims under \$40,000: Dispute Settlement Centre of Victoria, *Civil Claims Program* (27 September 2017) <www.disputes.vic.gov.au/about-us/civil-claims-program>.

41 Email from Dispute Settlement Centre of Victoria to Victorian Law Reform Commission, 16 October 2017.

Volume of tree disputes at DSCV

- 3.60 Disputes relating to trees⁴² are the third most common subject of inquiries to the DSCV, representing around 17 per cent of their work.⁴³
- 3.61 Information provided to the Commission by DSCV analyses the 18,727 out of 109,039 cases relating to trees, shrubs and creepers, recorded over the 5.5-year period from December 2011 to May 2017.
- 3.62 The data provided shows that the proportion of tree disputes that progress further through the DSCV framework is relatively low. In the relevant period, 11.3 per cent of tree disputes involved an ‘approach’, inviting the other party to participate in dispute resolution.⁴⁴ The total rate of DSCV-facilitated resolution over the relevant period is 5.3 per cent, or 922 cases.⁴⁵
- 3.63 Of these, DSCV was able to facilitate a resolution before formal mediation in 4.1 per cent of cases, and a further 1.2 per cent was brought to mediation.⁴⁶
- 3.64 DSCV also provided a breakdown of cases received by season, highlighting a clear increase in enquiries in the spring months. The proportion of enquiries made in summer was also markedly higher than in autumn or winter.⁴⁷

Question

- 2 Have you been involved in a DSCV mediation about a neighbourhood tree dispute? What was your experience?

Court proceedings

- 3.65 Parties in conflict over a tree may litigate their dispute in court, an option which is often described as the avenue of last resort.⁴⁸ Courts in Victoria are able to hear and determine tree disputes according to the common law, described in more detail below from [3.91]–[3.226].
- 3.66 If one party decides to take their dispute to court, it will usually be heard in the Magistrates’ Court of Victoria. Some cases involving large claims will be heard in the County Court of Victoria, or, in cases involving very large or complex claims, in the Supreme Court of Victoria.
- 3.67 Once a claim has been received by a court, the court itself may order that parties participate in mediation, or another form of court-ordered dispute resolution, before the case can be heard by a judge or other decision maker.
- 3.68 The jurisdiction, scope and fees of the Magistrates’ Court, County Court and Supreme Court (as relevant to tree disputes) are discussed in more detail below.

42 Cases are assigned one main issue type upon intake with the DSCV. Many disputes involve multiple issues: these statistics reflect disputes that were categorised on intake as relating to ‘trees’, ‘shrubs’ or ‘creepers’. These disputes are collectively referred to as ‘tree disputes’ for the purpose of analysing DSCV’s practices.

43 Email from Dispute Settlement Centre of Victoria to Victorian Law Reform Commission, 10 August 2017.

44 The information provided by DSCV notes that the average approach rate across all dispute types is 15–25%.

45 Ibid. DSCV notes that the overall resolution rate across all disputes is around 15–16%, and that tree disputes thus have a low resolution rate.

46 Email from Dispute Settlement Centre of Victoria to Victorian Law Reform Commission, 10 August 2017.

47 Ibid. Commentary from DSCV estimates that the number of enquiries in spring is roughly 1.8–2 times than the amount received in winter.

48 Magistrates’ Court of Victoria, *Commencing Civil Proceedings* (1 February 2013) <www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/commencing-civil-proceedings>.

Magistrates' Court of Victoria

- 3.69 The Magistrates' Court has jurisdiction to hear civil matters where claims for works or damages are no more than \$100,000.⁴⁹
- 3.70 Bringing a case before the Magistrates' Court can be costly. The application/filing fee depends on the amount being claimed, and ranges from \$145 (for claims under \$500), to \$691.10 (for claims over \$70,000). Other fees, for example for serving documents on the other party (\$69), may apply.⁵⁰ These are generally applied on a sliding scale by reference to the value claimed for works or damages.⁵¹

County Court of Victoria

- 3.71 The County Court has original, unlimited jurisdiction in all civil matters.⁵²
- 3.72 The civil jurisdiction of the Court is divided into two divisions: the Commercial Division and the Common Law Division. The Common Law Division includes 'any proceeding in which the plaintiff claims the recovery of damages founded in tort'.⁵³ Costs to have a matter heard in the County Court can be significant, particularly where the amounts claimed are small. The basic filing fee is \$851.80.⁵⁴
- 3.73 Although there are not many published neighbourhood tree dispute cases from the Victorian higher courts, the majority of those reviewed by the Commission were initiated in the Magistrates' Court, and later transferred or 'uplifted' to the County Court.⁵⁵
- 3.74 The cost of transferring a matter from the Magistrates' Court (for example, when the amount claimed unexpectedly exceeds the Magistrates' Court's \$100,000 jurisdictional limits) is also \$851.50, minus the original fee already paid to the Magistrates' Court.
- 3.75 Additional daily hearing fees start at \$523.30 for the second day, and increase to \$1459 for the tenth and any subsequent days.⁵⁶

Supreme Court of Victoria

- 3.76 The Supreme Court also has original, unlimited jurisdiction in all civil matters.⁵⁷
- 3.77 The Common Law Division manages claims in property, tort and contract law. Cases in the division are allocated into one of the varied specialist lists, which include the Major Torts List, the Valuation, Compensation and Planning List, and the Civil Circuit List.
- 3.78 The Major Torts List is 'designed to facilitate and expedite the passage of large or otherwise significant tortious claims to trial'. The Commission did not find many recent recorded cases in the Supreme Court involving tree disputes between neighbours.⁵⁸
- 3.79 Costs in the Supreme Court are higher than in the Magistrates' or County Court. The cost to file an originating motion is \$1065.10. Hearing fees for days or part-days in the Common Law Division begin at \$654.10, increasing to \$1092.10 for the fifth and subsequent days, and to \$1824.40 for the tenth and subsequent days.⁵⁹

49 *Magistrates' Court Act 1989* (Vic) s 100(1)(a)–(b); 3(1) ('jurisdictional limit').

50 Current values are set out in the Magistrates' Court of Victoria, *Court Fees and Costs Ready Reckoner* (effective 1 July 2017).

51 *Ibid.*

52 *County Court Act 1958* (Vic) s 37.

53 *County Court Civil Procedure Rules 2008* (Vic) O 34A.03(b)(i).

54 To file an originating motion.

55 *Eg Hiss v Galea* [2012] VCC 2010 (21 December 2012); *Marshall v Berndt* [2011] VCC 384 (7 April 2011). Order 34A of the *County Court Civil Procedure Rules 2008* (Vic) provides a framework for the management of all civil litigation by the County Court.

56 County Court of Victoria, *Fees* (effective 1 July 2017) <www.countycourt.vic.gov.au/fees>.

57 *Constitution Act 1975* (Vic) s 85.

58 See *Barton v Chhibber* (1988) Aust. Torts Reports 67, 745.

59 Pursuant to the *Supreme Court (Fees) Regulations 2012* (Vic) sch pt 1.

- 3.80 Fees for legal representation are separate to court costs in all three courts. If unsuccessful, parties may also be ordered to pay the other party's legal and court costs.

Question

- 3 Have you been involved in a Victorian court case about a neighbourhood tree dispute? What was your experience?

Law in Victoria

Legislation affecting tree disputes

- 3.81 In Victoria, the management and removal of trees can be affected in some circumstances by legislation dealing with land management, land protection and public safety. These laws do not address the resolution of tree disputes more generally, but may be relevant to the rights and responsibilities of parties in some disputes.
- 3.82 Some of these laws, including local laws, stipulate what should happen to a tree that causes (or is likely to cause) damage or harm, as well as the scope of a tree owner's liability where they fail to appropriately maintain a tree.
- 3.83 *The Planning and Environment Act 1987* (Vic) provides the legal framework for Victoria's planning system. Overlays and planning controls under this framework may affect individuals' ability to manage trees on private land.
- 3.84 The *Public Health and Wellbeing Act 2008* (Vic) contains an offence of creating a nuisance.⁶⁰ Where a nuisance is reported and is found to be 'dangerous to health or offensive', councils must investigate and may, in limited circumstances, enter private property to 'take appropriate action' to manage the nuisance.⁶¹
- 3.85 It is theoretically possible for this Act to be used in the management of private tree disputes. However, given limited council resources and the fact that they generally have no formal involvement in private disputes, it is most likely that councils would determine that such matters are more appropriately resolved privately, and choose to refer people to other resolution options.⁶² The Commission found no examples of a council using this Act for this purpose.
- 3.86 Under the *Fences Act 1968* (Vic), neighbours can recoup costs or request certain works where:
- a dividing fence is negligently or deliberately damaged or destroyed by a tree, such as where the tree owner has failed to rectify or remove a tree that poses a risk of damage. The tree owner will be liable for the entire cost of repairs to the dividing fence.⁶³
 - a dividing fence is in the form of a 'vegetative barrier', allowing neighbours to serve on each other a 'Notice to Fence' containing requests for works such as the 'planting, replanting, repair or maintenance of a hedge or similar vegetative barrier that is the whole or part of a dividing fence'.⁶⁴

60 *Public Health and Wellbeing Act 2008* (Vic) s 61.

61 *Ibid* ss 62(2)–(4).

62 *Ibid* s 62(3)(b). This is discussed further at [4.92]–[4.96].

63 *Fences Act 1968* (Vic) s 9.

64 *Ibid* s 13 Part 4.

- 3.87 Other laws that compel people to remove vegetation on their land include:
- the *Catchment and Land Protection Act 1994* (Vic), under which an owner of land may be directed to remove specified noxious weeds.⁶⁵
 - the *Country Fire Authority Act 1958* (Vic), under which local councils may issue Fire Prevention Notices to an owner of land requiring them to remove vegetation fuel hazards.⁶⁶
 - the *Electricity Safety Act 1998* (Vic), which requires a tree owner to keep their trees clear of any power lines or to carry out certain works or allow contractors to carry out these works where they fail to.⁶⁷
- 3.88 Other laws that deal with the removal of vegetation include:
- the *Flora and Fauna Guarantee Act 1998* (Vic), which deals with removal of native vegetation
 - the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which protects matters of national environmental significance and national heritage places
 - the *Heritage Act 1995* (Vic), which covers places of state significance and national significance
 - the *Aboriginal Heritage Act 2006* (Vic), which protects Aboriginal cultural heritage, and
 - transport and road legislation such as the *Road Management Act 2004* (Vic) and *Rail Management Act 1996* (Vic).
- 3.89 Each of these are discussed in detail in Chapter 4.
- 3.90 There is currently no legislation specific to the process for resolving private tree disputes between neighbours in Victoria.⁶⁸

The common law

- 3.91 The resolution of tree disputes in Victoria is based on the law of torts, which has largely been developed through judge-made case law, or the ‘common law’.⁶⁹
- 3.92 A tort is a ‘legal wrong’ that confers civil liability on the wrongdoer.⁷⁰ Torts cover a variety of acts or omissions that infringe on a person’s ‘fundamental liberties, such as personal liberty, and fundamental rights, such as property rights, and provide protection from interferences’.⁷¹
- 3.93 In order to bring a tree dispute to court, neighbours will usually have to rely on one or more of the torts of nuisance, negligence and trespass.⁷²

65 *Catchment and Land Protection Act 1994* (Vic) s 70.

66 *Country Fire Authority Act 1958* (Vic) s 41. This notice is usually issued outside metropolitan areas. See Chapter 4 for further discussion of Victorian legislative schemes governing the removal of trees on private land.

67 *Electricity Safety Act 1998* (Vic) ss 84B, 86(1), 86(5)–(7). See also *Electricity Safety (Electric Line Clearance) Regulations 2015* (Vic), sch 1 and Energy Safe Victoria, *Managing Trees near Powerlines* (2017) <www.esv.vic.gov.au/technical-information/electrical-installations-and-infrastructure/managing-trees-near-powerlines/>.

68 See Chapter 3 for discussion of types of tree disputes.

69 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Final Report No 129 (2015) [16.23]. Unlike statute law, common law rules are not set out in a single document, but rather are contained in the judgments of a range of courts and tribunals.

70 *Ibid* [16.21].

71 *Ibid*.

72 *Marshall v Berndt* [2011] VCC 384 (7 April 2011) 15.

- 3.94 In recent times, certain torts have undergone law reform. Their common law principles and elements are now largely restated in, clarified by or altered by statute.⁷³ This is particularly true of negligence, which has been given a statutory framework in the respective civil liability statutes of each state and territory.⁷⁴
- 3.95 These torts, their defences and available remedies are explored below in further detail.⁷⁵ As the development of the common law is incremental and case-based, a high level of detail is necessary to explain it fully, and to address the need for completeness in the Commission's review of this part of the law.
- 3.96 While some general principles are examined, discussion of each tort is limited to the extent it is relevant to tree disputes previously decided by the courts.

Table 1: Overview of relevant torts

Tort	Circumstances that give rise to the tort
Nuisance	Where there is or is likely to be unreasonable interference: (a) with the use and enjoyment of land, or (b) that causes damage to property.
Negligence	Where damage, loss or injury results from a negligent act.
Trespass	Where an invasion of land has occurred.

Nuisance

- 3.97 The tort (civil wrong) of nuisance can be classified as a public nuisance, or a private nuisance.⁷⁶ Neighbours in tree disputes will rely on private nuisance.⁷⁷
- 3.98 As a general rule, nuisance deals with the 'reciprocal rights and duties of private individuals'⁷⁸ and their 'conflicts over competing uses of land'.⁷⁹ Nuisance claims in tree disputes are often a balancing exercise between:
- the tree owner's right to enjoy and use their land in any lawful manner that they see fit, and
 - the affected neighbour's right to use and enjoy their land without unreasonable interference.⁸⁰
- 3.99 In legal terms, a nuisance relates to an act or omission that causes unreasonable interference with the affected neighbour's land or their enjoyment of land.⁸¹ It is 'a tort directed against the plaintiff's enjoyment of their rights over the land'⁸² and is inextricably linked to a person's proprietary interests over land they occupy.
- 3.100 In the context of tree disputes, nuisance covers situations where a tree:
- encroaches on neighbouring land
 - causes physical damage to neighbouring land, or

73 Loane Skene and Harold Luntz, 'Effects of Tort Law Reform on Medical Liability' (2005) 79 *Australian Law Journal* 345–63. As explained by the Australian Law Reform Commission, 'Despite their common law origins, most tort actions are subject to some statutory variation of the common law principles by state and territory legislation. Numerous statutes limit actions or defences, provide limitation periods, cap or exclude awards of damages, and provide for survival of actions': Australian Law Reform Commission, *Traditional Rights and Freedom — Encroachments by Commonwealth Laws*, Final Report No 129 (2015) 434–5, n 38.

74 See, eg, *Wrongs Act 1958* (Vic) pt X, but note that statutory amendments do not override or affect common law principles associated with negligence: *Wrongs Act 1958* (Vic) s 47. Generally speaking, alterations stemming from law reform have sought to restrict the scope of liability: Loane Skene and Harold Luntz, 'Effects of Tort Law Reform on Medical Liability' (2005) 79 *Australian Law Journal* 345–63. But see s 63 of the *Wrongs Act 1958* (Vic) which broadens the defence of contributory negligence so that it may fully defeat a claim.

75 But only to the extent each is relevant to resolving tree disputes. The tort of negligence, for example, is an extremely complex and technical area of law which will not be discussed in its entirety in this paper.

76 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 185.

77 Unless the context indicates otherwise, all references to 'nuisance' should be taken to refer to the tort of private nuisance.

78 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 508.

79 Ibid 487.

80 Samantha Hepburn, *Principles of Property Law* (Cavendish Publishing Pty Ltd, 1998) 1.2.1; Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.70]–[21.80].

81 *Hargrave v Goldman* (1963) 110 CLR 40; *Hunter v Canary Wharf Ltd* [1997] AC 655; *Robson v Leischke* [2008] NSWLR 98

82 *Robson v Leischke* (2008) 72 NSWLR 98, 91.

- produces an interference that emanates over neighbouring land.⁸³

3.101 Time limits apply to legal actions in tort. In the case of nuisance, an affected neighbour must bring legal action for nuisance within six years of the date the nuisance occurred.⁸⁴

Establishing nuisance

3.102 In order to establish nuisance, the affected neighbour must have the right to bring a claim (have 'standing') and must have experienced unreasonable interference for which the tree owner is liable.

Affected neighbour must have standing

3.103 As the tort of nuisance exists to remedy unreasonable interference with a person's use and enjoyment of their land,⁸⁵ the affected neighbour must be in actual possession of the land in order to have standing to bring a claim.⁸⁶

3.104 Three types of occupants of land have standing in private nuisance: freehold owners in possession of land, and tenants or licensees with exclusive possession.⁸⁷

3.105 Where the property is leased, only the tenant, who has actual possession of the land and is affected by the nuisance, will have standing to sue. However, where the nuisance causes damage of a permanent nature to the reversionary interest in land, the landlord may also have standing to sue even though they are not in actual possession of the land.⁸⁸

Interference must be unreasonable

3.106 Although nuisance is generally interpreted as unreasonable interference with the use and enjoyment of land, case law has developed to allow nuisance to be claimed for unreasonable interference resulting in damage to property.⁸⁹ The two outcomes attract different considerations.

Unreasonable interference with use and enjoyment of land

3.107 Unreasonable interference with use and enjoyment of land is typically relied on for interference which intrudes onto the affected neighbour's land.⁹⁰ In the context of tree disputes, examples of this could include leaf litter,⁹¹ or the spread of pollen⁹² or seeds.⁹³ Importantly, there is no need to prove that actual physical damage has resulted from a nuisance.

83 Ibid; *St Helen's Smelting Co v Tipping* (1865) 11 ER 1483. It is generally accepted that interference resulting in personal injury has been absorbed by the law of negligence: see *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 where the High Court of Australia absorbed the rule in *Rylands v Fletcher* [1866] LR 1 Ex at 280 into the tort of negligence. See also *Robson v Leischke* [2008] NSWLR 98 [49]. Trindade and Cane elaborate that 'claims for past personal injury or damage to property framed as nuisance are 'likely to be treated as ... claim[s] in negligence'. Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 216. Contrary to this, some case law has still not dismissed nuisance as an appropriate cause or action for personal injury: see, eg, *Pelmonthe v Phillips* (1889) 20 LR(NSW)(L) 58 and *Wilson v New South Wales Land and Housing Corp* [1998] ANZ Conv R 623, which assert that nuisance may be successfully relied on where negligence has not been made out. Negligence is discussed further at [3.164]–[3.203].

84 A person must bring action within the timeframe set out in the *Limitations of Actions Act 1958* (Vic) s 5(1)(a).

85 As expressed in *Robson v Leischke* [2008] NSWLR 98 [91]. Standing refers to 'the entitlement of a person or organisation to involve the jurisdiction of the court to hear a case': Peter Butt (ed) *Butterworths' Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) 'standing'.

86 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.4].

87 *Stockwell v Victoria* [2001] VSC 497 (17 December 2001) [241]; *Robson v Leischke* [2008] NSWLR 98.

88 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.140]. The landlord will not have standing to sue for a temporary interference (e.g. seasonal leaf litter) but will have standing to sue for interference that causes permanent damage, such as structural damage due to encroaching roots.

89 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.2.6].

90 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 497.

91 See, eg, *Wilson v Farah* [2017] NSWLEC 1006 (10 January 2017) but note this was decided under the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

92 See, eg, *Leonardi v Watson* [2015] QCATA 192 (22 December 2015) but note this was decided under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

93 See, eg, *Marsh v Baxter* [2015] WASCA 169 (3 September 2015).

- 3.108 In the Western Australian case of *Marsh v Baxter*,⁹⁴ a farmer who owned an organically certified farm claimed in nuisance against a neighbouring farmer whose crops included genetically modified (GM) canola. The GM canola seeds blew onto the organic farm, which resulted in the loss of the farm's organic certification.⁹⁵
- 3.109 Unreasonable interference with the use and enjoyment of land has been described as resulting when substantial and unreasonable 'annoyance, or discomfort' is caused.⁹⁶ This is judged against the common law standard of a 'reasonable user', which requires that any minor or trifling interference will be considered part of the ordinary neighbourly exchange of 'give and take, live and let live'.⁹⁷
- 3.110 Trindade and Cane explain this as follows:
- when people live in close proximity to one another they have to be prepared, to some extent, to allow others to do things that annoy them at times when they would prefer to be left in peace and quiet if they, in turn, want to be able to behave in a way that might annoy their neighbours and at a time when their neighbours would prefer they did not.⁹⁸
- 3.111 Therefore, liability will only be imposed 'where the harm or risk to one is greater than [what] one ought to be required to bear under the circumstances'.⁹⁹
- 3.112 In order to determine this, the court will balance factors including:
- the character of the neighbourhood in which the interference occurs
 - the extent of the interference
 - the sensitivity of the affected neighbour
 - whether an intention to harm exists.¹⁰⁰
- 3.113 The character of the neighbourhood in which the interference occurs is relevant to determining the unreasonableness of the interference. What is reasonably acceptable in one neighbourhood may not be in another. For example, the emission of noise and smoke in an industrial area may be considered an expected characteristic of the area.¹⁰¹
- 3.114 However, even if a *type* of interference is reasonable in a neighbourhood, nuisance can still be found if the interference causes annoyance, inconvenience or discomfort to an unreasonable degree.¹⁰²
- 3.115 The degree or extent of the interference is determined by examining its duration, frequency, timing and intensity.¹⁰³ These factors are weighed against one another to determine whether or not the interference can be considered unreasonable.
- 3.116 For example, an interference of low to moderate intensity may not be unreasonable unless it occurs over an extended period of time; equally, a considerably intrusive interference even if over only a short period of time may be unreasonable.¹⁰⁴

94 Ibid.

95 Although, in this case, nuisance was not found on two grounds: (1) the organic farm was unduly sensitive to de-certification and (2) the mere presence of GM canola seeds, which had not yet germinated and could be easily identified and thus removed, did not amount to interference that was unreasonable: *ibid* [775]–[789].

96 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.80].

97 *Bamford v Turnley* (1862) 3 B & S 66; 122 ER 27, 83–84 (B & S), 32–33 (ER) (Bramwell B).

98 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.2.2].

99 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 499 n 98 citing American Law Institute, *Restatement (Second) of the Law of Torts* 2d (1965) § 822. In other words, 'there must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty habits of living but according to plain and sober notions among ordinary people': Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 500 citing *Walter v Selfe* (1851) De G & Sm 315, 322.

100 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.90]–[21.110].

101 *Ibid* 502. As elaborated by the House of Lords decision of *Colls v Home & Colonial Stores* [1904] AC 179 [185] '[a] dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if [they] lived in the country, and distant from other dwellings'.

102 This proposition is often expressed as 'coming to a nuisance' for which there is no defence: *Sturges v Bridgman* (1879) 11 Ch D 852; *Bliss v Hall* (1838) 4 Bing NC 183. See [3.150] for further detail. Furthermore, there is no also no defence on the basis that the activities causing the interference are of benefit to the public or community where it is unreasonable: *Munro v South Dairies Ltd* [1955] VLR 332.

103 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.2.5].

104 *Halsey v Esso Petroleum Ltd* [1961] 2 All ER 145; *Seidler v Luna Park Reserve Trust* (Unreported, Supreme Court of New South Wales, Hodgson J, 21 August 1995); *McKenzie v Powley* [1916] SALR 1; *Haddon v Lynch* [1911] VLR 230.

- 3.117 Interference will not be considered unreasonable where the affected neighbour, their land or their use of the land are unduly sensitive to the interference. Whether or not undue sensitivity exists is tested objectively by examining the interference against the 'ordinary usages of humankind living in a particular society'.¹⁰⁵
- 3.118 An improper motive, or an intention to cause harm, may also be relevant. Where the interference is carried out in order to annoy, vex or harm, nuisance may be established regardless of whether or not that interference is otherwise unreasonable or the affected neighbour is unduly sensitive.¹⁰⁶

Unreasonable interference causing damage to property

- 3.119 The second type of unreasonable interference relates to damage to property.
- 3.120 In order to make out nuisance causing damage to property, actual physical damage must have occurred. This may include physical damage, such as a crack in concrete foundations, or damage to a dwelling, fixture or chattels on the land.¹⁰⁷
- 3.121 In the Victorian case *City of Richmond v Scantelbury*,¹⁰⁸ the roots of elm trees encroached on neighbouring land and, in doing so, extracted water and moisture from the subsoil. This undermined the structure of the affected neighbour's property and caused its concrete foundations to crack. The affected neighbour sued the tree owner for nuisance¹⁰⁹ and was awarded damages.¹¹⁰
- 3.122 A simple encroachment of a branch or root over boundary lines without causing damage, or the mere potential of a tree to cause damage to neighbouring property will not be sufficient to make out nuisance.¹¹¹
- 3.123 The presence of damage makes the interference unreasonable.¹¹² The relative weight of factors such as the characteristics of the neighbourhood, the extent of the interference, sensitivity and improper motive are not relevant.¹¹³
- 3.124 Where damage has not yet occurred but there are concerns that it may occur in the future, a court may grant relief, but only in limited circumstances. The damage must be imminent or likely to occur in the near future, and be very substantial and almost irreparable in nature.¹¹⁴

Tree owner must be liable

- 3.125 A tree owner will be liable for the nuisance caused by a tree if they created, adopted or continued the nuisance.
- 3.126 In determining whether the tree owner has created, adopted or continued the nuisance, a court would consider the relevant acts, omissions and knowledge, discussed below.

105 *Robson v Leischke* [2008] NSWLR 98 [84]. As explained in the English case *Robinson v Kilvert* (1889) 41 Ch D 88 [97] per Lopes LJ, 'a [person] who carries on an exceptionally delicate trade cannot complain because it is injured by [their] neighbour's doing something lawful on [their] property, if it is something which would not injure anything but an exceptionally delicate trade'.

106 *Hollywood Silver Fox Farm v Emmett* [1936] 1 All ER 825; *Christie v Davey* [1839] 1 Ch 316.

107 See, eg, *Robson v Leischke* [2008] NSWLR 98; *City of Richmond v Scantelbury* [1991] 2 VR 38; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *Bennetts v Honroth* [1959] SASR 170; *Pemberton v Bright* [1960] 1 WLR 436; *Crowhurst v Amersham Burial Board* (1878) 4 Ex D 5.

108 [1991] 2 VR 38. The tree owner in this case was a council.

109 Or alternatively, negligence.

110 The matter was originally determined in the Magistrates' Court of Victoria where the tree owner was ordered to pay the affected neighbour \$19,507 in damages. The tree owner then sought a review of this order in the Supreme Court of Victoria and was successful: *City of Richmond v Scantelbury* [1991] 2 VR 38, 39, 47–8.

111 *Young v Wheeler* [1987] Aus Torts Reps 80–126; *Robson v Leischke* [2008] NSWLR 98 citing *Asman v MacLurcan* (1985) 3 BPR 9592.

112 *St Helen's Smelting Co v Tipping* (1865) 11 ER 1483; *Kraemers v Attorney-General (Tas)* [1966] Tas SR 113, 122–3; *Corbett v Pallas* [1995] Aust Torts Reps 81–326 [62,241].

113 See [3.112]–[3.118] for further discussion of these factors.

114 *Robson v Leischke* [2008] NSWLR 98 [58].

Creating a nuisance

- 3.127 A tree owner can create a nuisance in two ways: by deliberately or recklessly causing the nuisance, or where they know it is reasonably foreseeable that their actions would cause a nuisance.¹¹⁵
- 3.128 A tree owner may plant a tree in a deliberate or reckless way by, for example, planting a tree likely to cause interference very close to a boundary line.
- 3.129 However, a tree owner can also create a nuisance by planting a tree without deliberateness or recklessness. In these cases, the tree owner will be liable if they knew or ought to have known that it was reasonably foreseeable that their planting of trees would cause nuisance to their neighbour.¹¹⁶
- 3.130 This is particularly relevant where a tree is planted by third parties, who are admitted onto the property and whose actions are authorised by the tree owner. Having control over who to allow onto a premises makes the tree owner liable for any nuisance created by the third party.¹¹⁷ For example, if a contracted gardener plants a tree which causes nuisance to the neighbour, the tree owner is liable for the nuisance as long as the planting was not outside the scope of what was instructed and the tree owner knew or ought to have known of the risk of nuisance occurring.¹¹⁸
- 3.131 A tree owner may also be considered liable where their tenant creates a nuisance if they authorised their tenant to plant a tree that posed a 'special risk of nuisance',¹¹⁹ or if they knew that the probability of the tree causing nuisance was 'highly likely'.¹²⁰
- 3.132 If, however, the tree owner had no knowledge of the risk of nuisance, it was not reasonable to expect them to know, or the tenant or third party acted without authorisation, then the tree owner is not liable.¹²¹ Instead, liability attaches to the tenant or the third party who created the nuisance.¹²²
- 3.133 Liability continues as long as the interference remains.¹²³

Adopting or continuing a nuisance

- 3.134 A person may buy or inherit property on which a tree causing nuisance already exists, having grown naturally or been planted by previous owners.¹²⁴
- 3.135 The successive tree owner will be considered liable for nuisance where they adopt or continue the nuisance after coming into possession of the land.
- 3.136 A tree owner will have *adopted* the nuisance caused by the tree where they make use of it. Similarly, the tree owner will be considered to have *continued* the nuisance where they fail to stop the nuisance being caused by the tree within a reasonable time.¹²⁵

115 Ibid [76].

116 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) [21.160]; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.5].

117 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 511.

118 Legal Services Commission of South Australia, *Trees and the Law* (May 2016) 5 <[www.lsc.sa.gov.au/cb_pages/publications.php#Neighbour s\(fences,trees,noiseetc\)](http://www.lsc.sa.gov.au/cb_pages/publications.php#Neighbour%20s(fences,trees,noiseetc))>; *City of Richmond v Scantelbury* [1991] 2 VR 38, 40, 45.

119 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 200; *De Jager v Payneham & Magill Lodges Hall Inc* (1984) 36 SASR 498.

120 'Highly likely' is taken to mean 'certain' or 'virtually certain': Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 201. See also *Smith v Scott* [1973] Ch 314; *De Jager v Payneham & Magill Lodges Hall Inc* (1984) 36 SASR 498.

121 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 513.

122 Ibid; *Fennell v Robson Excavations Pty Ltd* [1977] 2 NSWLR 486.

123 *Fennell v Robson Excavations* [1977] 2 NSWLR 486 (CA); Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 509.

124 Whether the subject tree is sown or naturally occurring has no bearing: *City of Richmond v Scantelbury* [1991] 2 VR 38; *Robson v Leischke* (2008) 72 NSWLR 98.

125 Ibid.

- 3.137 As with the creation of a nuisance, the tree owner must have actual or constructive knowledge of the interference.¹²⁶ A tree owner will not be held liable for nuisance if they did not know of it or could not be expected to know that it was likely.¹²⁷ For example, if a tree had shown no signs of decay or structural damage, then its unforeseeable fall during a storm and resultant damaging of neighbouring property will not confer liability on the tree owner.¹²⁸
- 3.138 Adopting or continuing a nuisance also requires the tree owner to be at fault.
- 3.139 A tree owner will be at fault for adopting or continuing a nuisance where they fail to take reasonable steps to end the interference that is reasonably foreseeable.¹²⁹ Foreseeability is based on the real risk of the interference occurring, not just a theoretical risk.¹³⁰

Reasonable steps

- 3.140 In order to determine whether the tree owner has failed to take reasonable steps, the court will consider the precautions the tree owner could have taken, and did take, to mitigate or remove the interference.¹³¹ The court will weigh the likely cost and inconvenience of mitigating or removing the interference against any damage or discomfort that the affected neighbour may experience.¹³² Where the cost or inconvenience of taking precautions is prohibitive compared to the risk of damage or discomfort occurring, liability will not be imposed.¹³³
- 3.141 Liability begins when a tree owner gains actual knowledge of the nuisance or when they ought to have known of the nuisance.¹³⁴

Defences

- 3.142 Where a nuisance can be shown, a tree owner may still not be liable in some circumstances, if they have a legal defence. Defences to nuisance may be available to tree owners where:
- they had statutory authority for their actions
 - the nuisance was consented to
 - the affected neighbour was contributorily negligent.

Statutory authority

- 3.143 Where an act is authorised by statute, it is not unlawful, even if it causes a nuisance.¹³⁵ This is because it is presumed that Parliament, in authorising activities capable of causing nuisance, has already balanced within the statute 'the rights of individuals against the benefit to the public of certain nuisance-creating activities'.¹³⁶
- 3.144 However, if it is found that the authorised act could have reasonably been carried out without causing nuisance, then the defence will no longer be available.¹³⁷

126 Ibid [49]–[50]. Constructive knowledge is inferred from facts and circumstances. It differs from actual knowledge which is tested subjectively and is a question of fact: Peter Butt (ed) *Butterworths' Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) 'actual knowledge' and 'knowledge'.

127 *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478.

128 *Robson v Leischke* [2008] NSWLR 98 [102] citing *Bruce v Caulfield* (1918) 34 TLR 204 [205].

129 *City of Richmond v Scantelbury* [1991] 2 VR 38 citing *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617.

130 *City of Richmond v Scantelbury* [1991] 2 VR 38.

131 *Goldman v Hargrave* [1967] 1 AC 645; *Stockwell v State of Victoria* [2001] VSC 497 (17 December 2001).

132 *City of Richmond v Scantelbury* [1991] 2 VR 38, 46–7.

133 *Solloway v Hampshire County Council* (1981) 79 LGR 449, but note that there are some cases where, despite taking precautions against the nuisance, an occupier of a premises may still be found liable, especially in cases where the occupier makes the premises available for hire for a particular purpose. In these cases, the occupier will be responsible for any nuisance caused by the hirer who carries out that purpose: *De Jager v Payneham & Magill Lodges Hall Inc* (1984) 36 SASR 498.

134 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 510.

135 *Hammersmith Rly v Brand* (1869) LR 4 HL 171; *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391; *Cohen v City of Perth* (2000) 112 LGERA 234.

136 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.220].

137 *Cohen v City of Perth* (2000) 112 LGERA 234.

Consent

- 3.145 A tree owner may rely on the express or implied consent of an affected neighbour as a defence. For example, if a tree causing nuisance is maintained by the tree owner for an agreed common benefit, such as providing shade, then the affected neighbour may forego any rights against the tree owner because of the agreement reached.¹³⁸

Contributory negligence

- 3.146 Where the person claiming nuisance has themselves contributed to the nuisance, a defence of contributory negligence may be available to the other party.¹³⁹
- 3.147 A finding of contributory negligence does not, however, fully defeat a nuisance claim. Instead, it reduces the tree owner's liability where the affected neighbour is found to have acted without reasonable care for their own property, contributing to the resulting damage for which they seek relief.¹⁴⁰
- 3.148 For example, if the affected neighbour could have installed a root barrier earlier in time instead of delaying its installation by months and allowing their property to undergo further damage from the encroaching roots, then a court may find contributory negligence on their part and, as a result, reduce the tree owner's liability.¹⁴¹
- 3.149 Any resulting damages awarded to the affected neighbour will be reduced by an amount reflecting the extent of their contributory negligence.¹⁴²

Claims that cannot be relied on to defend nuisance

- 3.150 There are three established grounds on which nuisance cannot be defended:¹⁴³
- 'Coming to' a nuisance: those who acquire a property with the knowledge that it is affected by a tree still retain their right to enjoy and use their land without unreasonable interference.¹⁴⁴
 - The affected neighbour's use of land and foreseeability of exposure to nuisance: the affected neighbour does not need to take affirmative steps, no matter how marginal, to change the way they would ordinarily use and enjoy their land to minimise the nuisance they experience.¹⁴⁵
 - Nuisance caused by multiple parties: to claim that the nuisance was the cumulative result of many people's actions is no defence.¹⁴⁶

Remedies

- 3.151 An affected neighbour has several options for resolving a tree dispute. As discussed above at [3.17]–[3.26], the self-help 'remedy' of abatement is often exercised before an affected neighbour pursues an action for nuisance in court.
- 3.152 Where the affected neighbour takes the matter to court, they may seek an injunction or damages.

138 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.240].

139 *Wrongs Act 1958* (Vic) Part V.

140 *Ibid* s 26(1); *Stockwell v State of Victoria* [2001] VSC 497 (17 December 2001) [624], [626].

141 *Stockwell v State of Victoria* [2001] VSC 497 (17 December 2001) [624], [626]; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478, 486, but note that in both cases, the Court did not find contributory negligence.

142 *Wrongs Act 1958* (Vic) s 26(1)(b).

143 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.240].

144 *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478, 486 citing *Davey v Harrow Corporation* [1958] 1 QB 60.

145 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.240]. For example, an affected neighbour cannot be expected to stop parking their car in their usual spot in order to mitigate the risk of a branch falling and damaging the car.

146 *Ibid*.

Injunction

- 3.153 An injunction is a court order restraining the tree owner from performing or continuing the interference.¹⁴⁷ It is the main remedy awarded to an affected neighbour in an action for nuisance.¹⁴⁸
- 3.154 An injunction may be prohibitive, in that it orders the tree owner to stop certain actions; or mandatory, in that it orders the tree owner to carry out a certain act.¹⁴⁹
- 3.155 Injunctions are an appropriate remedy for types of interference that are recurrent, and where a monetary award of damages would not provide relief from the interference.¹⁵⁰ They are also best suited for types of interference which infringe on the affected neighbour's right to use and enjoy their land, as opposed to causing damage to property.
- 3.156 For nuisance expected to occur in the future, an injunction¹⁵¹ may be granted, even if the nuisance does not exist at the time the injunction is sought. The high threshold for this type of injunction requires 'proof that the apprehended damage ... is imminent or likely to occur in the near future and ... that the damage [will be] very substantial or almost irreparable'.¹⁵²

Damages

- 3.157 A court may make an award of damages to an affected neighbour, which is monetary compensation for any material loss or damage that has already occurred as a reasonably foreseeable consequence of the nuisance.¹⁵³
- 3.158 Damages are awarded in order to 'put the injured parties back as nearly as possible into the position in which they would have been had the wrong not been committed'. While 'it is recognised that damages cannot return a plaintiff precisely to the pre-tort position', the award is nevertheless 'calculated to achieve this as far as money can'.¹⁵⁴
- 3.159 Damage must be proven in order for an award to be made.¹⁵⁵ This could be material loss or damage to land, possessions, or for the loss of profits which would have otherwise been earned from use of the land.¹⁵⁶
- 3.160 Damages cannot be awarded for a decrease in the value of the affected neighbour's property.¹⁵⁷
- 3.161 Each new instance of loss or damage caused by a repeated nuisance gives rise to a fresh claim for damages.¹⁵⁸ This discourages tree owners from repeating the nuisance after compensating the affected neighbour for past damage.
- 3.162 Damages can be awarded alone or in combination with an injunction.¹⁵⁹ Where contributory negligence is found, damages will be reduced by an amount reflective of this.¹⁶⁰

147 Ibid [21.270].

148 Ibid.

149 An injunction must clearly identify how it is to be complied with. Injunctions must not be impossible to comply with and, if the terms of the injunction are not followed, its compliance must be able to be easily enforced: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.7.1].

150 Interference that is temporary or on a one-off basis is more suited to damages: see [3.157]–[3.163].

151 Known as a 'quia timet' injunction: Latin meaning 'because he or she fears': Peter Butt (ed) *Butterworths' Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) 'quia timet'.

152 *Robson v Leischke* [2008] NSWLR 98, [58], [67]. An affected neighbour may also seek an injunction before the hearing (an interlocutory injunction), but only if there is a 'serious question to be tried' and if it is appropriate on 'the balance of convenience' to restrain the tree owner in such a way before the hearing: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 [19].

153 Teck H Ong, 'Equitable Damages: A Powerful but Often Forgotten Remedy' (1999/2000) 4(2) *Deakin Law Review* 61, 63; *Overseas Tankship (UK) Ltd v Miller Steamship Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617. This remedy is particularly suitable for tree disputes where an injunction would be ineffective, such as when the dispute concerns interferences causing damage to property.

154 Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '10 Damages' [33.10.10].

155 *Asman v MacLurcan* (1985) 3 BPR 9592 at 9594; *Robson v Leischke* [2008] NSWLR 98.

156 *Hunter v Canary Wharf Ltd* [1937] AC 655, 706; *Robson v Leischke* [2008] NSWLR 98 [216].

