

Submission to the Victorian Law Reform Commission

RE: Neighbourhood Tree Disputes

I am grateful for the opportunity to make a submission on this most important matter. I have been interested in the interaction between urban trees and the legal system for nearly forty years. Matters that arise can be many and varied and the system that deals with disputes seems to be very complex and often appears to display a lack of knowledge of the biology and arboriculture of urban trees.

I have made my submission in point form, but would be more than happy to expand upon or discuss any of the matters it contains in greater detail should there be interest to do so.

Introduction:

- One of the things that would generally assist in the area of tree disputes between neighbours would be the legal recognition of trees as assets.
- There should be a proper recognition and accounting of the services and functions that trees provide in urban ecosystems, which would then allow a proper and logical cost;benefit analysis of situations that involve urban trees.
- Current and up-to-date information on tree biology and arboriculture should be available to courts.
- The development of an App for the National Trust's register of Significant Trees made a huge difference to the use and recognition of the Register. I wonder if an App could be developed to facilitate matters concerning urban tree disputes between neighbours.

The definition of trees:

- Defining a tree is not as easy as many think and that used in other parts of the world often involves a single stem or trunk, which would not work in Australia with our mallee eucalypt species and some of the acacias.
- The definition that I have used for many years with students is: *Trees are long lived woody perennial plants greater than 3 metres in height that have one or relatively few stems or trunks.* (G Moore, Oxford Companion to Australian Gardens 2002). This is the definition that is cited to Nillumbik Footnote #17).
- The meaning of the term woody also causes confusion, but is generally taken to mean that the plant has undergone secondary growth. Technically this is quite clear, but such a definition would exclude the term tree as a descriptor of palms, cycads and tree ferns. Such plants have thickened stems and are more correctly described as pachycauls. However, most people would consider these to be trees once they reach sufficient height.
- Given this wide public perception, it might be wise to include pachycauls in legislation that relates to tree.

Root systems and infrastructure:

- There have been great advances in our understanding of tree root biology, structure and architecture over the past couple of decades, but this knowledge does not seem to be considered by the legal system or other professions that give expert witness advice.
- Urban tree root systems tend to be shallow and spreading (Landscape Below Ground I, II AND III). The roots are often no deeper than 500mm below the soil surface and many are less, but they can spread way beyond the dripline of the tree.
- There are various ways of locating roots under ground. They can be excavated by hand or air knife, the soil can be augured or probed with a spike or modern technologies like ground penetrating radar (GPR) can be used. Some of the methods such as the air knife or GPR can be more expensive than others, but there is no excuse for making decisions about roots and their location in urban tree disputes without data to inform the decisions. I have included a reference at the end of this submission.
- Root damage to hard landscape should be rare if the structures are properly constructed and certain simple procedures are followed. Trenches, slabs and footings should be properly back-filled – they never are!
- Properly installed plastic and other plumbing cannot be penetrated by roots tips unless they are damaged or cracked.
- Damage to infrastructure due to direct root contact and subsequent growth is possible, but is a small percentage of root related damage.

Expert Advice and Witnesses:

- Expert witnesses should be experts of the court not of either of the parties. This would eliminate the “guns for hire” types or those who suffer from client bias. The costs of such experts should be covered by the parties not the court or state.
- In the context of expert witness qualifications, the minimum level should be at Certificate 4 in Arboriculture level.
- In Victoria, there is a very good argument that it should be higher such as a minimum of level 5. The reason for this is that there are several hundred trained/educated arborists in Victoria at level 5 or above, but this is not the case in other states.
- Hence in national standards, the level for professional advice and expertise is usually set at level 4 as there would be too few qualified arborists in other states. I do not see why Victoria should have to go for a lower level when there are many working with the higher levels of qualification.
- In relation to expert advice, the advice should come from qualified experts’ in soils, tree biology and not from other disciplines such as geology or engineering and the advice should be supported by data and proper methodology.
- Too often trees are assumed to be causing problems to infrastructure but there are no data to support the assumptions or assertions made. If for example tree roots are said to be damaging infrastructure, there should be some evidence that the roots of the said tree are found in the vicinity of the damaged structure. For far too long, lazy

consultants have got away with asserting that trees are causing problems without providing evidence.

- Any claims of tree-related allergies should be supported by proper medical tests to be certain that there is an allergy and that it relates to that particular species of tree. Too often allergies are asserted or assumed without any proof. Again a letter from a GP without proper allergy testing cannot be considered proof of cause and effect.
- In relation to expert advice, I wonder if there is a case for the appointment of a State Arborist who might take part in mediation and court cases related to tree. The office might have powers similar to an ombudsman in tree-related matters on private and public land.
- It would seem certain that such an approach would be cost effective, and it would perhaps consist of only a few positions – arborist, lawyer, support staff – other staff would be contract as needed. Cost of the office would be recouped from fees paid by those involved in disputes.

Urban development and tree removals

- The so called “moonscaping” of development sites and building blocks should be forbidden. Many fine trees are unnecessarily removed for construction works and then there are young plantings on