157 *Soltau v De Held* (1851) 2 Sim (NS) 133, 158; *Young v Wheeler* (1987) Aus Torts Reps 80–126; *McKenzie v Powley* [1916] SALR 1. This decrease in value can, however, act as a measure of the seriousness of the nuisance. This is because damages for nuisance seek to provide relief for infringement of the right to use and enjoyment of the land. The assessment of this interference is based on the level of discomfort or annoyance caused to the person and is thus a subjective assessment.

158 *Manson v Shire of Maffra* (1881) 7 VLR(L) 364.

159 *Supreme Court Act 1986* (Vic) s 38.

160 *Wrongs Act 1958* (Vic) s 26(1)(b). See discussion above at [3.146]–[3.149].

- 3.163 Common law damages cannot be awarded for nuisance expected to occur in the future.¹⁶¹ However, equitable damages, instead of an injunction for future nuisance,¹⁶² may be awarded in rare circumstances.¹⁶³

Negligence

- 3.164 Where a tree owner fails to exercise reasonable care in relation to their tree, resulting in harm or loss to a neighbour, the tree owner can be found to have been negligent.¹⁶⁴
- 3.165 Negligence occurs where the tree owner breaches the duty of care they owe to the affected neighbour, causing the affected neighbour to suffer a reasonably foreseeable harm.¹⁶⁵
- 3.166 Damages for negligence is therefore the most appropriate remedy to past, one-off losses such as personal injury or damage to property. An injunction is usually ineffective in these situations, as the risk of these events and losses recurring is likely to be low.¹⁶⁶ For example, where an old, decaying tree falls and causes damage to property or injury to a person on neighbouring land, it is unlikely that this event will recur.¹⁶⁷
- 3.167 In tree disputes where damage to property is concerned, negligence is often submitted as an alternative cause of action to nuisance.¹⁶⁸ A matter may succeed on one or the other, or both causes of action.¹⁶⁹
- 3.168 Where personal injury is alleged in a tree dispute, it is more likely that negligence will be exclusively relied on.¹⁷⁰
- 3.169 While negligence cases concerning trees and damage to property are plentiful,¹⁷¹ negligence cases concerning personal injury due to trees are scarce. The Commission is unaware of any cases in the higher courts concerning personal injury caused by trees.¹⁷²
- 3.170 Although personal injury from trees is not frequently litigated,¹⁷³ the Commission is aware that it is an issue of concern in the community and warrants exploration.¹⁷⁴ Personal injury resulting from a tree was considered in reviews of tree disputes in other jurisdictions and is frequently brought forward as a basis of a claim under the New South Wales and Queensland statutory schemes.¹⁷⁵

161 *Overseas Tankship (UK) Ltd v Miller Steamship Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617.

162 See [3.156] for discussion of injunctions for future damage.

163 *Leeds Industrial Co-op Society Ltd v Slack* [1924] AC 851; *Barbagallo v J&F Catelan Pty Lrd* [1986] 1 Qd R 245; *Supreme Court Act 1986* (Vic) s 38; Teck H Ong, 'Equitable Damages: A Powerful but Often Forgotten Remedy' (1999/2000) 4(2) *Deakin Law Review* 4(2) 61.

164 *Wrongs Act 1958* (Vic) s 43.

165 *Robson v Leischke* [2008] 72 NSWLR 98 [93]; Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 122; *Hargrave v Goldman* (1963) 110 CLR 40, 62, (Windeyer J).

166 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 653; *Bolton v Stone* [1951] AC 850 cf *Miller v Jackson* [1977] QB 966.

167 See, eg, *Timbs v Shoalhaven City Council* (2004) 132 LGERA 397, but note that the subject tree was on council land. See also *Dudley v Meadowbrook Inc* 166 A2d 743 (Wash, 1961), a case from Washington DC, US where a neighbouring tree fell and caused damage to property; *Kurtigian v City of Worcester* 348 N.E.2d 284 (Mass, 1964–1965), a case from Massachusetts, US where a council tree fell onto neighbouring private property injuring the landowner.

168 See, eg, *Dimitrios Michos v Council of the City of Botany Bay* (2012) 189 LGERA 25 [634]–[65]; *Marshall v Berndt* [2011] VCC 384 (7 April 2017) [234]; *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 (24 October 2016).

169 *Dimitrios Michos v Council of the City of Botany Bay* (2012) 189 LGERA 25.

170 *Robson v Leischke* [2008] 72 NSWLR 98; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 653 and see above for why nuisance is not suited to pursue legal action for personal injury.

171 Although, in these cases, the discussion of negligence and how it is applied to the facts at hand is often brief and succinct; most probably due to the fact that negligence is usually argued in the alternative to nuisance and most of the court's analysis is concerned with the nuisance claim. See, eg, *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 (24 October 2016) [64] where Jordan J states of the negligence claim argued by the affected neighbour in addition to nuisance, 'In view of what I have concluded as to nuisance, it is not necessary to separately discuss the question of the tort of negligence at any length. But lest there is any doubt about the matter, I am satisfied on the balance of probabilities that the loss and damage caused to the plaintiff is as a result of breach of the duty of care owed to the plaintiff by the defendant.'

172 Personal injury caused by trees situated on public land is more common. See, eg *Secretary to the Department of Natural Resources & Energy v Harper* [2000] VSCA 36 (29 March 2000).

173 Litigation is more common in cases where personal injury is caused by council-owned trees on public land, especially in context of motor vehicle accidents: see, eg, *Robson v Leischke* [2008] 72 NSWLR 98 [81].

174 See [2.54]–[2.71].

175 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998); Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015). The NSW and Queensland statutory schemes are discussed in more detail at [5.14]–[5.53]. For cases where personal injury was alleged, see, eg, *Leonardi v Watson* [2015] QCATA 192 (22 December 2015); *Yang v Scerri* [2007] NSWLEC 592 (21 August 2007).

- 3.171 Negligence claims must be brought before a court within three years of the harm being discoverable (ie it is known about or could be identified), or within 12 years of the date the negligent act occurred, whichever occurs first.¹⁷⁶ For negligence resulting in damage to property, a person must bring legal action within six years of the date the negligent act occurred.¹⁷⁷
- 3.172 The requirements that must be established for a person's actions to be considered legally negligent, and the available defences and remedies are discussed below.

Establishing negligence

- 3.173 In order to establish negligence, the affected neighbour must prove all of the following:
- that the tree owner owed them a duty of care
 - that the tree owner breached that duty
 - that the breach resulted in harm
 - that the harm was not too remote from, but was a reasonably foreseeable consequence of, the breach.¹⁷⁸

Duty of care

- 3.174 In order for a person to be held liable for negligence, it must be shown that they owed a duty of care to the person alleging negligence.¹⁷⁹
- 3.175 A person who owes a duty of care to another fulfils this duty by adhering to a standard of care that a 'reasonable person of ordinary prudence' would adhere to in order to avoid 'unreasonable risk or danger to others'.¹⁸⁰
- 3.176 It is well established that neighbours owe each other this duty of care.¹⁸¹

Breach of duty of care

- 3.177 The duty of care can be breached through a positive act or omission that falls short of the standard of care that a reasonable person of ordinary prudence would adhere to.¹⁸²
- 3.178 However, a person will not fall short of this standard of care, and thus will not breach their duty of care, if they take precautions to safeguard against foreseeable risks that are 'not insignificant'.¹⁸³
- 3.179 The foreseeability of risks and whether or not a person has adequately taken precautions against them will depend on factors such as 'the probability of the risk occurring, the severity of the harm if it does, the cost and difficulty of taking precautions against the risk and the social utility of the conduct that creates the risk'.¹⁸⁴
- 3.180 The balancing of these factors is commonly referred to in law as 'the calculus of negligence';¹⁸⁵ the result of which will depend on the particular facts of each case.¹⁸⁶

176 *Limitations of Actions Act 1958* (Vic) s 27D.

177 *Ibid* s 5(1)(a).

178 *Wrongs Act 1958* (Vic) s 48; *Dimitrios Michos v Council of the City of Botany Bay* (2012) 189 LGERA 25 [65] citing *Robson v Leischke* [2008] 72 NSWLR 98 [93].

179 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 151; *Donoghue v Stevenson* [1932] AC 562.

180 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 151. See also *Robson v Leischke* [2008] NSWLR 98 [93].

181 *Robson v Leischke* [2008] NSWLR 98 [96]; Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 126. As Gillard J states in *Stockwell v State of Victoria* [2001] VSC 497 (17 December 2001) [392], 'authorities in the past have established that in certain circumstances, an occupier of property owes a duty of care to an adjoining land owner to avoid damage, resulting from something moving onto an adjoining property by reason of some action or inaction on the first property'.

182 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 151.

183 This double negative is a statutory formulation: see *Wrongs Act 1958* (Vic) s 48(1)(b). Risks that are 'not insignificant' are those that are 'not far-fetched or fanciful': Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J). See also *Wrongs Act 1958* (Vic) s 48(3)(a).

184 *Wrongs Act 1958* (Vic) s 48(2).

185 A phrase stemming from Judge Learned Hand's judgment in the US case of *United States v Carrol Towing Co* 159 F 2d 169 (2nd Cir 1947).

186 See, eg, *Schiller v Gregory* (1985) Aus Torts Reps 80–751; *Nagle v Rottneest Island Authority* (1993) 177 CLR 423; *Inverell Municipal Council v Pennington* (1993) Aus Torts Reps 81–234; *Smith v Broken Hill Proprietary Co Ltd* (1957) 97 CLR 337. Courts have also developed principles to infer negligent conduct: see generally Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) ch 8.7.

Harm

- 3.181 The affected neighbour must then prove that the breach resulted in harm to them.
- 3.182 Harm is also referred to as ‘injury’, ‘damage’ or ‘loss’ in case law. Section 43 of the *Wrongs Act 1958* (Vic) defines harm broadly as ‘any kind of harm’, which includes personal injury or death; and damage to property and economic loss:¹⁸⁷
- Damage to property includes damage caused to anything on the land, including chattels/possessions.
 - Personal injury refers to physical bodily injury.¹⁸⁸
 - Economic loss is an ‘injury to person or property resulting in immediate or subsequent detriment to a person’s income or wealth’.¹⁸⁹

Causation and remoteness

- 3.183 The existence of a breach of duty (by the tree owner) that results in harm caused (to the affected neighbour) does not prove the tree owner’s negligence.¹⁹⁰ Instead, the affected neighbour must go on to prove that the resulting harm was, in fact, *caused* by the negligence of the tree owner, and that the consequences they suffer are not too remote.¹⁹¹
- 3.184 To determine this, the court will use a two-step approach that involves determining first, factual causation¹⁹² and secondly, the scope of liability.¹⁹³

Factual causation

- 3.185 Factual causation is established where the negligent conduct ‘was a necessary condition of the occurrence of the harm’.¹⁹⁴
- 3.186 This reflects the common law ‘but for’ test, which obliges the court to ask whether the affected neighbour would still have suffered their loss if the tree owner had not been negligent.¹⁹⁵
- 3.187 An affected neighbour may need to produce expert evidence, such as reports by arborists or structural engineers, to prove factual causation.¹⁹⁶
- 3.188 Establishing this causal link can be difficult where there may be multiple causes of the harm, such as where an affected neighbour suffers allergies from a neighbouring tree but also from other species of tree, or trees on their own property.¹⁹⁷
- 3.189 In order to assess factual causation in complex circumstances, the courts will apply common law principles.¹⁹⁸ In addition, section 51(2) of the *Wrongs Act* directs the court to consider, along with established principles for examining factual causation, ‘whether or not and why responsibility for the harm should be imposed on the negligent party’.¹⁹⁹

187 *Wrongs Act 1958* (Vic) s 43.

188 Cf mental harm, which is a separate category of harm: see *Wrongs Act 1958* (Vic) Part XI and Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) Ch 9.4.

189 Peter Butt (ed) *Butterworths’ Concise Australian Legal Dictionary* (Lexis Nexis Butterworths, 3rd ed, 2004) ‘economic loss’.

190 In some situations, a person may have indeed breached the duty of care they owed the plaintiff and caused them harm but this will not confer liability in negligence on them unless causation and remoteness are made out: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [10.1].

191 *Wrongs Act 1958* (Vic) s 52.

192 *Ibid* s 51(1)(a). This provision comprises the common law ‘but for’ test.

193 *Ibid* s 51(1)(b).

194 *Ibid* s 51(1)(a).

195 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [10.2.1].

196 *Ibid* [8.7.4].

197 *Leonardi v Watson* [2015] QCATA 192 (22 December 2015), but note that this case concerned an action under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

198 Eg, where the tree owner’s negligent conduct cannot readily be attributed to the harm. Other complex circumstances include: where there is a failure to warn; alternative, multiple or hypothetical causes; intervening causes that break the chain of causation (*novus actus interveniens*) or where there is no medical or scientific knowledge currently available to provide evidence for the causal link: See generally Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) 232–239; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [8.7], [10.3].

199 *Wrongs Act 1958* (Vic) s 51(2).

Scope of liability

- 3.190 The law provides that a finding of factual causation must consider whether it is appropriate for the negligent person to be held liable for the harm suffered by the affected neighbour.²⁰⁰
- 3.191 For the courts, this involves finding a ‘policy-based balance between the defendant’s wrongful conduct and the consequences for which the defendant is to be liable’.²⁰¹ This is set out in section 51(4) of the *Wrongs Act*, which directs the court to consider, among other things, ‘whether or not and why responsibility for the harm should be imposed on the negligent party’.²⁰²
- 3.192 The harm suffered will be considered the responsibility of the tree owner where it is a reasonably foreseeable consequence of their negligent conduct.²⁰³ There must be a real (not far-fetched) risk of the conduct causing harm to the affected neighbour.²⁰⁴ What has to be foreseeable is the type of harm caused, rather than its extent or the manner in which it occurred.²⁰⁵
- 3.193 For example, if a healthy tree with no signs of decay or rot blows down in gale-force winds and causes damage to property or injury to a person, the harm it causes is not likely to be considered reasonably foreseeable (that is, there was no way for the tree owner to predict this outcome).²⁰⁶ The law of negligence is not concerned with ‘acts of God’ or where no known risk ever existed.²⁰⁷
- 3.194 However, if it was obvious that the tree was full of rot and on the verge of dying, or the tree owner knew that the tree posed a risk of falling down, then any resulting harm from it falling on neighbouring property would be considered reasonably foreseeable, even if the manner in which it fell or the extent of the harm was unexpected.²⁰⁸

Defences

- 3.195 There are four defences available against claims of negligence. These are:
- contributory negligence
 - voluntary assumption of risk
 - illegality
 - statutory defences.

Contributory negligence

- 3.196 Where the affected neighbour fails to take reasonable care for their own safety, and this failure contributes to their injury, the court may find contributory negligence.²⁰⁹ This provides a partial defence resulting in the award of damages being reduced in proportion to the affected neighbour’s contribution to their harm.²¹⁰

200 Loane Skene and Harold Luntz, ‘Effects of Tort Law Reform on Medical Liability’ (2005) 79 *Australian Law Journal* 345–63, 355; *Wrongs Act 1958* (Vic) s 51(1)(b). Determining remoteness on the basis of factual causation alone has been criticised for ‘cast[ing] its net too widely’, as it more often than not leads to a positive finding of negligence: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 535. See also Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) 231; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

201 Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) 245.

202 Ibid 259.

203 *Overseas Tankships (UK) v Morts Dock & Engineering Co* (Wagon Mound No 1) [1961] AC 388.

204 Ibid.

205 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [10.3.4.3].

206 *Bruce v Caulfield* (1918) 34 TLR 204, 205; *Noble v Harrison* [1926] 2 KB 332, 336–339; *Caminer v Northern & London Investment Trust Ltd* [1951] AC 88, 96, 99, 103–104; *Dungog Shire Council v Babbage* (2004) 134 LGERA 349 [85].

207 Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) [9.180]; *Commissioner of Railways (WA) v Stewart* (1936) 56 CLR 520. An act of God is ‘an event or occurrence due to natural causes which occurs independently of human intervention and either could not be foreseen, or if foreseen, could not be reasonably guarded against. Examples include a storm or earthquake: Peter Butt (ed) *Butterworths’ Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) ‘act of God’.

208 *Robson v Leischke* (2008) 72 NSWLR 98; *Noble v Harrison* [1926] 2 KB 332, 336, 339; *Caminer v Northern & London Investment Trust Ltd* [1951] AC 88, 96, 99, 103–104; *Dungog Shire Council v Babbage* (2004) 134 LGERA 349 at 377 [85].

209 *Wrongs Act 1958* (Vic); Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook Co, 10th ed, 2011) [12.30].

210 *Wynberg v Hoyts Corp Pty Ltd* (1997) 72 ALJR 65 (HCA). However, unlike contributory negligence in a nuisance claim, liability for negligence can also be fully defeated by contributory negligence if the court thinks it just and equitable to do so: *Wrongs Act 1958* (Vic) s 63. See discussion of contributory negligence at [3.146]–[3.149]; unless otherwise expressly stated, the same principles apply.

Voluntary assumption of risk

- 3.197 A negligence claim may be defeated where the tree owner can prove that the affected neighbour fully comprehended the extent of the risk and freely chose to accept or ignore it, thus voluntarily assuming the risk.²¹¹
- 3.198 Whether or not the affected neighbour comprehended the extent of the risk is a subjective assessment based on their actual knowledge.²¹² Where the risk is obvious, the court will presume the affected neighbour was aware of the risk.²¹³

Illegal activity

- 3.199 The fact that a person was engaged in an illegal activity at the time they suffered harm does not necessarily provide an automatic defence for the negligent party.²¹⁴ A duty of care may still be owed to a person engaged in an illegal activity in certain circumstances.²¹⁵
- 3.200 The court may also take into consideration whether or not the person bringing the claim was engaged in illegal activity and reduce an award of damages to reflect this engagement.²¹⁶

Statutory defences

- 3.201 Some defences are included in the *Wrongs Act*. These include the statutory defences relating to 'good samaritans' and volunteers.²¹⁷

Remedies

- 3.202 The main remedy for negligence is financial compensation (damages). Damages are awarded for losses that can be proven in precise monetary terms (called special damages), and for losses that cannot be proven so precisely including future financial²¹⁸ and non-financial losses (called general damages).²¹⁹
- 3.203 The *Wrongs Act* sets out various thresholds of harm and caps for monetary amounts that must be applied when awarding damages.²²⁰

211 This defence is also known by the Latin maxim *volenti non fit injuria*: Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '9 Defences' [33.9.880] citing R P Balkin and J L R Davis, *Law of Torts* (Lexis Nexis Butterworths, 5th ed, 2013) [10.27], the second edition of which is cited in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 (Kirby J). See also *Monie v Commonwealth* [2007] NSWCA 230 [75]–[76] (Campbell JA); *Wrongs Act 1958* (Vic) ss 53–54.

212 Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '9 Defences' [33.9.910]; *Commissioner of Insurance* (Qld) v Joyce (1948) 77 CLR 39.

213 Unless the affected neighbour can prove, in turn, on the balance of probabilities that they were in fact not aware of the risk. An 'obvious risk' is a risk that would have been obvious to a reasonable person in the position. They include 'risks that are patent or a matter of common knowledge'. Furthermore, a risk can be obvious even if it 'has a low probability of occurring' and 'is not prominent, conspicuous or physically observable'. A risk will not be obvious if the risk is created because a person has failed to properly 'operate, maintain, replace, prepare or care for' an item or 'living thing' unless 'the failure itself is an obvious risk': *Wrongs Act 1958* (Vic) s 53.

214 Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '9 Defences' [33.9.880] citing *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438; *Zalewski v Turcarolo* [1995] 2 VR 562. See also *Miller v Miller* [2011] 242 CLR 446.

215 Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '9 Defences' [33.9.980]. At a minimum, a causal relationship must exist between the harm suffered and the illegal activity. If the harm suffered and the illegal activity are independent of one another, then claiming a defence based on illegal activity will not be successful. A common example given is that of a burglar who suffers a motor vehicle collision on a highway while in commission of theft. The harm suffered by the burglar is independent to the crime they committed: Thomson Reuters Westlaw, *The Laws of Australia* (at June 2016) 33 Torts, '9 Defences' [33.9.910]. (Jacobs JA).

216 *Wrongs Act 1958* (Vic) s 14G; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 624; Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) [12.440].

217 A good samaritan, acting in good faith and without financial reward, can rely on s 31B of the *Wrongs Act 1958* (Vic) to relieve themselves of liability. Section 37 provides a similar defence for volunteers engaged in community work; liability is conferred onto the community organisation for which they volunteer. See generally *Wrongs Act 1958* (Vic) pts VIA, IX. However, exceptions may apply to volunteers: see *Wrongs Act 1958* (Vic) s 38.

218 Eg, medical expenses, loss of earning capacity.

219 Eg, loss of amenity (ie enjoyment of life), pain and suffering.

220 Eg, 'In Victoria the threshold for non-economic loss requires the plaintiff to have suffered a "significant injury". Significant injury is defined in s 28LF and depends on assessment of the degree of impairment, according to a procedure laid down, by an approved medical practitioner or a medical panel.': Loane Skene and Harold Luntz, 'Effects of Tort Law Reform on Medical Liability' (2005) 79 *Australian Law Journal* 345–63, 358–9. See also *Wrongs Act 1958* (Vic) parts VA, VB, VBA and VBA.

Trespass

- 3.204 Trespass to land²²¹ is unauthorised entry onto land.²²² Legal action can be taken against the person entering without authority.
- 3.205 Land relates not only to 'the surface of any ground, soil or earth but also any buildings or structures that might be affixed to it ... both things growing on the surface (such as trees and grass) and minerals under the surface'.²²³
- 3.206 An action for trespass may be used by the tree owner for invasions of land by the affected neighbour in two situations. First, where the affected neighbour abates (cuts back overhanging vegetation) beyond their boundary line from their own land and onto the tree owner's land.²²⁴ Secondly, where the affected neighbour physically enters the tree owner's land without permission.
- 3.207 Every invasion of land, no matter how minor, is considered a trespass,²²⁵ even if the trespass does not cause any material damage.²²⁶

Establishing trespass

- 3.208 Trespass is established when the affected neighbour intentionally causes direct physical intrusion onto the tree owner's land.
- 3.209 The requirements for making out this cause of action are discussed below.

Intention

- 3.210 The affected neighbour must intend the trespass. An affected neighbour will have intended the trespass if they 'deliberately and wilfully' carried out any voluntary act, such as cutting down branches of a tree that have not encroached onto their land.
- 3.211 The affected neighbour may be deemed to have intended trespass where it is substantially certain that a particular action would result in contact with the land.
- 3.212 An affected neighbour who recklessly commits trespass will also be regarded as having had the necessary intention.²²⁷

Direct physical intrusion

- 3.213 The most obvious form of direct physical intrusion which causes contact with the land is entering the land without permission. Direct physical intrusion does not need to be carried out by a person; it may occur when, for example, objects are placed over boundary lines and left on the land, or poison is deposited on the tree owner's soil.²²⁸ As Justice Bollen explained in the South Australian case of *Gazzard v Hutchesson*,²²⁹ trespass can be made out without entering another's land when an affected neighbour uses a stepladder to lean over a boundary line and cut their neighbour's roses.
- 3.214 The encroachment of roots and branches over boundary lines will not constitute a direct physical intrusion for the purposes of trespass. An action in nuisance would be better suited to these situations.²³⁰

221 A number of forms of trespass exist, including to land, property and to the person. For the purposes of this paper, and unless the context indicates otherwise, all references to 'trespass' should be considered to mean 'trespass to land'.

222 *Rodrigues v Ufton* (1894) 20 VLR 539, 543–4; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 154–5.

223 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.1].

224 See, eg, *Gazzard v Hutchesson* (1995) Aust Torts Reports 81–337. Abatement is discussed in further detail at [3.17]–[3.26].

225 *Plenty v Dillon* (1991) 171 CLR 635 citing Lord Camden LCJ in *Entick v Carrington* (1765) 19 St. Tr. 1029, 1066.

226 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 50. A person must bring legal action within six years of the date the trespass occurred: *Limitation Of Actions Act 1958* (Vic) s 5(1)(a).

227 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 166 citing *League against Cruel Sports v Scott* [1986] 1 QB 240, 252 where it was held that an 'indifference to the risk' of trespass amounted to sufficient intention. Where the trespass is careless, negligent trespass may be a more suitable cause of action: Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '8 Trespass and Intentional Torts' [33.8.490].

228 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.5.3].

229 (1995) Aust Torts Reports 81–337, 62, 360.

230 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 56 citing *Lemmon v Webb* [1894] 3 Ch 1. See [3.97]–[3.163] for further discussion on nuisance.

Possession of land

- 3.215 The tree owner must be in actual possession of the land. This means that, where a property is being rented, only a tenant with exclusive possession can bring an action for trespass.²³¹
- 3.216 A licensee (someone with permission to be on the land but without a tenancy agreement) may also be able to sue third parties for trespass in certain circumstances.²³²

Defences

- 3.217 Trespass resulting from mistake, however reasonable, will not be a defence.²³³
- 3.218 An affected neighbour may rely on the following defences against trespass:²³⁴
- necessity (a belief that the trespass was reasonably necessary to 'preserve life or protect property from real and imminent harm')²³⁵
 - consent.²³⁶

Remedies

- 3.219 A tree owner may seek an injunction or damages as a remedy for trespass. These are discussed below.

Injunction

- 3.220 A court order (injunction) restraining a person from continuing to trespass, may be sought. For example, this may occur when a person remains on the land after entry and refuses to leave,²³⁷ places objects on the land and refuses to remove them; or builds a wall on the land. The trespass will continue for as long as the intrusion remains.²³⁸
- 3.221 An injunction may also be sought against any threatened trespass.²³⁹

Damages

- 3.222 Physical intrusion onto property, even without causing material damage or harm, is enough to hold the intruder liable to pay damages.²⁴⁰
- 3.223 However, for trespass where no damage results, the tree owner may be awarded only a small ('nominal') amount of damages.²⁴¹
- 3.224 Exemplary or aggravated damages may be awarded where significant disrespect is shown for the rights of the tree owner, and the court considers that punishment is warranted.²⁴² For example, cutting down a neighbour's tree when they are absent from their land, without informing them or allowing them a chance to have their say about what should happen to their tree, would be an example of this.²⁴³

231 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.2]
 232 Ibid 163.
 233 Thomson Reuters Westlaw, *The Laws of Australia* (at 1 June 2016) 33 Torts, '8 Trespass and Intentional Torts' [33.8.330, 33.8.470].
 234 Re-entry onto land and lawful authority are also defences to trespass to land but are not discussed here.
 235 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.4.1]. The situation believed by the affected neighbour to compel them to act to preserve life and property must be 'an urgent situation of imminent peril' that 'existed actually, and not merely in the belief of the [affected neighbour]': *Southwark London Borough Council v Williams* [1971] 1 Ch 734, 746; *Cope v Sharpe (No 2)* [1912] 1 KB 496, 508.
 236 An affected neighbour will not be liable for trespass where they had consent to act in the way that they did. Consent can be express or implied. Common examples of implied consent are entering a driveway and knocking on a neighbour's door to speak to them: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.3].
 237 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.5.2].
 238 Ibid [4.2.5.3]. The requirement of intent distinguishes these acts from acts of nuisance.
 239 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) citing *Lincoln Hunt v Willesee* (1986) 4 NSWLR 457.
 240 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 58.
 241 Ibid. Nominal damages are damages awarded when a legal right has been infringed but no real damage has been suffered: Teck H Ong, 'Equitable Damages: A Powerful but Often Forgotten Remedy' (1999/2000) 4(2) *Deakin Law Review* 61, 63.
 242 *Gazzard v Hutchesson* (1995) Aust Torts Reports 81–337, 62, 360: 'contumelious disrespect for the rights of the enjoyment by the [tree owner]'.
 243 Ibid 81–337.

- 3.225 Consequential damages may also be awarded if the consequences following the trespass are not too remote; for example, where a person trespassing on land leaves the gate open, which then allows livestock to enter and damage vegetation on the land.²⁴⁴
- 3.226 Damages will be limited to the tree owner's interest in the land.²⁴⁵

Conclusion

- 3.227 In Victoria, neighbours involved in a tree dispute must rely on disparate information sources published by government and community organisations to navigate the fragmented resolution process for themselves.
- 3.228 Neighbours unwilling or unable to reach agreement informally have little structure or support to assist them, and conflicts may escalate quickly.
- 3.229 If formal mediation is sought, neighbours will be provided with more information, but their rights and responsibilities may still not be clear, as the current law in Victoria, based on the common law, is difficult to understand and not clearly articulated in a single, accessible location or document. Further, agreements made in DSCV-led mediation are not necessarily binding, and may not finally resolve a dispute.
- 3.230 Only when a common law action is brought in the courts are neighbours then subject to binding orders. The outcomes may still not be what either party had expected or hoped for, and the remedies are limited.

Question

- 4 Are the current law and process for resolving neighbourhood tree disputes in Victoria satisfactory? If not, why not?

244 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 58 citing *Svingos v Deacon* (1971) 2 SASR 126; *Hogan v Wright* [1963] TA SR 44.

245 Eg, a tenant will only be able to recover damages for any interference with their exclusive possession of the land rather than any permanent damage to the reversionary interest. The owner, however, may sue the neighbour who trespasses on land and causes damage for: action on the case for damages; damage of a permanent character to reversionary interest after the expiration of the license or tenancy; or other proprietary remedies: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.2]; Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) [3.50].

Planning law and regulation affecting trees on private land

- 50** Introduction
- 50** The planning system in Victoria
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4. Planning law and regulation affecting trees on private land

Introduction

- 4.1 As discussed in Chapter 3, Victoria does not have a specific statutory framework that regulates disputes between neighbours over trees. Generally, an affected neighbour must rely on the self-help remedy of abatement or the common law torts of nuisance, negligence and trespass.
- 4.2 Planning schemes and environmental and heritage laws may also be relevant to a dispute. These laws may prescribe that vegetation or individual trees are protected or preserved on private land. They may require a landowner to obtain a permit before removing or pruning vegetation. They may also authorise the removal of vegetation in specific circumstances; for example, bushfire management or to keep electricity lines clear. Other laws may put a positive obligation on a landowner to remove some types of vegetation, for example, noxious weeds.
- 4.3 Landowners typically find out about planning laws affecting their land through contact with their local council.
- 4.4 Planning schemes administered by local councils are the most common type of regulation affecting trees on private land in Victoria. The Victorian planning system is complex and layered, and the Commission is not seeking to review the system or its operation.
- 4.5 Instead, the purpose of this chapter is to give a brief overview of the Victorian planning scheme, and to consider some of the planning regulations that may affect disputes between neighbours about trees. While many regulations only apply in specific and limited circumstances, they are relevant to some tree owners. This chapter also canvasses the impact other laws may have on vegetation on private land.
- 4.6 Any reforms to the current dispute-resolution processes in Victoria would need to consider the impact on existing tree protection mechanisms and processes contained in planning schemes and local laws.

The planning system in Victoria

- 4.7 The *Planning and Environment Act 1987* (Vic) (the Planning Act) provides the legal framework for Victoria's planning system. The Planning Act does two key things: it establishes the Victoria Planning Provisions (the VPPs), and enables local councils to build their own planning schemes from those standard provisions.¹

¹ Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) [1.2] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>. See also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 23.

- 4.8 The VPPs are a comprehensive set of model planning provisions which ensure consistent rules for planning matters across Victoria, and consistency across local council planning schemes. The VPPs are made up of standard components² that may be incorporated into local planning schemes.
- 4.9 Each municipality in Victoria is covered by a local planning scheme.³ A planning scheme generally applies to all private and public land in Victoria and is binding on all members of the public, on every Victorian minister, government department, public authority and council, unless exempted under the Planning Act.⁴
- 4.10 The purpose of local planning schemes is to:
- provide a clear and consistent framework within which decisions about the use and development of land can be made
 - express state, regional, local and community expectations for areas and land uses
 - provide for the implementation of state, regional and local policies affecting land use and development.⁵
- 4.11 Local planning schemes can identify and offer protection to significant or important vegetation on public and private land. If someone complains about vegetation on a neighbouring property, planning regulations may protect that vegetation or limit the action a tree owner can take to address their neighbour's concerns. Planning regulations may also specify the process involved and documents needed to obtain a permit to prune or remove protected vegetation.
- 4.12 Local planning schemes may also include provisions that are relevant to or give effect to [the Council's] Municipal Strategic Statement and local planning policies.⁶ These provisions will include the relevant state standard zones and overlays.⁷ Some of these zones and overlays have local content added to them as schedules, which 'can be used to supplement and fine-tune the basic provisions of a state-standard clause, zone or overlay in a planning scheme, adapting it to local circumstances and locally-defined objectives'.⁸
- 4.13 The next section gives a brief overview of the some of the key components of the Victorian planning system. It also provides examples of local content that has been added to planning schemes by some councils.
- 4.14 These examples are not necessarily typical of all local government areas. The focus is on councils that manage vegetation closely, such as 'Green Wedge' councils or councils in areas of significant ecological diversity, as well as aspects of planning schemes that are most likely to affect parties' rights in a tree dispute.

2 Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) [1.2] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>. The standard components include: State Planning Policy Framework; Local Planning Policy Framework comprising the Municipal Strategic Statement and Local Planning Policies; zones; overlays; particular provisions; general provisions; definitions; incorporated documents; VicSmart provisions.

3 There are 79 local government areas in Victoria and three special planning areas (Alpine Resorts, Port of Melbourne and French and Sandstone Island). Each of these areas is covered by a planning scheme: Department of Environment, Land, Water and Planning (Vic), *Planning Schemes Online—About Planning Schemes* <<http://planningschemes.dtpli.vic.gov.au/about#user>>.

4 There are some exceptions. A planning scheme will not apply to places acquired by the Commonwealth for a public purpose and cannot regulate the use or development of Commonwealth land. Other exemptions relate to existing use rights, exemptions declared under s 16 of the *Planning Act 1987* (Vic) and permanently reserved Crown land: Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) [1.6]–[1.6.1] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

5 These purposes are identified by the Hume City Council, *General Planning Information Fact Sheet*, <www.hume.vic.gov.au>.

6 Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) [1.2] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

7 Ibid.

8 Ibid [1.8.7].

Standard Victorian zones

- 4.15 The VPPs currently list 30 distinct zones that are arranged into six categories—residential, industrial, commercial, rural, public land and special purpose.⁹ The way private land is zoned may impact on landowners’ rights to control vegetation on their property and specify the process and permits involved.
- 4.16 Some zones will have more controls relating to trees and vegetation than others. For example, the Rural Conservation Zone provides tighter restrictions on use of land and is designed to protect and enhance the natural environment for its historic, archaeological, scientific, landscape, faunal habitat and cultural values.¹⁰
- 4.17 One example of a decision-making guideline in this zone prioritises the retention of vegetation when developing land.¹¹ Zones must also be read alongside any schedule that applies. For example, in the City of Stonnington, a schedule to the General Residential Zone specifies that for the construction or extension of a single dwelling on a lot, a canopy tree is to be planted and that the planning application must detail any vegetation proposed to be removed or planted.¹²

Standard Victorian overlays

- 4.18 The main tools in the VPPs to protect vegetation in urban environments are overlays.¹³ An overlay may require a tree owner to retain vegetation that is the subject of a dispute with a neighbour or require them to obtain a permit to prune or remove it. An overlay may also specify the process required and documents needed to obtain a permit.
- 4.19 Standard overlays for Victoria are included in the VPPs. As with zones, many overlays have schedules to specify local objectives and requirements.
- 4.20 There are 24 overlays listed in the VPPs. They are organised into broad categories, including environmental and landscape, heritage and built form, and land management.¹⁴
- 4.21 An overlay differs from a zone because it considers the practical constraints that apply to a particular site, whereas a zone control is directed at the central purpose of the land.¹⁵ Generally, an overlay applies to a ‘single issue or related set of issues (such as heritage, an environmental concern or flooding)’.¹⁶ Multiple overlays can be used if more than one issue applies to land.
- 4.22 The overlays most likely to be relevant to neighbourhood tree disputes are:
- the Vegetation Protection Overlay
 - the Environmental Significance Overlay
 - the Significant Landscape Overlay
 - the Heritage Overlay
 - the Neighbourhood Character Overlay
 - the Bushfire Management Overlay.

9 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 27. A short summary of each of the zones listed in the VPP is provided in Department of Environment, Land, Water and Planning, *Using Victoria’s Planning System Guide*. (28 May 2015) [1.8.12] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

10 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 35.06 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

11 Ibid cl 35.06–6.

12 City of Stonnington, *City of Stonnington Planning Scheme* (19 September 2017) sch 8 cl 32.08 General Residential Zone, Items 2 and 4 <<http://planning-schemes.delwp.vic.gov.au/schemes/stonnington>>.

13 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note — Vegetation Protection in Urban Areas* (August 1999) 4 <www.planning.vic.gov.au/publications/planning-practice-notes>.

14 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 42, 43, 44 and 45 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

15 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 33.

16 Department of Environment, Land, Water and Planning (Vic), *Using Victoria’s Planning System Guide* (28 May 2015) [1.8.4] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

- 4.23 These are considered below more closely, along with examples of the way some councils have added local content to them.¹⁷ The examples concern Nillumbik and East Gippsland Shire Councils. These municipalities provide some examples of environmental overlay controls applying to vegetation on private land.
- 4.24 Nillumbik Shire Council is a local government area on Melbourne's north-east fringe. It contains outer northern suburbs of Melbourne and rural localities beyond the urban area. It is known as a Green Wedge Shire.¹⁸ This Green Wedge area has agricultural and recreational uses and other functions that support Melbourne. It also has areas of 'strong environmental, landscape, built and Koori heritage value for Victorians—many of which are of state, national or international significance'.¹⁹ The Nillumbik Green Wedge covers 91 per cent of the total shire area, and is zoned rural. Seventy-nine per cent of Nillumbik Green Wedge land is in private ownership and around 43 per cent of that land has environmental significance.²⁰ This Shire has numerous environmental overlays that apply to private property in the municipality and other planning controls which trigger the need to obtain a planning permit to clear vegetation on private land.
- 4.25 The East Gippsland Shire Council covers the second largest local government area in Victoria and includes extensive coastline, a major lake and river system, high country, national parks and state forest.²¹ The shire has a high biodiversity of species and ecosystems, and is home to 'many species of plants and animals which are absent from, or rare in, the rest of Victoria'.²² The region has significant areas of original native vegetation. Planning regulations in this Shire also trigger the need to obtain a planning permit to clear vegetation on private land in some circumstances.

Vegetation Protection Overlay

- 4.26 The Vegetation Protection Overlay²³ focuses on the protection of significant vegetation, including native and introduced vegetation in urban and rural environments.²⁴
- 4.27 The overlay can be applied to individual trees, groups of trees or areas of significant vegetation.²⁵ It requires a landowner to obtain a permit to remove, destroy or lop any vegetation specified in a schedule to the overlay subject to a list of exemptions.²⁶ Some of those exemptions apply to particular types of vegetation and others apply to specific situations, for example, to clear vegetation from electricity lines and to ensure emergency access.²⁷
- 4.28 The East Gippsland Shire Council has eight local schedules to the Vegetation Protection Overlay which outline the nature and significance of the vegetation to be protected and the vegetation protection objective, as well as permit requirements and decision-making guidelines.²⁸

17 Other land management overlays not discussed may also limit the removal of vegetation, eg, erosion, salinity or flood overlays: see Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 44.01, 44.02 and 44.03 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

18 Green wedge land is defined as land outside the urban growth boundary: *Planning and Environment Act 1987* (Vic) s 46AC.

19 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 31: Preparing a Green Wedge Management Plan* (June 2015) 2 <www.planning.vic.gov.au/publications/planning-practice-notes>.

20 Nillumbik Shire Council, *Nillumbik Green Wedge Management Plan 2010: Part 1* (2010) [2.1] <www.nillumbik.vic.gov.au/Environment/Nillumbik-Environment-Charter>.

21 East Gippsland Shire Council, *Know Your Council* <<http://knowyourcouncil.vic.gov.au/councils/east-gippsland>>.

22 The Shire website states that 11 mammal, 45 bird and 3 reptile species in East Gippsland are threatened: see the discussion about biodiversity at <www.eastgippsland.vic.gov.au/Community/Our_Environment/Biodiversity>.

23 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 42.02.

24 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (28 May 2015) [1.8.13] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>. See also Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 5 <www.planning.vic.gov.au/publications/planning-practice-notes>.

25 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (28 May 2015) [1.8.13] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

26 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 42.02–2 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

27 The permit requirement is subject to the exclusions listed in Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 42.02–3 Table of exemptions <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

28 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 5 <www.planning.vic.gov.au/publications/planning-practice-notes>.

- 4.29 For example, Schedule 8 is the Mallacoota Vegetation Protection Area Overlay. It seeks to protect vegetation of high conservation value and vegetation with high aesthetic and landscape value within built-up areas around the township of Mallacoota. Some remnant native vegetation in this area provides habitat for vulnerable rare or threatened species and some vegetation is rare or threatened on a state or national basis.²⁹ For those living in this area, the schedule provides some exemptions to the need to obtain a permit, including pruning of garden vegetation in the course of regular maintenance, provided this does not significantly affect the extent or nature of vegetation on a lot.³⁰

Environmental Significance Overlay

- 4.30 This overlay is applied if vegetation protection 'is part of a wider objective to protect the environmental significance of the area'.³¹ It is broader than the Vegetation Protection Overlay because it can also contain requirements about building and fence construction.³² A permit is required under this overlay to remove, destroy or lop any vegetation, including dead vegetation, unless there is an exemption in the overlay or any schedule.³³
- 4.31 The Nillumbik Shire Council has added three separate local schedules to the Environmental Significance Overlay, one of which is the Faunal and Habitat Significance Schedule.³⁴ It is designed to protect and enhance significant faunal and habitat sites and to allow fauna to move between different areas. There are 'specific sites on both public and private land that have been identified as being of particular importance'.³⁵
- 4.32 The Shire requires that any application for the removal of vegetation include detailed information about the number and size of any trees to be removed or pruned, as well as information about the reason for removal and steps taken to avoid that removal and any offsetting arrangements. An arborist's report is also required in some circumstances.³⁶
- 4.33 The Shire notes the impact that vegetation removal may have on neighbours. It suggests that neighbours are sometimes unaware of approved removal of vegetation, and therefore recommends that residents:

advise any nearby neighbours of [their] intention to remove the vegetation and that [they] have obtained permission to do so before [they] proceed to remove the vegetation. Failure to do so may result in Council officers being obliged to visit [their] land, and also potentially delay the vegetation removal.³⁷

Significant Landscape Overlay

- 4.34 This overlay exists to conserve and enhance the character of significant landscapes.³⁸ It mainly applies when vegetation is aesthetically or visually important in the broader landscape and vegetation is identified as an 'important contributor to the character of an area'.³⁹ A permit is required to remove, destroy or lop vegetation unless an exemption applies.⁴⁰

29 East Gippsland Shire Council, *Planning Scheme* (12 October 2017) sch 8 to the Vegetation Protection Overlay—Mallacoota Vegetation Protection Area, 1 and 2 <<http://planning-schemes.delwp.vic.gov.au/schemes/eastgippsland>>.

30 Ibid 3.

31 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 5 <www.planning.vic.gov.au/publications/planning-practice-notes>. See also Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 42.01 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

32 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 5 <www.planning.vic.gov.au/publications/planning-practice-notes>.

33 A permit is not required if a native vegetation precinct plan applies: East Gippsland Shire Council, *Planning Scheme* (12 October 2017) cl 42.01–2 and see table of exemptions in cl 42.01–3. <<http://planning-schemes.delwp.vic.gov.au/schemes/eastgippsland>>.

34 Nillumbik Shire Council, *Planning Scheme* (19 September 2017) sch 1 to the Environmental Significance Overlay—Sites of Faunal and Habitat Significance <<http://planning-schemes.delwp.vic.gov.au/schemes/nillumbik>>.

35 See Nillumbik Shire Council, *Environmental Significance Overlays* (2 February 2015) <www.nillumbik.vic.gov.au/Building-and-Planning-permits-and-advice/Planning-advice/Environmental-significance-overlays>.

36 See the complete checklist for planning assessment. Ibid.

37 Ibid.

38 See Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 42.03 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

39 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 6 <www.planning.vic.gov.au/publications/planning-practice-notes>.

40 Nillumbik Shire Council, *Planning Scheme* (19 September 2017) cl 42.03–2 and 42.03–3 table of exemptions <<http://planning-schemes.delwp.vic.gov.au/schemes/nillumbik>>. A permit is not required if complying with the terms of a native vegetation precinct plan under 52.16.

- 4.35 The Nillumbik Shire Council has seven schedules to the Significant Landscape Overlay,⁴¹ meaning that ‘the planning controls and desired landscape outcomes of the overlay vary from neighbourhood to neighbourhood’.⁴²
- 4.36 For example, in the designated ‘Garden Court’ area, described as a residential development set within predominantly native vegetation, a permit is required to remove, destroy or lop any ‘substantial tree’.⁴³
- 4.37 The Shire’s Neighbourhood Character Policy (to be read in conjunction with the overlays) specifically outlines the existing and preferred character of each neighbourhood precinct covered by the Significant Landscape Overlay.⁴⁴ The policy aims to ensure that development respects local community and environmental values, and maintains and enhances the character of urban and township areas. A design objective of this policy is to maintain the existing vegetation including canopy trees.⁴⁵
- 4.38 Where the need for a planning permit is triggered by an overlay requirement and a resident wishes to remove only one or two trees or to prune trees and no development is involved, the Nillumbik Shire Council allows residents to lodge a ‘fast track’ application.⁴⁶ Otherwise, the standard application for planning permit must be used.⁴⁷
- 4.39 A council arborist will inspect the tree/s, and will then provide a recommendation to the Shire planning team so Council can determine the application. A condition of approval may include a requirement for the replanting of trees to compensate for the approved removal of trees.⁴⁸

Heritage Overlay

- 4.40 The Heritage Overlay may protect specific individual trees or groups of trees on private land (such as a landmark tree or an Avenue of Honour).⁴⁹ A heritage overlay aims to conserve and enhance heritage places⁵⁰ of natural or cultural significance and to ensure that development does not adversely affect the significance of heritage places.⁵¹
- 4.41 The overlay includes a statement outlining what is valuable about a place or object, and this is often supplemented by local policy.⁵² A permit is required to remove, destroy or lop a tree if a schedule identifies tree controls for a heritage place.⁵³
- 4.42 These tree controls are not intended to protect trees for their amenity value, but to protect trees that are ‘of intrinsic significance (such as trees that are included on the National Trust Register or trees that contribute to the significance of a heritage place)’.⁵⁴

41 Bush and Semi-Bush Residential Areas, Bush Garden, Garden Court, Eltham Central and several new schedules awaiting content.

42 See Nillumbik Shire Council, *Significant Landscape Overlay* (2 February 2015) <www.nillumbik.vic.gov.au/Property/Building-and-Planning-permits-and-advice/Advice-Sheets/Significant-landscape-overlay>.

43 A permit is not needed to prune a tree for regeneration or ornamental shaping or the removal of dead trees or dead limbs or the partial removal of limbs and branches directly overhanging dwellings, garages and outbuildings or the removal of Yarra Burgan for fire prevention purposes: Nillumbik Shire Council, *Planning Scheme* (19 September 2017) sch 4 to the Significant Landscape Overlay—Garden Court Character <<http://planning-schemes.delwp.vic.gov.au/schemes/nillumbik>>.

44 Nillumbik Shire Council, *Planning Scheme* (19 September 2017) cl 22.12 <<http://planning-schemes.delwp.vic.gov.au/schemes/nillumbik>>.

45 Eg, the Garden Court precinct in the Neighbourhood Character Policy has a design objective to maintain the existing mix of native and exotic vegetation including canopy trees and understorey. Remnant indigenous understorey vegetation should be retained where possible and replanted where appropriate: Nillumbik Shire Council, *Planning Scheme* (19 September 2017) cl 22.12 and 22.12–3 <<http://planning-schemes.delwp.vic.gov.au/schemes/nillumbik>>. See also Nillumbik Shire Council, *Significant Landscape Overlay* (2 February 2015) <www.nillumbik.vic.gov.au/Property/Building-and-Planning-permits-and-advice/Advice-Sheets/Significant-landscape-overlay>.

46 See the discussion in Nillumbik Shire Council, *Tree Removal and Pruning Application* (2017) <www.nillumbik.vic.gov.au/Building-and-planning-permits-and-advice/Planning-forms/Tree-removal-and-pruning-application>.

47 Ibid. The fast track process cannot be used for the removal of three or more trees or if directly associated with the development or redevelopment of land that requires a planning permit. It cannot be used to clear Native Vegetation under the Native Vegetation Particular Provision 52.17 discussed at [4.49]–[4.53].

48 See the discussion in Nillumbik Shire Council, *Tree Removal and Pruning Application* (2017) <www.nillumbik.vic.gov.au/Building-and-planning-permits-and-advice/Planning-forms/Tree-removal-and-pruning-application>.

49 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 6 <www.planning.vic.gov.au/publications/planning-practice-notes>.

50 A ‘heritage place’ includes both the listed heritage item and its associated land: Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 43.01 ‘Heritage Overlay’ <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

51 Ibid.

52 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 256.

53 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 43.01–1 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

54 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 1: Applying the Heritage Overlay* (July 2015) 4 <www.planning.vic.gov.au/publications/planning-practice-notes>.

- 4.43 One of the decision-making guidelines to be considered in granting a permit is whether the lopping or development will adversely affect the health, appearance or significance of the tree.⁵⁵
- 4.44 One criterion used for the assessment of heritage values is a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons. This includes the significance of a place to Aboriginal people as part of their continuing and developing cultural traditions.⁵⁶

Neighbourhood Character Overlay

- 4.45 The Neighbourhood Character Overlay identifies areas of existing or preferred neighbourhood character and aims to ensure that development respects that character.⁵⁷ Vegetation removal may be controlled by this overlay. If trees are specified in a schedule, a permit is usually required to remove, destroy or lop them.⁵⁸ The overlay only protects large trees over a certain height or girth.⁵⁹ The overlay lists factors relevant to decision making, including the contribution that the tree makes to the neighbourhood character and the health of the tree.⁶⁰

Bushfire Management Overlay

- 4.46 The Bushfire Management Overlay⁶¹ specifies planning requirements for bushfire protection and developmental controls to 'mitigate risk to life, property and community infrastructure'.⁶² One of its purposes is to identify areas where bushfire hazards warrant bushfire protection measures being implemented. Consequently, this overlay may provide exemptions where a permit would otherwise be required to remove certain vegetation.⁶³

Particular provisions

- 4.47 Particular provisions are statewide specific planning provisions that apply to particular issues or application types. They apply in addition to a zone or an overlay unless specified otherwise. Some particular provisions have schedules for local requirements.⁶⁴
- 4.48 The particular provisions relating to native vegetation and bushfire protection exemptions are potentially relevant to private tree owners' management of their trees. These provisions may require a landowner to obtain a permit to remove or prune protected native vegetation on large blocks of land. They may also excuse a landowner from having to obtain a permit required elsewhere in a planning scheme, in an overlay, for example, for bushfire safety purposes.

55 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 43.01–4 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

56 See Criterion G: Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 1: Applying the Heritage Overlay* (July 2015) 1–2 <www.planning.vic.gov.au/publications/planning-practice-notes>. Nillumbik Shire Council notes that it is Council policy to both provide for the identification of sites of Aboriginal cultural significance and the appropriate level of management in consultation with the local Aboriginal community, and ensure new uses, developments and works do not impinge on or detract from sites and features of Aboriginal cultural heritage and archaeological significance: Nillumbik Shire Council, *Planning Scheme* (19 September 2017) cl 22.05 of the Local Planning Policy Framework <<http://planning-schemes.delwp.vic.gov.au/schemes/nillumbik>>. See also the discussion about heritage protections: Nillumbik Shire Council, *How Heritage Places are Protected* <www.nillumbik.vic.gov.au/Property/Planning-our-townships/Planning-for-our-Shire/Heritage/How-Heritage-Places-are-Protected>.

57 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 43.05 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

58 *Ibid* cl 43.05–2.

59 If the tree is less than 5 m high or has a trunk circumference of less than 0.5 m, an exemption applies. For this and other exemptions, see *ibid*.

60 *Ibid* cl 43.05–5.

61 *Ibid* cl 44.06.

62 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (28 May 2015) [1.8.13] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

63 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 64: Local Planning for Bushfire Protection* (September 2015) 3 <www.planning.vic.gov.au/publications/planning-practice-notes>. Schedules may be added to the Bushfire Management Overlay. A schedule can vary specified requirements of cl 44.06, including permit requirements, and notice/referral requirements, and modify the measures and application requirements in cl 52.47. Other VPPs that relate to bushfire and vegetation removal are: cl 52.47 'Planning for Bushfire'; cl 52.48–5 'Bushfire exemption to create defensible space'; and cl 66.06 'Referral requirements to the relevant fire authority'.

64 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (28 May 2015) [1.8.5] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

Native vegetation particular provisions

- 4.49 Native vegetation is defined in the VPPs as ‘plants that are indigenous to Victoria, including trees, shrubs, herbs and grasses’.⁶⁵
- 4.50 The native vegetation particular provisions of the VPPs control the removal of native vegetation. A permit is usually required to remove, destroy or lop native vegetation,⁶⁶ subject to some limited exemptions.⁶⁷ The provisions also establish offset requirements to compensate for removal, with the aim of ensuring that clearing native vegetation has a neutral impact on Victoria’s biodiversity. The type of offset required depends on the characteristics of the native vegetation being removed, and the extent of the loss.⁶⁸
- 4.51 The native vegetation particular provisions will not affect most private properties in Victoria. They ‘aim to prevent broad-scale clearing of vegetation and will have limited applicability in urban areas with small lot sizes’.⁶⁹ They are more relevant in country areas or Green Wedge areas because this is where most native vegetation is located and because of the way the VPP defines native vegetation and the way the exemptions are framed.
- 4.52 If the native vegetation provisions apply to private property, the provisions allow the clearing of some vegetation without a permit. Some of the exemptions include: lopping and pruning for maintenance to a maximum of one-third of the foliage from an individual plant; where the vegetation has been planted, for example, in a garden or as a street tree; or to enable the removal or destruction of a listed weed in certain circumstances.⁷⁰ The permit requirements will not apply to vegetation on small blocks.⁷¹
- 4.53 Planning schemes also consider the non-biodiversity impacts of native vegetation removal, for example, for managing bushfire risk, Aboriginal cultural heritage, timber harvesting, minimising land and water degradation, and preserving landscape values.⁷²

Bushfire protection particular provisions

- 4.54 The bushfire protection particular provisions were added following the recommendations of the 2009 Victorian Bushfire Royal Commission.⁷³ They provide additional exemptions to the need to obtain a native vegetation clearing permit, and they also apply to non-native vegetation. They allow for the clearance of some vegetation around existing buildings, used for accommodation and adjacent to fences on property boundaries, to reduce fuel load.⁷⁴

65 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 72 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

66 Ibid. cl 52.17–2.

67 Ibid: exemptions are listed in the table.

68 See Department of Environment, Land, Water and Planning (DELWP) (Vic), *Permitted Clearing of Native Vegetation—Biodiversity Assessment Guidelines* (2013) [2.3] <www.environment.vic.gov.au/native-vegetation/native-vegetation>. DELWP is the responsible authority for determining the statewide biodiversity impacts of permit application pursuant to cl 66.02–2 of the VPPs. Offset requirements are discussed in cl 52.17–6 of the VPPs.

69 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 7: Vegetation Protection in Urban Areas* (August 1999) 4 <www.planning.vic.gov.au/publications/planning-practice-notes>.

70 Another exemption allows clearance of native vegetation to build or maintain a fence provided that the combined maximum clearance either side of the fence is 4 m in total. The complete exemption requirements are listed in *ibid* cl 52.17–7.

71 With a total site area of less than 0.4 ha: *ibid*.

72 These other issues are managed by the local council or other referral authority: *ibid* cl 52.17–5. See also Department of Environment, Land, Water and Planning (Vic), *Permitted Clearing of Native Vegetation—Biodiversity Assessment Guidelines* (2013) [1.3] <www.environment.vic.gov.au/native-vegetation/native-vegetation> and the discussion in Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 58.

73 Department of Planning and Community Development, *Advisory Note 39: Amendment VC83—Bushfire Protection, Vegetation Exemptions* (November 2011) <www.planning.vic.gov.au/_data/assets/pdf_file/0014/13901/AN39-Amendment-VC83-Bushfire-protection-Vegetation-Exemptions.pdf>.

74 Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 52.48–1 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>. Eg, the provisions allow the removal, destruction or lopping of any vegetation within 10 m of an existing building used for accommodation and any vegetation, except trees within 30 m. See Department of Environment, Land, Water and Planning, *Native Vegetation* <www.environment.vic.gov.au/native-vegetation/native-vegetation>. These exemptions only apply to buildings that were constructed or approved to be built by a certain time and there is a long list of local government areas excluded from its operation. There is a separate exemption in cl 52.48–5 to create a defensible space around a dwelling if the land is subject to a Bushfire Management Overlay and other conditions are met.

- 4.55 A further exemption allows a private land holder to clear vegetation along a fence line without a permit.⁷⁵ This exemption applies across Victoria but only to maintain a fence between properties in different ownership.⁷⁶ Some local government areas are specifically excluded from the operation of the provision.⁷⁷
- 4.56 Written permission must be sought from the neighbouring landowner before any vegetation is removed from a neighbour's property, including from the public land manager.⁷⁸
- 4.57 These exemptions override any other requirements to obtain a permit in a planning scheme, including if an overlay requires a permit.⁷⁹

Incorporated documents

- 4.58 Planning schemes may incorporate documents that relate to the use, development or protection of land. These documents can 'inform the planning scheme, guide decision making or affect the operation of the scheme'.⁸⁰ For example, the guidelines for the native vegetation particular provisions are an incorporated document in all Victorian planning schemes.⁸¹ Local councils can incorporate their own documents into the planning scheme.⁸²

VicSmart provisions

- 4.59 The VicSmart provisions provide a mechanism that allows for a quick planning decision to be made about the removal, destruction or lopping of only one tree.⁸³ The application must provide a range of information, including the species and size of the tree and any other significant trees removed in the past three years on the site. It must also explain why works need to be conducted and include a photograph of the tree. The decision-making guidelines include consideration of the objectives of any applicable overlay, whether the tree contributes to the significance of the area and the extent to which the health, appearance or significance of the tree will be affected by the works.⁸⁴

Administration of the planning scheme

- 4.60 The Planning Act is administered by the Victorian State Government Minister for Planning. The Department of Environment, Land, Water and Planning (DELWP) advises the Minister and administers and implements the state government's role in the system.⁸⁵
- 4.61 The Planning Act specifies two roles in Victoria's planning structure—the Responsible Authority and the Planning Authority.

75 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 52.48–2 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

76 The fence must have been constructed before 10 September 2009.

77 Department of Environment, Land, Water and Planning (Vic), *Planning Advisory Note 83—Bushfire Protection: Vegetation Exemptions* (February 2012) <www.planning.vic.gov.au/publications/planning-advisory-notes>.

78 Ibid.

79 The exemptions do not apply if there is a legal agreement or covenant in place that prohibits the removal, destruction or lopping of the native vegetation. This might arise if the vegetation is subject to a native vegetation offset: *ibid*.

80 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (19 September 2017), cl 81 and 81.01 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>; Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) [1.8.9] <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

81 See Department of Environment, Land, Water and Planning (Vic), *Native Vegetation* <www.environment.vic.gov.au/native-vegetation/native-vegetation>.

82 Councils incorporate documents as a schedule to cl 81.01 of the VPPs.

83 These provisions were added in 2014: Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 39; Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 93.06 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>.

84 See the complete requirements in the VPPs: Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 93.06–1–2 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>. Additional requirements apply to lopping trees subject to a Heritage Overlay.

85 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 16.

- 4.62 The Responsible Authority is the person or organisation that will administer and enforce the planning scheme, generally the local council.⁸⁶
- 4.63 A Planning Authority is the person or organisation authorised to prepare a planning scheme or an amendment; the default Planning Authority is the local council in a municipal district. However, the council will need approval from the Minister to change a scheme.⁸⁷
- 4.64 Decisions can be made at the state and local level, depending on the nature of the proposal. Generally, local councils control the day-to-day administration of Victoria's planning system, and each must also keep an up-to-date copy of the VPPs and its planning scheme available for inspection during office hours, free of charge.⁸⁸

Non-compliance and enforcement

- 4.65 Any person who uses or develops land in contravention of, or fails to comply with, a planning scheme, a planning permit, or an agreement with the owner of land under section 173 of the Planning Act, is guilty of an offence.⁸⁹ There are a range of enforcement options available to a Responsible Authority, including negotiation, warnings, infringement notices, injunctions and prosecution.⁹⁰
- 4.66 A recent Nillumbik Shire Council prosecution for an illegal tree removal under the Planning Act resulted in a fine of \$30,000. The Council noted that 'removing significant trees is something that this Council takes very seriously and the message is clear—if [residents] remove trees without a permit we will take action'.⁹¹

The role of the Victorian Civil and Administrative Tribunal

- 4.67 Applications can be made to the Victorian Civil and Administrative Tribunal (VCAT) to independently review planning decisions made by a Responsible Authority.⁹² VCAT also has original jurisdiction to hear some types of matters, including applications to cancel permits and applications for enforcement orders.⁹³
- 4.68 The *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) sets out the powers of VCAT and procedural rules relevant to the hearing of disputes.⁹⁴

The role of arborists in planning schemes

- 4.69 Councils often rely on arborists to assist them to manage vegetation in local government areas. Some councils employ in-house arborists and others engage contractor arborists. The bulk of work done by arborists is in relation to council trees.

86 This may be the Minister or any other person who the planning scheme itself specifies: Department of Environment, Land, Water and Planning, *Victoria Planning Provisions* (19 September 2017), cl 61.01 <<http://planningschemes.dpcd.vic.gov.au/schemes/vpps>>. See *Planning and Environment Act 1987* (Vic) ss 13 and 14 for a complete list of responsibilities.

87 See *Planning and Environment Act 1987* (Vic) s 8A and Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 17.

88 The VPPs and all planning schemes, including the associated maps, are available via Planning Schemes Online on the Department of Environment, Land, Water and Planning website <<http://planning-schemes.delwp.vic.gov.au/>>. Copies of planning schemes are also held in the Department's regional offices.

89 See *Planning and Environment Act 1987* (Vic) s 126.

90 See the discussion in Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (28 May 2015) Ch 7: Enforcement <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

91 See Nillumbik Shire Council, 'Biggest Fine for Tree Removal in Nillumbik' (Press Release, 7 March 2017) available at <www.nillumbik.vic.gov.au/News/Biggest-fine-for-tree-removal-in-Nillumbik>.

92 Eg, there is a right of review of a responsible authority's refusal to grant a planning permit in s 77 of the *Planning and Environment Act 1987* (Vic) and a right of review of a decision to put any condition in a permit in s 80. A useful summary of the common types of decision that can be reviewed by VCAT is set out the Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) 5, Table 5.1 <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

93 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (28 May 2015) [5.1.1] and Table 5.1 <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

94 Information about VCAT's review process, relevant forms and practice notes is available on VCAT's website <www.VCAT.vic.gov.au>. See also Department of Environment, Land, Water and Planning, *Using Victoria's Planning System Guide* (28 May 2015) Ch 5 <www.planning.vic.gov.au/planning-in-victoria/a-guide-to-the-planning-system>.

- 4.70 As well as carrying out works and assessments of trees for councils,⁹⁵ arborists may also assist councils with ensuring that proposed work on trees aligns with planning principles. Their work may include:
- providing reports for planning applications that involve the removal of vegetation (residential or commercial)
 - reviewing submissions to prune or remove private protected trees and carrying out that work or inspecting it⁹⁶
 - determining the boundaries of tree protection zones⁹⁷
 - approving Tree Protection Management Plans
 - conducting risk assessments for trees that may pose a danger to people or property and removing unsafe trees or branches⁹⁸
 - surveying and making an inventory of the trees on a given site.

Local tree protection laws

- 4.71 Some councils have local laws to protect trees on private and public land.⁹⁹ Councils sometimes introduce these laws as an added protection mechanism where trees are important to the character of the district or are otherwise significant. These laws supplement planning regulations. If a tree is protected, these laws may limit the action a landowner can take to resolve a dispute with their neighbour (namely abatement) and may require a particular process to be followed before work can be done to that tree.
- 4.72 Where they exist, local laws generally contain similar tree protections, operating to:
- protect trees identified as 'significant' or 'protected' on private land
 - extend protection by reference to trees' large size, age, rarity, ecological value, or cultural and historical significance
 - extend protections to a root zone around the base of the tree and/or a tree protection zone around the trunk of the tree
 - require the owner to obtain a permit to prune or remove protected trees or to carry out works in proximity to the tree protection zones.
- 4.73 The operation of local tree protection laws can be understood through the following examples from the Cities of Boroondara, Port Phillip and Frankston.

95 This includes providing guidance on the planting and maintenance of trees, treating tree diseases or pests, managing roots and providing long-term tree care plans. For a more detailed discussion of the role of arborists (in the context of private disputes), see [3.41]–[3.48].

96 In the City of Port Phillip, an application for the private pruning or removal of identified 'significant' trees requires the submission of an arborist's report at the applicant's own initiative and expense. This report is then reviewed by the Council's own arborist: City of Port Phillip (Vic) *Significant Tree Permits, Factsheet* (2016) <www.portphillip.vic.gov.au/Significant_Tree_Permits_Fact_Sheet_Version_3.pdf>. See also City of Boroondara, *Fact Sheet: Find an Arborist* <www.boroondara.vic.gov.au/waste-environment/trees-and-naturestrips/find-arborist>.

97 See City of Melbourne, *Tree Retention and Removal Policy* (2012) cl 2.5 <www.melbourne.vic.gov.au/community/parks-open-spaces/tree-protection-management/Pages/tree-protection-policy.aspx>.

98 See City of Port Phillip, *Process for Responding to Requests Chart* <www.portphillip.vic.gov.au/Tree_Removal_-_Process_for_responding_to_requests_chart.pdf>.

99 Local laws are those made by local governments under the *Local Government Act 1989* (Vic). Under the Act a local law must not be inconsistent with any other Act or regulation (state or federal): s 111. Local laws are therefore aimed at dealing with local issues.

City of Boroondara

- 4.74 The City of Boroondara is in the eastern suburbs of Melbourne, and includes established, leafy suburbs, some alongside the Yarra River.¹⁰⁰ The City of Boroondara Tree Protection Law 2016 protects canopy trees and significant trees in the municipal district on private property.¹⁰¹ In outlining the context of the new laws, the Council acknowledged the environmental benefits of trees in the suburban environment and the contribution the local tree canopy 'makes to the quality of its suburban environment. Damage and or removal of Significant Trees or Canopy Trees results in a degradation of this established character.'¹⁰²
- 4.75 Three key principles are identified by the City of Boroondara:
- Significant trees must be retained and cared for and will be the major determining factor in any redevelopment of land in the vicinity of the tree.
 - Trees that contribute to the municipal district's overall tree canopy character should be retained where practicable. Works near significant trees or canopy trees should be minimised to prevent damage and disruption to tree roots or growing conditions.
 - Owners of land and/or contractors will be responsible for the loss or damage of significant trees or canopy trees that are required to be retained.¹⁰³
- 4.76 Local law prohibits a range of activities in relation to significant trees and canopy trees including removing, pruning and damaging the tree and carrying out works in a tree protection zone or a structural root zone.¹⁰⁴ They apply whether or not the tree extends beyond the boundary of private land but do not apply to a tree or part of a tree that is on public land.¹⁰⁵
- 4.77 In deciding whether to grant a permit to allow those activities, the Council or authorised officer must consider:
- the effect of the proposed action on the aesthetics of the neighbourhood
 - whether the tree is a significant tree
 - the condition of the tree
 - the appropriateness of the tree for its location on the property, having regard to the existing buildings and conditions on the property
 - whether the proposed action is to be undertaken for reasons of health or safety
 - whether the tree is causing any unreasonable property damage
 - whether the tree is causing any unreasonable public nuisance or creating any unreasonable nuisance to private property owners or occupiers
 - whether the tree is a recognised weed
 - the nature of the zoning of the land under the City of Boroondara Planning Scheme
 - any legislative requirements
 - any other matter relevant to the circumstances associated with the application.¹⁰⁶

100 It includes the suburbs of Ashburton, Balwyn, Balwyn North, Burwood, Camberwell, Canterbury, Deepdene, Glen Iris, Glenferrie South, Greythorn, Hawthorn, Hawthorn East, Kew, Kew East, Mont Albert and Surrey Hills: <<http://knowyourcouncil.vic.gov.au/councils/boroondara>>.

101 *Tree Protection Local Law 2016* (City of Boroondara) s 2. Protections also apply to trees on public land. The City of Boroondara notes that a significant tree is protected because of its impressive size or age, rarity, ecological value, or cultural and historical significance. A canopy tree contributes to the municipality's biodiversity, shade and privacy.

102 *Tree Protection Local Law 2016* (City of Boroondara) 5, Part B.

103 Ibid.

104 See *ibid* s 8(3) for the complete list of activities that require a permit.

105 *Ibid* s 8(1).

106 *Ibid* s 12.

- 4.78 A qualified arborist visits and inspects the tree and provides a report to council.¹⁰⁷ If granted, permits are valid for 12 months and can be issued for longer if needed. Special conditions may be attached to the permit, including requirements to replace trees that have been removed, conduct remediation works to existing trees, and to protect trees close to building works.¹⁰⁸
- 4.79 The provisions also set up a security bond scheme where an authorised officer or council can ask that the owner of private land proposing to do works within protected zones pay a security bond to the council. This bond may be retained to pay for replacement vegetation or refunded at the discretion of the council.¹⁰⁹
- 4.80 If a tree or a part of a tree is interfered with contrary to the tree protection law, the owner of the private land that the tree is situated on is guilty of an offence.¹¹⁰ This applies whether or not the person who actually interfered with the tree is identified or prosecuted, unless the owner can prove that the interference occurred without their knowledge.¹¹¹
- 4.81 An authorised officer may direct a private landowner or anyone engaged to work on private land who appears to be in breach of this local law to remedy the situation. The officer may also direct someone in breach of these provisions to plant by way of replacement of one or more trees.¹¹²
- 4.82 Other protections that are provided in the local laws include the cancellation of a permit, inspections and infringement notices as an alternative to prosecution for the offence.¹¹³
- 4.83 The Council also carries out follow-up inspections to make sure permit conditions are being met. If a condition is breached, Council may issue a fine, send a 'notice to comply' or prosecute.¹¹⁴

City of Frankston

- 4.84 The City of Frankston is located on the eastern side of Port Phillip Bay, approximately 40 kilometres south of Melbourne. The municipality covers an area of about 131 square kilometres from Seaford Wetlands in the north, to Mount Eliza in the south, and the Western Port Highway in the east. The western boundary of the city is made up of about 10 kilometres of coastline.
- 4.85 Under Tree Protection Local Law 2016 No 22, trees with a trunk circumference of over 100 centimetres may not be removed, otherwise killed, or pruned (more than one third of the canopy) without a permit from the council.¹¹⁵ The stated aims of the Tree Protection Law include to:
- protect [the] community forest by maintaining tree canopy on private land
 - require a minimum standard of tree pruning for the protection of trees and public safety
 - protect and enhance the amenity and environment of Frankston.¹¹⁶

107 See City of Boroondara, *Remove, Prune or Carry Out Works Near a Tree* <www.boroondara.vic.gov.au/waste-environment/trees-and-naturestrips/remove-prune-or-carry-out-works-near-tree>.

108 Ibid.

109 *Tree Protection Local Law 2016* (City of Boroondara) s 13.

110 Ibid ss 8(5), 8(3).

111 Ibid s 8(5). A similar provision exists in the City of Yarra's tree protection local laws: General Local Law 3 2016 (City of Yarra), cl 39.4.

112 Of a type and in a location determined by the authorised officer: *Tree Protection Local Law 2016* (City of Boroondara) ss 9, 10.

113 Ibid ss14,15,16. Prosecution for the offence is outlined in ss 8 and 17.

114 See City of Boroondara, *Remove, Prune or Carry Out Works Near a Tree* <www.boroondara.vic.gov.au/waste-environment/trees-and-naturestrips/remove-prune-or-carry-out-works-near-tree>.

115 Frankston City, *Local Laws for Trees* <www.frankston.vic.gov.au/Environment_and_Waste/Environment/Trees/Local_Laws_for_Trees>.

116 *Tree Protection Local Law 2016 (No 22)* (Frankston City Council) cl 2.

City of Port Phillip

- 4.86 The City of Port Phillip¹¹⁷ is an inner-city bayside local government area of Melbourne. It has tree protection laws that protect palms and other significant trees.¹¹⁸
- 4.87 A significant tree permit is generally required in addition to any planning permit required under the Port Phillip planning scheme. The Council has some exclusions to its permit requirement. For example, a permit is not required to prune a significant tree where the tree overhangs a footpath or other part of the road used by pedestrians,¹¹⁹ or extends over a road to create a danger or obscure or block vehicles, lighting or council assets.¹²⁰
- 4.88 The Council encourages people relying on these exemptions to keep photographic evidence of the tree before conducting any work.¹²¹

Other laws relevant to vegetation management

- 4.89 Other pieces of legislation supplement the core planning framework in the Planning and Environment Act.¹²² While planning schemes and local laws are most likely to prescribe what can and cannot be done on most private property in Victoria, other laws may also be relevant, particularly outside metropolitan areas.
- 4.90 Although less likely to apply to neighbourhood disputes, these laws potentially impact on disputes between neighbours about trees. They can oblige a landowner to remove vegetation, for example, a noxious weed or vegetation that is dangerous to road users. They may also require a landowner to protect important vegetation. Some of these laws are considered below and deal with issues of public health and land protection, environmental protections, transport and road reserves, and heritage and cultural protections.

Public health and land protection

- 4.91 Private landowners with trees that adversely affect public health and wellbeing, or the land of another owner, may be required to take certain actions under the *Public Health and Wellbeing Act 2008* (Vic) and the *Catchment and Land Protection Act 1994* (Vic).

Public Health and Wellbeing Act 2008 (Vic)

- 4.92 Under the *Public Health and Wellbeing Act 2008* (Vic), councils are required to remedy nuisances within the municipality, insofar as possible.¹²³ To be considered a nuisance under this Act, an act or phenomenon must be 'dangerous to health or offensive'.¹²⁴
- 4.93 If notified of a potential nuisance, the Council is obliged to investigate it.¹²⁵ If a nuisance is found to exist, Council must take action it considers appropriate,¹²⁶ including issuing an improvement or prohibition notice or bringing proceedings under the Act for the offence of creating a nuisance.¹²⁷
- 4.94 The relevant part of the Act applies in particular to nuisances arising from or constituted by any: 'premises ... state, condition or activity ... or other matter or thing', and could theoretically be applied to private tree disputes.¹²⁸

117 The City of Port Phillip includes the suburbs of Albert Park, Middle Park, Port Melbourne, Ripponlea, South Melbourne, Southbank, St Kilda, St Kilda East, St Kilda West and Windsor: <<http://knowyourcouncil.vic.gov.au/councils/port-phillip>>

118 *Local Law Number 1 (Community Amendment) 2013* (City of Port Phillip) cl 44.

119 To any extent up to a height of 2.1m.

120 City of Port Phillip, *Fact Sheet: Significant Tree Permits* <www.portphillip.vic.gov.au/Significant_Tree_Permits_Fact_Sheet_Version_3.pdf>.

121 Ibid. The Council further advises that a qualified arborist should be engaged to prune the tree and that pruning must be done in accordance with *Australian Standard AS4373-2007—Pruning of Amenity Trees*.

122 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 19.

123 *Public Health and Wellbeing Act 2008* (Vic) s 60.

124 Ibid s 58, defined by s 3. In determining this, Council may not consider the number of people affected, but may consider degree of offensiveness: s 58(3)(a)–(b).

125 Ibid s 62(2).

126 Ibid s 62(3)(a)–(b).

127 Ibid s 61.

128 Ibid s 58(2).

- 4.95 However, if the council is satisfied that the matter is better settled privately, it must advise the complainant of any available methods for doing so.¹²⁹
- 4.96 In practice, these provisions are designed to address nuisances posing extreme public health risks. Councils are therefore unlikely to become involved in private tree disputes through this mechanism. The provision of information on council websites about how to resolve private tree disputes, and referrals from council officers to DSCV and other resources, would satisfy the Act's requirements.

Catchment and Land Protection Act 1994 (Vic)

- 4.97 Landowners have responsibilities to manage specific weeds on their properties.¹³⁰ The *Catchment and Land Protection Act 1994* (Vic) (the Catchment Act) defines noxious weeds,¹³¹ and is Victoria's primary legislation dealing with invasive plants and animals, although local laws may also apply.
- 4.98 Under the Catchment Act, landowners must take all reasonable steps to eradicate regionally prohibited weeds and prevent the growth and spread of regionally controlled weeds on and from their land.¹³²
- 4.99 If required steps are not taken, the government may serve a notice on a landowner outlining measures that must be taken to control noxious species on their land.¹³³ Not complying with the conditions is an offence.¹³⁴

Environmental protections

- 4.100 Private landowners may need to obtain a permit under the *Flora and Fauna Guarantee Act 1988* (Vic) or the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (Cth) to remove native vegetation.¹³⁵

Flora and Fauna Guarantee Act 1988 (Vic)

- 4.101 The Flora and Fauna Act aims to conserve threatened native plants or communities of native plants and manage processes that are potentially threatening to them.¹³⁶ The permit requirements under the Act mainly apply to public land because of the significant exceptions for private landowners.¹³⁷ However, the exceptions that apply to private land do not extend to taking flora from land that forms part of a critical habitat¹³⁸ or taking tree-ferns, grasstrees or sphagnum for the purpose of sale.¹³⁹

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

- 4.102 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides a legal framework to protect and promote the recovery of threatened species and ecological communities and preserve significant places from decline.¹⁴⁰

129 Ibid s 62(3)(b).

130 See Agriculture Victoria, *Victorian Noxious Weeds List* (20 July 2017) <<http://agriculture.vic.gov.au/agriculture/pests-diseases-and-weeds/protecting-victoria-from-pest-animals-and-weeds/legislation-policy-and-permits/declared-noxious-weeds-and-pest-animals-in-victoria>>.

131 Noxious weeds are either state-prohibited weeds, regionally prohibited weeds, regionally controlled weeds or restricted weeds: *Catchment and Land Protection Act 1994* (Vic) s 1. See Agriculture Victoria, *Victorian Noxious Weeds List* (20 July 2017) <<http://agriculture.vic.gov.au/agriculture/pests-diseases-and-weeds/protecting-victoria-from-pest-animals-and-weeds/legislation-policy-and-permits/declared-noxious-weeds-and-pest-animals-in-victoria>>.

132 *Catchment and Land Protection Act 1994* (Vic) s 20.

133 See Agriculture Victoria, *Noxious Weeds and Pest Management* <<http://agriculture.vic.gov.au/agriculture/farm-management/business-management/legal-information-for-victorian-landholders/noxious-weed-and-pest-management>>.

134 *Catchment and Land Protection Act 1994* (Vic) s 41.

135 A permit to remove native vegetation under the VPPs does not replace permit requirements under these Acts.

136 *Flora and Fauna Guarantee Act* (Vic) 1988 s 1.

137 Ibid s 47(2)(b)(c). There are other exceptions including where a person has accidentally taken that flora and has exercised reasonable care not to take that flora: s 47(2)(a).

138 Ibid s 47(2)(b).

139 Flora and Fauna Guarantee (Taking, Trading in, Keeping, Moving and Processing Protected Flora) Order 2004, cl 6. Available at: <www.environment.vic.gov.au/_data/assets/pdf_file/0013/50422/Flora-and-Fauna-Guarantee-Taking,-Trading-in,-Keeping,-Moving-and-Processing-Protected-Flora-Order-2004.pdf>.

140 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3.

- 4.103 The Act affects any group or individual whose actions may have a ‘significant impact’ on a matter of National Environmental Significance,¹⁴¹ including landowners.¹⁴² If the proposed action meets this test, it is a ‘controlled action’ and must be referred to the Commonwealth Department of Environment and Energy for assessment and approval.¹⁴³
- 4.104 If a private landowner wishes to clear native vegetation on their property which is listed as a threatened species, the requirements of this legislation will only apply if the clearance satisfies the significant impact test. While it is unlikely that the removal of one or two native trees on a suburban block would meet this test, it might apply on a larger property outside metropolitan Melbourne.

Transport legislation and road reserves

- 4.105 Legislation that regulates public land in road reserves and rail corridors may place obligations on private landowners to maintain vegetation on private property. Examples of legislation include:
- *Road Management Act 2004* (Vic)—enables a state road authority¹⁴⁴ to require the owner of neighbouring land to take action where the condition of land next to a road adversely affects the structural integrity of the road or the safety of its users.¹⁴⁵
 - *Rail Management Act 1996* (Vic)—provides that the owner of land may be required to remove or prune a tree if it poses a risk to the safety of anyone on or using a railway track.¹⁴⁶

Heritage and cultural protections

- 4.106 Heritage protections can apply to natural environments. The Victorian Heritage Register covers places of state significance. Commonwealth law applies to places of national significance, and a separate scheme protects Aboriginal heritage.¹⁴⁷ As discussed above at [4.40]–[4.44], protections are also provided in the VPPs and planning schemes. Examples of relevant heritage laws include:
- *Heritage Act 1995* (Vic)—establishes the Victorian Heritage Register. It covers non-Indigenous heritage places of state or national significance. A ‘place’ is defined under the Act as including a building, a garden, a tree, a precinct, a site and land associated with any of those.¹⁴⁸
 - *Aboriginal Heritage Act 2006* (Vic)—establishes the Victorian Aboriginal Heritage Council and the Victorian Aboriginal Heritage Register, which records known Aboriginal heritage places and objects in Victoria, such as scarred trees.¹⁴⁹

141 The Act focuses on the protection of nine matters of National Environmental Significance, which are: world heritage properties; national heritage places; wetlands of international importance; listed threatened species and ecological communities; migratory species protected under international agreements; Commonwealth marine areas; the Great Barrier Reef Marine Park; protection from nuclear actions (including uranium mines); protection of water resources from coal seam gas development and large coal mining development: *Ibid* ch 2 pt 3.

142 As well as developers, industry, farmers, councils, state and territory agencies and Commonwealth agencies: see Australian Government Department of Environment and Energy, *EPBC ACT Frequently Asked Questions* <www.environment.gov.au/epbc/publications/factsheet-epbc-act-frequently-asked-questions>. Action includes vegetation clearance.

143 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 7 s 68.

144 ‘State road authority’ means a road authority other than a municipal council, the Extension Corporation, the Link Corporation, EastLink Corporation or Peninsula Link Freeway Corporation. See *Road Management Act 2004* (Vic) s 3.

145 See the example provided in *Road Management Act 2004* (Vic) sch 6. Some local laws also prohibit a person from allowing vegetation to obstruct or interfere with traffic, including pedestrian traffic. See, eg, *General Local Law 2011* (East Gippsland Shire) cl 30. Sch 3 specifies that a tree or plant overhanging a footpath ‘shall have foliage no lower than 3 m where it is deemed that such foliage will obstruct or interfere with the passage of pedestrian traffic’.

146 *Rail Management Act 1996* (Vic) s 67A.

147 Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 4th ed, 2017) 254.

148 See *Heritage Act 1995* (Vic) s 3 for complete definition.

149 An Aboriginal scarred tree is a tree that has had bark removed by Aboriginal people for various purposes, including canoe building or shield making. Scarred trees are important evidence of Aboriginal use of land and resources, and can be found all over Victoria. Notable examples in Melbourne include scarred trees in the Burnley Gardens and Fitzroy Gardens: Aboriginal Affairs Victoria, *Place Identification Mini Poster 1: Aboriginal Scarred Trees*, June 2008 <www.vic.gov.au/system/user_files/Documents/av/ScarTrees.pdf>.

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)—contains provisions for the management and protection of Commonwealth heritage places classed as natural, Indigenous and historic.¹⁵⁰ The Act creates the National Heritage List and the Commonwealth Heritage List.¹⁵¹

Tree protection laws in other jurisdictions

- 4.107 New South Wales, Western Australia, Queensland and Tasmania adopt approaches similar to Victoria, where tree protections are incorporated mainly into local planning instruments—planning schemes, overlays or tree protection orders.¹⁵² In these states, ‘tree protection criteria can vary significantly from local council to council’.¹⁵³
- 4.108 In South Australia and the Australian Capital Territory, protections for native and non-native vegetation on private land are provided for in state-based development control legislation.¹⁵⁴ These laws adopt a similar approach to that of the local tree protection laws discussed above at [4.71]–[4.88].

Conclusion

- 4.109 The Commission is not reviewing the planning system, and is not able to recommend changes to planning law in this project. However, any changes to the current dispute resolution system in Victoria would need to take into account the impact on the planning scheme and other existing laws relating to the management of trees on private land.
- 4.110 Many of these laws and planning principles in this chapter apply only in very specific circumstances. Although they are unlikely to affect a large number of disputes between neighbours over trees on private property, they may place significant restrictions on some tree owners.

150 Des Eccles and Tannetje Bryant, *Statutory Planning in Victoria* (The Federation Press, 4th ed, 2011) 198. Section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) describes the ‘heritage value’ of a place to include ‘the place’s natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians’. See also Australian Government Department of Environment and Energy, *Heritage Laws* <www.environment.gov.au/heritage/laws>.

151 The Commonwealth Heritage List comprises places managed or owned by the Commonwealth and therefore exempt from state or local government control: see Des Eccles and Tannetje Bryant, *Statutory Planning in Victoria* (The Federation Press, 4th ed, 2011) 198.

152 See Michelle Lensik, ‘Tree Protection Laws in Australian States and Territories’, (Speech delivered at the 13th National Street Tree Symposium, University of Adelaide, 2012) <http://treenetmedia.com/up/pdf/2012/Urban%20Trees_Lensink.pdf>. See also John Watson, ‘Preserving Tomorrow’s Urban Trees with Financial Incentives: The Choice of a New (Tree) Generation’ (2015) 40(4) *Alternative Law Journal* 261.

153 John Watson, ‘Preserving Tomorrow’s Urban Trees with Financial Incentives: The Choice of a New (Tree) Generation’ (2015) 40(4) *Alternative Law Journal* 261.

154 Michelle Lensik, ‘Tree Protection Laws in Australian States and Territories’, (Speech delivered at the 13th National Street Tree Symposium, University of Adelaide, 2012) <http://treenetmedia.com/up/pdf/2012/Urban%20Trees_Lensink.pdf>.

Approaches to tree disputes in other jurisdictions

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5. Approaches to tree disputes in other jurisdictions

Introduction

- 5.1 Although the nature of tree disputes is largely similar across Australia, there is a range of approaches to their resolution.
- 5.2 Australian jurisdictions can be divided into those which have enacted legislative regimes to govern the resolution of tree disputes, and those which have retained the common law.
- 5.3 As outlined in Chapter 1, reviews in New South Wales, Queensland and Tasmania have been the basis for significant change. In these jurisdictions, there are now statutory schemes that set out the rights and responsibilities of neighbours involved in a tree dispute, as well as the specific causes of action parties can rely on if they bring legal action. These schemes are analysed in more detail, and in the context of a possible Victorian scheme, in Chapter 6.
- 5.4 International jurisdictions can also largely be separated into those that retain the common law, and those that have enacted specialist legislation in this area.
- 5.5 In researching international models, the Commission has looked primarily at those countries and sub-national entities that have a similar political and cultural context to Australia.
- 5.6 Those jurisdictions with important similarities or relevant differences are discussed below.¹

Australian jurisdictions

Jurisdictions governed by the common law

- 5.7 In the Australian Capital Territory, the Northern Territory, South Australia and Western Australia, tree disputes are governed by common law, as is the case in Victoria. The overall process in each of these states and territories is similar to the Victorian process, in relation to disputes between individuals.²
- 5.8 When local councils are involved (for example, where a tree on private land causes nuisance or poses a risk of injury to people using adjacent public land, such as footpaths or roads) they may be able to order the tree owner to remove the tree or maintain it a certain way.³

1 Many jurisdictions' statutory processes also deal with obstruction of sunlight and views, including New South Wales, Queensland and Tasmania. This is outside of the terms of reference for this project, and will not be covered.

2 See Chapter 3 for a discussion of the process in Victoria.

3 Eg, in the Northern Territory, a local council may order the removal or trimming of a tree growing on private land if it is 'causing inconvenience or an obstruction to persons using a public street or footpath or is causing or likely to cause damage to an adjacent public place': City of Darwin, *Darwin City Council By-Laws* (26 June 2009) s 95 <<https://legislation.nt.gov.au/en/Legislation/DARWIN-CITY-COUNCIL-BYLAWS>>.

- 5.9 Some councils may also have power to order a tree owner to remove or maintain a tree if it affects a neighbour on private land. For example, in the Shire of Mundaring in Western Australia, if a tree is deemed to be ‘potentially dangerous to life or limb, or a property on adjoining land’ the Shire will contact the tree owner and ask that ‘they either make the tree safe or prove it is not dangerous (via a report from a qualified and experienced arboricultural consultant)’.⁴ If this is not done, the Shire may start a formal process to compel the tree owner ‘to make safe any potential danger caused by a tree or any part of the tree’.⁵
- 5.10 Similarly, in South Australia, local councils have power to order tree owners to remove or perform certain works on a tree where it is ‘likely to create danger or difficulty to persons using a public place or is unsightly and detracts from the amenity of the local area’. According to the Legal Services Commission of South Australia, an affected neighbour may also contact their local council to ask that such action be taken against a tree owner if it affects their land. However, some of these requests are unlikely to be progressed because some councils in South Australia have indicated that they will avoid involvement in neighbour disputes where possible.⁶
- 5.11 As is the case in Victoria, each of the states and territories has its own provider of free mediation services.⁷
- 5.12 Where a party brings legal action in these jurisdictions, smaller claims are heard in the Local Court in the Northern Territory and the Magistrates’ Courts in South Australia and Western Australia.⁸
- 5.13 In the Australian Capital Territory, an affected neighbour can bring legal action for nuisance in the ACT Civil and Administrative Tribunal instead of going to court, if their claim is under \$25,000.⁹ Claims exceeding this amount must be brought in the ACT Magistrates Court.¹⁰

Jurisdictions governed by legislation

New South Wales

- 5.14 In New South Wales, tree disputes can be heard in the New South Wales Land and Environment Court (NSWLEC) under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (the NSW Act). Key features of the statutory scheme in New South Wales are discussed in more detail below, and under Option 2 in Chapter 6.
- 5.15 Before taking legal action, neighbours can try to resolve their dispute through free mediation provided by community justice centres.¹¹
- 5.16 While common law nuisance is no longer available as a cause of action for tree disputes in New South Wales,¹² an affected neighbour can still employ the common law self-help remedy of abatement and cut away encroaching parts of a tree from their land up to the

4 Shire of Mundaring, *Infrastructure Services: Neighbourhood Tree Disputes Information Sheet* <www.mundaring.wa.gov.au/Pages/default.aspx>.

5 *Local Government Act 1995* (WA) s 3.25; *ibid*.

6 Legal Services Commission of South Australia, *Trees and the Law* (May 2016) 9 <www.lsc.sa.gov.au/cb_pages/publications.php>. See, eg, City of Mitcham, *City of Mitcham Policy Manual 14.30: Tree Policy* (13 October 2017) [7.3] <www.mitchamcouncil.sa.gov.au/treesandvegetation>.

7 These include the Conflict Resolution Service in the Australian Capital Territory (<www.crs.org.au/>), Community Justice Centre in the Northern Territory (Northern Territory Government, *Resolving Disputes without Going to Court* (2017) <<https://nt.gov.au/law/processes/resolving-disputes-without-going-to-court>>), Uniting Communities Mediation Service in South Australia (Uniting Communities, *Mediation* (2017) <www.unitingcommunities.org/services/financial-legal-services/mediation-services/>), and the Citizens Advice Bureau in Western Australia (<www.cabwa.com.au/>).

8 Individual jurisdictional limits of each state and territory’s courts may require larger claims to be brought in higher courts.

9 *Civil and Administrative Tribunal Act 2008* (ACT) ss 16, 18. Actions in negligence and trespass can also be brought but as stated in Chapter 3, nuisance is the more common cause of action for tree disputes. See, eg, *Campbell v Blackshaw & Evans* (Appeal) [2017] ACAT 64 (30 August 2017).

10 The jurisdictional limit of the ACT Magistrates Court is \$250,000. Claims lower than \$250,000 can also be resolved in the ACT Supreme Court but it generally tends to deal with matters over \$250,000: Magistrates’ Court of the Australian Capital Territory, *Magistrates Court—Civil Jurisdiction* (3 March 2017) <www.courts.act.gov.au/magistrates/courts/magistrates_court_-_civil_jurisdiction>.

11 Department of Justice (NSW), *Neighbours*, Community Justice Centres (22 April 2015) <www.cjc.justice.nsw.gov.au/Pages/cjc_what_is_mediation/cjc_common_disputes/com_justice_neighbours.aspx#Trees>.

12 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 5.

boundary line. This may be limited in some cases by the relative prevalence in NSW of council-based tree protection orders, which require council approval for the cutting back of encroaching branches or roots.¹³

Trees (Disputes Between Neighbours) Act 2006 (NSW)

- 5.17 The NSW Act governs the resolution of tree disputes in New South Wales and gives jurisdiction to the NSWLEC to hear these disputes.
- 5.18 The NSW Act was enacted following the recommendations made by the New South Wales Law Reform Commission in its 1998 report, *Neighbour and Neighbour Relations*.¹⁴
- 5.19 The NSW Act aims to simplify the resolution of tree disputes with a framework that is more efficient and less costly than commencing actions in tort.¹⁵ The majority (58 per cent) of neighbours who seek resolution through the NSWLEC are self-represented.¹⁶
- 5.20 The NSW Act applies only to disputes over trees on adjoining private land that have caused damage, or are likely to cause damage or injury in the future.¹⁷ It allows an affected neighbour to bring an application seeking court orders 'to remedy, restrain or prevent' damage or injury.¹⁸ The NSW Act also allows an affected neighbour to bring legal action in relation to vegetation that severely obstructs sunlight or views.¹⁹

New South Wales Land and Environment Court process

- 5.21 The NSWLEC is a superior court with specialist jurisdiction. Its decision makers are judges and commissioners, led by a Chief Judge. Tree disputes are usually heard by commissioners, at least some of whom will have specialist knowledge in arboriculture.²⁰
- 5.22 Before lodging an application with the NSWLEC, the affected neighbour must first give the opposing party at least 21 days' notice of their intention to start legal action along with details about the specific orders they seek from the Court.²¹ The affected neighbour must also notify any other interested parties, such as the local council.²²
- 5.23 The Court encourages the use of Alternative Dispute Resolution (ADR) such as mediation, conciliation or neutral evaluation to resolve disputes.²³ The Court reports that 'in 2011, 59 per cent of matters were resolved by ADR processes and negotiated settlement, without the need for a court hearing'.²⁴ If ADR is unsuccessful or inappropriate, then the matter will proceed to a hearing.
- 5.24 Hearings comprise a preliminary hearing and a final hearing, the latter usually conducted on site.²⁵ Further hearings may be arranged as needed.²⁶ Decisions are handed down

13 Department of Justice and Attorney-General (NSW) (2009), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 42–44. See, eg, Georges River Council, *Tree Pruning and Removal Guidelines* <<http://uat.georgesriver.nsw.gov.au/Environment/Biodiversity/Tree-Management/Tree-Pruning-and-Removal-Guidelines>>.

14 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998).

15 As Commissioner Fakes explains, the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* 'was enacted to provide a relatively simple means of dealing with disputes between neighbours as a result of trees ... These are civil matters that prior to the [statutory scheme] would have required someone to take an action in nuisance or negligence ... an expensive and time consuming process, and a process more limited in scope than that of the current [statutory scheme]'. *Ghazal v Vella (No. 2)* [2011] NSWLEC 1340 (29 November 2011).

16 New South Wales Land and Environment Court, *Annual Review (2015)* 15 <www.lec.justice.nsw.gov.au/Pages/publications/annual_reviews.aspx>.

17 *Trees (Disputes Between Neighbours) Act 2006 (NSW)* s 7.

18 *Ibid.*

19 The Act also allows an affected neighbour to bring action for obstruction of sunlight to a window of a dwelling and views from a dwelling. These matters are beyond the scope of this inquiry.

20 New South Wales Land and Environment Court, *Practice Note No 2 — Class 2 Tree Disputes*, 13 May 2014 [42].

21 *Trees (Disputes Between Neighbours) Act 2006 (NSW)* s 14C.

22 *Ibid* s 8(1)(b)–(c).

23 New South Wales Land and Environment Court, *Annual Review (2015)* 18 <www.lec.justice.nsw.gov.au/Pages/publications/annual_reviews.aspx>.

24 New South Wales Land and Environment Court, *Resolving Disputes* (6 May 2015) <www.lec.justice.nsw.gov.au/Pages/resolving_disputes/resolving_disputes.aspx>.

25 New South Wales Land and Environment Court, *At the Final Hearing* (22 April 2015) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_finalhearing.aspx>.

26 New South Wales Land and Environment Court, *Practice Note No 2 — Class 2 Tree Disputes*, 13 May 2014 [24]. *Trees (Disputes Between Neighbours) Act 2006 (NSW)* s 14C.

within three months of filing the application but urgent matters can be heard and determined within a shorter timeframe.²⁷

- 5.25 The form that applicants must complete when commencing an action is relatively clear and straightforward, in recognition of the fact that most applicants appear in the Court without legal assistance. The applicant provides information about the nature and circumstances of the dispute, and whether they have made efforts to resolve it. The applicant also responds to matters the NSWLEC must take into consideration, such as the tree's contribution to the local ecosystem; its historical, cultural and scientific significance; and its heritage value.²⁸
- 5.26 Parties may engage their own experts to provide expert evidence. Experts owe a general duty to the Court and must agree to be bound by the code of conduct.²⁹ The Court may direct experts to engage in joint conferencing and to produce a joint report.³⁰
- 5.27 Before making any orders, the NSWLEC must be satisfied that the applicant has made a reasonable effort to reach an agreement with the tree owner and that the applicant has complied with the notice requirements.³¹
- 5.28 The Court may make orders to:
- 'remedy, restrain or prevent' damage to property
 - prevent injury to any person, including removal or replacement of the tree
 - mandate payment for works or compensation.³²
- 5.29 Parties can appeal decisions made by a commissioner on a question of law to a judge of the NSWLEC.³³
- 5.30 If an order is not complied with, a person may face a maximum penalty of 1000 penalty units.³⁴

Further resources for community members

- 5.31 The NSW Act is supported by various policy documents, as well as Regulations³⁵ and an Annotated Act containing explanatory case law and examples.³⁶ The NSWLEC publishes tree dispute principles from time to time to promote consistent decision making. These principles can be statements about a probable outcome, a chain of reasoning, or a list of appropriate matters to be considered.³⁷ Tree dispute principles apply only to tree disputes concerning damage or harm (as opposed to those concerning obstructions to sunlight and views, which are also heard in the NSWLEC).³⁸

27 New South Wales Land and Environment Court, *Outcomes and Orders* (22 April 2015) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_outcomes.aspx>; New South Wales Land and Environment Court, *Tree Disputes: Understanding the Law* (1 September 2016) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/Treedisputes-helpfulmaterials/treedisputes_helpfulmaterial.aspx>.

28 See generally New South Wales Land and Environment Court, *Form H: Tree Dispute Claim Details (Damage to Property or Injury to a Person)* (Version 1) (9 May 2017) <www.lec.justice.nsw.gov.au/Pages/forms_fees/forms.aspx>.

29 *Uniform Civil Procedure Rules 2005 (NSW)* sch 7 rr 31.23(1), 31.23(3)–(4).

30 New South Wales Land and Environment Court, *Practice Note No 2 — Class 2 Tree Disputes*, 13 May 2014 [41]–[50]; New South Wales Land and Environment Court, *Experts and Expert Witnesses* (20 April 2015) <www.lec.justice.nsw.gov.au/Pages/coming_to_the_court/expert_witnesses.aspx>.

31 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14E. What constitutes a reasonable effort to reach an agreement is explored further at [6.192]–[6.205].

32 See generally *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 9(1)–(2).

33 *Land and Environment Court Act 1979* (NSW) s 56A; New South Wales Land and Environment Court, *Outcomes and Orders* (22 April 2015) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_outcomes.aspx>.

34 One penalty unit in New South Wales is equal to \$110. 1000 units therefore represents \$110,000. Resulting proceedings for this offence can occur in the Court's summary jurisdiction: *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 15.

35 See *Trees (Disputes between Neighbours) Regulations 2007* (NSW).

36 See New South Wales Land and Environment Court, *Helpful Materials* (1 September 2016) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/Treedisputes-helpfulmaterials/treedisputes_helpfulmaterial.aspx>.

37 New South Wales Land and Environment Court, *Tree Dispute Principles* (25 September 2017) <www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/tree_principles.aspx>.

38 Information and resources are discussed further at [6.311]–[6.319]. All of these materials can be found online on the Law and Environment Court website: <www.lec.justice.nsw.gov.au>.

Queensland

5.32 In Queensland, tree disputes are heard in the Queensland Civil and Administrative Tribunal (QCAT) under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (the Queensland Act). Key features of the statutory scheme in Queensland are discussed in more detail below, and under Option 2 in Chapter 6.

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

5.33 The Queensland Act governs the resolution of tree disputes, and sets out the rights and responsibilities of tree owners.³⁹ It gives jurisdiction to QCAT to hear these disputes.

5.34 The genesis of the Queensland Act was a review conducted by the Queensland Department of Justice and Attorney-General between 2007 and 2010.⁴⁰ The Department's review centred on 'finding more efficient ways of assisting neighbours to resolve disputes about ... nuisance caused by trees on neighbouring properties'.⁴¹ The Queensland Law Reform Commission conducted a statutory review of the new Queensland Act in 2014.⁴²

5.35 The Queensland Act only applies to trees on private adjoining land that:

- cause serious damage or injury, or are likely to do so within 12 months
- produce overhanging branches that are at least 50 centimetres long and a maximum of 2.5 metres above the ground
- cause substantial, ongoing and unreasonable interference with a person's use and enjoyment of their land.⁴³

5.36 The Queensland Act sets out a three-stage process for resolving tree disputes:

- informal resolution
- abatement
- formal resolution through QCAT.

5.37 At the first stage, neighbours are encouraged to resolve disputes informally.⁴⁴ To assist with this and for clarity, the Queensland Act sets out the responsibilities of tree owners. They include ensuring that the tree does not cause serious injury to a person, serious damage to land or any property, or substantial, ongoing and unreasonable interference with a person's use and enjoyment of their land.⁴⁵ Neighbours can also seek free mediation services through a Dispute Resolution Centre.⁴⁶

5.38 If neighbours cannot resolve disputes between themselves, then an affected neighbour may exercise their common law right of abatement where it would be effective, and where branches encroach to a specified extent.⁴⁷ However, the Queensland Act has modified the common law right in the following ways:

- The abatement scheme set out in the Act is only applicable to overhanging branches that are at least 50 centimetres long and a maximum of 2.5 metres above the ground.
- An affected neighbour must give the tree owner notice of their intention to abate.

39 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) Pts 5 and 3 respectively.

40 Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations: Trees*, Discussion Paper (2008).

41 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) 1. See also generally Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) cls 2, 9; Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations: Dividing Fences*, Discussion Paper (2006); Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations: Trees*, Discussion Paper (2008).

42 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 97, which states that the relevant minister must 'review the operation and effectiveness' of the Act within three years of the Act's commencement on 1 November 2011. See also Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) 2.

43 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 46, 57.

44 *Ibid* s 56(1).

45 *Ibid* s 54.

46 Dispute Settlement Centre of Victoria, *Trees* (25 September 2017) <www.disputes.vic.gov.au/trees>.

47 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 56(2). The relevant sections apply where encroaching branches are at least 50 cm over the boundary and a maximum of 2.5 m above the ground: s 57(1)(a)–(b).

- The cost of tree works is covered by the tree owner, or the affected neighbour can recoup the costs from the tree owner.
- An affected neighbour exercising this right is no longer required to return the removed parts to the tree owner (but may choose to).⁴⁸

5.39 If parties cannot resolve the tree dispute between themselves and abatement cannot be exercised or is ineffective, an affected neighbour can lodge an application with QCAT to bring legal action.⁴⁹

Queensland Civil and Administrative Tribunal process

5.40 QCAT is a tribunal set up under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) that deals with minor civil disputes.⁵⁰ It is led by the President, who is a judicial officer. Tribunal members who determine matters are legal experts or other specialists with knowledge relevant to the matter being heard.⁵¹

5.41 At least 21 days before the date the application is to be heard, the affected neighbour must provide the tree owner with a copy of the application.⁵² The affected neighbour must also provide any other interested parties who may be affected by an order with a copy of the application.⁵³

5.42 Where the dispute is over a minor issue, such as leaf litter or overhanging branches, QCAT may order parties to participate in mediation or compulsory conferencing, which provide an opportunity to resolve the matter without a QCAT determination.⁵⁴

5.43 QCAT may also arrange a directions hearing at an early stage in certain situations before a hearing.⁵⁵ Tree disputes usually take some weeks to finalise from the date the application is lodged but urgent matters can be heard more quickly. QCAT can also make interim orders and grant a stay of a decision.⁵⁶

5.44 The Queensland application form is easy to navigate and complete without legal assistance. It asks the applicant to provide information about the dispute, and the type of orders they seek from QCAT.⁵⁷ It also requires the applicant to respond to matters QCAT must take into consideration, such as whether the tree forms part of a dividing fence, any permission required from local authorities to carry out works, the tree's ecological contribution, and its historical, cultural and scientific significance. A similarly detailed response form exists for the other party to complete. It requires them to explain what they agree or disagree with, their reasons for disagreement, and what orders they seek from the tribunal and why.⁵⁸

5.45 Parties are able to engage their own experts to provide expert evidence. Alternatively, QCAT will appoint a qualified arborist to provide expert evidence.⁵⁹

48 See generally *Ibid* s 54 and pt 4.

49 *Ibid* s 66.

50 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 11.

51 Queensland Civil and Administrative Tribunal, *Organisational Structure* (11 October 2017) QCAT <www.qcat.qld.gov.au/about-qcat/organisational-structure>. The President decides which member(s) will hear a matter, with no more than three members hearing a matter.

52 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 63.

53 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 62–63.

54 Queensland Civil and Administrative Tribunal, *Tree Dispute Resolution* (version 4, March 2017) QCAT <www.qcat.qld.gov.au/matter-types/tree-disputes>.

55 *Ibid*.

56 Queensland Civil and Administrative Tribunal, *Urgent Applications* (26 May 2017) QCAT <www.qcat.qld.gov.au/applications/urgent-applications>.

57 Queensland Civil and Administrative Tribunal, *Form 51: Application for Tree Dispute—Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (25 July 2017) <www.qcat.qld.gov.au/resources/forms>.

58 Queensland Civil and Administrative Tribunal, *Form 52: Response to Application for a Tree Dispute—Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (25 July 2017) <www.qcat.qld.gov.au/resources/forms>.

59 If the only expert in a matter is QCAT's appointed tree assessor, then the assessor will inspect the tree and the land before providing QCAT with a report on the possible solutions to the issues in dispute. Parties share the cost of the tree assessor and cannot produce further expert evidence without leave: Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013—Arrangements for Applications for Orders to Resolve Other Issues about Trees* (2013).

- 5.46 Experts engaged by parties owe a duty to assist QCAT, which overrides any obligation to the party that engages them. Experts from both parties must produce a joint report detailing matters in agreement and matters in contention following an ‘experts’ conclave’ convened by QCAT.
- 5.47 Before making any orders, QCAT must be satisfied that the affected neighbour has made a reasonable effort to reach an agreement with the tree owner and that they have taken all reasonable steps to resolve the issue under any other applicable law.⁶⁰
- 5.48 QCAT can make orders depending on the circumstances of the dispute, including orders for:
- the removal of a tree
 - annual maintenance work
 - a survey to be undertaken to clarify who owns the tree
 - authorisation of a person to enter the tree owner’s land to obtain a quote or to carry out work
 - compensation or repair costs relating to damage.⁶¹
- 5.49 QCAT can also make orders relating to the recovery of a minor debt where a party does not pay an amount previously agreed for carrying out work on a tree.⁶²
- 5.50 An order made by QCAT for certain works to be carried out overrides any local laws to the contrary, such as, the need for consent of the local council or tree owner where the tree is under a vegetation protection order.⁶³ However, QCAT cannot make an order for work on a tree that is prohibited by or contrary to other legislation.⁶⁴
- 5.51 Parties can appeal decisions made by members on a question of law, a question of fact, or both to the Queensland Civil and Administrative Appeals Tribunal.⁶⁵
- 5.52 If the tree owner fails to follow an order without reasonable excuse, they can be held liable for an offence with a maximum of 1000 penalty units.⁶⁶ The Act also provides a ‘last resort’ enforcement mechanism that allows the local council to carry out QCAT orders where the tree owner fails to do so. However, this provision is not frequently used.⁶⁷

Further resources for community members

- 5.53 The Queensland Act is supported by various policy documents and a searchable tree orders register made available online by the Queensland Government and QCAT to help parties resolve disputes.⁶⁸

60 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65. What constitutes a reasonable effort to reach an agreement is explored further at [6.192]–[6.205].

61 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 65–66; Queensland Government, *What To Do if a Neighbour's Tree is Affecting You* <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/what-to-do-if-a-neighbours-tree-is-affecting-you/>.

62 However, this must be lodged as a claim for a minor debt, cf a tree dispute <www.qld.gov.au/law/court/queensland-civil-and-administrative-tribunal/resolve-disputes-at-qcat/minor-civil-disputes/apply-to-start-a-minor-debt-dispute>.

63 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67.

64 *Ibid* s 67(3); Queensland Civil and Administrative Tribunal, *Frequently Asked Questions—Tree Disputes* (18 April 2017) QCAT <www.qcat.qld.gov.au/matter-types/tree-disputes/faq-tree-disputes>.

65 Queensland Civil and Administrative Tribunal, *Decision Made by a Non-judicial Member* (26 May 2017) QCAT <www.qcat.qld.gov.au/qcat-decisions/appealing-a-qcat-decision/decision-made-by-a-non-judicial-member>.

66 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 77. The value of a penalty unit in Queensland as of 1 July 2017 is \$126.15. 1000 penalty units therefore represents \$126,150.

67 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88; Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) [5.93].

68 Information and resources are discussed further at [6.311]–[6.319]. See generally Queensland Civil and Administrative Tribunal, *Tree Disputes* (19 April 2017) QCAT <www.qcat.qld.gov.au/matter-types/tree-disputes>.

Tasmania

- 5.54 In Tasmania, tree disputes are heard in the Resource Management and Planning Appeal Tribunal (RMPAT) under the *Neighbourhood Disputes About Plants Act 2017* (Tas) (the Tasmanian Act).
- 5.55 At the time of writing, the Tasmanian Act had only recently been enacted and no tree dispute had yet been brought before RMPAT.⁶⁹ As a result, most of the information detailed below reflects RMPAT's general practices and procedures. As tree disputes begin to be brought before RMPAT, it is probable that this category of dispute will attract its own unique practices and procedures as it has in NSWLEC and QCAT. Key features of the statutory scheme in Tasmania are discussed in more detail below.

Neighbourhood Disputes About Plants Act 2017 (Tas)

- 5.56 The Tasmanian Act governs the resolution of tree disputes and sets out the rights and responsibilities of landowners in respect to trees. Before the enactment of the Tasmanian Act, neighbours seeking legal relief for their tree dispute would have had to bring legal action in the Supreme Court of Tasmania. Now the Tasmanian Act allows people to take legal action in RMPAT.
- 5.57 The Tasmanian Act implements most of the recommendations resulting from the Tasmanian Law Reform Institute's inquiry into Problem Trees and Hedges and is largely modelled on the Queensland Act.⁷⁰
- 5.58 Like the Queensland Act, the Tasmanian Act also sets out three ways to resolve a tree dispute: informal resolution, abatement, and legal action in RMPAT.⁷¹
- 5.59 The rights and responsibilities set out in Part 2 of the Act 'provide a clear set of rules ... to help landowners and affected neighbours resolve any issues about a tree'⁷² without having to take legal action.
- 5.60 The Act also allows an affected neighbour to give the tree owner a written 'notice about the land affected by the plant' containing details about how their land is affected, how the problem can be resolved, and requesting a written response from the owner within the period specified in the notice. This period is to be not less than 14 days.⁷³
- 5.61 The common law right to abate is preserved but there is no longer any need to return severed parts of the tree to the tree owner. There are further notice requirements for branches that are at least 50 centimetres long and 2.5 metres above the ground.⁷⁴
- 5.62 If informal resolution and abatement do not assist in resolving the matter, an affected neighbour can bring legal action in the RMPAT where the tree has 'caused, is causing, or is likely within the next 12 months to cause':
- serious injury to a person on the affected land
 - serious damage to land or property, or
 - substantial, ongoing and unreasonable interference with the use and enjoyment of the land.⁷⁵

69 Assented to on 19 September 2017.

70 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 1 (Rene Hidding).

71 *Neighbourhood Disputes About Plants Act 2017* (Tas) pts 3–4.

72 Tasmania, *Parliamentary Debates*, Legislative Council, 22 June 2017, 3 (Leonie Hiscuitt).

73 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 22.

74 *Ibid* (Tas) ss 12, 20.

75 *Ibid* (Tas) s 7.

Resource Management and Planning Appeal Tribunal process

- 5.63 RMPAT is an independent tribunal that hears appeals relating to the management of natural and physical resources and planning.⁷⁶ It is led by a chairperson required to be an Australian legal practitioner of not less than five years standing.⁷⁷ Tribunal members who determine matters are appointed for their specialist knowledge in ‘planning, engineering, architecture, science, and environmental management’.⁷⁸ The Tribunal is ordinarily constituted by three members but this number can be increased or reduced. Matters are usually heard by the chairperson or a member appointed for their legal knowledge and expertise.⁷⁹
- 5.64 The affected neighbour must give the tree owner or any other interested party notice of the application, the grounds for their claim and the relief sought. RMPAT itself may also give such notice to anyone else it thinks will be affected by the requested relief.⁸⁰
- 5.65 Under the Tasmanian Act RMPAT must consider whether the parties have attempted to resolve the matter themselves before a hearing begins.⁸¹ RMPAT’s own practice direction on ADR also requires RMPAT to consider whether the matter could be ‘settled expeditiously’ through ADR such as mediation, conciliation or early neutral evaluation.⁸²
- 5.66 Mediation is the most common form of ADR used by RMPAT. Virtually all matters will be assessed for their suitability for mediation and only exceptional circumstances will justify no mediation.⁸³ Mediation can occur before a hearing or during a hearing following an order to stay proceedings. Matters discussed in mediation remain confidential.⁸⁴
- 5.67 Hearings are held in RMPAT’s main location in Hobart.⁸⁵ Site inspections are conducted as part of the hearing process and this is ordinarily done without parties or their representatives present. However, ‘if the parties wish to specifically ensure that the Tribunal members have regard to certain matters on the subject site’ then they may arrange such a site inspection and notify RMPAT about it at least seven days before the hearing.⁸⁶
- 5.68 RMPAT must deliver its decision in writing, which is usually done in ‘14 to 21 days from the conclusion of the hearing’.⁸⁷
- 5.69 RMPAT has separate application forms for each type of matter it has jurisdiction to hear. An application form for tree disputes under the Tasmanian Act has not yet been published. However, the Tasmanian Act stipulates that the following details must be provided by the affected neighbour in their application:
- information or evidence (which may be photographic) that is sufficient to identify the land affected by the tree; the type, scale and height of the tree; the tree’s location, and a copy of a certificate of title
 - detailed grounds on which the application is made
 - the general nature of the relief that is being sought and, if the relief requires the approval of a government body, then details about the type of approval required
 - details of the persons or bodies whom the affected neighbour intends to notify.⁸⁸

76 Resource Management & Planning Appeal Tribunal <www.rmpat.tas.gov.au/>.

77 Resource Management & Planning Appeal Tribunal Act 1993 (Tas) s 6(a).

78 Resource Management & Planning Appeal Tribunal, *Annual Report (2014–15)* 7 <www.rmpat.tas.gov.au/annual_reports/>.

79 Resource Management & Planning Appeal Tribunal, *Practice Direction No 7 — Hearing Process*, 10 February 2009 [7.2].

80 Neighbourhood Disputes About Plants Act 2017 (Tas) s 24.

81 Ibid s 26.

82 Resource Management & Planning Appeal Tribunal, *Practice Direction No 5 — Alternative Dispute Resolution (ADR)*, 11 August 2016 [5.1].

83 Ibid [5.2].

84 Neighbourhood Disputes About Plants Act 2017 (Tas) s 16A.

85 Resource Management & Planning Appeal Tribunal, *Practice Direction No 7 — Hearing Process*, 10 February 2009 [7.3].

86 Ibid [7.12].

87 Resource Management & Planning Appeal Tribunal Act 1993 (Tas) s 24; Resource Management & Planning Appeal Tribunal, *Practice Direction No 7 — Hearing Process*, 10 February 2009, [7.13].

88 Neighbourhood Disputes About Plants Act 2017 (Tas) s 23(5).

- 5.70 RMPAT’s general practice direction on expert evidence states that expert witnesses owe a general duty to RMPAT and must follow an Expert Witness Code of Conduct (the Code of Conduct).⁸⁹
- 5.71 Once engaged by a party, an expert witness must be given a copy of the Code of Conduct, and in their expert evidence must acknowledge and agree to be bound by it.⁹⁰
- 5.72 RMPAT can make orders to reduce or prevent:
- overhanging of branches
 - serious injury or damage
 - substantial, ongoing and unreasonable interference.
- 5.73 It can also make orders to remedy damage already caused.⁹¹
- 5.74 If an order is not complied with, then parties can bring proceedings in the Civil Division of the Magistrates’ Court.⁹²
- 5.75 A party may appeal a decision of RMPAT on a question of law to the Supreme Court of Tasmania.⁹³

Further resources for community members

- 5.76 It is intended that the scheme set out in the Tasmanian Act will be supported by various resources, such as guides and practice directions, and a database of orders that can be searched for a fee.⁹⁴

International jurisdictions

- 5.77 Key features of the relevant law and practice in New Zealand, Singapore, Canada and the United States (US) governing tree disputes are discussed below. The approaches in each of these jurisdictions derived originally from the English common law but have, in modern times, developed independently of it. The law in Singapore largely mirrors the law in Victoria. New Zealand, some provinces of Canada and some states of the United States, however, have different approaches.

New Zealand

- 5.78 In New Zealand, neighbours may exercise their right to abate or take legal action under the *Property Law Act 2007* (NZ).
- 5.79 The law underpinning the right to abate derives largely from English common law and is similar to the law in Victoria. An affected neighbour may abate by cutting back overhanging branches or encroaching roots up to the boundary line.⁹⁵ A neighbour who abates is not entitled to recover costs from the tree owner.⁹⁶ The option to abate may also be affected if the tree is protected by the *Resource Management Act 1991*.⁹⁷
- 5.80 Where abatement is unavailable or is ineffective, neighbours are encouraged to communicate with each other and come to a resolution. If needed, neighbours can also engage mediators and arbitrators to resolve disputes.⁹⁸

89 Resource Management & Planning Appeal Tribunal, *Practice Direction No 12 — Expert Witnesses*, 11 August 2016.

90 Ibid 12.3(c).

91 *Resource Management & Planning Appeal Tribunal Act 1993* (Tas) s 33(1)–(6).

92 Resource Management & Planning Appeal Tribunal, *Practice Direction No 14 — Civil Enforcement Proceedings*, 11 August 2016, [14.12].

93 Appeals must be lodged within 28 days: *Resource Management & Planning Appeal Tribunal Act 1993* (Tas) s 25(1)–(2).

94 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 5, 8 (Rene Hidding).

95 New Zealand Government, *Pruning Tree Branches* (4 October 2017) <www.govt.nz/browse/housing-and-property/neighbourhood-problems/tree-problems/>; Community Law Manual Online, *Trees*, Community Law <<http://communitylaw.org.nz/community-law-manual/chapter-10-neighbourhood-life/trees-chapter-10/>>.

96 Consumer, *Trees and Neighbours* <www.consumer.org.nz/articles/trees-and-neighbours>.

97 Community Law, *Trees*, Community Law Manual Online (2017), <<http://communitylaw.org.nz/community-law-manual/chapter-10-neighbourhood-life/trees-chapter-10/>>.

98 New Zealand Law Society, *Over the Fence ... Are Your Neighbours* (March 2013) 7 <www.lawsociety.org.nz/news-and-communications/guides-to-the-law/over-the-fence...are-your-neighbours>.

- 5.81 The New Zealand scheme differs from Victoria in that an affected neighbour can rely on the *Property Law Act 2007* (NZ) instead of an action in tort. This Act allows an affected neighbour to seek orders in the District Court for the trimming or removal of a tree on the basis that it:
- causes actual or potential risk to their life, health or property
 - unduly obstructs a view
 - causes undue interference with the use and enjoyment of the applicant's land due to leaf litter, overhanging branches or by blocking sunlight.⁹⁹
- 5.82 An affected neighbour can also seek an order for any costs they have incurred as a result of abating.
- 5.83 In making an order, the hardship that would be caused to the affected neighbour if the tree remains is balanced against the hardship that will be caused to the tree owner in complying with any orders made. The court will also consider factors such as 'the public interest in maintaining an aesthetically pleasing environment; the importance of protecting public reserves containing trees; any historical, cultural or scientific significance that the tree has, and any likely effect that removing or trimming the tree would have on ground stability, the water table, or run-off'.¹⁰⁰
- 5.84 If an order is not complied with, the affected neighbour can, with the tree owner or court's permission, enter the tree owner's land to carry out the works stipulated in the order themselves. They can also recover from the tree owner any expenses they incur.¹⁰¹

Singapore

- 5.85 In Singapore, neighbours may exercise their right to abate or take legal action against their neighbour in tort. The law underpinning the right to abate and tort law derives largely from English common law and is similar to the law in Victoria.¹⁰²
- 5.86 An affected neighbour may cut back branches that protrude over their land by exercising their right to abate. However, the branches, including any fruit they bear, cannot be kept by the affected neighbour.
- 5.87 The affected neighbour's ability to abate may be limited, however, by the *Parks and Trees Act* which seeks to preserve certain trees that fall within a 'tree conservation area'.¹⁰³
- 5.88 Where an affected neighbour cannot abate, then they may sue the tree owner for nuisance where the tree interferes with their use and enjoyment of the land, and where it causes damage.¹⁰⁴ Claims are brought in the Magistrates' Court.¹⁰⁵
- 5.89 A distinctive feature of the Singaporean approach to neighbour disputes is the *Community Disputes Resolution Act 2015*, which allows neighbours to bring claims against each other in a Community Disputes Resolution Tribunal (CDRT). Disputes which can be brought to the tribunal include those based on unreasonable interference with the use and enjoyment of a neighbour's place of residence.¹⁰⁶

99 *Property Law Act 2007* (NZ) ss 334–5.

100 Ibid ss 335(1), 336(2), 337(1)–(2); Community Law Manual Online, *Trees*, Community Law <<http://communitylaw.org.nz/community-law-manual/chapter-10-neighbourhood-life/trees-chapter-10/>>.

101 *Property Law Act 2007* (NZ) s 338(5)–(6).

102 See, eg, *Shi Ka Yee v Nasrat Lucas Muzayyin* [2016] SGHC 138 (20 July 2016) citing *Lemmon v Webb* (1895) AC 1 and *Mills v Brooker* (1919) 1 KB 555.

103 *Parks and Trees Act* (Singapore, cap 216, 2006 rev ed) s 14(1).

104 *Shi Ka Yee v Nasrat Lucas Muzayyin* [2016] SGHC 138 (20 July 2016).

105 *Parks and Trees Act* (Singapore, cap 216, 2006 rev ed) s 48.

106 *Community Disputes Resolution Act* (Singapore, 2015 rev ed).

- 5.90 The Act was implemented to provide a ‘last resort for difficult disputes between neighbours’¹⁰⁷ and aims to ‘facilitate the resolution of community disputes by providing for a statutory tort for community disputes and for the establishment of Community Disputes Resolution Tribunals to deal with such disputes’.¹⁰⁸ Mediation is encouraged before parties seek legal recourse in the CDRT.¹⁰⁹
- 5.91 The framework set out in the *Community Disputes Resolution Act 2015* is an example of how Singapore has sought to streamline the resolution of neighbourly disputes. The Act sets out a list of actionable disputes such as those concerning excessive noise, littering, trespass, interference caused by animals, and interference with the neighbour’s moveable property.¹¹⁰ Although tree disputes are not explicitly mentioned in this list, the Act states that this list is not exhaustive.¹¹¹

Canada

- 5.92 The law governing tree disputes in Canada also has its basis in English law.

Joint ownership

- 5.93 A distinctive feature of Canadian law is that legislation in some provinces allows trees to be jointly owned. For example, under the *Forestry Act* in the province of Ontario, a tree whose trunk grows between two separate parcels of land is called a ‘boundary tree’ and is jointly owned by the respective landowners as tenants in common irrespective of who planted the tree.¹¹² Any action sought by one co-owner in respect of the tree, including its removal, must be consented to by the other co-owner.¹¹³ Any person who injures or destroys a boundary tree without the consent of the co-owners is guilty of an offence.¹¹⁴
- 5.94 A similar framework of joint ownership exists in Saskatchewan where these trees are called ‘straddle trees’.¹¹⁵ However, it differs from Ontario in that it places importance on how the straddle tree came to exist between properties.
- 5.95 A straddle tree planted with agreement between neighbours is ‘owned in common by them and each has a proprietary interest in the whole of the tree that may be protected by registration of a caveat’.¹¹⁶ However, ‘Where it is not determinable which [neighbour] planted the tree or permitted it to grow initially on [their] property, ownership in common will not be implied.’¹¹⁷ In such a case, the tree remains the property of the owner of the land on which the tree was planted even when the trunk, roots and branches extend into neighbouring property.¹¹⁸

British Columbia Civil Resolution Tribunal

- 5.96 A distinctive approach to smaller-scale dispute resolution is found in the British Columbia Civil Resolution Tribunal (the CRT). The CRT uses online dispute resolution (ODR) to assist people in resolving small civil claims up to the value of \$5000 Canadian.¹¹⁹
- 5.97 The CRT began operation in July 2016. All matters filed in the Provincial Court’s small claims jurisdiction after June 2017 are now dealt with in the CRT.

107 Ministry of Culture, Community and Youth (Singapore), *Community Disputes Resolution Tribunals, The Last Resort for Difficult Disputes between Neighbours, start 1st October 2015* (8 January 2016) MCCY <www.mccy.gov.sg/en/news/press-releases/2015/cdrt_starts.aspx>.

108 *Community Disputes Resolution Act* (Singapore, 2015 rev ed).

109 Housing Development Board (Singapore), *Managing Neighbour Disputes* (6 October 2016) <www.hdb.gov.sg/cs/infoweb/residential/living-in-an-hdb-flat/my-neighbourhood/managing-neighbour-disputes>.

110 A full list of actionable neighbour disputes is listed in s 4 of the *Community Disputes Resolution Act* (Singapore, 2015 rev ed) 54.

111 *Community Disputes Resolution Act* (Singapore, 2015 rev ed) s 4.

112 *Forestry Act*, RSO 1990, c F26, s 10(2); *Hartley v Cunningham* (2013) ONSC 2929 (17 May 2013) (Ontario Superior Court of Justice); *Demenuk v Dhadwal* (2013) BCSC 2111 (21 November 2013) (Supreme Court of British Columbia).

113 *Hartley v Cunningham* (2013) ONSC 2929 (17 May 2013) (Ontario Superior Court of Justice); *Laciak v City of Toronto* (2014) ONSC 1206 (7 February 2014) (Ontario Superior Court of Justice).

114 *Forestry Act*, RSO 1990, c F26, s 10(3).

115 *Koenig v Goebel* [1998] 6 WWR 56 (Court of Queen’s Bench for Saskatchewan) [7].

116 *Ibid* [24].

117 *Ibid*.

118 *Ibid*.

119 *Civil Resolution Tribunal Act* SBC 2012, c 25.

- 5.98 The CRT process can be divided into four main stages:
- 1) Solution Explorer: a self-driven tool providing information, problem diagnosis and self-help tools to help parties understand their rights and obligations, and to explore possible solutions before formal dispute resolution or hearings take place. This is free and available 24 hours a day.
 - 2) Negotiations: the CRT provides tools and guidance for party-to-party negotiations, and will soon begin hosting an online platform, allowing parties to log in and negotiate by exchanging messages.
 - 3) Case management: a CRT case manager can use a range of communication platforms and tools (phone, email, messaging) to facilitate negotiation between the parties. Agreements can then be referred to a Tribunal member to be converted into a binding order of the CRT.
 - 4) Adjudication: if not yet resolved by the preceding steps, a matter can be transferred to hearing (usually on the papers) by a tribunal member with relevant specialist expertise. Decisions of the CRT are binding.¹²⁰
- 5.99 Initially, the CRT dealt solely with strata disputes (between parties in an owners' corporation), but it has expanded to provide information and dispute resolution tools in a range of dispute areas, including:
- payment and quality of goods and services
 - personal property rights, including intellectual property and contracts
 - debts and payment plans
 - residential construction and renovations
 - some employment disputes
 - insurance disputes
 - personal injuries.
- 5.100 Although neighbourhood tree disputes are not currently heard by the CRT, this may be a suitable area for future expansion of the jurisdiction.

United States

- 5.101 The law in the United States concerning tree disputes also has its origins in English law but has now developed independently. An affected neighbour can use the remedy of self-help and trim overhanging branches or take legal action against a tree owner for nuisance or negligence. Tree disputes are determined by state courts, with each state developing its own common law and interpretation of statute.
- 5.102 In certain states, whether or not a tree owner is liable in nuisance or negligence depends on whether the tree grows naturally or artificially.¹²¹ On rural land, a tree owner is not liable for any damage or harm caused by a tree that grows naturally.¹²² The term 'naturally' refers to land that has 'not been changed by any act of a human being' and includes 'the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them'.¹²³ On urban land, the distinction between naturally and artificially occurring trees is not regarded, and a tree owner may be liable 'for harm caused to others outside of the land by a defect in the condition of a tree'.¹²⁴

120 British Columbia Provincial Court, *Important Changes to Small Claims Court* (20 February 2017) <<http://provinciacourt.bc.ca/enews/eneews-20-03-2017>>; Department of Justice and Regulation (Vic), *Access to Justice Review* (2017) 275.

121 See, eg, Massachusetts: *Kurtigian v Worcester* (1965) 348 Mass 284, 203 NE2d 692.

122 American Law Institute, *Restatement (Second) of Torts 2d* (1965) § 363(2).

123 *Ibid* § 363 cmt (b).

124 Cheryl M. Bailey, Annotation, *Tree or Limb Falls onto Adjoining Private Property: Personal Injury and Property Damage Liability*, 54 American Law Reports 4th 530 (1987) 2[a].

- 5.103 A distinctive feature of tree ownership in the United States is where a tree stands on the boundary line with its trunk on both properties. In this situation the neighbours own the tree as tenants in common if an 'intention, acquiescence, or agreement'¹²⁵ as to its joint ownership can be demonstrated.¹²⁶
- 5.104 While neighbours may abate up to boundary lines in the usual manner, any significant work that crosses boundary lines or is concerned with the removal of the tree must be done with the agreement of owners.¹²⁷

Question

- 5 Are there any aspects of international jurisdictions' approaches to resolving neighbourhood tree disputes that should be considered in Victoria?

125 *Holmberg v Bergin*, 172 NW (2d) 739 (1969) (Supreme Court of Minnesota), Nelson J.

126 Clark Boardman Callaghan, *Nichols Cyclopaedia of Legal Forms Annotated*, vol 1 (at November 2016) 6.4 Joint ownership of trees on dividing line, 'Chapter 6 Adjoining or Abutting Owners'.

127 See, eg, Cal Civil Code § 833-834; Illinois Legal Aid Online, *Who Owns the Tree on Both My and My Neighbour's Property?* ILAO <www.illinoislegalaid.org/legal-information/who-owns-tree-both-my-and-my-neighbors-property>.

Options for reform to the law of neighbourhood tree disputes

- 84** Introduction
- 84** Option 1: Retain existing system
- 85** Option 2: Introduce a statutory scheme
- 131** Option 3: An alternative option for reform

6. Options for reform to the law of neighbourhood tree disputes

Introduction

- 6.1 The Commission has identified three options for reform to the current process of resolving tree disputes in Victoria:
- Option 1: Make no change and rely on the services provided by the Dispute Settlement Centre of Victoria and the common law.
 - Option 2: Introduce a statutory scheme dedicated to the resolution of tree disputes.
 - Option 3: An alternative option for reform.
- 6.2 Community members and stakeholders may wish to simply state which option they are for or against. However, as Option 2 raises detailed questions about how best to give effect to this option, the Commission invites comments in relation to these questions under parts (a)–(m) of Option 2.
- 6.3 Relevant features of the existing schemes in New South Wales, Queensland and, to a lesser extent, the newly introduced scheme in Tasmania, are outlined and discussed as examples of what may or may not be considered appropriate for the Victorian context under Option 2.

Option 1: Retain existing system

- 6.4 This option preserves the existing process in Victoria for resolving tree disputes, discussed in more detail in Chapter 3. The current self-help and mediation-focussed process allows parties to access free mediation and allows for some interim steps before litigation.
- 6.5 Initially, neighbours can abate any unreasonable interference caused by the tree. Neighbours can cut back encroaching branches or roots up to the boundary line but must return severed parts of the tree to the tree owner.¹
- 6.6 If abatement is inappropriate or does not help resolve a dispute, parties can access free mediation services via the Dispute Settlement Centre of Victoria (DSCV). Mediation through DSCV is a confidential and flexible process that encourages cooperation between neighbours. It allows them to formulate their own resolution of the tree dispute without the cost and formality of legal action. The form of mediation can be adapted to suit the dispute. DSCV centres are widely accessible, with offices in Melbourne and 12 regional locations.²

- 6.7 If neither abatement nor mediation is appropriate or resolves the dispute, neighbours can bring legal action for nuisance, negligence or trespass³ in the Magistrates' Court of Victoria or the County Court of Victoria, depending on the size of their claim.⁴ Taking legal action in response to a tree dispute usually involves expenses in the form of filing fees, legal representation and obtaining expert opinions.⁵

Question

- 6 If the existing system is retained, are there any specific changes necessary to improve it?

Option 2: Introduce a statutory scheme

- 6.8 As discussed in Chapter 5, New South Wales, Queensland and Tasmania have enacted statutory schemes specific to resolving tree disputes.
- 6.9 These schemes were enacted in order to provide neighbours with access to a fairer and more effective legal mechanism than that offered by the common law. Some of the overarching aims of these schemes include:
- clarifying rights and responsibilities of tree owners and affected neighbours so that tree disputes can be prevented from arising
 - enabling people to more easily take legal action without legal representation
 - allowing people to resolve tree disputes quickly
 - reducing the cost of taking legal action.
- 6.10 As outlined in Chapter 1, many people believe the process in Victoria for resolving tree disputes is confusing, ineffective and costly. Some common criticisms include:
- The available common law causes of action are hard to navigate and understand.
 - The rights and responsibilities of neighbours at common law are unclear.
 - Mediation may not be appropriate in all disputes, particularly where the dispute has escalated.
 - Any agreement reached in DSCV-led mediation is not binding and depends on voluntary action.
 - The cost of taking legal action to obtain a binding resolution (eg lawyers' fees and/or court fees) may be prohibitive.
- 6.11 In its report *Problem Trees and Hedges: Access to Sunlight and Views*, the Tasmanian Law Reform Institute concluded that the Victorian model, based predominantly on alternative dispute resolution for resolving tree disputes, was able to provide only limited relief and was therefore undesirable to adopt in Tasmania.⁶
- 6.12 A statutory scheme dedicated to tree disputes may be more accessible and easier to navigate than the common law. Such a scheme may help to resolve tree disputes about damage and harm in more fair and efficient ways, and to bring the law up-to-date with the community's views about the obligations neighbours owe to each other with respect to the trees growing on their land.

3 See [3.97]–[3.226] for more information about these causes of action.

4 Claims over \$100,000 are heard in the County Court: *Magistrates' Court Act 1989* (Vic) ss 3 ('jurisdictional limit'), 100(1).

5 See [3.65]–[3.80] for more information on litigation.

6 Tasmanian Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views*, Report No 21 (2016) 35 (Recommendation 3).

Question

7 Should a statutory scheme for resolving tree disputes be adopted in Victoria? What should the overarching aims of a new scheme be?

- 6.13 If a statutory scheme is to be adopted, there are further details that need to be considered.
- 6.14 The Commission considers below some specific elements of a possible statutory scheme, exploring options and providing a comparison between jurisdictions which have already enacted statutory schemes.
- 6.15 Community feedback is sought on these and any other elements that should be considered in assessing the desirability of a statutory framework for Victoria:
- a) which trees and vegetation should be covered by the scheme
 - b) the relevant location of trees, including zoning considerations and the nature of adjoining land
 - c) who can bring an action (standing) and who can be found liable for harm or damage caused
 - d) the degree and subject of damage or interference that could be considered under a new scheme
 - e) the degree and subject of harm that could be considered under a new scheme
 - f) the appropriate jurisdiction for determining disputes under a new scheme
 - g) preconditions to be met in order to bring an action under the new scheme
 - h) factors to be considered by a decision maker under a new scheme
 - i) the types of orders and enforcement available under a new scheme
 - j) the effect of a new scheme on the current law
 - k) processes for handling expert evidence
 - l) the impact on and responsibility of new owners of land
 - m) enhancing useability.
- 6.16 Key features of both the New South Wales and Queensland schemes have informed the Commission's identification of further issues that need to be considered. Each of these features are discussed in further detail below and provide examples of possible approaches. The general features of the newly-introduced Tasmanian scheme are also discussed.

(a) Trees and vegetation covered by the scheme

- 6.17 In designing a statutory scheme for Victoria, it is important to consider what type of vegetation would be covered.
- 6.18 Defining trees too broadly may create a lack of clarity for those without arboricultural expertise; conversely, defining a tree too narrowly may exclude some disputes.

- 6.19 The *Trees (Disputes Between Neighbours) Act 2006* (NSW) (the NSW Act) defines a tree as ‘any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the Regulations’.⁷
- 6.20 Bamboo, technically a type of grass, was originally excluded from the definition of ‘tree’ under the NSW Act, but since 2007 has been prescribed under the *Trees (Disputes Between Neighbours) Regulation 2014* (the NSW Regulations), having the effect of including it in the relevant definition.⁸
- 6.21 Vines were also excluded from the definition of ‘tree’.⁹ In *Buckingham v Ryder*,¹⁰ a dispute between neighbours over a pink trumpet vine was dismissed because it was determined that vines generally do not meet the definition of a ‘tree’ under the Act—vines do not display the self-supporting characteristics of trees and instead require a surface to grow along.¹¹
- 6.22 However, following statutory review of the Act by the New South Wales Government in 2009, it was decided that vines can cause damage to, for example, ‘the paintwork on the outside of a house, or caus[e] water damage by blocking a downpipe or drain’, or pose a risk of injury. The review concluded that there was no reason why disputes relating to vines should have to be resolved by ‘the more complicated procedure in nuisance’¹² and recommended that vines be declared a prescribed plant under the NSW Regulations. This was done in 2014.¹³
- 6.23 The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (the Queensland Act) defines a tree more broadly, as ‘any woody perennial plant or any plant resembling a tree in form and size as well as a vine and anything listed in regulation’.¹⁴ Examples listed in the legislation are bamboo, banana plant, palm, cactus and vine.¹⁵ It also includes parts of a tree in its definition, such as ‘a bare trunk; and a stump rooted in the land; and a dead tree’.¹⁶
- 6.24 In its review of the Queensland Act, the Queensland Law Reform Commission (QLRC) recommended that the definition of a tree should also include ‘a root or the roots of any living or dead tree’.¹⁷ The QLRC reasoned that roots, on their own, can be a cause of disputes between neighbours and incorporating roots into the definition of a tree would make it consistent with other provisions in the Act referring to the cutting back of roots.¹⁸ However, this has not yet been adopted into the Queensland Act.
- 6.25 In 2017 the Tasmanian Parliament introduced the *Neighbourhood Disputes About Plants Act 2017* (the Tasmanian Act). Section 4 of the Tasmanian Act defines a plant to include a ‘tree; a hedge or group of plants; fruits, seeds, leaves or flowers of a plant; a bare trunk; a stump rooted in land; any root of a plant and a dead plant’.¹⁹ The definition in the Tasmanian Act is the only one expansive enough to cover products of trees.
- 6.26 As noted in Chapter 2, some local laws also define ‘tree’ in the context of council tree protection mechanisms and tree maintenance works. The Melbourne City Council’s definition includes ‘the trunk, branches, canopy and root system of the tree’.²⁰ Nillumbik Shire Council defines a tree as a ‘long lived woody perennial plant (usually) greater than

7 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3.

8 *Trees (Disputes Between Neighbours) Regulation 2007* (NSW) r 4.

9 A vine can also be referred to as a creeper or climber.

10 [2007] NSWLEC 458 (25 July 2007).

11 *Ibid* [28]–[32].

12 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 19–20.

13 *Trees (Disputes Between Neighbours) Act 2006* (NSW) r 4.

14 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45(1).

15 *Ibid* s 45(1)(b).

16 *Ibid* s 45(2).

17 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) (Recommendations 3–4).

18 *Ibid*.

19 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 4(1)–(2). Note that the plant must be situated within 25 m of the affected land: s 7(4). This allows for the roots of a plant to travel some distance. The plant also does not have to be on adjoining land: s 7(6).

20 *Activities Local Law 2009* (Melbourne City Council), cl 1.11.

3 metres in height with one or relatively few main stems or trunks'.²¹ This definition is found in *Australian Standard 4373-2007—Pruning of Amenity Trees*.²²

- 6.27 There is a variety of tree definitions in the above discussion. Some incorporate taxonomical descriptions and refer to individual parts of the tree and their size. Other types of vegetation that resemble a tree or have been known to trigger disputes have also been recognised in relevant Acts and Regulations.

Question

- 8 What type of vegetation should be covered by a statutory scheme? Is there any vegetation that should not be covered?

(b) Location of trees and land

- 6.28 The location of a tree may be determinative of an owner's or neighbour's rights to manage the tree. Three main elements are discussed below: the zone in which the tree is located, to what extent the tree must be located on this land, and how this land adjoins an affected neighbour's land.

Zoning

- 6.29 In some jurisdictions, the zone in which a tree is located may determine whether neighbours are able to use the relevant statutory dispute resolution schemes.
- 6.30 Two main reasons have been given for this in reviews conducted in New South Wales and Queensland. The first is that neighbours involved in a tree dispute on rural land may not require the same remedies as those in urban areas,²³ and because of the vast spaces associated with rural land, disputes do not commonly arise.²⁴ The second reason is that any Act governing tree disputes may have the potential to contravene or contradict existing legislation that protects biodiversity, especially in particular zones. For example, in Victoria, this could include the *Catchment and Land Protection Act 1994* and *Flora and Fauna Guarantee Act 1988*.²⁵
- 6.31 In its earlier incarnation, the NSW Act only applied to 'urban land'. However, following a statutory review of the Act by the New South Wales Government in 2009, it was considered that this limit excluded some community members who needed to resolve disputes:

[some individuals] were not able to bring proceedings relating to damage or risk of injury under the [NSW] Act, because the zoning of the private land on which the tree was situated was outside the scope of the Act. One of these related to a tree that had reportedly been found unsafe by the Local Council. When the owner of the tree did not do any work, the adjoining neighbours applied to the Land and Environment Court for orders that work be done on the tree. However, after a preliminary hearing their

21 Nillumbik Shire Council, *Nillumbik Tree Management Guidelines 2015* (2017) 7 <www.nillumbik.vic.gov.au/Council/Council-property/Maintenance>.

22 Standards Australia *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007) [4]. The objective of the standard is to 'provide arborists, tree workers, government departments, property owners, and contractors with a guide defining uniform tree pruning procedures and practices in order to minimize the adverse or negative impact of pruning on trees'. Part 3.5 defines a 'branch' as 'a lateral shoot on a main axis such as trunk or another branch. A branch arising off a trunk is a first order branch. A branch arising off a first order branch is a second order branch and so on. Second and successive orders of branches may be referred to as 'lateral branches'.'

23 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Issues Paper No 72 (2015) 48.

24 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 35.

25 Ibid 40; Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) 74. See Chapter 4 for a more comprehensive review of relevant legislation.

application was dismissed because the tree was found to be on land zoned 'rural-residential'. In these situations, the only legal recourse is to sue in nuisance.²⁶

- 6.32 A recommendation to broaden the application of the NSW Act to cover rural-residential zones was later enacted.
- 6.33 Currently in New South Wales, the Act applies to trees located on land zoned as residential, rural-residential, village, township, industrial or business under an environmental planning instrument.²⁷ The NSW Act does not apply to trees on public land.²⁸
- 6.34 In Queensland, the scheme is more limited and applies to trees in urban areas only. More specifically, it does not apply to trees on rural land, on land that is more than four hectares in size, on land owned by a local government that is used as a public park, trees planted or maintained for certain purposes (such as for commercial production), or trees planted as a condition of a development approval.²⁹
- 6.35 In its statutory review of the Queensland Act, the QLRC rejected the inclusion of rural land because it would have an impact on Queensland's Planning Principles and their objectives.³⁰
- 6.36 The Tasmanian Act does not apply to plants on 'excluded land': council-owned or managed land, rail network land, reserves, and certain forestry land.³¹ Plants 'necessary or desirable for the management or operation' of certain farms will also be exempt.³²
- 6.37 The Second Reading Speech preceding the enactment of the Tasmanian Act explains the reasoning behind their exclusion:

these excluded categories are more likely to capture large parcels of land that are located in rural or remote locations—the land is often unoccupied, or it may have high conservation value or serve some other kind of public purpose or be of benefit to the broader community.

It should also be noted that these exclusions are largely consistent with the types of land excluded under the Boundary Fences Act and under similar laws in Queensland and New South Wales.³³

Tree wholly or partially on land

- 6.38 In Victoria, the location of a tree on private land and therefore the ownership of the tree is usually determined by reference to the location of its trunk.³⁴ A tree is considered a 'fixture' on the land—a tangible item of personal property that is attached to and therefore forms part of the land.³⁵ However, it is possible for a tree to grow between two parcels of land and 'straddle' the boundary line. This may create ambiguity as to who owns the tree for the purposes of new legislation.
- 6.39 In New South Wales, the tree affecting a neighbour must also be 'wholly or principally' on adjoining land.³⁶ In *Barker v Kyriakides*,³⁷ the affected neighbour brought an application in respect of a tree that overhung his property and straddled the boundary of two adjoining

26 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 40.

27 *Trees (Disputes Between Neighbours) Act 2006 (NSW)* s 4.

28 *Ibid* s 4(1).

29 Queensland Government, *Your Responsibilities as a Tree Keeper* (20 October 2015) <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/avoiding-fence-tree-and-building-disputes/your-responsibilities-as-a-tree-keeper/>.

30 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) 74. Queensland Planning Provisions are made under s 54 of the *Sustainable Planning Act 2009 (Qld)*.

31 *Neighbourhood Disputes About Plants Act 2017 (Tas)* ss 5, 9.

32 *Ibid* s 5(1)(b).

33 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 3 (Rene Hidding); *Neighbourhood Disputes About Plants Bill 2017 (Tas)*.

34 *Trees (Disputes Between Neighbours) Act 2006 (NSW)* s 4(3); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 47(1); *Neighbourhood Disputes About Plants Act 2017 (Tas)* s 4(4).

35 Margaret Davies and Kynan Rogers, 'Tale of a Tree' (2014) 16 *Flinders Law Journal* 43; *Permanent Trustee Australia v Shand* (1992) 27 NSWLR 426; *Clos Farming Estates Pty Ltd v Easton* (2002) 11 BPR 20, 605. By contrast, a tree that becomes severed from the land is considered a chattel, as it can be moved.

36 *Trees (Disputes Between Neighbours) Act 2006 (NSW)* s 4(3).

37 [2007] NSWLEC 292 (24 May 2007).

neighbours to the rear of his land. The application was brought against the neighbour on whose land the majority (80 per cent) of the tree's trunk was located.³⁸

- 6.40 In Queensland, the base of the tree trunk must be 'wholly or mainly' on neighbouring land. It does not matter if the tree has been removed by the time the application is heard. It is enough for the tree to have once been wholly or mainly on the land.³⁹
- 6.41 In Tasmania, a tree is 'situated on land' if the base of the trunk, or the place at which the stem of the plant connects with the roots of the plant, is in whole or in part, on the land.⁴⁰ Even if a tree straddles the boundary of adjoining properties, for the purposes of bringing an action under the Act, the tree will be treated as if it lies wholly on the neighbouring land. That is, either neighbour, although both are technically tree owners, can have recourse if the tree is affecting them in the ways covered by the Act. In determining the extent to which the tree is affecting a neighbour, the proportion of the tree situated on each area of land will be taken into account.⁴¹

Adjoining land

- 6.42 As a Victorian Act would aim to provide effective resolution of tree disputes between neighbours, the land on which the tree is located may need to be within a certain proximity to or in a particular relationship to the land of the person who brings an action. In New South Wales and Queensland, the two parcels of land must be directly adjoining in order to fall under the scope of their respective Acts, whereas in Tasmania, neighbours on non-adjoining land can take legal action.
- 6.43 In New South Wales, adjoining land:
includes properties that abut each other, but might also include properties that are separated by other land, such as a public road or drainage easement, provided there is a relevant connection in the sense that the tree growing on one property is capable of causing damage to the other property or injuring persons on that other property.⁴²
- 6.44 In *Dive v Lin*,⁴³ an affected neighbour's application in respect of a Sydney blue gum, which had previously dropped branches and caused damage, was dismissed by the Court because his land was 'separated ... by another residential allotment' and was, more specifically, 'two properties to the east' of the tree owner's land. The affected neighbour's application was therefore beyond the jurisdiction of the Court, and the potentially hazardous nature of the tree could not be considered through that application.⁴⁴ This decision was upheld on appeal.⁴⁵
- 6.45 If the tree has caused damage to multiple properties on adjoining land, then separate applications for each affected property would be required.⁴⁶
- 6.46 In Queensland, adjoining land is the land on either side of a common boundary. The tree must be on land that adjoins the tree owner's land, or would adjoin the land if it were not separated by a road.⁴⁷ For larger, agricultural parcels of land, the Queensland Act specifies that land will be considered to be adjoining even where it is on the other side of a road, if the neighbours agree to this construction, or if the Queensland Civil and Administrative Tribunal (QCAT) decides a fence has been or could be used to divide the two parcels of land.⁴⁸

38 Ibid [11]. See also *Dive v Lin* [2017] NSWLEC 1348 (3 July 2017) [11].

39 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 47.

40 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 4(4).

41 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8.

42 *Robson v Leischke* (2008) 72 NSWLR 98 [157]. See also *Dive v Lin* [2017] NSWLEC 1348 (3 July 2017).

43 [2017] NSWLEC 1348 (3 July 2017).

44 Ibid [15]–[17]. See also *Barker v Kyriakides* [2007] NSWLEC 292 (24 May 2007) [4]–[8], where the Court decided it could not intervene with respect to some trees that the affected neighbours alleged could potentially damage nearby council sewers that ran adjacent to their land.

45 *Dive v Lin* [2017] NSWLEC 153 (16 November 2017).

46 New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016) 8 <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/Treedisputes-helpfulmaterials/treedisputes_helpfulmaterial.aspx>.

47 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46.

48 Ibid s 15.

- 6.47 In Tasmania, an affected neighbour may take action under the Tasmanian Act even if their land does not adjoin the tree owner's land,⁴⁹ as long as part of their land is within 25 metres of the base of the trunk or where the stem connects to a root system.⁵⁰ This broader provision 'recognises that in some cases tree roots can extend horizontally to a distance of up to 25 metres'.⁵¹
- 6.48 A Victorian Act would need to address the appropriate location of the tree affecting a neighbour. This comprises the zoning classification of the land on which the tree is located, whether the tree is to be wholly or partially on the land, and whether the land on which the tree is located needs to adjoin the affected neighbour's land.

Questions

- 9 Should the application of a statutory scheme be limited to land in particular zones? If so, which zones?
- 10 Should there be a requirement that the affected neighbour's land adjoin the tree owner's land? If so, how should the relevant degree of proximity be defined?
- 11 How should trees that are partially on the tree owner's land be dealt with under a statutory scheme?

(c) Standing and liability

- 6.49 The question of which neighbours can make an application (that is, who has 'standing') and who can be held liable is usually determined based on the person's relationship to the land.⁵²
- 6.50 Not all people who are present on the land affected by the tree may be able to take legal action as the affected neighbour. Similarly, not all people present on the land on which the tree is located may be held liable as the tree owner.
- 6.51 The possible requirements for standing and basis of liability are explored below.

Standing of affected neighbour

- 6.52 Currently in Victoria, in order to have standing to bring a legal action for nuisance, the affected neighbour must be in possession of the land affected by the tree: as its owner, tenant or licensee with exclusive possession.⁵³
- 6.53 In New South Wales, in order to bring an action under the NSW Act, an affected neighbour must be an owner or an occupier of the land.⁵⁴ If there are multiple owners or occupiers then any one of them can make an application.⁵⁵
- 6.54 The same is true in Queensland:⁵⁶ owners or occupiers of registered freehold land, or a body corporate, can bring legal action.⁵⁷ However, tenants are first advised to raise their concerns with their landlord or agent. If this does not resolve the matter, they may take legal action, but must show that the landlord refused to take any action.⁵⁸

49 *Neighbourhood Disputes About Plants Act 2017* (Tas) s7(6).

50 *Ibid.*

51 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 1 (Rene Hidding) 4.

52 See, eg, *Russell v Parsons* [2009] NSWLEC 1026 (6 February 2009).

53 *Stockwell v Victoria* [2001] VSC 497 (17 December 2001) [241].

54 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3 ('owner of land'), s 7.

55 *Treves v Hedge* [2010] NSWLEC 1344 (10 December 2010) [17]–[21].

56 In relation to registered freehold land.

57 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49.

58 *Ibid* s 62(2); Queensland Civil and Administrative Tribunal, *FAQ—Tree Disputes* <www.qcat.qld.gov.au/resources/faqs/faq-tree-disputes>.

- 6.55 In Tasmania, owners or occupiers of land can bring legal action under the Tasmanian Act.⁵⁹ An occupier who is not an owner of land may bring legal action if ‘the person has, in writing to the owner, requested the owner of the land to make an application’ and the owner has refused to comply.⁶⁰
- 6.56 An occupier is a ‘person who is entitled to the immediate possession and occupation of the land’.⁶¹ However, ‘tenants under the Residential Tenancy Act, will not have responsibility for plants under the provisions of the [Act]. That responsibility will rest with the owner of the land.’⁶²

Liability of tree owner

- 6.57 Currently in Victoria, in order to be held liable, the tree owner must have created, adopted or continued the nuisance.⁶³
- 6.58 In New South Wales, actions under the NSW Act can be brought against the owner or occupier of the land on which the tree is situated.⁶⁴ The NSW Act does not contain any provisions detailing liability or notice requirements for multiple tree owners.⁶⁵
- 6.59 In Queensland, actions can be brought against a tree owner who owns, occupies or has control over the land on which the tree is located. This includes: the owner of registered freehold land, tenant, licensee, grantee of a permit, body corporate, or, if the land on which the tree is located is in a reserve, then the trustee of the reserve.⁶⁶ If there is more than one tree owner then they all share equal liability, but notice of the application in QCAT can be satisfied by notifying any one of the tree owners.⁶⁷
- 6.60 In Tasmania, actions can be brought against an owner of land on which the tree is located. If there are multiple owners of land on which the tree is located then each owner is jointly and severally liable for the tree. Notice of an application in the Resource Management and Planning Appeal Tribunal (RMPAT) can be given to any of the owners.⁶⁸

Questions

- 12 Who should have standing to bring a legal action in tree disputes under a new scheme?
- 13 Who should be liable for harm or damage caused under a new scheme?

(d) Damage or interference

- 6.61 Damage claims relate to property rather than people. The scope of damage that is to be captured by any new scheme is important to consider, and comprises three key elements: the degree of damage, the subject of damage, and future damage. These three elements are discussed in more detail below.

59 An owner of land is considered to be a person with joint or several freehold possession of land; a life tenant; the lessee of a lease over 99 years; licensees with a right to occupy or manage Crown land; a body corporate, or any other person with an interest in the land prescribed under the Regulations: *Neighbourhood Disputes About Plants Act 2017* (Tas) s 3.

60 Within 42 days of the request being made: *Neighbourhood Disputes About Plants Act 2017* (Tas) s 23(4).

61 *Ibid* s 3.

62 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 1 (Rene Hidding) 4.

63 This is discussed in more detail at [3.125]–[3.139].

64 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3 ('owner of land'); see, eg, s 14E.

65 In contrast to *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 53.

66 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48.

67 *Ibid* s 53.

68 *Neighbourhood Disputes About Plants Act 2017* (Tas).

Degree of damage or interference

- 6.62 Whether a new scheme should broadly capture damage of any kind or only damage that is of a significant degree will determine what sort of claims for damage will be actionable.
- 6.63 In New South Wales, any sort of damage, regardless of its degree, can be claimed before the NSW Land and Environment Court (NSWLEC).⁶⁹ However, a tree that merely causes interference, which in turn causes annoyance or discomfort to the affected neighbour without causing any actual damage, does not fall within the jurisdiction of the NSW Act.⁷⁰ For example, dropping of leaf litter into neighbouring land will not constitute damage, neither will the cleaning of resultant mould or slime.⁷¹
- 6.64 In Queensland, the scope of damage is narrower because only ‘serious’ damage will qualify.⁷² However, unlike the NSW Act, Queensland also covers ‘interference’ which is ‘substantial, ongoing and unreasonable’; it is not necessary for actual damage to have been caused.⁷³ For example, the ‘substantial, ongoing and unreasonable’ accumulation of leaf litter in a neighbour’s gutters⁷⁴ or pool⁷⁵ will be sufficient for QCAT to intervene and make orders. However, in most cases concerning leaf litter, this threshold is not likely to be satisfied. Leaf litter is generally considered ‘to be expected in urban or suburban areas with trees’ and it is reasonable to expect that residents ‘will perform some level of regular maintenance, including cleaning gutters and leaf litter’.⁷⁶
- 6.65 The Tasmanian Act also mandates that damage must be ‘serious’ and that any interference with the ‘use and enjoyment’ of the affected neighbour’s land must be of a ‘substantial, ongoing and unreasonable’ nature in order to be actionable.⁷⁷

Subject of damage or interference

- 6.66 The subject of damage relates to whether damage to any property on neighbouring land (such as a house, a garden shed, or car), or also to the land itself (such as a garden), should be considered actionable damage.
- 6.67 In New South Wales, the subject of damage must be ‘property on the land’,⁷⁸ which is not only real property but also extends to ‘buildings, fences, paving or other structures, or to fruit trees, crops, ornamental gardens or other vegetation growing on a neighbour’s land’ and ‘moveable objects or corporeal chattels, such as animals,⁷⁹ vehicles or furniture, that may be located on, but are not attached to or part of the ground’.⁸⁰

69 ‘An owner of land may apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree to which this Act applies that is situated on adjoining land.’: *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 7.

70 *Robson v Leischke* (2008) 72 NSWLR 98 [168]–[173].

71 See tree dispute principle following *Barker v Kyriakides* [2007] NSWLEC 292 (24 May 2007) and *Hendry v Olsson* [2010] NSWLEC 1302 (14 October 2010). Commentary in the NSW Annotated Act suggests, however, that these circumstances could constitute damage if the applicant is able to convince the Court that ‘exceptional circumstances’ are present—‘There are many examples of the application of this Principle. To date it has been adopted consistently and there have been no examples where the applicant has convinced the Court of exceptional circumstances’: New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016) 9. However, this is not explicitly stated in the Act itself.

72 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(B).

73 The obstruction of sunlight and views fits into the category of substantial, ongoing and unreasonable interference in the Queensland scheme.

74 *Ferraro v Body Corporate of ‘Omaru’ Brisbane City Council* [2013] QCAT 343 (3 July 2013); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 7(1)(b)(ii)–(iii).

75 *Oberhoffer v Tarlton* [2013] QCAT 495 [18] (19 September 2013). The affected neighbour also told QCAT that ‘[f]ronds and debris fall from the trees on to the tin garage roof, causing noise at night’, but this aspect of the claim was determined by QCAT not to constitute substantial ongoing unreasonable interference: [2], [19].

76 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) [3.551].

77 Although what would constitute damage that is ‘serious’ remains undefined: *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 7, 7(1)(b)(ii)–(iii).

78 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 7.

79 An example is found in the English case of *Crowhurst v Amersham Burial Board* (1878) 4 Ex D 5, where branches of a tree, the leaves and branches of which were poisonous to stock, projected over the neighbour’s land and were eaten by the neighbour’s horse, which later died from poisoning. This was found to constitute nuisance at common law.

80 *Robson v Leischke* (2008) 72 NSWLR 98 [162]–[167].

- 6.68 Tree disputes determined by the NSWLEC have considered garden plants, outdoor furniture and motor vehicles ‘property on the land’.⁸¹ Moreover, ‘property on the land’ need not be above ground, as shown by cases concerning sewer pipes.⁸² However, ‘damage to the surface of the land such as raising a mound of earth or drying the soil without consequential damage to other property’ is not covered.⁸³
- 6.69 In Queensland and Tasmania, the subject of damage must be ‘the land or property on the land’.⁸⁴

Future damage or interference

- 6.70 Trees that have not caused problems in the past may, after growth, or a change in health, go on to affect a neighbour’s land.⁸⁵
- 6.71 It is important to consider whether, under a Victorian scheme, affected neighbours can seek relief where a tree has not yet caused damage but is expected to do so. If so, the question must be considered of how far into the future expected damage should extend.
- 6.72 The New South Wales, Queensland and Tasmanian schemes allow neighbours to bring legal action for expected future damage.
- 6.73 In New South Wales, people are allowed to bring claims to prevent damage. Orders to prevent the damage cannot be made unless the court is satisfied that the damage is likely to occur in the ‘near future’, which has been interpreted to mean within the next 12 months.⁸⁶
- 6.74 In Queensland, the Act explicitly states that future damage must be likely to ‘occur within the next 12 months’.⁸⁷ This is also the case in Tasmania.⁸⁸
- 6.75 A Victorian scheme would need to address each of these considerations in relation to damage and interference.

Questions

- 14 Should interference (not causing damage) be actionable under a new scheme? If so, what degree of interference?
- 15 What degree of damage should be sufficient to bring an action under a new scheme?
- 16 What kind of damage should be covered under a new scheme? Should damage include damage to land itself, or only to property on the land?
- 17 Should future damage be actionable under a statutory scheme? If so, should a particular time period be specified?

81 See *Lee v Martin* [2010] NSWLEC 1146 (11 June 2010) (garden plants); *McHugh v Schmiedte* [2010] NSWLEC 1163 (28 June 2010) (outdoor furniture); *Russell v Parsons* [2009] NSWLEC 1026 (6 February 2009) (car).

82 *Ding v Phillips* [2008] NSWLEC 1268 (3 July 2008); *Payn v Allen* [2010] NSWLEC 1315 (15 Nov 2010).

83 *Robson v Leischke* (2008) 72 NSWLR 98 [166]; *Ardagh v Ellston* [2012] NSWLEC 1235 (23 August 2010) [41]–[42].

84 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b)(ii); ‘property’ is not defined.

85 See *Moreno v Parer* [2017] QCAT 223 (12 June 2017) 18.

86 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 10(2)(a); *Yang v Scerri* [2007] NSWLEC 592 (31 August 2007).

87 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(A).

88 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(b)(2ii).

(e) Harm

- 6.76 Harm in this paper refers to harm to people—causing injury or otherwise affecting their health or safety. Under the New South Wales, Queensland and Tasmanian schemes, harm is called ‘injury’.⁸⁹
- 6.77 It is important to consider the degree of harm to be captured under any scheme, as well as the subject of harm and future harm. These three elements are discussed in more detail below.

Degree of harm

- 6.78 In considering the degree of harm caused by a tree to a person, a Victorian scheme would need to make clear the degree of harm which is actionable. For example, whether there must be significant harm caused to a person or whether any type of harm, even mere discomfort to a person, would be sufficient.⁹⁰
- 6.79 Currently in Victoria, a number of Acts contain definitions of ‘injury’ and require claimants to have sustained a certain degree of harm in the form of a ‘significant’ or ‘serious’ injury in order to be compensated.⁹¹
- 6.80 In New South Wales, there is no definition of the term ‘injury’ or a required threshold degree of harm stipulated in the Act. Decisions of the NSWLEC indicate that exacerbations of medical conditions such as asthma and allergies will constitute an injury in addition to bodily injury.⁹²
- 6.81 Affected neighbours must produce ‘medical or arboricultural evidence and any supporting medical or arboricultural peer-reviewed literature’ that supports their claim that the tree is the cause of the injury.⁹³
- 6.82 In Queensland and Tasmania, injury to persons must be ‘serious’.⁹⁴ The Queensland Act does not define serious injury but does state that ‘a severe allergic reaction’ would meet the definition.⁹⁵

Subject of harm

- 6.83 The question also arises whether, in addition to occupants of a property, temporary visitors should be covered.
- 6.84 In New South Wales, Queensland and Tasmania, any person injured on the land affected by the tree can make an application.⁹⁶
- 6.85 Further, in New South Wales, a neighbour can bring an application if they believe injury may be caused to another person not on the affected neighbour’s land. In *Ashworth v Joyce*,⁹⁷ the affected neighbour argued that some dead trees on adjoining land ‘were likely to cause injury to persons on an adjacent public beach reserve’. In *Reuben v Lace*,⁹⁸ a tree was ordered to be removed because it was considered it may cause injury not only to people on the affected neighbour’s land but also people on the tree owner’s land.

89 *Trees (Disputes Between Neighbours) Act 2006* (NSW) pt 2; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b).

90 A specific example in the Victorian context is pollen from trees, which is known to cause hay fever, and may need to be considered. In New South Wales, hay fever was put forward by community members as a type of interference caused by trees: New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.16].

91 See, eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Transport Accident Act 1986* (Vic); *Wrongs Act 1958* (Vic).

92 See, eg, *Tuft v Piddington* [2008] NSWLEC 1249 (3 June 2008) where the injury was an asthmatic reaction to pollen.

93 New South Wales Land and Environment Court, *Practice Note — Class 2 Tree Applications*, 13 May 2014, [15] sch B; New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016) 10. Without this evidence, injury as a consequence of the tree concerned will not be successfully made out. See, eg, *Hurditch v Staines* [2008] NSWLEC 1351 (22 August 2008); *Oakey v Owners Corporation Strata Plan 22678*; *Oakey v Owners Corporation Strata Plan 5723* [2009] NSWLEC 1108 (19 March 2009); *Turner v O'Donnell* [2009] NSWLEC 1349 (9 October 2009).

94 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(2)(b); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b)(i).

95 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 4 (‘injury’); *Leonardi v Watson* [2015] QCATA 192 (22 Dec 2015) [11].

96 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 7 (‘any person’) and *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48 (‘a person on the land’); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b)(i).

97 [2007] NSWLEC 357 (15 June 2007).

98 [2010] NSWLEC 1024 (27 January 2010).

- 6.86 As noted above, in Tasmania, the harmed or injured person does not need to be on land that adjoins the tree owner's land. Instead, land needs to be within 25 metres of the tree.⁹⁹

Future harm

- 6.87 Trees are dynamic, living organisms. It is therefore important to consider whether an affected neighbour can seek relief in relation to a tree that has not yet caused harm but is expected to do so. If so, it is also important to consider how far into the future the likelihood of harm should extend.
- 6.88 The schemes in New South Wales, Queensland and Tasmania allow neighbours to bring legal action for injury likely to occur in the future.
- 6.89 In New South Wales, people may make claims to prevent injury. Unlike the case for future damage, there is no requirement that harm is likely to occur 'in the near future'.¹⁰⁰
- 6.90 However, in Queensland and Tasmania, 'serious injury' must be likely within 12 months.¹⁰¹ In Queensland, factors such as the size and health of the tree and weather conditions may be taken into account to assess the likely seriousness of the future injury.¹⁰²
- 6.91 A Victorian scheme would need to address the degree of harm, the subject of harm and future harm.

Questions

- 18 What degree of harm should be sufficient to bring an action under a statutory scheme?
- 19 How should the relevant subject of the harm be determined? Should harm include harm to occupiers only, to others on the land, or to anyone at all?
- 20 Should future harm be actionable under a statutory scheme? If so, should a particular time period be specified?

(f) Jurisdiction

- 6.92 Which court or tribunal should have decision-making jurisdiction over a new scheme is another important consideration.
- 6.93 Tree disputes are heard in the Land and Environment Court (NSWLEC) in New South Wales, the Queensland Civil and Administrative Tribunal (QCAT) in Queensland and the Resource Management and Planning Appeal Tribunal (RMPAT) in Tasmania.
- 6.94 The NSWLEC is a superior court, with equal status to the NSW Supreme Court, where tree disputes are heard and determined by commissioners with specialised expertise in areas such as arboriculture, town planning, environmental science, land valuation, urban design, and law.¹⁰³ Hearings are often conducted on site.¹⁰⁴

99 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(6).

100 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 10(2)(b).

101 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(A); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b)(i).

102 *Finch v Grahle* [2017] QCAT 80 (14 March 2017).

103 *Land and Environment Court Act 1979* (NSW) s 12; New South Wales Land and Environment Court, *Annual Review* (2015); New South Wales Land and Environment Court, *Who's Who in Court* <www.lec.justice.nsw.gov.au/Pages/coming_to_the_court/whos_who.aspx>.

104 New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016) 12.

- 6.95 QCAT is an independent tribunal that determines and reviews disputes and administrative decisions.¹⁰⁵ Matters are heard by members who are either lawyers or who have knowledge, expertise or experience about the matter being heard.¹⁰⁶
- 6.96 RMPAT is an independent tribunal that determines and reviews matters relating to the management of natural and physical resources and planning. Members are appointed for their specialist knowledge in 'planning, engineering, architecture, science, and environmental management'.¹⁰⁷
- 6.97 Some other notable approaches that could help inform Victoria's choice of jurisdiction include the Australian Capital Territory Civil and Administrative Tribunal (ACAT) and Singapore's Community Disputes Resolution Tribunals.
- 6.98 ACAT can hear and determine small civil claims, including those based on nuisance, negligence and trespass where the claim is under \$25,000.¹⁰⁸
- 6.99 This approach is to be contrasted with Victoria, South Australia, Western Australia and the Northern Territory, where tree disputes are heard and determined by the courts.
- 6.100 ACAT aims to resolve disputes in a timely, economical and less formal manner where parties are able to represent themselves instead of having to engage legal counsel.¹⁰⁹
- 6.101 As discussed in Chapter 5, in Singapore, neighbour disputes are resolved in specialised Community Disputes Resolution Tribunals (CDRTs) under the *Community Disputes Resolution Act 2015*.¹¹⁰ CDRTs operate under a division of state courts and deal exclusively with neighbour disputes. Matters are heard by tribunal judges who are appointed district judges of the State Courts.¹¹¹
- 6.102 In Victoria, tree disputes can currently be heard in the Magistrates' Court, County Court and (very rarely) in the Supreme Court.¹¹² Whether or not jurisdiction should remain with these courts, or another forum, such as the Victorian Civil and Administrative Tribunal (VCAT) or an alternative forum altogether, needs to be considered. The current and possible Victorian jurisdictions are discussed below.
- 6.103 As each of these jurisdictions has recently been examined by the 2016 report *Access to Justice*, some of the resulting observations and recommendations from that review which are most pertinent to the resolution of tree disputes are also considered.¹¹³

Magistrates' Court of Victoria

- 6.104 The Magistrates' Court has jurisdiction to hear civil matters such as tree disputes where amounts claimed are no more than \$100,000. The cost of commencing a tree dispute can range between \$142 and \$677.50 and depends on the amount claimed. This basic filing fee cost is independent of other applicable court fees and legal representation.
- 6.105 Unlike comparable lower courts in other states and territories, the Magistrates' Court also has equitable jurisdiction, meaning that it may 'hear and determine any claim for equitable relief', which may include injunctions and damages in equity.¹¹⁴ The jurisdictional limit for claims for equitable relief is also \$100,000.

105 For a full list of matter types, see Queensland Civil and Administrative Tribunal, *Matter Types* <www.qcat.qld.gov.au/matter-types>.

106 Queensland Civil and Administrative Tribunal, *Organisational Structure* <www.qcat.qld.gov.au/about-qcat/organisational-structure>.

107 Resource Management and Planning Appeal Tribunal, *Annual Report 2014–2015* (2015) 7.

108 *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 16, 18. Actions in negligence and trespass can also be brought but as explained in Ch 3, nuisance is the more common cause of action for tree disputes. See, eg, *Campbell v Blackshaw* (Appeal) [2017] ACAT 64 (30 August 2017).

109 *Campbell v Blackshaw* (Appeal) [2017] ACAT 95 (2 November 2016).

110 A full list of actionable neighbour disputes is listed in s 4 of the *Community Disputes Resolution Act* (Singapore, 2015 rev ed).

111 *Community Disputes Resolution Act* (Singapore, 2015 rev ed) s 14.

112 Court proceedings are discussed at [3.65]–[3.80].

113 Department of Justice and Regulation (Vic), *Access to Justice Review* (2017).

114 *Magistrates' Court Act 1989* (Vic) ss 100(1)(a)–(b); 3(1) ('jurisdictional limit').

- 6.106 The Magistrates' Court has the power to grant injunctions at any time during proceedings,¹¹⁵ or in urgent cases, before proceedings have started.¹¹⁶ Within the limits of its monetary jurisdiction, the Court's powers to grant injunctions are as extensive as those of the Supreme Court or the County Court.¹¹⁷
- 6.107 The Magistrates' Court has the same power to make orders and directions in civil proceedings as the Supreme Court and County Court, under the *Civil Procedure Act 2010* (Vic).¹¹⁸ The Court may give any directions it considers appropriate about the use of alternative dispute resolution to assist in the resolution of a civil case.¹¹⁹

Subject matter expertise

- 6.108 The Magistrates' Court has a specific process for dealing with smaller claims, such as neighbourhood disputes, which is designed to keep costs down, encourage early resolution and divert simpler cases away from full hearings. Where parties are seeking relief under \$10,000, they will be referred for compulsory arbitration.¹²⁰ Parties may also mutually agree to undertake arbitration, or one party will apply and the other will be required to participate.
- 6.109 The arbitration process is less formal and simpler than a hearing, as it may involve a relaxation of the rules of evidence and procedure, and fixed costs, depending on the facts of the case.¹²¹ The parties' cases are heard by an independent arbitrator, who is empowered to make a binding decision about the case.
- 6.110 The Magistrates' Court monitors the accessibility and ease of use for people claiming in this jurisdiction, including reviewing court information, forms and procedures, 'to ensure that best practices are in place to secure efficient resolution of cases'.¹²²
- 6.111 Relevantly, the Magistrates' Court currently hears fence disputes under the *Fences Act 1969* (Vic), based on the new scheme effected by the *Fences Amendment Act 2014* (Vic).¹²³ These disputes include matters regarding the construction or repair of a dividing fence, such as who pays, what type of fence is built and where it is placed.¹²⁴ The Magistrates' Court has power to make a broad range of orders in relation to fencing disputes.¹²⁵

Flexibility

- 6.112 The Magistrates' Court has attributes which allow it to respond flexibly and efficiently to a wide range of civil matters. The Magistrates' Court sits at 51 metropolitan and regional locations in Victoria¹²⁶ and also operates through specialist court models that are comparatively informal and flexible.¹²⁷ These have been adapted for distinct issues, and are reflected in the Koori Court, the Drug Court of Victoria and the Victims of Crime Assistance Tribunal. The Neighbourhood Justice Division of the Magistrates' Court also sits at the Neighbourhood Justice Centre in the City of Yarra and has jurisdiction to hear a range of matters including fence disputes.¹²⁸

115 *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 38.0.

116 *Ibid* r 4.08. Injunctions may only be granted where a person intends to bring proceedings and undertakes to do so within such time as the court directs.

117 An inferior court exercising equitable jurisdiction has the same power to grant equitable relief, redress or remedy as the Supreme Court would have in a like case: *Supreme Court Act 1986* (Vic) s 31.

118 See generally *Civil Procedure Act 2010* (Vic) pt 4.2.

119 *Ibid* s 48(2)(c).

120 Unless the Court determines otherwise, or if the parties' application to have the matter heard without arbitration is approved by the Court: *Magistrates' Court Act 1989* (Vic) s 102(1)–(3).

121 *Ibid* s 103(2).

122 Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 27.

123 See Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015). See also Magistrates' Court of Victoria, *Information Guide: Fencing Disputes* <www.magistratescourt.vic.gov.au/publication/mcv-information-guide-fencing-disputes>.

124 Magistrates' Court of Victoria, *Fencing Disputes* <www.magistratescourt.vic.gov.au/jurisdictions/civil/fencing-disputes>.

125 Department of Justice and Regulation (Vic), *Fencing Law in Victoria* (12 October 2017) <www.justice.vic.gov.au/home/justice+system/laws+and+regulation/civil+law/fencing+law+in+vic>.

126 Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 1.

127 Magistrates' Court of Victoria, *Specialist Jurisdictions* <www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions>.

128 *Magistrates' Court Act 1989* (Vic) ss 4M, 4O; *Magistrates' Court (Miscellaneous Civil Proceedings) Rules 2010* (Vic) r 11.02(a).

- 6.113 Of all Victorian courts, self-represented litigants appear most frequently in the Magistrates' Court.¹²⁹ The number of people representing themselves in the Magistrates' Court is steadily increasing and the Court is working towards updating its website and forms with clearer information so that self-represented litigants can more easily navigate the Court's practices and procedures.¹³⁰ Furthermore, the 2016 *Access to Justice Review* recommended that the Magistrates' Court should 'develop materials, improve procedures and make increased use of technology to assist self-represented litigants'.¹³¹

Alternative dispute resolution

- 6.114 As well as compulsory arbitration for matters under \$10,000, the Magistrates' Court also offers a variety of mechanisms to support early resolution of disputes, including pre-hearing conferences,¹³² mediation, 'early neutral evaluation' and arbitration.¹³³
- 6.115 Pre-hearing conferences, if directed by the Court, are compulsory for the parties and their lawyers to attend and are generally heard before an experienced Registrar. The Registrar assists the parties by identifying and exploring the issues and by promoting settlement.¹³⁴ If no resolution is reached, the Registrar may make directions for the dispute to proceed to a hearing.¹³⁵
- 6.116 With or without the parties' consent,¹³⁶ the Court may refer them to mediation with a Registrar, a Judicial Registrar or an external mediator such as the DSCV.¹³⁷ As noted above, mediations conducted by the DSCV are free of charge to the parties.¹³⁸ Mediation before a Registrar costs \$252.30, and \$437.70 before a Judicial Registrar.¹³⁹ If the parties select a mediator from the Court's list of approved mediators, there is a flat fee of \$1,320 plus the cost of a mediation venue to be shared between the parties.¹⁴⁰ The standard timeframe for a matter to be mediated as part of the Magistrates' Court process is 60 days.¹⁴¹
- 6.117 A Registrar can also direct a matter to proceed to early neutral evaluation.¹⁴² This process involves a magistrate, in the presence of the parties and their legal representatives, hearing a statement of the relevant evidence and principles of law from each party, facilitating discussion between the parties and presenting a non-binding opinion on the likely outcome of the dispute.¹⁴³
- 6.118 If the parties do not reach a resolution in that forum, their matter can proceed to a hearing. Early neutral evaluation does not prejudice parties' chances in any future hearing, as the magistrate who presided over the process will not determine the case at hearing.¹⁴⁴

129 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—Self-Represented Litigants* (2015) 2.

130 Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 15.

131 Department of Justice and Regulation (Vic), *Access to Justice Review Summary and Recommendations* (2016) 40 (Recommendation 8.5).

132 *Magistrates' Court Act 1989* (Vic) s 107.

133 See *Magistrates' Court General Civil Procedure Rules 2010* (Vic) o 50; Magistrates' Court of Victoria, *Mediation Process 2011—Single List of External Mediators* (2017) <www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>.

134 Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 29.

135 *Magistrates' Court Act 1989* (Vic) ss 107, 107(2)(a); Magistrates' Court of Victoria, *Pre-Hearing Conferences and Mediation* (2017) <www.magistratescourt.vic.gov.au/procedural-information/pre-hearing-conferences-and-mediation>.

136 *Magistrates' Court Act 1989* (Vic) s 108(1).

137 This is the Court Civil Claims program referred to at [3.59]. 'Most defended civil claims in the Magistrates' Court of less than \$40,000 value (or of any value when they relate to an incorporated association) are referred to mediation conducted by the Dispute Settlement Centre of Victoria': Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, (2016) vol 1,202.

138 Dispute Settlement Centre of Victoria, *Frequently Asked Questions* <www.disputes.vic.gov.au/frequently-asked-questions>.

139 Magistrates' Court of Victoria, *Court Fees and Costs Ready Reckoner* (effective 1 July 2017).

140 Magistrates' Court of Victoria, *Mediation Process 2011—Single List of External Mediators* (2017) <www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>.

141 Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 29. The Magistrates' Court website states that the standard court procedure is that once the court indicates that a matter is suitable for mediation, the parties have 21 days to raise any concerns. After 21 days have passed, the court will make a mediation order, and within 14 days the parties nominate a mediator or the court appoints one from a list of approved mediators. Once the parties agree on a mediator, mediation is to be completed within 30 days.

142 Magistrates' Court of Victoria, *Mediation Process 2011—Single List of External Mediators* (2017) <www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>. Early Neutral Evaluation was recognised as a permanent feature of the Magistrates' Court's alternative dispute resolution processes pursuant to Magistrates' Court of Victoria, *Practice Direction No 7 — Early Neutral Evaluation*, 10 September 2012.

143 Magistrates' Court of Victoria, *Annual Report 2014–2015* (2015) 29.

144 See Magistrates' Court of Victoria, *Court Fees and Costs Ready Reckoner* (effective 1 July 2017).

Appeals

- 6.119 Appeals from decisions of judicial registrars are to the Court constituted by a magistrate.¹⁴⁵
- 6.120 Appeals from civil decisions of the Magistrates' Court can be heard by the County Court or the Supreme Court.¹⁴⁶
- 6.121 Appeals on questions of law from final orders of the Magistrates' Court must be heard in the Supreme Court.¹⁴⁷

County Court of Victoria

- 6.122 The County Court has original, unlimited jurisdiction in all civil matters and can hear tree disputes for claims over \$100,000. The cost of bringing a tree dispute in the County Court is higher than the Magistrates' court, with a basic filing fee of \$851.80. This cost is independent of other applicable court fees, such as daily hearing fees and legal representation.

Subject matter expertise

- 6.123 Claims based on tort are heard in the Court's Common Law Division, which comprises eight specialist lists.¹⁴⁸ Tree disputes will generally be heard in the General List.¹⁴⁹
- 6.124 Most tree disputes heard in the County Court have been transferred from the Magistrates' Court.¹⁵⁰

Flexibility

- 6.125 As set out in the governing practice note: 'The aim of the County Court in civil litigation is to list, hear and determine cases quickly and cost-effectively, consistent with the demands of justice and, in particular, with the requirements of the *Civil Procedure Act 2010* (Vic).'¹⁵¹
- 6.126 The County Court sits in Melbourne and in 12 regional locations. These are Bairnsdale, Ballarat, Bendigo, Geelong, Horsham, Mildura, La Trobe Valley (Morwell), Sale, Shepparton, Wangaratta, Warrnambool and Wodonga.¹⁵²
- 6.127 The Court has instituted the County Koori Court, a specialist model that demonstrates the flexibility and adaptability of the Court's practices and procedures to specific matters.¹⁵³
- 6.128 The Court has also published a practice note which outlines the management of self-represented litigants in the Common Law Division.¹⁵⁴ The practice note applies to any matter where one or more litigants are self-represented. It appoints a judge in charge of self-represented litigation and a self-represented litigant coordinator who work together to manage self-represented litigants and the proceedings in which they are a party. For example, once a matter is listed, self-represented litigants are able to contact the coordinator for assistance with the form and content of documents to be filed or

145 *Magistrates' Court Act 1989* (Vic) s 16K.

146 As to appeals to the County Court of Victoria, see: *County Court Civil Procedure Rules 2008* (Vic) o 58.01(a). As to appeals to the Supreme Court of Victoria, see: *Magistrates' Court Act 1989* (Vic) s 109.

147 *Magistrates' Court Act 1989* (Vic) s 109(1). These matters will be heard in the Supreme Court Judicial Review and Appeals List. See Supreme Court of Victoria, *Practice Note SC CL 9 — Judicial Review and Appeals List*, 20 January 2017. See, eg, *City of Richmond v Scantlebury* [1991] 2 VR 3. A question of law, also known as a 'legal error', is 'a question to be resolved by applying legal principles, rather than by determining a factual situation; an issue involving the application or interpretation of a law and reserved for a judge': Peter Butt (ed) *Butterworths' Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) 'question of law'.

148 *County Court Civil Procedure Rules 2008* (Vic) r 34A.04. The eight lists are as follows: General List; Defamation List; Family Property List; General List; Medical List; Serious Injury Applications List; WorkCover List; Confiscation List.

149 See, eg, *Owners' Corporation SPO20030 v Keyt* [2016] VCC 1656 (24 October 2016).

150 'Uplifted', where matters have a complexity or value more suited to the County Court jurisdiction; see [3.73].

151 County Court of Victoria, *Practice Note No 3 of 2017 — Operation and Management of the Lists within the Common Law Division*, 23 August 2017, 3.1. 'Practice Notes provide information about the Court's practice and procedure. They also set out the Court's expectations of parties coming before the Court. While they do not have the force of law, lawyers with the conduct of proceedings are expected to be familiar with their content and follow their requirements where applicable. The Court may take a failure to comply with a Practice Note into account in the exercise of its case management and costs powers': Supreme Court of Victoria, *Practice Note SC Gen 1 — Practice Notes and Notice to the Profession*, 30 January 2017, 4.3.

152 County Court of Victoria, *Court Locations* <www.countycourt.vic.gov.au/court-locations>.

153 Ibid; County Court of Victoria, *County Koori Court* <www.countycourt.vic.gov.au/county-koori-court>.

154 See County Court of Victoria, *Practice Note No 5 of 2016 — Common Law Division—Self Represented Litigation*, 26 May 2016.

issued.¹⁵⁵ Furthermore, after the initial directions hearing, the judge in charge will undertake ‘total pre-trial management of the proceeding’¹⁵⁶ which is intended to ensure that ‘as far as is possible, the matter is in the best position to proceed on the day of trial’.¹⁵⁷

- 6.129 The Court has published information for self-represented litigants on its website. A webpage, ‘Are You Representing Yourself?’, contains contact details of the self-represented litigant coordinator and a short film containing a ‘step by step guide to each major step in a civil proceeding’.¹⁵⁸ There is also a downloadable guide for self-represented litigants.¹⁵⁹
- 6.130 However, it was noted in the *Access to Justice* review that the ‘practices and procedures in the higher courts are more complicated and technical than in the Magistrates’ Court or VCAT’¹⁶⁰ and that self-represented litigants may be disadvantaged and ‘feel disempowered’ by these ‘formal and opaque’ court practices.¹⁶¹ The review recommended ways the higher courts should improve the way they work with self-represented litigants as well as improving interpreter services and establishing a ‘self-representation service’ in conjunction with the community legal sector.¹⁶²

Alternative dispute resolution and judicial mediation

- 6.131 The County Court also employs alternative dispute resolution (ADR) processes and judicial mediation. The Court’s ADR practice, established in 2009, aims to provide parties ‘with a timely and cost effective avenue to have their matter resolved’.¹⁶³ ADR such as mediation is encouraged in the majority of cases.¹⁶⁴ Section 47A of the *County Court Act 1958* (Vic) provides that the Court may, with or without the consent of the parties, refer the whole or any part of a civil proceeding to mediation or arbitration.¹⁶⁵
- 6.132 The Standard Mediation Procedures also sets out the Court’s ‘expectations as to how ... mediation is to be conducted’, including that the parties agree on a mediator, and take all necessary steps to ensure the mediation goes ahead at the appointed day and time.¹⁶⁶
- 6.133 Mediation is initially ordered two to three months before hearing,¹⁶⁷ and further mediation may be ordered at or just before the trial.¹⁶⁸
- 6.134 Mediation is mandatory before any matter proceeds to trial where one or both of the parties are self-represented, unless otherwise ordered by the judge in charge.¹⁶⁹ If the judge in charge is satisfied that it is appropriate, parties may undertake case conferencing instead of mediation.¹⁷⁰
- 6.135 The Court may also use judicial resolution conferences, a form of judicial mediation, in certain matters. Judicial mediation differs from standard mediation in that judicial officers

155 Ibid 20(ii).

156 Ibid 15.

157 County Court of Victoria, *Practice Note No 3 of 2017 — Operation and Management of the Lists within the Common Law Division*, 23 August 2017, 6.1.

158 County Court of Victoria, *Are You Representing Yourself?* <www.countycourt.vic.gov.au/are-you-representing-yourself>. See also County Court of Victoria, *Self-Represented Litigants—County Court of Victoria* (April 2017), Vimeo <<https://vimeo.com/211592938>>.

159 County Court of Victoria, *A Guide for Self-Represented Litigants in the Civil Jurisdiction of the County Court* (23 October 2014) <www.countycourt.vic.gov.au/are-you-representing-yourself>.

160 VCAT is discussed below at [6.153]–[6.191].

161 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—Self-Represented Litigants* 3, 9.

162 Department of Justice and Regulation (Vic), *Access to Justice Review Summary and Recommendations* (2016) Recommendations 8.1–8.2, 8.4.

163 County Court of Victoria, *Civil Jurisdiction* <www.countycourt.vic.gov.au/civil-jurisdiction>.

164 The County Court Standard Mediation Process provides that all proceedings in the Common Law Division, General and Applications Lists will be referred to a mediation. The County Court website details external accredited mediators, including the Victorian Bar, Law Institute of Victoria ADR Mediation Service, The Institute of Arbitrators & Mediators Australia and LEADR: County Court of Victoria, *Mediation* <www.countycourt.vic.gov.au/mediation>.

165 *County Court Act 1958* (Vic) s 47A. See also *County Court Civil Procedure Rules 2008* (Vic) rr 50.07, 50.07.1, 34A.21.

166 The Standard Mediation Procedures document can be downloaded from County Court of Victoria, *Mediation* <www.countycourt.vic.gov.au/mediation>.

167 County Court of Victoria, *Practice Note No 3 of 2017 — Operation and Management of the Lists within the Common Law Division*, 23 August 2017, 29.1.

168 *County Court Act 1958* (Vic) s 47A; *County Court Civil Procedure Rules 2008* (Vic) r 50.07.

169 County Court of Victoria, *Practice Note No 5 of 2016 — Common Law Division: Self Represented Litigation*, 26 May 2016, 47.

170 Ibid 48.

instead of private mediators conduct these conferences.¹⁷¹ For example, in family provision claims where the estate is under \$700,000, parties are 'automatically referred to a judicial resolution conference conducted by a judge, while for claims above that amount, parties can choose private mediation instead. No fee is charged for a conference.'¹⁷²

Appeals

6.136 Appeals from decisions of the County Court are to the Court of Appeal (if the Court of Appeal grants leave to appeal).¹⁷³ Where the County Court decision was made by an Associate Judge, the right of appeal is to the Trial Division of the Supreme Court.¹⁷⁴

Supreme Court of Victoria

6.137 The Supreme Court is the highest court in Victoria and deals with the most serious criminal and civil matters.¹⁷⁵ As discussed at [3.76]–[3.80], the Supreme Court has original, unlimited jurisdiction to hear all civil matters, and is theoretically able to hear large tree disputes under its Common Law Division's Major Torts List. The Supreme Court very rarely hears neighbourhood tree disputes as such, unless a case also involves other legal issues.¹⁷⁶ Costs of bringing a tree dispute in the Supreme Court are higher than the Magistrates' Court and County Court, with a basic filing fee of \$1065.10. This cost is independent of other applicable court fees, such as daily hearing fees and legal representation.

Subject matter expertise

6.138 The Court's Major Torts List 'is designed to facilitate and expedite the passage of large or otherwise significant tortious claims to trial'.¹⁷⁷

6.139 Procedure followed in the Major Torts Lists is set out in a practice note,¹⁷⁸ which outlines the types of proceedings 'suitable for inclusion in the list'. Those potentially relevant to neighbourhood tree disputes are:

- large, complex or otherwise significant tortious claims¹⁷⁹
- tortious claims for economic loss or property damage¹⁸⁰
- nuisance claims, including land contamination claims¹⁸¹
- claims based on intentional torts¹⁸²
- tortious claims of significant public interest.¹⁸³

Flexibility

6.140 The Supreme Court is located in Melbourne. Where a cause of action arises in regional Victoria, parties are directed to initiate the matter in the Civil Circuit List of the Regional Circuit Court, which sits in 12 regional districts across Victoria on scheduled dates throughout the calendar year.¹⁸⁴ The regional districts are Ballarat, Mildura, Bendigo, Sale, Geelong, Shepparton, Hamilton, Wangaratta, Horsham, Warrnambool, Morwell and Wodonga.¹⁸⁵

171 A judicial officer is a judge of the court, associate judge, or judicial registrar.

172 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 203.

173 *County Court Act 1958* (Vic) s 74.

174 *Ibid* s 75.

175 Supreme Court of Victoria, *About the Court* (19 April 2017) <www.supremecourt.vic.gov.au/home/about+the+court/>.

176 See, eg *Barton v Chhibber* [1988] *Aust. Torts Reports* 67, 745 where damage to property as a result of tree roots formed a counter claim.

177 Supreme Court of Victoria, *Major Torts List* (19 September 2017) <www.supremecourt.vic.gov.au/home/law+and+practice/specialist+areas+of+law/major+torts/>.

178 Supreme Court of Victoria, *Practice Note SC CL 4 — Major Torts List*, 30 January 2017.

179 *Ibid* 4.1.

180 *Ibid* 4.2(c).

181 *Ibid* 4.2(d).

182 *Ibid* 4.2(e).

183 *Ibid* 4.2(f).

184 *Ibid* 4.5.

185 Supreme Court of Victoria, *Regional Circuit Court Calendar* (20 June 2017) <www.supremecourt.vic.gov.au/home/going+to+court/court+calendar/regional+circuit+court+calendar/>.

- 6.141 The Supreme Court has taken steps to create greater clarity for self-represented litigants. The Court provides a suite of resources for self-represented litigants on a webpage, 'Representing yourself'.¹⁸⁶ Resources include 'self-help information packs' about starting, defending and appealing a legal action.¹⁸⁷ Litigants can contact and make appointments with the Court's specialist self-represented litigant coordinator who 'is available to assist self-represented litigants with procedural advice, information about alternative dispute resolution, organisations that provide low cost legal services and self-help packs on various types of proceedings'.¹⁸⁸
- 6.142 However, the *Access to Justice* report identified that self-represented litigants in higher courts still experience disadvantage and difficulty in navigating the courts' complex procedures.
- 6.143 The Court has the power to waive its fees under section 129(3) of the *Supreme Court Act 1986* (Vic) on the basis of financial hardship. A person wishing to have their fees waived must complete an application form. In the majority of circumstances, fees are only waived for self-represented litigants.¹⁸⁹

Alternative dispute resolution and judicial mediation

- 6.144 The Supreme Court actively encourages the use of ADR to resolve legal disputes via mediation. The Court also conducts judicial mediation where this process would be most efficient in reaching a resolution.¹⁹⁰
- 6.145 The Court may order parties, even where they do not consent, to undergo mediation at any stage of a proceeding.¹⁹¹ Parties may also ask the Court to refer them to a mediator at any stage of a proceeding.¹⁹²
- 6.146 Judicial mediation is ordered selectively and 'is not a substitute for mediation by appropriately qualified private mediators'.¹⁹³ Judicial mediation may be ordered in the following circumstances:
- an earlier unsuccessful private mediation
 - one or more parties has limited resources
 - a substantial risk that the costs and time of a trial would be disproportionately high compared to the amount in dispute or the subject matter of the dispute
 - an estimated trial length that would occupy substantial judicial and other court resources
 - aspects that otherwise make it in the interests of justice that the matter be referred to judicial mediation.¹⁹⁴

Appeals

- 6.147 The Trial Division of the Court hears and determines cases. Decisions of the Trial Division can be appealed to the Court of Appeal.
- 6.148 The Court of Appeal also has jurisdiction to 'hear an appeal against civil judgments made by the County Court and Supreme Court. The Court may also hear appeals against civil judgments made by the President or Vice-President of VCAT'.¹⁹⁵

186 Supreme Court of Victoria, *Representing Yourself* (17 August 2017) <www.supremecourt.vic.gov.au/home/going+to+court/representing+yourself/>.

187 Ibid.

188 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—Self-Represented Litigants* 4–5.

189 Supreme Court of Victoria, *Fees* (2 June 2017) <www.supremecourt.vic.gov.au/home/forms+fees+and+services/fees/>.

190 Supreme Court of Victoria, *Practice Note SC Gen 6 — Judicial Mediation Guidelines*, 30 January 2017, 4.1.

191 Ibid.; *Civil Procedure Act 2010* (Vic) s 66; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 50. For more information about judicial mediation, see [6.135].

192 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 50.07; Supreme Court of Victoria, *Fees* (2 June 2017) <www.supremecourt.vic.gov.au/home/forms+fees+and+services/fees/>.

193 Supreme Court of Victoria, *Practice Note SC Gen 6 — Judicial Mediation Guidelines*, 30 January 2017.

194 Ibid.

195 Supreme Court of Victoria, *About the Court* (19 April 2017) <www.supremecourt.vic.gov.au/home/about+the+court/>.

6.149 In almost all matters, a direct right of appeal does not exist,¹⁹⁶ and leave must be granted by the Court.¹⁹⁷

Transfer to County Court

6.150 While the Supreme Court has jurisdiction over all matters, including tree disputes, research by the Commission has found only one case of this kind being heard by the Court in the last 30 years.¹⁹⁸ There are very few published decisions of the Supreme Court relating to neighbourhood tree disputes.¹⁹⁹ It is likely that solicitors advise clients to initiate in the County Court, as that court also has unlimited jurisdiction, and is likely to provide a cheaper and quicker resolution than the Supreme Court.

6.151 Cases may be (and would likely be) transferred to the County Court where, in the opinion of the designated judicial officer:

- the Supreme Court does not have exclusive jurisdiction to hear and determine it, and
- the County Court has the appropriate skill, experience and authority to hear and determine it having regard to its gravity, difficulty and importance, and
- it is just and convenient that it be transferred.²⁰⁰

6.152 These considerations are made to further the overall aim to ‘improve efficiency in the administration of civil justice in Victoria’.²⁰¹

Victorian Civil and Administrative Tribunal (VCAT)

6.153 VCAT is a tribunal that hears small civil claims. It was established under the *Victorian Civil and Administrative Tribunal Act 1998*. VCAT is a ‘modern, accessible, efficient, cost-effective, and independent judicially-governed tribunal’.²⁰²

6.154 VCAT comprises four main divisions: the Administrative Division, Civil Division, Human Rights Division and the Residential Tenancies Division. Claims brought before VCAT can be monetary and non-monetary in nature.

6.155 The Civil Division, in which disputes over matters such as consumer issues, domestic building works, and retail tenancies are heard, deals largely with monetary claims.

6.156 In other divisions such as the Residential Tenancies Division and Human Rights Division, claims are more likely to be non-monetary in nature, dealing with issues such as anti-discrimination, tenancy or guardianship.²⁰³

6.157 VCAT derives its jurisdiction to hear and determine claims in these specialised areas from various statutes.²⁰⁴

6.158 Although VCAT is known to handle smaller civil claims,²⁰⁵ there is no limit on the amount that can be claimed in the Civil Division.²⁰⁶ Even more complex claims over the value of \$100,000 can be heard in VCAT.²⁰⁷

196 Except appeals against a refusal to grant habeas corpus and appeals under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

197 Supreme Court of Victoria, *Court of Appeal—Civil Appeals* (29 June 2017) <www.supremecourt.vic.gov.au/home/law+and+practice/court+of+appeal/civil+appeals/>.

198 *Barton v Chhibber* [1988] Aust. Torts Reports [1988] 67, 745.

199 But note *City of Richmond v Scantlebury* [1991] 2 VR 3, transferred from the Magistrates’ Court.

200 *Court (Case Transfer) Act 1991* (Vic) s 16.

201 Ibid.

202 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 245.

203 Ibid. These lists are not exhaustive.

204 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 3 (‘enabling enactment’). See Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016) 58.

205 Generally considered to be claims not exceeding \$10,000. ‘This is consistent with the definition of a ‘small claim’ in Part 2AB of Schedule 1 of the *Victorian Civil and Administrative Act 1998* which applies to proceedings under the *Australian Consumer Law and Fair Trading Act 2012*; and Part 5 of the *Magistrates’ Court Act 1989*’: Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—VCAT* n 5.

206 Ibid 3.

207 Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016) 33. This presents an overlap between the VCAT and Magistrates’ Court jurisdictions. This is discussed in further detail below at [6.183]–[6.186].

- 6.159 VCAT is headed by a president who is a judge of the Supreme Court of Victoria. VCAT also has 13 vice-presidents who are judges from the County Court of Victoria. The president and vice-presidents are responsible for the management and administration of VCAT.
- 6.160 Claims are determined by members who ‘have specialist knowledge and qualifications’, most of whom also have a legal background.²⁰⁸
- 6.161 VCAT deals with a high volume of matters and is significantly less formal than the courts. VCAT’s website states that it is the busiest tribunal of its kind in Australia, finalising 87,448 matters in the 2015–16 financial year.²⁰⁹
- 6.162 Fees to bring a claim at VCAT are significantly lower than in the courts, with most areas applying a sliding scale depending on the amount in dispute. VCAT revised its fees in July 2016, making it more affordable.
- 6.163 The *Access to Justice* report found that this ‘new fee structure adequately meets concerns about the affordability of commencing applications for small civil claims’.²¹⁰ Individuals are charged lower fees than corporate parties, and those with a health-care concession card can often have their fees waived.²¹¹

Subject matter expertise

- 6.164 As VCAT does not have jurisdiction over common law matters, it does not currently hear tree disputes.²¹²
- 6.165 However, VCAT does have substantial jurisdiction over a number of areas that intersect with planning, environment and land issues. Some of the areas in which VCAT hears matters include:
- disputes over the use or development of land, including applications relating to natural resources (including unreasonable flow of water from surrounding properties), and applications relating to protection of the environment and removal of vegetation
 - building and construction, including domestic building claims and applications for injunctions
 - land valuation
 - disputes about co-owned land and goods under the *Property Law Act 1958*
 - residential tenancies disputes
 - owners corporation disputes.
- 6.166 As stated above, VCAT has specialist divisions and lists dealing with specific types of disputes, and its members have, in addition to legal backgrounds, various types of specialist expertise.²¹³ There were 237 VCAT members in the 2015–16 financial year.²¹⁴
- 6.167 VCAT’s specialist members ‘must possess in-depth and up-to-date expert knowledge’ of the relevant subject matter.²¹⁵ Similar requirements apply to commissioners of NSWLEC and members of QCAT and RMPAT.

208 Victorian Civil and Administrative Tribunal, *Who We Are* <www.vcat.vic.gov.au/about-us/who-we-are>.
 209 Victorian Civil and Administrative Tribunal, *About VCAT* <www.vcat.vic.gov.au/about-vcat>; Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016) 33.
 210 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 283–3.
 211 Victorian Civil and Administrative Tribunal, *VCAT Fees Table* (4 July 2017) <www.vcat.vic.gov.au/resources/vcat-fee-tables-effective-1-july-2017>.
 212 In the form of common law nuisance or negligence.
 213 Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016) 6.
 214 Ibid.
 215 Victorian Civil and Administrative Tribunal, *Member Competency Framework* (2010) 4.

Flexibility

- 6.168 VCAT's primary location is in central Melbourne. VCAT also hears cases in various Magistrates' Court locations and local council customer service offices across metropolitan Melbourne and regional Victoria.²¹⁶ VCAT also sits at the Neighbourhood Justice Centre in the City of Yarra.²¹⁷
- 6.169 VCAT's processes differ from those of a court.²¹⁸ On the webpage entitled 'Steps to resolve your case', parties are informed that 'VCAT is deliberately less formal than a court and we encourage you to represent yourself where possible'.²¹⁹ In fact, parties may only appear with legal representation in limited circumstances, with VCAT's permission.²²⁰
- 6.170 Through VCAT's website parties can access informative materials to help guide them through VCAT's processes. VCAT has also produced a video entitled *Taking it to VCAT*, available on YouTube and the VCAT website.²²¹ Information about VCAT's process and procedures is also available through the registries and the litigant in person co-ordinator.
- 6.171 The *Access to Justice* report noted that VCAT's active case management is also of assistance to parties. It provides an example of active case management in VCAT's Human Rights List:
- once a person has filed their matter, VCAT will serve the documents on the respondent and, in some cases, contact the parties to discuss the matter proceeding direct to a compulsory conference or mediation. Alternatively, the case will be listed for a directions hearing where VCAT's processes are explained and discussed with the parties.²²²

Alternative dispute resolution

- 6.172 VCAT uses a range of ADR processes to help parties resolve their dispute without a full hearing. They are conducted by 'members, staff, and external mediators from a panel who are engaged on a sessional basis'.²²³
- 6.173 The principal registrar may require parties to undergo compulsory conferencing, a private and confidential meeting in which a member will assist the parties identify the issues in contention, and questions of fact and law. Compulsory conferences take place before a hearing and allow the member to take an active role in helping to resolve the dispute. If resolution cannot be achieved through the compulsory conference then the member can issue orders and directions for the final hearing. Parties do not incur additional costs for compulsory conferencing.²²⁴
- 6.174 Parties may also, with or without consent, undergo mediation with a member or accredited mediator. Conversations during mediation are confidential and cannot be used in hearings. Mediation may target all the issues in a proceeding or a subset of them. The mediator or member's role is less active than in compulsory conferencing, as they cannot 'give advice about a party's prospects of success' or 'put forward options for settlement of the proceeding'.²²⁵

216 Victorian Civil and Administrative Tribunal, *Contact us* <www.vcat.vic.gov.au/contact-us>.
217 Neighbourhood Justice Centre, *At Court* (19 December 2014) <www.neighbourhoodjustice.vic.gov.au/home/court/at+court/index.html>.
218 Victorian Civil and Administrative Tribunal, Submission No 34 to Victorian Government, *Access to Justice Review*, 2016, 1.
219 Victorian Civil and Administrative Tribunal, *Steps to Resolve Your Case* <www.vcat.vic.gov.au/steps-to-resolve-your-case>.
220 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper — Self-Represented Litigants 4*; Victorian Civil and Administrative Tribunal, *About VCAT* <www.vcat.vic.gov.au/about-vcat>.
221 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 113.
222 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper — Self-Represented Litigants 5*.
223 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 204.
224 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 83; Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, (2016) vol 1 204–5; Victorian Civil and Administrative Tribunal, *Compulsory Conferences* <www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/compulsory-conferences>.
225 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88; Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, (2016) vol 1 204–5; Victorian Civil and Administrative Tribunal, *Mediations* <www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/mediations>.

- 6.175 For some Civil Division claims for goods and services under \$3000 (without counter claims), parties may participate in VCAT’s Short Mediation and Hearing Program which consists of a one-hour mediation session conducted by VCAT registry staff with suitable accreditation. If unresolved, the dispute will proceed to a final hearing on the same day.²²⁶
- 6.176 If parties resolve their dispute and reach an agreement, VCAT can confirm the agreement in legally binding consent orders.²²⁷
- 6.177 The *Access to Justice* report made recommendations to improve and expand VCAT’s ADR processes. These include partnering with the Dispute Settlement Centre of Victoria to expand its ADR services and expanding its short mediation and hearing program, including into regional areas.²²⁸

Appeals

- 6.178 There is a limited right to appeal VCAT decisions, with most decisions being final and binding.²²⁹ A party may appeal a VCAT decision to the Supreme Court but only on questions of law (legal errors).²³⁰ This limit on appeals is designed to provide certainty and clarity once VCAT makes a determination.²³¹
- 6.179 Parties who wish to appeal a decision made by a VCAT member must seek leave to appeal a question of law from the Supreme Court.
- 6.180 Parties who wish to appeal a decision made by the President or Vice-President of VCAT must seek leave to appeal a question of law from the Court of Appeal.²³²
- 6.181 An application seeking leave to appeal must be made no later than 28 days after VCAT makes an order and in accordance with the rules of the Supreme Court.²³³ VCAT advises parties to seek legal advice or contact the Supreme Court’s self-represented litigant coordinator for assistance as soon as VCAT makes a determination.²³⁴
- 6.182 If leave to appeal is granted then the appeal must be filed in the Supreme Court within 14 days.²³⁵

Concurrent jurisdiction and transfer to the Magistrates’ Court

- 6.183 VCAT can hear civil claims under \$100,000. This coincides with the jurisdiction of the Magistrates Court, particularly in relation to ‘debts, damages for breach of contract, other contractual disputes, and claims under the Australian Consumer Law’.²³⁶
- 6.184 Reasons why a person may elect to bring a matter in VCAT rather than the Magistrates’ Court include:
- The proceedings are less formal.
 - It is easier to bring a claim without legal representation.
 - The costs are lower.

226 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 204–5; Victorian Civil and Administrative Tribunal, *Mediations* <www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/mediations>.

227 Victorian Civil and Administrative Tribunal, *Consent Orders* <www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/consent-orders>.

228 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, (2016) vol 1 Recommendation 4.3

229 Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016) 6.

230 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).

231 Victorian Civil and Administrative Tribunal, *Annual Report 2015–16* (2016) 6.

232 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.

233 *Ibid* s 148(2).

234 Victorian Civil and Administrative Tribunal, *Appeal a VCAT Decision* <www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/appeal-a-vcat-decision>.

235 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(3)(a).

236 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—VCAT 4*.

- 6.185 However, VCAT does not have the same powers as the Magistrates' Court in relation to similar claims. For example, VCAT 'cannot award costs in small civil claims in the Civil Claims List, whereas costs are usually awarded to the successful party in a Magistrates' Court matter'.²³⁷
- 6.186 Actions brought in the Magistrates' Court can also be transferred to VCAT on the request of the person against whom the action is brought if it would be more appropriate for the case to be heard by VCAT.²³⁸

VCAT and 1998 Fences Review

- 6.187 The possibility of conferring jurisdiction to hear neighbourhood disputes about fences was previously explored in Victoria by the Parliamentary Law Reform Committee (a different body from the Victorian Law Reform Commission) in its 1998 review of the Fences Act. In its report, the Committee provides useful commentary on its recommendation that VCAT, rather than the Magistrates' Court, should be given power to hear comparable neighbourhood disputes:

VCAT could perform a larger role in providing an efficient and cost effective forum for the resolution of a wider range of neighbour disputes. Consequently, the Committee recommends the creation of a 'Neighbour Disputes' Division of the Tribunal with the jurisdiction under the proposed Boundaries and Dividing Fences Act at its core.²³⁹

- 6.188 This recommendation was not, however, implemented. The government's 2001 response to this recommendation provides some context:

The Government ... notes that there are complex issues to be considered in the relocation of any jurisdiction. In particular, the Government is concerned that regional and rural Victoria remain serviced in the comprehensive manner in which they are currently serviced by local Magistrates' courts. It proposes to consider further the necessity of an entirely new Division at the Tribunal, and whether broader disputes would be better resolved in another arena.²⁴⁰

- 6.189 The government also stated that if jurisdiction were to be given to VCAT, then the powers conferred on VCAT 'would not be large but limited to determination of disputes on defined matters under that Act, ensuring that there was no overlap with building or planning legislation'. Currently, fencing disputes are heard in the Magistrates' Court.
- 6.190 Whether or not tree disputes should continue to be heard in the Magistrates' Court or in another forum is a key consideration in the design of a new scheme.
- 6.191 Stakeholders may wish to take into account the following factors when considering which jurisdiction should hear tree disputes:
- the cost of proceedings
 - the formality of proceedings
 - the capacity of parties to participate in proceedings/ability to represent themselves
 - the expertise of the arbiters
 - the powers available to the arbiters
 - the resources of the court/tribunal
 - the location of the court/tribunal.

237 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s cl 41 of sch 1; Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—VCAT 4*.

238 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—VCAT 4*.

239 Law Reform Committee, Parliament of Victoria, *Review of the Fences Act 1968* (1998) 2.32.

240 Victorian Government, *Government Response to the Victorian Law Reform Committee Review of the Fences Act 1968* (2001) 1–2.

Question

- 21 Which court/s or tribunal should have jurisdiction over neighbourhood tree disputes under a statutory scheme?

(g) Preconditions

- 6.192 Some preconditions (or ‘jurisdictional facts’) must be met before a court (or tribunal) can make orders.²⁴¹
- 6.193 In New South Wales, the NSWLEC needs to be satisfied that the following preconditions have been met before making any orders:
- Parties have made a reasonable effort to resolve the dispute among themselves before commencing an application.²⁴²
 - Appropriate notice has been given. An affected neighbour must give the tree owner, local council or any other person likely to be affected by an order at least 21 days notice of the lodging of the application and the orders they wish to seek.²⁴³
 - The tree concerned has caused or is likely to cause the damage or harm claimed by the affected neighbour.²⁴⁴
- 6.194 One of the ways a reasonable effort to reach an agreement may be demonstrated is by writing to the other party informing them of any concerns or engaging in mediation.²⁴⁵ The presence of parties at a hearing may also demonstrate a reasonable effort in and of itself. Chief Justice Preston in *Robson v Leischke* explained that this requirement is ‘less demanding than the language used in provisions of other statutory enactments which require parties to make reasonable attempts to reach agreement’²⁴⁶ and that exhaustive negotiation is not required.²⁴⁷ A reasonable effort does not need to be made before the filing of an application but does need to be made before the court makes any orders.²⁴⁸
- 6.195 In order for the tree concerned to have caused or be likely to cause damage or harm, there must be a relationship between the tree and the damage or harm alleged in the application.²⁴⁹ Although the tree does not need to be the sole cause of the damage or harm alleged, ‘something more than a theoretical possibility is required in order to engage the power under [the NSW Act]’.²⁵⁰ Furthermore, the tree itself must be the cause of damage or harm. Chief Justice Preston explains in *Robson v Leischke*:²⁵¹

although a tree when it flowers might attract bees seeking nectar in the flowers, and the presence of the bees might increase the risk of persons in the vicinity being stung by bees, it is not the tree itself that is likely to cause such injury of bee sting to any person, but rather it is the bees: see *Immarrata v Mourikis* [2007] NSWLEC 601. Similarly, the fact that an animal which has caused, is causing or is likely to cause in the near future damage to property on adjoining land, uses a tree as habitat, such as for feeding, roosting or nesting, does not result in the tree itself having caused, causing or being likely to cause in the near future damage to the applicant’s property: *Dooley v Newell* [2007] NSWLEC 715 at [22]–[23].

241 These limit the court’s valid exercise of power to meet the ‘description of the action to which the legislation in question attaches a legal consequence’: Mark Leeming, ‘The Riddle of Jurisdictional Error’ (2014) 38 *Australian Bar Review* 152.

242 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 8.

243 Ibid.

244 Ibid s 10(2).

245 *Aarons v MacDonell as Executor to the Estate of the late Ronald Ayres* [2015] NSWLEC 1058 (18 March 2015) [15].

246 *Robson v Leischke* (2008) 72 NSWLR 98 [195].

247 Ibid citing *Antipas v Kutcher* (2006) 144 LGERA 289, 293 [14].

248 *Aarons v MacDonell as Executor to the Estate of the late Ronald Ayres* [2015] NSWLEC 1058 (18 March 2015) [15].

249 *Robson v Leischke* (2008) 72 NSWLR 98 [176]–[189].

250 *Smith v Zhang* [2011] NSWLEC 29 (4 March 2011) [62] (Craig J).

251 (2008) 72 NSWLR 98 [189].

- 6.196 In Queensland, QCAT needs to be satisfied that the following preconditions have been met before the making of any orders:
- The affected neighbour has made a reasonable effort to reach an agreement with the tree owner.
 - The affected neighbour has taken all reasonable steps to resolve the issue under any other applicable law or scheme.
 - The affected neighbour has provided the tree owner with copies of the application with at least 21 days notice.
 - In the case of overhanging branches, that the branches extend into the affected neighbour's land by at least 50 centimetres and the dispute cannot be resolved under the Part 4 branch removal process.²⁵²
- 6.197 One way a reasonable effort to reach an agreement may be demonstrated is by writing to the tree owner to request certain works to be performed on their tree,²⁵³ engaging in mediation²⁵⁴ or participating in compulsory conferencing ordered by the Tribunal. A reasonable effort does not need to be made before an application is filed but does need to be made before a final decision in a proceeding.²⁵⁵
- 6.198 In Tasmania, the affected neighbour must give 'notice in writing of an application, the grounds of the application and the nature of the relief sought' to the tree owner and any other interested party.²⁵⁶ Additionally, RMPAT must consider, before hearing an application, whether 'reasonable attempts to resolve the matter ... have been made by the parties'.²⁵⁷ This differs from New South Wales and Queensland, where the decision maker must be satisfied a reasonable effort to resolve the matter has been made before making orders.²⁵⁸
- 6.199 In determining whether a reasonable attempt has been made, RMPAT will consider whether the notice and request processes set out in the Tasmanian Act have been followed, and any refusals to carry out work for reasons of the health and safety of the tree or people on the land.²⁵⁹
- 6.200 If reasonable efforts have not been made, RMPAT 'may direct the parties to an application to attempt to resolve the matter'. In doing so, RMPAT may take into account whether parties have made any threats of violence; have successfully obtained orders restraining any behaviour; or have already participated in any form of dispute resolution.²⁶⁰
- 6.201 In Victoria, parties in a dispute being litigated in the Magistrates' Court, County Court and Supreme Court are bound by the 'overarching obligations' set out in the *Civil Procedure Act 2010* (Vic).²⁶¹ These overarching obligations place similar emphasis on attempting to resolve a dispute as the New South Wales, Queensland and Tasmanian Acts.
- 6.202 Parties have an overarching obligation to:
- use reasonable endeavours to resolve a dispute by agreement if appropriate, including by appropriate dispute resolution²⁶²
 - narrow the issues in dispute. If parties cannot resolve a dispute wholly by agreement then parties must use reasonable endeavours to resolve issues that can be resolved and narrow the scope of remaining issues.²⁶³

252 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 65.

253 *Wiseman v RPD Qld Pty Ltd* [2017] QCAT 81 (9 March 2017).

254 Queensland Civil and Administrative Tribunal, *Tree Dispute Resolution* (March 2017) version 4, 1.

255 *Moreno v Parer* [2017] QCAT 223 (12 June 2017) [24].

256 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 24.

257 *Ibid* s 26(1)(a)–(b). A history of threats of violence between the parties, and any prior attempt at alternative dispute resolution will inform the Tribunal's decision to refer the parties to resolve the dispute themselves.

258 See [6.193], [6.196].

259 *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 26(2)(a)–(b).

260 *Ibid* s 26(3).

261 *Civil Procedure Act 2010* (Vic) s 1.

262 *Ibid* s 22.

263 *Ibid* s 23.

- 6.203 Although the *Civil Procedure Act 2010* (Vic) applies to all Victorian courts, it does not apply to matters heard in VCAT.²⁶⁴
- 6.204 However, if the overarching obligations are not fulfilled, this does not prevent parties from commencing litigation. As noted in the 2016 *Access to Justice Review*:
- The Civil Procedure Act, as passed, included a general preaction protocol that prevented litigants from commencing proceedings (with some limited exceptions) before they had taken reasonable steps to resolve the dispute by agreement, or to clarify and narrow the issues in dispute. Following a change of government, those provisions were repealed before the Act commenced, due to concerns that they would add to the complexity, costs, and delays of civil proceedings, and could be used to frustrate proceedings.²⁶⁵
- 6.205 Any necessary preconditions under a new scheme, and their interaction with the *Civil Procedure Act 2010* obligations would need to be clearly defined.

Question

- 22 What preconditions, if any, should parties have to satisfy under a statutory scheme before any orders are made?

(h) Decision-making factors

- 6.206 The New South Wales, Queensland and Tasmanian Acts require the decision makers to take certain factors into account when coming to a decision. Decision makers in New South Wales and Queensland *must* consider all of these factors.²⁶⁶ In Tasmania, decision makers must consider these factors but only to the extent that they are relevant.²⁶⁷
- 6.207 Factors to be considered which are common to all three Acts include:
- contribution the tree makes to the local ecosystem and to biodiversity
 - public amenity of the tree
 - impact of works such as pruning to the health of the tree
 - soil stability, the water table or other natural features of the land or locality
 - local laws and Acts, and what consent is needed
 - type of tree and whether it is native, protected or considered a pest
 - seasonal changes
 - contribution to natural landscape, privacy and protection from natural elements.
- 6.208 Decision makers in each of these jurisdictions are not limited to these factors and are able to consider other factors they consider relevant.
- 6.209 Factors to be considered in each jurisdiction are set out below.²⁶⁸

264 Ibid s 3.

265 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations*, vol 1 (2016) 204.

266 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14F; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30.

267 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30.

268 Sub-sections relating solely to claims about sunlight and/or views have been removed.

Table 2: Decision-making factors in New South Wales, Queensland and Tasmania

New South Wales <i>Trees (Disputes Between Neighbours Act 2006 (NSW) s 14F</i>	Queensland <i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 73</i>	Tasmania <i>Neighbourhood Disputes About Plants Act 2017 (Tas) s 30</i>
<p>(a) the location of the trees concerned in relation to the boundary of the land on which the trees are situated and the dwelling the subject of the application, ...</p> <p>(d) whether interference with the trees would, in the absence of section 6 (3), require any consent or other authorisation under the <i>Environmental Planning and Assessment Act 1979</i> or the <i>Heritage Act 1977</i> and, if so, whether any such consent or authorisation has been obtained,</p> <p>(e) any other relevant development consent requirements or conditions relating to the applicant's land or the land on which the trees are situated,</p> <p>(f) whether the trees have any historical, cultural, social or scientific value,</p> <p>(g) any contribution of the trees to the local ecosystem and biodiversity,</p> <p>(h) any contribution of the trees to the natural landscape and scenic value of the land on which they are situated or the locality concerned,</p> <p>(i) the intrinsic value of the trees to public amenity,</p> <p>(Continues next page)</p>	<p>(a) the location of the tree in relation to the boundary of the land on which the tree is situated and any premises, fence or other structure affected by the location of the tree;</p> <p>(b) whether carrying out work on the tree would require any consent or other authorisation under another Act and, if so, whether the consent or authorisation has been obtained;</p> <p>(c) whether the tree has any historical, cultural, social or scientific value;</p> <p>(d) any contribution the tree makes to the local ecosystem and to biodiversity;</p> <p>(e) any contribution the tree makes to the natural landscape and the scenic value of the land or locality;</p> <p>(f) any contribution the tree makes to public amenity;</p> <p>(g) any contribution the tree makes to the amenity of the land on which it is situated, including its contribution relating to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke;</p> <p>(Continues next page)</p>	<p>(a) the provisions of a planning scheme, within the meaning of the <i>Land Use Planning and Approvals Act 1993</i>, that applies to the land, including—</p> <p>(i) the zone, under the <i>Land Use Planning and Approvals Act 1993</i>, of the land and</p> <p>(ii) any designation, and requirements, that apply in relation to plants and</p> <p>(iii) any height restrictions, or requirements as to setback, that apply under that scheme in relation to the land</p> <p>(b) the location of the plant in relation to the boundary of the land</p> <p>(c) any risks associated with soil instability, or changes to the water table, that may be caused by the work required under a proposed order</p> <p>(d) whether the plant, or any risk, obstruction or interference related to the plant, existed before the applicant purchased or first began to occupy the land that is affected by the plant</p> <p>(Continues next page)</p>

New South Wales <i>(continued)</i>	Queensland <i>(continued)</i>	Tasmania <i>(continued)</i>
<p>(j) any impact of the trees on soil stability, the water table or other natural features of the land or locality concerned,</p> <p>(k) the impact any pruning (including the maintenance of the trees at a certain height, width or shape) would have on the trees,</p> <p>(l) any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated,</p> <p>(n) any steps taken by the applicant or the owner of the land on which the trees are situated to prevent or rectify the obstruction,</p> <p>(p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves, ...</p> <p>(s) such other matters as the Court considers relevant in the circumstances of the case.</p>	<p>(h) any impact the tree has on soil stability, the water table or other natural features of the land or locality;</p> <p>(i) any risks associated with the tree in the event of a cyclone or other extreme weather event;</p> <p>(j) the likely impact on the tree of pruning it, including the impact on the tree of maintaining it at a particular height, width or shape;</p> <p>(k) the type of tree, including whether the species of tree is a pest or weed (however described) or falls under a similar category under an Act or a local law.</p>	<p>(e) whether any work in relation to the plant would require any consent or other authorisation under any other Act</p> <p>(f) the type of plant, including whether it is a pest or weed under any other Act</p> <p>(g) the extent to which the plant contributes to the amenity of the land, including by providing privacy, protection from sun, wind, noise, odour or smoke or by contributing to the landscaping or garden design on the land</p> <p>(h) any risk associated with the plant due to weather or in the event of a storm or other extreme weather event</p> <p>(i) the likely effect on the plant of pruning it.</p>

- 6.210 By way of further guidance, the Queensland Act explains that a tree's 'historical, cultural, social or scientific value' includes whether the tree comes under the *Aboriginal Cultural Heritage Act 2003*, *Torres Strait Islander Cultural Heritage Act 2003* or is situated in a Queensland heritage place under the *Queensland Heritage Act 1992*.²⁶⁹ The Queensland Act also states that 'no financial value or carbon trading value may be placed on a tree'.²⁷⁰
- 6.211 The Queensland and Tasmanian Acts set out some additional factors that *may* be considered by the decision makers in particular circumstances, such as claims about injury, damage or unreasonable interference, and when deciding to order the destruction of a tree. The decision maker is not bound to consider all these additional factors.
- 6.212 In relation to claims about injury, damage or unreasonable interference, the decision maker *may* consider:
- whether anything other than the tree has contributed, or is contributing, to the injury or damage or likelihood of injury or damage, including any act or omission by the neighbour and the impact of any tree situated on the neighbour's land
 - any steps taken by the tree-keeper or the neighbour to prevent or rectify the injury or damage or the likelihood of injury or damage.
- 6.213 In relation to claims concerning substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land, the decision maker *may* consider:
- anything other than the tree that has contributed, or is contributing, to the interference
 - any steps taken by the tree-keeper or the neighbour to prevent or minimise the interference
 - the size of the neighbour's land
 - whether the tree existed before the neighbour acquired the land.
- 6.214 The Tasmanian Act goes on to state that the decision maker may also consider any other matter considered to be relevant.²⁷¹
- 6.215 In relation to orders for the destruction of a tree, the decision maker *may* consider:
- how long the neighbour has known of the injury or damage
 - any steps that have been taken by either neighbour to prevent further injury or damage
 - anything other than the tree that may have caused, or contributed to, some or all of the injury or damage
 - any other matter considered to be relevant.²⁷²
- 6.216 As can be seen in Table 2, some of the general factors from New South Wales have been replicated in the later Queensland Act. Most of the general and specific factors from the Queensland Act have then been replicated in the more recent Tasmanian Act. These factors may provide a basis from which to model any similar factors in Victoria. However, as reflected by differences in the existing state Acts, there may also be unique factors relevant to Victoria that should be taken into account by the decision maker.

269 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(c).
270 *Ibid* s 73(3).
271 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 32(f).
272 *Ibid* s 31(2)(a)–(d).

Questions

- 23 What factors should be taken into account by the decision maker before making any determinations under a statutory scheme?
- 24 Should there be a hierarchy or relative weight for each of these factors? If so, how should this be determined?

(i) Types of orders and enforcement

- 6.217 The NSW Act sets out the types of order that the NSWLEC can make in tree disputes.²⁷³ The NSWLEC has broad jurisdiction to make 'such orders as it thinks fit to remedy, restrain or prevent' and it is not limited to orders requested by the parties.²⁷⁴ Examples of such orders include:
- seasonal or annual maintenance works
 - authorisation to enter land to carry out work or obtain quotations for work
 - payment of costs of works
 - payment of compensation
 - replacement of trees ordered to be removed.²⁷⁵
- 6.218 Payment of compensation is only available for claims based on damage.²⁷⁶ The NSWLEC cannot make orders as to costs²⁷⁷—parties must instead file a Notice of Motion that would be heard by a Registrar or judge of the court.²⁷⁸
- 6.219 Failure to comply with an order is an offence with a maximum of 1000 penalty units.²⁷⁹ On the request of the affected neighbour, local council may also arrange for an authorised person to enter the tree owner's land to ascertain whether any orders relating to tree works have been carried out and, if not, arrange for the works to be carried out. The local council must give a signed notice to the tree owner that contains details such as the relevant provisions of the NSW Act, the day the authorised person will enter and for what purpose.²⁸⁰ The local council can bring legal action to recoup any costs incurred for carrying out the order. A judgment debt can be registered as a charge on the tree owner's land.²⁸¹
- 6.220 The Queensland Act also sets out the types of orders that can be made.²⁸² QCAT can make any orders it considers necessary to remedy, restrain or prevent. The content of these orders depends on the circumstances of the dispute and can include orders for:
- annual maintenance work
 - a survey to clarify who owns the tree
 - a person to enter the tree owner's land to obtain a quote or to carry out work
 - compensation or repair costs relating to damage caused

273 *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 9, 14D.

274 *Ibid* s 14D; Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 8.

275 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 8.

276 New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016).

277 'Costs refer to the financial outlay incurred by a party in defending or pursuing proceedings before the Tribunal. Costs may include the retaining of a solicitor/barrister to act for a party, retaining an expert witness to give evidence or retaining a planning consultant to assist a party in an appeal. It may also include disbursements such as photocopying and faxing': Resource Management and Planning Appeal Tribunal, *Practice Direction No 15 — Costs*, amended 1 March 2016, 15.2.

278 *Fang v Li* [2017] NSWLEC 1503 (19 September 2017) [11].

279 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 15.

280 *Ibid* s 17.

281 *Ibid* ss 17(8), 17A.

282 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.

- an arborist to check and write a report on the tree
 - removal of the tree.²⁸³
- 6.221 If QCAT orders the removal of a tree, it can also make orders for the replacement of the tree with a more appropriate tree of different maturity or species and, if appropriate, for it to be placed in a more appropriate location on the tree owner's land.²⁸⁴
- 6.222 QCAT can make orders to compensate the affected neighbour for damage, even if the tree has already been completely removed. However, QCAT can not do so in respect of a tree completely removed if the tree owner has since sold the land.²⁸⁵
- 6.223 Each party in a QCAT matter must bear their own costs. QCAT usually does not make orders as to costs except where it 'considers the interests of justice require it'.²⁸⁶ QCAT may consider factors set out in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) in coming to a decision.²⁸⁷
- 6.224 If the tree owner fails to follow an order without reasonable excuse, they can be held liable for an offence with a maximum of 1000 penalty units.²⁸⁸
- 6.225 Like the Act, the Queensland Act also provides a 'last resort' enforcement mechanism through local council in the case where the tree owner fails to carry out a QCAT order. The affected neighbour can contact their local council and ask that it carry out the order because the tree owner has failed to do so. The local council is under no obligation to follow this request.²⁸⁹
- 6.226 In its statutory review of the Queensland Act, the Queensland Law Reform Commission (QLRC) reported that this mechanism is not frequently used but 'considers it appropriate for the [Queensland] Act to continue to include provisions to allow a local [council] to carry out work under a tree order if the tree-keeper has failed to comply, particularly for cases where the tree poses a significant danger'.²⁹⁰
- 6.227 The QLRC also stated that the non-obligatory nature of this mechanism should be retained because it 'is concerned that, if assistance were made obligatory, local [councils] would need to establish new procedures with additional attendant expenses, which may have unintended implications'.²⁹¹
- 6.228 In Tasmania, the tribunal can make orders in relation to a tree to:
- ensure that parts of the tree do not overhang
 - prevent or reduce the likelihood of a serious injury
 - prevent, restrain or reduce the likelihood of serious damage
 - prevent or reduce the likelihood of substantial, ongoing and unreasonable interference
 - remedy damage caused to a person's land or any property on that land.²⁹²
- 6.229 Parties to a proceeding in RMPAT must bear their own costs. However, as in QCAT, RMPAT can make orders as to costs if it considers it 'fair and reasonable'.²⁹³ The *Resource Management and Planning Appeal Tribunal Act 1993* sets out factors RMPAT may take into consideration in coming to a decision.²⁹⁴

283 Ibid s 66; Queensland Government, *What to Do If a Neighbour's Tree is Affecting You* (30 October 2015) <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/what-to-do-if-a-neighbours-tree-is-affecting-you/>.

284 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 69.

285 Ibid s 68.

286 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(1).

287 Ibid s 102(3).

288 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 77.

289 Ibid s 88.

290 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) [5.93].

291 Ibid [5.94].

292 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 33(1)–(6).

293 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 28(1)–(2). See also Resource Management and Planning Appeal Tribunal, *Practice Direction No 15 — Costs*, amended 1 March 2016.

294 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 28(3).

- 6.230 Specific examples of these types of orders include:
- compelling the tree owner to carry out final or ongoing tree works
 - requiring a survey to be undertaken to clarify the tree's position in relation to a boundary line
 - requiring an application for consent from a relevant authority
 - authorising the entry of a person onto land to carry out an order
 - requiring the tree owner to pay the costs of carrying out an order or pay the affected neighbour compensation for damage
 - requiring a report to be obtained from an appropriately qualified arborist.²⁹⁵
- 6.231 The Tasmanian Act does not set out penalties for parties who fail to follow RMPAT's orders.²⁹⁶ Where an order is not complied with, the aggrieved party may take legal action for non-compliance in the Civil Division of the Tasmanian Magistrates' Court.²⁹⁷
- 6.232 Consideration must be given to appropriate orders and enforcement under any new Victorian scheme.

Questions

- 25 What types of orders should be available under a statutory scheme?
- 26 How should these orders be enforced?

(j) Effect on current law

- 6.233 As described in Chapter 3, the resolution of tree disputes is governed by tort law, with neighbours relying primarily on the common law self-help remedy of abatement, and seeking relief under the law of nuisance.
- 6.234 As described in Chapter 4, trees on private land may be subject to environment and planning legislation as well as local laws.
- 6.235 It is therefore important to consider how a new scheme would interact with torts, such as nuisance, as well as how orders issued by any decision-making body in relation to a tree dispute would interact with environment and planning legislation and local laws.
- 6.236 Approaches in New South Wales, Queensland and Tasmania are explored below and provide examples of possible approaches.

Nuisance and abatement

- 6.237 The NSW Act abolishes the right to bring common law actions in nuisance in relation to tree disputes that fall under the remit of the Act.²⁹⁸
- 6.238 In *Robson v Leischke*,²⁹⁹ Chief Justice Preston noted, however, that this provision does not affect other common law actions such as trespass and negligence. He stated that despite the provision barring nuisance claims, the NSW Act:

²⁹⁵ Ibid s 33(6). Orders that the tribunal can make are not limited to these examples.

²⁹⁶ Ibid s 34(1).

²⁹⁷ Resource Management and Planning Appeal Tribunal, *Practice Direction No 14 — Civil Enforcement Proceedings*, amended 1 March 2016, 14.12.

²⁹⁸ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 5.
²⁹⁹ (2008) 72 NSWLR 98 [218]–[219].

contains no limitation on bringing common law actions in trespass or negligence, regardless of whether the tree concerned is one to which the [Act] applies. The Land and Environment Court, however, has no original jurisdiction to hear and determine such common law actions, nor would such actions be ancillary to a matter that falls within jurisdiction such as an application under the [Act] but rather are separate causes of action[.]

- 6.239 Furthermore, Chief Justice Preston stated that ‘if the damage is caused by a tree to which the NSW Act does not apply’, such as a tree on land outside permitted zones or on public land, then ‘a common law action in nuisance can still be brought’.³⁰⁰
- 6.240 Although an affected neighbour cannot bring a claim for nuisance in respect of a tree that is captured by the NSW Act, they can still exercise the self-help remedy of abatement. However, it has been noted that an affected neighbour’s ability to abate may be significantly limited, due to the prevalence of local council tree protection orders which require not only the local council’s but also the tree owner’s consent to remove encroaching parts.³⁰¹
- 6.241 In Queensland, nuisance claims are not prohibited under the Queensland Act in the explicit manner of the NSW Act. However, the actions available under the Queensland Act, such as for the ‘substantial, ongoing and unreasonable interference with the neighbour’s use and enjoyment of the land’,³⁰² are underpinned by general principles of nuisance³⁰³ and are likely to make reliance on separate nuisance actions an unattractive option.
- 6.242 Abatement is still available to affected neighbours in Queensland, although it has been modified to the extent that the affected neighbour is no longer required to return the removed parts of the tree to the tree owner.³⁰⁴
- 6.243 In some cases, the common law remedy of abatement is displaced by the removal process set out in Part 4 of Chapter 3 of the Queensland Act. The Part 4 removal process comprises four main aspects.
- 6.244 First, it is available only where overhanging branches are at least 50 centimetres long and a maximum of 2.5 metres above the ground.³⁰⁵ In its review of the Queensland Act, the QLRC explained that ‘overhanging branches that are 2.5 metres or less above the ground may impede the passage of a person or vehicle. It is also a lower and safer height range to carry out the work of cutting and removing the branches’ and that a depth of 50 centimetres provides a ‘reasonable balance between the right of a neighbour to have uninterrupted use of their property, and the burden that a tree-keeper may experience as a result of the ongoing need to trim or lop trees close to the boundary.’³⁰⁶
- 6.245 Secondly, an affected neighbour must give the tree owner notice that they seek removal. The notice must:
- state the day by which the branches must be removed (at least 30 days from the date of the notice)
 - ask for at least one day’s written notice of the date on which the branches are scheduled to be removed and notice of who will do the work

300 Ibid.

301 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 43. See, eg, Northern Beaches Council, *Removing and Pruning Trees on Private Land* (6 October 2017) <www.northernbeaches.nsw.gov.au/planning-development/tree-management/private-land>

302 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(C).

303 Tasmanian Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views*, Report No 21 (2016) [1.1.5].

304 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 54, 54(2); Queensland Government, *Step-by-Step Guide to Resolving Tree and Fence Disputes* (14 July 2017) <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/step-by-step-guide-to-resolving-tree-and-fence-disputes/>.

305 Where tree branches are more than 2.5 m above the ground and overhang by at least 0.5 m, an application for a QCAT order can be made.

306 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) [3.295], [3.299].

- give permission to the tree owner or their contractor to enter the affected neighbour's land on the agreed day between 8am and 5pm
 - include at least one written quote for the cost of the work
 - include a copy of Part 4 of the Queensland Act which deals with overhanging branches.
- 6.246 A pre-drafted government form is available which satisfies these notice requirements.³⁰⁷
- 6.247 Thirdly, the onus for arranging the works is on the tree owner and costs are incurred by the tree owner. If the tree owner refuses to comply, or does not remove the encroaching branches by the specified time, the affected neighbour can remove the branches themselves or via a contractor at the tree owner's expense. Tree owners are liable to pay up to \$300 a year for the removal of branches from their tree.³⁰⁸
- 6.248 Fourthly, an affected neighbour exercising this right by removing an overhanging branch is not required to return the removed part to the tree owner.
- 6.249 The Tasmanian Act largely mirrors the Queensland Act's implied limitation on nuisance claims and its notice provisions for the removal of overhanging branches.³⁰⁹ The Tasmanian Act process for non-compliance differs slightly from Queensland, and the Act provides additional notice requirements for other tree works that are not branch removal.³¹⁰
- 6.250 An affected neighbour who abates the nuisance caused by the tree is no longer required to return any severed parts of the tree to the tree owner.³¹¹ If the parts intended to be abated are branches that are at least 50 centimetres long and a maximum of 2.5 metres above the ground, then a 'branch removal notice' must be given to the tree owner. The form and process of furnishing the tree owner with this notice mirrors Queensland's Part 4 removal process.³¹²
- 6.251 The Tasmanian Act also states that a branch removal notice concerning the same tree cannot be issued to the same tree owner within the 12-month period after the day the previous notice was given.³¹³
- 6.252 If the tree owner does not comply with the notice, then the affected neighbour may remove the overhanging branches themselves. Although they do not need to return the branches to the tree owner, they are not prohibited from doing so.
- 6.253 The affected neighbour is entitled to recoup reasonable expenses incurred in the removal of the branches as a debt owed to them by the tree owner but only up to a maximum prescribed amount. If the tree owner takes issue with the amount of the debt, they may apply to have the issue heard and determined by a magistrate. The magistrate can determine that another amount should be owed if the original amount is 'not fair and reasonable' up to the prescribed maximum.³¹⁴

307 Queensland Government, *Form 3—Notice for Removal of Particular Overhanging Branches: Neighbourhood Disputes (Dividing Fences and Trees) Act 2011—Chapter 3 Part 4* (29 October 2015) <<https://publications.qld.gov.au/dataset/notices-to-neighbours/resource/fe9779b-75b4-4e60-839b-f1c44123e147>>.

308 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54; Queensland Government, *Step-by-Step Guide to Resolving Tree and Fence Disputes* (14 July 2017) <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/step-by-step-guide-to-resolving-tree-and-fence-disputes/>. In this statutory review, the Queensland Law Reform Commission rejected the introduction of a general right to the costs of any type of abatement (eg, abating the roots by installing a root barrier) because it 'would operate inconsistently with the policy choices and the tight controls that inform and restrict the extent of the operation of the provisions in Part 4': Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) [3.260].

309 See, eg, *Neighbourhood Disputes About Plants Act 2017* (Tas) s 21.

310 Ibid ss 21–22.

311 Ibid s 12.

312 See paragraphs [6.244]–[6.246] and *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 20–22.

313 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 20(9)–(10).

314 Ibid s 21. This mirrors the limited right to recoup the cost of abating particular overhanging branches in Queensland: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 8.

- 6.254 If other parts of the tree that do not come under the branch removal provisions are affecting a neighbour, then the affected neighbour 'may give notice in writing' to the tree owner outlining the ways the tree is affecting their land or property and how it should be remedied. The notice must also request that the tree owner respond to the notice in writing within a period of not less than 14 days.³¹⁵

Legislation and local laws

- 6.255 Chapter 4 sets out how trees on private land may be affected by local laws and other legislation in Victoria.
- 6.256 In New South Wales, orders made by the NSWLEC can override local laws such as tree protection orders or any other permission required by local councils. However, permission required under legislation cannot be overridden.³¹⁶
- 6.257 Copies of orders are provided to the local council and other relevant authorities via a standard letter from the NSWLEC.³¹⁷ This letter also informs the local council 'of its obligations [under the *Environmental Planning and Assessment Act 1979* (NSW)] to make the appropriate notation [of the order] on the database for planning certificates'.³¹⁸
- 6.258 The 2009 statutory review of the NSW Act recommended that notations on planning certificates should be deleted or amended when the work ordered is finally completed (but not for work which is of an ongoing nature, eg maintenance orders).³¹⁹
- 6.259 Similarly, in Queensland, orders made by QCAT can override local laws to the contrary, such as the need for consent of the local council or tree owner before undertaking any work on a protected tree.³²⁰ However, QCAT cannot make an order for work on a tree that is prohibited by or contrary to legislation.³²¹
- 6.260 QCAT must give the local council or any other relevant authority that appears in a proceeding a copy of any order it makes.³²²
- 6.261 The Tasmanian Act does not allow RMPAT to make orders that would be unlawful under legislation. However, unlike New South Wales and Queensland, it also does not allow local laws, such as those that require local council permission for certain works, to be overridden.³²³
- 6.262 The Second Reading Speech for the Tasmanian Act explains:
- Parties who are seeking redress under the Bill will be required to obtain the relevant permit from the planning authority in the first instance, or if the permit has not been obtained when the matter comes before the Tribunal, the Tribunal may put a stay on proceedings in order to enable the relevant permit to be obtained. In this way, the bill retains the current policy settings for decision-making under other legislative regimes, including notification and rights of appeal.³²⁴
- 6.263 As set out in Table 2, in all jurisdictions, the question of permission is taken into account when coming to a decision. In New South Wales and Queensland, if permission is required, then this consideration is weighed against the issuing of an order in favour of the aggrieved neighbour.³²⁵

315 Ibid s 22.

316 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 18; New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016).

317 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14.

318 *Environmental Planning and Assessment Regulation 2000* (NSW), sch 4, pt 13; New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016) 26.

319 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 22 (Recommendation 6).

320 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67.

321 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(3); Queensland Civil and Administrative Tribunal, *Frequently Asked Questions—Tree Disputes* (18 April 2017) <www.qcat.qld.gov.au/matter-types/tree-disputes/faq-tree-disputes>.

322 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No 72 (2015) 71.

323 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 14.

324 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 6–7 (Rene Hidding).

325 Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views*, Report No 21 (2016) 5.4.121.

Questions

- 27 Should the common law right of abatement remain available to affected neighbours under a statutory scheme? Should it be modified in any way?
- 28 To what extent, if any, should orders made under a statutory scheme override or modify:
- (a) local laws?
 - (b) other legislation?

(k) Expert evidence

- 6.264 Proving in court that damage or harm has been caused by a particular tree or group of trees, often requires an expert opinion. This may be given by a variety of experts, in the form of a written report or oral evidence in a court or tribunal ('expert evidence').
- 6.265 Expert evidence is given in court proceedings by expert witnesses who have 'specialised knowledge' based on their 'training, study or experience'.³²⁶ Expert evidence in tree disputes, particularly in relation to large trees, trees with 'any historical, cultural, social or scientific value' and trees that contribute to the ecosystem and to biodiversity, will likely be given by arborists.³²⁷ Expert evidence from structural engineers, horticulturalists, botanists and plumbers has also been given in court.³²⁸
- 6.266 Because an expert has been contracted by either the affected neighbour or tree owner, there is a risk that their expert reports and evidence may contain an 'adversarial bias'.³²⁹ This bias may result in divergent reports between parties' experts.³³⁰
- 6.267 Adversarial bias is not limited to tree disputes, and may arise in any type of dispute, civil or criminal.³³¹ Combatting this bias is the reason behind the trend for courts in many areas to order 'experts' conclaves', or a 'hot tub', in which experts are required to compare reports, and to produce a joint report detailing what they agree on, and what they disagree on, and why. Sometimes they are also required to give evidence concurrently.
- 6.268 It is important to consider the obligations and duties expert witnesses are bound by, the quality of expert reports, and any practical mechanisms a decision-making body can employ to reduce adversarial bias.
- 6.269 The obligations of expert witnesses in civil proceedings in Victorian courts are discussed below. This is followed by discussion of the role and obligations of expert witnesses in tree disputes heard by the NSWLEC, QCAT and RMPAT.

326 *Evidence Act 2008* (Vic) s 78(1).

327 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No 72 (2015) [3.444].

328 See, eg, *Marshall v Berndt* [2011] VCC 384 (7 April 2011); *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478.

329 Victorian Law Reform Commission, *Civil Justice Review, Report No 14 (2008) 484–5*, citing New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005) 71–4; preliminary consultations with Arboriculture Australia (17 August 2017) and Victorian Tree Industry Organisation (VTIO) (22 August 2017). For a further analysis of expert witness bias, see Deirdre M Dwyer, 'The Causes and Manifestations of Bias in Civil Expert Evidence' (2007) 26 *Civil Justice Quarterly* 425.

330 Judy Fakes, 'What is Required of an Expert Witness?' (Paper presented at Treenet Symposium, Sydney, 2011); preliminary consultations with Arboriculture Australia (17 August 2017) and Victorian Tree Industry Organisation (VTIO) (22 August 2017).

331 See Judy Fakes, 'What is Required of an Expert Witness?' (Paper presented at Treenet Symposium, Sydney, 2011); Justice Stuart Morris, 'Getting Real about Expert Evidence' (Paper presented at the National Environment Law Association Limited, 2005 National Conference, Canberra, 13–15 July 2005).

Victoria

- 6.270 The Victorian legislature and the courts have sought to clarify the duties and obligations of expert witnesses in the *Civil Procedure Act 2010* (Vic) and court rules.
- 6.271 The *Civil Procedure Act 2010* (Vic) applies its overarching obligations to expert witnesses in all Victorian courts.³³² These include a paramount duty owed to the court to further the administration of justice,³³³ as well as obligations to:
- act honestly at all times³³⁴
 - not engage in conduct that is, or, is likely to be, misleading or deceptive³³⁵
 - narrow down issues in contention.³³⁶
- 6.272 Court rules also seek to reduce adversarial bias of expert witnesses by setting out their duties and obligations.³³⁷ For example, expert witnesses must abide by the Code of Conduct found in Form 44A of all Victorian courts' rules.³³⁸ The Code of Conduct states that an expert witness:
- owes an overriding duty to assist the court impartially
 - is not an advocate for a party
 - must acknowledge in their report that they have read the Code of Conduct and agree to be bound by it
 - must provide a supplementary report to the court and parties if they change their opinion on a material matter
 - if required by the court, must provide a joint report specifying matters in agreement and in contention.³³⁹
- 6.273 The Code of Conduct also sets out the required content of expert reports and supplementary reports.³⁴⁰
- 6.274 Courts may also issue practice directions about expert witnesses as needed.³⁴¹
- 6.275 In Victoria, there is no consistent or mandatory industry reporting standard for arboricultural expert evidence in tree disputes. Council Arboriculture Victoria and some local councils have published guidelines for report writing.³⁴² Arborists may choose to follow these guidelines.³⁴³
- 6.276 Unlike arborist reports submitted to local councils for the removal of protected or council-owned trees, expert evidence in court does not need to be from an arborist with particular minimum qualifications or expertise.³⁴⁴

332 Except those found in *Civil Procedure Act 2010* (Vic) ss 18, 19, 22, 16.

333 *Civil Procedure Act 2010* (Vic) s 16.

334 *Ibid* s 17.

335 *Ibid* s 21.

336 *Ibid* s 23.

337 See, eg, Form 44A—Expert Witness Code of Conduct, cl 1 in *Magistrates' Court General Civil Procedure Rules 2010* (Vic), *County Court Civil Procedure Rules 2008* (Vic) and *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

338 See o 44 and Form 44A—Expert Witness Code of Conduct, pt 3 in *Magistrates' Court General Civil Procedure Rules 2010* (Vic), *County Court Civil Procedure Rules 2008* (Vic) and *Supreme Court (General Civil Procedure) Rules 2015* (Vic); Douglas J James and James Fitzpatrick, 'Effective Expert Witnesses' (2016) 90(10) *Law Institute Journal* 27, 29.

339 This list is not exhaustive.

340 See o 44 and Form 44A—Expert Witness Code of Conduct, pt 3 in *Magistrates' Court General Civil Procedure Rules 2010* (Vic), *County Court Civil Procedure Rules 2008* (Vic) and *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

341 See, eg, Supreme Court of Victoria, *Practice Note SC CR 3 — Expert Evidence in Criminal Trials*, 30 January 2017; Supreme Court of Victoria, *Practice Note SC CR 7 — Expert Reports on the Mental Functioning of Offenders*, 1 July 2017. See also the corresponding County Court practice notes.

342 Council Arboriculture Victoria guide relates primarily to reports in relation to development applications, but contains a general structure that could be adapted into reports in private disputes: Council Arboriculture Victoria, *Arboricultural Reporting Guidelines for Developments* (November 2009) <<http://www.councilarboriculturevictoria.com.au/resources/>>.

343 Preliminary consultations with Arboriculture Australia (17 August 2017) and Victorian Tree Industry Organisation (VTIO) (22 August 2017).

344 Although the Code of Conduct requires an expert witness to note their qualifications and expertise in their report: Form 44A—Expert Witness Code of Conduct, pt 3 in *Magistrates' Court General Civil Procedure Rules 2010* (Vic), *County Court Civil Procedure Rules 2008* (Vic) and *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

New South Wales Land and Environment Court

- 6.277 In New South Wales, as set out in Chapter 5, parties are able to engage their own experts to provide expert evidence.
- 6.278 Experts owe a general duty to the court and must agree to be bound by the code of conduct set out in Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW).³⁴⁵
- 6.279 The Court may direct experts to engage in joint conferencing and to produce a joint report.³⁴⁶

Queensland Civil and Administrative Tribunal

- 6.280 The QCAT framework for expert evidence in tree disputes arguably does more to reduce adversarial bias and encourage a greater degree of objectivity.
- 6.281 Although parties are able to engage their own experts to provide expert evidence, QCAT practice directions stipulate that:
- Only one expert for each area of expertise is allowed.
 - Experts owe a duty to assist QCAT which overrides any obligation to the party that engages them.
 - All experts in a proceeding must participate in an ‘experts’ conclave’ convened by QCAT and produce a joint report which identifies the matters agreed and disagreed about, and the reasons for any disagreement. The joint report must be prepared by the experts without instruction from the parties.³⁴⁷
- 6.282 Where parties do not engage their own experts and expert evidence is required, QCAT will generally appoint an independent expert tree assessor to provide expert evidence. Tree assessors are appointed to a panel of casual appointees, which is reviewed annually, and receive remuneration from QCAT for their assessment and reports.³⁴⁸
- 6.283 The tree assessor is a qualified arborist of ‘Australian Qualifications Framework Level 5 Diploma in Arboriculture (or verified equivalent), with a minimum of 5 years’ experience in local government tree management, or private tree industry tree assessment’.³⁴⁹ QCAT also recommends that its tree assessors show ‘commitment to continued professional development through membership of a professional organisation such as Arboriculture Australia Ltd and Queensland Arboricultural Association Inc’.³⁵⁰
- 6.284 The tree assessor will inspect the tree and the land before providing QCAT with a report on the possible solutions to the issues in dispute.³⁵¹ The tree assessor may also help each party understand the evidence their conclusions are based on.³⁵² Parties share the cost of the tree assessor equally and QCAT will generally make an order requiring each party to pay half the cost up to a total of \$1000.³⁵³

345 *Uniform Civil Procedure Rules 2005* (NSW) rr 31.23(1), r 31.23(3)–(4), sch 7. People who owe a general duty to the court must not mislead the court.

346 New South Wales Law and Environment Court, *Experts and Expert Evidence* (20 April 2015) <www.leg.justice.nsw.gov.au/Pages/coming_to_the_court/expert_witnesses.aspx>; New South Wales Land and Environment Court, *Practice Note — Class 2 Tree Applications*, 13 May 2014, [41]–[50].

347 See generally Queensland Civil and Administrative Tribunal, *Practice Direction 4 of 2009 — Expert Evidence*, 11 November 2009. For an example of an Experts’ Conclave, see *Cacopardo v Woolcock* [2017] QCAT 214 (12 June 2017).

348 Queensland Civil and Administrative Tribunal, *Information Kit: Tree Assessors Expression of interest* (EOI) (2013) <www.qcat.qld.gov.au/>.

349 *Ibid* 3.

350 *Ibid* 5.

351 Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for Applications for Orders to Resolve Other Issues about Trees*, 3 April 2014.

352 Queensland Civil and Administrative Tribunal, *Information Kit: Tree Assessors Expression of interest* (EOI) (2013) <www.qcat.qld.gov.au/>.

353 Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for Applications for Orders to Resolve Other Issues about Trees*, 3 April 2014 [6]–[7]. QCAT may also vary these proportions and make different orders, ‘having regard to the contents of the application, any other submission or document filed in the proceedings and any other matter the Tribunal may consider relevant’: Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for Applications for Orders to Resolve Other Issues about Trees*, 3 April 2014 [7]. See also [13].

6.285 Once QCAT receives the appointed tree assessor's report, parties cannot produce further expert evidence without leave. If leave is granted, additional expert witnesses must participate in an experts' conclave with the tree assessor.³⁵⁴

Resource Management and Planning Appeal Tribunal

6.286 The Tasmanian Act does not contain any provisions dealing with expert evidence. As the Act was only recently enacted, RMPAT has not issued any comments or practice directions concerning expert evidence specific to tree disputes. This may change as tree disputes begin to be brought before RMPAT.

6.287 At the time of writing, RMPAT had issued one general practice direction concerning expert evidence.³⁵⁵ The key expectations of expert witnesses and requirements of their evidence are summarised below.

6.288 Expert witnesses must comply with an Expert Witness Code of Conduct. The Code of Conduct states that expert witnesses owe a general duty to RMPAT. This general duty comprises:

- an overriding duty to assist RMPAT impartially on matters relevant to their area of expertise
- a paramount duty to RMPAT and not to any party to the proceedings (including the person retaining the expert witness)
- the requirement that an expert witness is not to advocate for a party.³⁵⁶

6.289 The Code of Conduct also sets out the required content of expert evidence—that experts are expected to work cooperatively with other experts and that they must participate in joint conferencing or produce a joint report when instructed by RMPAT.

6.290 As soon as an expert is engaged by a party, they must be given a copy of the Code of Conduct. An expert's statement or report cannot be produced in RMPAT as evidence unless it contains an 'acknowledgment that the author has read the Code of Conduct and agrees to be bound by it'.³⁵⁷

6.291 These different approaches may be of assistance in determining how any Victorian system manages the provision of expert evidence.

Questions

- 29 What factors should be taken into account in relation to the appointment or qualifications of experts giving evidence about neighbourhood tree disputes?
- 30 Should the decision-making body issue guidelines or model reports to guide expert evidence?

(I) New owners of land

6.292 Tree disputes may continue throughout and even after the sale of one of the properties involved. Buyers of the tree owner's land also buy the tree that is affecting their neighbours. Buyers of the affected neighbour's land may also inherit the issues caused by the neighbouring tree. The New South Wales, Queensland and Tasmanian schemes set out the legal position of new owners (successors in title), where the relevant tree disputes have already been the subject of legal action.

354 Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for Applications for Orders to Resolve Other Issues about Trees*, 3 April 2014 [12].

355 Resource Management and Planning Appeal Tribunal, *Practice Direction No 12 — Expert Witnesses*, amended 1 March 2016.

356 Ibid, Appendix 12A—Expert Witness Code of Conduct, 2.

357 Ibid [12.3(c)].

- 6.293 The point at which the relevant provisions apply to new owners differs in each state. In New South Wales, new owners will be bound by the outcome of legal action after title to the land has passed to them, whereas in Queensland and Tasmania, new owners will be bound by the outcome of legal action when, as purchasers of land, they enter into a contract of sale. These schemes are explored in more detail below.
- 6.294 In New South Wales, if ownership of the land passes to another person before an order for any work on the tree is carried out, then the new owner must carry out the order as if they were the original tree owner but only if they have been served with a copy of the order by the affected neighbour.³⁵⁸
- 6.295 Copies of orders made by the NSWLEC are sent to the affected neighbour 'with a standard letter advising the [affected neighbour] of the provisions ... and, as a consequence, the steps that the [affected neighbour] must take to ensure that the orders remain in force if the tree owner sells the property in which the tree is located'.³⁵⁹
- 6.296 In its original incarnation, the NSW Act was silent on what should happen if the affected neighbour's land passes to a new owner before an order is carried out by the tree owner. Following the 2009 statutory review of the Act, a new provision was enacted, which now allows immediate new owners of the affected neighbour's land to be entitled to the same benefits given to the original affected neighbour under the order.³⁶⁰
- 6.297 The NSW *Environmental Planning and Assessment Regulations 2000* require that where a local council has been informed, its planning certificates must specify any orders made under the NSW Act. The 2009 statutory review of the NSW Act found this to be an 'appropriate safeguard for potential buyers of the property'.³⁶¹
- 6.298 In Queensland, once the purchaser enters into a contract for sale and has been given a copy of the application, the purchaser is joined as a party to the QCAT proceeding.³⁶²
- 6.299 Similarly, once given a copy of an order and after entering into a contract of sale, the purchaser is bound by the order as if the purchaser were the original tree owner to the extent the order has not been carried out. Any period of time mentioned in the order for carrying out the required work begins from the transfer of land.³⁶³
- 6.300 The Queensland Act also sets out the purchaser's right to terminate the sale of contract and recoup their deposit if they have not been given a copy of the application or order before the transfer of land.³⁶⁴
- 6.301 QCAT also administers a searchable tree orders register. Any person, including prospective buyers, can search a property by its address to see if any tree on the land is subject to an order.³⁶⁵
- 6.302 The Tasmanian Act is similar to the Queensland Act. An owner of land, whether the tree owner or affected neighbour, may be fined if they fail to provide purchasers with a copy of any application or order relating to the land.³⁶⁶ If the purchaser is not notified, they may terminate the contract of sale and retrieve their deposit.³⁶⁷

358 *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 16, 16(2); Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 23.

359 New South Wales Land and Environment Court, *Annotated Trees Act January 2013* (1 September 2016) 39.

360 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 23; *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16A.

361 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (2009) 22, 23.

362 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 84.

363 *Ibid* s 85.

364 *Ibid* s 86.

365 Queensland Civil and Administrative Tribunal, *Tree Order Register* (27 January 2017) <www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>. The register can also be searched by parties' names.

366 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 16(1).

367 *Ibid* s 17.

- 6.303 If the original owner fails to provide copies of a relevant order before entering into a contract for sale, and fails to carry out any works required under the order before settlement, they remain liable to ensure that that work is carried out, despite the fact that they no longer own the property.³⁶⁸
- 6.304 If an application before RMPAT has not yet been determined, then a purchaser who enters into a contract of sale must be joined, as soon as practicable, as a party to an application of which they have been notified and given a copy.³⁶⁹ A fine is applicable if this is not done.
- 6.305 Local councils are to be informed of any orders, and ‘information certificates’ about the tree to which the orders relate are to be provided to prospective purchasers of land by the council, as explained in the Second Reading Speech:
- These provisions will ensure that prospective purchasers of land on which problem plants are situated are aware that matters relating to plants may need to be dealt with in the future. This will also ensure that landholders who are affected by a plant will not, in most cases, be required to seek fresh orders if the owner of the plant fails to fulfil his or her obligations under the order before selling the property.³⁷⁰
- 6.306 The Tasmanian Act also provides for a publicly available database of orders and applications, maintained by RMPAT. Information will ‘include the terms of the order, when the order takes effect, when any work is required to be carried out and who is required to carry out the work’.³⁷¹ This information is to be made available on the database within 14 days after an order is made.³⁷² Any member of the community can search the database for a fee.³⁷³
- 6.307 In order to provide clarity about their rights and responsibilities, the impact of orders or outstanding disputes on new owners of land may need to be considered in any new Victorian scheme.

Questions

- 31 Should new owners of land who take the place of the affected neighbour be bound by the outcome of legal action regarding relevant trees on the land?
- 32 Should new owners of land who take the place of the tree owner be bound by the outcome of legal action regarding relevant trees on the land?
- 33 At what point during the sale and/or transfer of land process should a purchaser become bound by the outcome of legal action:
- (a) on transfer of title?
 - (b) on entering into a contract of sale?
 - (c) at some other time?
- 34 Should new owners be joined as a party to a proceeding that is already underway? If so, at which point of the sale and/or transfer of land process?
- 35 Should a searchable database of orders relating to trees be made available in Victoria?

368

Ibid s 18.

369

Ibid s 16(2).

370

Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 8 (Rene Hidding).

371

Ibid.

372

Neighbourhood Disputes About Plants Act 2017 (Tas) s 37(3).

373

Ibid s 37(4).

(m) Enhancing useability

- 6.308 A statutory scheme for resolving tree disputes could be complemented by supplementary materials and tools to help people to understand the law, identify their rights and responsibilities, navigate the available options and in some cases, resolve their dispute before taking legal action.
- 6.309 Easily accessible online resources and information, and online dispute resolution (ODR) techniques are some of the ways in which the useability of a statutory scheme could be enhanced.
- 6.310 Resources and information currently available to community members in New South Wales, Queensland and Tasmania are set out below at [6.311]–[6.319]. The possible use of ODR for resolving tree disputes is explored at [6.320]–[6.333].

Resources and information

- 6.311 The schemes in New South Wales and Queensland aim to equip people to represent themselves and so are complemented by a variety of publicly available online resources.
- 6.312 The NSWLEC has published particularly useful resources for neighbours seeking information and guidance. These include:
- an annotated version of the NSW Act containing explanatory case law and examples³⁷⁴
 - information sheets³⁷⁵
 - step-by-step guides, setting out the Court's process³⁷⁶
 - information about how to prepare applications.³⁷⁷
- 6.313 The Court also, from time to time, publishes tree dispute principles to promote consistent decision making.³⁷⁸
- 6.314 The Queensland Government and QCAT websites are particularly useful resources for neighbours seeking information and guidance. The government webpage entitled 'Disputes about fences, trees and buildings'³⁷⁹ sets out resources such as step-by-step guides to resolving and avoiding tree disputes.³⁸⁰
- 6.315 QCAT has published informative fact sheets and practice directions³⁸¹ and administers a searchable tree orders register where people can search for a property or the name of a party to a tree dispute to see if any orders against trees on the land have been made.³⁸²
- 6.316 The QCAT application is supported by an application checklist to help applicants correctly complete the form and determine whether their tree dispute falls under the remit of the Queensland Act.³⁸³

374 See New South Wales Land and Environment Court, *Helpful Materials* (1 September 2017) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/Treedisputes-helpfulmaterials/treedisputes_helpfulmaterial.aspx>.

375 See, eg, New South Wales Land and Environment Court, *Tree Disputes: Understanding the Law* (22 April 2015) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_pracproc.aspx>.

376 See, eg, New South Wales Land and Environment Court, *Trees or Hedge Dispute Process* (16 September 2016) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/trees_and_hedges.aspx>.

377 See, eg, New South Wales Land and Environment Court, *How to Start the Application* (16 May 2015) <www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_how.aspx>.

378 New South Wales Land and Environment Court, *Tree Dispute Principles* (29 September 2017) <www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/tree_principles.aspx>. Principles can be statements about a probable outcome; a chain of reasoning; or a list of appropriate matters to be considered.

379 Queensland Government, *Disputes About Fences, Trees and Buildings* (14 December 2016) Services for Queenslanders <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings>.

380 See, eg, Queensland Government, *Step-by-Step Guide to Resolving Tree and Fence Disputes* (14 July 2017) <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/step-by-step-guide-to-resolving-tree-and-fence-disputes/>; Queensland Government, *What To Do if a Neighbour's Tree is Affecting You* (30 October 2015) <www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/what-to-do-if-a-neighbours-tree-is-affecting-you>.

381 Queensland Government, *Frequently Asked Questions: Tree Disputes* (18 April 2017) <www.qcat.qld.gov.au/matter-types/tree-disputes/faq-tree-disputes>; Queensland Civil and Administrative Tribunal, *Practice Directions* (1 April 2016) <www.qcat.qld.gov.au/resources/practice-directions>.

382 Queensland Civil and Administrative Tribunal, *Tree Order Register* (27 January 2017) <www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>.

383 Queensland Civil and Administrative Tribunal, *Application Checklist: Tree Dispute Resolution*, version 3 (March 2017).

- 6.317 The new Tasmanian scheme will be supported by ‘Plain-English guidance material and practice directions’ aimed at providing ‘further assistance to members of the general public who wish to use the new scheme’.³⁸⁴
- 6.318 RMPAT will administer a searchable database of orders made in tree dispute matters. This database will be available to the public and can be searched for a fee.
- 6.319 In all three jurisdictions, community resources inform people about their rights and responsibilities, empower them to resolve their tree dispute and help them to navigate the procedures and processes associated with taking legal action. Whether or not such resources, and of what kind, should be made available in Victoria to complement a statutory scheme may be relevant to consider.

Question

36 What types of resources should be made available to community members to complement a statutory scheme?

Online dispute resolution

- 6.320 As the information and resources on tree disputes in Australian jurisdictions are increasingly presented online, the potential benefits of online dispute resolution (ODR) are also starting to be recognised.
- 6.321 ODR is a general term, describing a range of technology-assisted forms of dispute resolution. The styles of ODR are outlined in the *Access to Justice* report:
- Online dispute resolution techniques range from methods where parties have full control of the procedure, such as in an online negotiation, to methods where a neutral third party is in control of both the process and the outcome, such as online arbitration. In online dispute resolution, the information management role is often carried out not by physical persons, but by computers and software.³⁸⁵
- 6.322 There is no one format of ODR, with each jurisdiction that uses it employing a different range of ODR tools in combination with traditional methods. Some examples of this include:
- self-navigated ‘smart forms’ and interactive tools for exploring options and solutions
 - technologically assisted problem diagnosis
 - automated negotiation tools
 - password-protected online chat platforms
 - assisted mediation and arbitration
 - online adjudication.
- 6.323 ODR is generally used for smaller, simpler disputes, which can be ‘triaged’ with threshold questions, and potentially resolved with good quality information and tools. In its 2008 Civil Justice Review, the Commission noted that ‘online ADR is an important development with considerable potential for wider use, including by parties who may be distant from each other and the court’.³⁸⁶ Some of the benefits of ODR methods include:

384 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 5 (Rene Hidding).

385 Pablo Cortes, ‘Online Dispute Resolution Services: A Selected Number of Case Studies’ (2014) 6 *Computer and Telecommunications Law Review* 172.

386 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 225.

- Accessibility: Those in non-metro areas, or without access to a physical court or tribunal may find it easier to interact with online tools and processes. ODR tools may also be available around the clock, meaning that parties need not be in the same place at the same time to participate in resolving their dispute.
 - Physical removal of parties: In some cases, being in a room together, as is usually the case in traditional mediation, can exacerbate the problem. In ODR, there is no need to meet or speak with the other party.
 - Lower cost: The cost to the user (parties) is generally much lower, as is the cost of resource use by the relevant tribunal or decision maker. An increase in settlement before hearing as a result of successful ODR would also represent a significant decrease in costs otherwise incurred.
 - Ease of use: Assuming a certain level of technological literacy, ODR systems are generally simple and user-friendly.
 - Enforceable orders: Agreements made through ODR may be able to be simply converted into consent orders by the relevant decision maker.
 - Secure and documented communications: Conducting negotiations online provides better opportunities to accurately record and document each stage of the process.
- 6.324 One of the most successful examples of ODR is the Civil Resolution Tribunal (CRT) in British Columbia, Canada, which deals with debts, personal property disputes, enforcement of specific performance, strata title disputes, some personal injury disputes, among others. The CRT uses a cumulative model of ODR, offering different levels of support if disputes cannot be resolved. The CRT process is discussed in more detail at [5.96]–[5.100].
- 6.325 An ODR pilot program was conducted in the NSW Civil and Administrative Tribunal (NCAT) in 2014. Intended as an ‘innovative and convenient web-based tool for parties in dispute to negotiate online without the need to attend NCAT in person’, the pilot focused on selected, single-issue consumer disputes under the value of \$5000.³⁸⁷
- 6.326 Parties were invited to participate on a voluntary basis, and the matters were concurrently listed for conciliation and hearing, presumably to ensure that no time was lost and the parties were not at a disadvantage should the ODR mechanism not prove successful. Parties were then guided by automated software through the identification of issues and priorities, the joint development of solutions and the generation of a negotiated agreement. If the parties reached an agreement, it would be converted into a consent order. Where no agreement was reached, the matter would proceed to hearing on the scheduled date.³⁸⁸
- 6.327 Feedback from this pilot was generally positive, and showed that:
- 65 per cent of participants agreed or strongly agreed that ODR was convenient and that they would use it again.
 - 63 per cent agreed or strongly agreed that the ODR website was easy to access and use.
- 6.328 Analysis of the uptake of matters included in the pilot showed an increase in finalisations before hearing, an increase in resolutions at hearing, a reduction of adjournments at hearing, and an overall projected saving of 12 hearing days per month.³⁸⁹
- 6.329 It is unclear whether the NCAT pilot will be extended to deal with other areas of civil dispute, or whether other New South Wales jurisdictions such as NSWLEC will introduce ODR methodology.

387 NSW Civil and Administrative Tribunal, *NCAT Online Dispute Resolution Pilot* (August 2014) <www.ncat.nsw.gov.au/Documents/ncat_online_dispute_resolution_pilot.pdf>.

388 Sian Leatham, ‘Alternative Dispute Resolution at NCAT’ (Speech delivered at the NSW LEADR CPD session, Sydney, 10 April 2014).

389 Louise Clegg, ‘Achieving Efficiency—NCAT Online Dispute Resolution Pilot’ (Speech delivered at the COAT National Conference 2015, Melbourne, 4–5 June 2015) <<http://coat.gov.au/events/conferences/details/16/2015-coat-national-conference.html>>.

- 6.330 In Victoria, following the *Access to Justice* report, the Victorian Government has pledged almost \$800,000 to establish an online dispute resolution system for the resolution of small civil claims in VCAT. This is intended to serve as a pilot program to gauge the suitability of broader introduction of ODR in Victoria.³⁹⁰ The review also recommended the establishment of an online dispute resolution advisory panel. ODR is currently in use in Victoria for some Worksafe dispute resolutions.³⁹¹
- 6.331 For neighbourhood tree disputes, ODR tools may be useful in providing structure and clarity in the resolution process, and could be particularly complementary to a statutory scheme outlining rights and responsibilities.
- 6.332 An ODR system may also be a valuable way to link up existing tools and sources of information, as parties could move through the dispute resolution in a guided, linear way, and be given access to the information that best suited their dispute, as is the case in the CRT in British Columbia.
- 6.333 ODR tools may be delivered by the court or tribunal with jurisdiction to determine disputes or by a body independent of the adjudication process such as a government agency or community organisation. The delivery of ODR for neighbourhood tree disputes would depend on the applicable jurisdiction—for example, VCAT, in line with the pilot proposed under the *Access to Justice* report, or the Magistrates' Court. An ODR neighbourhood tree disputes website could be hosted by the Victorian Government under the auspices of the DSCV, or by Victoria Legal Aid Legal.

Question

- 37 Should an online dispute resolution platform dedicated to neighbourhood tree disputes be introduced in Victoria? If so, what tools should be made available on this platform and who should administer it?

Other features

- 6.334 Introducing a new scheme for resolving tree disputes in Victoria would require careful consideration of a number of factors. Many of these have been set out above in parts (a) to (m), with examples of approaches from New South Wales, Queensland and Tasmania.
- 6.335 The Commission is aware that this list may not be exhaustive and that there may be further issues relevant to the Victorian context that require consideration.

Question

- 38 Are there any other specific features of a statutory scheme that the Commission should consider?

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Department of Justice and Regulation (Vic), *Access to Justice Review* (2017) 277.
Accident Compensation Conciliation Service, *Online Dispute Resolution* <www.worksafe.vic.gov.au/conciliation-web/conciliation-process/conferences/online-dispute-resolution>.

Option 3: An alternative option for reform

- 6.336 The above options and elements were selected from the range of approaches that emerged out of the Commission's cross-jurisdictional review of common law and legislative responses to tree disputes.
- 6.337 The Commission welcomes proposals for alternative options. Alternative options for reform could be an entirely different option, not considered above, or an amalgam of elements from the current Victorian system and other jurisdictions.
- 6.338 Any proposal must address the key question for the Commission's review, which is how tree disputes can be resolved in simpler, clearer and fairer ways.

Question

- 39 Do you have an alternative option for reform that you would like to see introduced in Victoria?

Conclusion

7. Conclusion

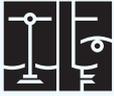
- 7.1 This consultation paper sets out the law and process in Victoria for resolving disputes between neighbours about trees on private land. It also canvasses other Australian and international approaches, and presents options for change.
- 7.2 The Commission now invites submissions from all parts of the community, in particular from people who have been involved in a neighbourhood tree dispute. Any information about navigating the dispute resolution system, and suggestions for improvements, will be of great assistance to the Commission in recommending whether and how the law should change.
- 7.3 The Commission invites people's views on the specific questions raised in this paper. A complete list of questions can be found on pages xi–xiii. Responses may include all questions, or may answer only those in which the person has an interest or has had relevant experience. Submissions may be made in many forms, including by letter, by email, by telephone or in person, should that be required. In addition, the Commission has created a shorter online survey, which is based on the options presented in this paper. The survey can be accessed at: **www.surveymonkey.com/r/treedisputes**.
- 7.4 In accordance with the terms of reference, set out on page vii, the Commission will not be considering disputes about trees on public land, or disputes relating to access to sunlight or views.
- 7.5 To allow the Commission adequate time to consider your views before deciding on final recommendations, submissions are due by 28 February 2018.

Appendix

Appendix: Common law torts and their equivalent interstate statutory provisions

	Victoria		New South Wales	
	<i>Basis of legal action</i>	<i>Requirement</i>	<i>Basis of legal action</i>	<i>Requirement</i>
Damage eg, A large branch falls and damages property	Nuisance and/or negligence	Any degree of damage resulting from nuisance or a negligent act	<i>Trees (Disputes Between Neighbours) Act 2006 (NSW) s 7</i>	Any degree of damage
Future damage eg, Property is likely to be damaged in the future by the falling of a large overhanging branch	Nuisance	Unreasonable interference with the use and enjoyment of land <i>A quia timet</i> injunction may be granted to restrain apprehended nuisance that will cause imminent and substantial damage.	<i>Trees (Disputes Between Neighbours) Act 2006 (NSW) s 7</i>	Tree is likely to cause any degree of damage in the near future (interpreted to mean within 12 months)
Harm eg, a large overhanging branch falls and causes personal injury	Negligence	Any degree of injury resulting from a negligent act	<i>Trees (Disputes Between Neighbours) Act 2006 (NSW) s 7</i>	Any degree of injury resulting from a tree
Future harm eg, unable to use and enjoy property due to the threat of being harmed by a falling branch	Nuisance	Unreasonable interference with the use and enjoyment of land <i>A quia timet</i> injunction may be granted to restrain apprehended nuisance that will cause imminent and substantial harm.	<i>Trees (Disputes Between Neighbours) Act 2006 (NSW) s 7</i>	Tree is likely to cause any degree of injury
Interference with land (cf. damage) eg, an overhanging branch that drops leaf litter	Nuisance	Unreasonable interference with the use and enjoyment of land	Nuisance	Unreasonable interference with the use and enjoyment of land
Unauthorised entry onto land eg, Pruning a tree beyond boundary lines or entering neighbouring land to deal with a tree	Trespass	Intentional and direct physical intrusion onto land	Trespass	Intentional and direct physical intrusion onto land

Queensland		Tasmania	
<i>Basis of legal action</i>	<i>Requirement</i>	<i>Basis of legal action</i>	<i>Requirement</i>
<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 46(a)(ii)(B)</i>	Serious damage	<i>Neighbourhood Disputes About Plants Act 2017 (Tas) s 7(1)(b)(ii)</i>	Serious damage
<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 46(a)(ii)(B)</i>	Tree is likely to cause serious damage within the next 12 months	<i>Neighbourhood Disputes About Plants Act 2017 (Tas) s 7(1)(b)(ii)</i>	Tree is likely to cause serious damage within the next 12 months
<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 46(a)(ii)(A)</i>	Serious injury resulting from a tree	<i>Neighbourhood Disputes About Plants Act 2017 (Tas) s 7(1)(b)(i)</i>	Serious injury resulting from a tree
<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 46(a)(ii)(A)</i>	Tree is likely to cause serious injury within the next 12 months	<i>Neighbourhood Disputes About Plants Act 2017 (Tas) s 7(1)(b)(i)</i>	Tree is likely to cause serious injury within the next 12 months
<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 46(a)(ii)(C)</i>	Substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land	<i>Neighbourhood Disputes About Plants Act 2017 (Tas) s 7(1)(b)(iii)</i>	Substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land
Trespass	Intentional and direct physical intrusion onto land	Trespass	Intentional and direct physical intrusion onto land



Victorian
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Neighbourhood Tree Disputes
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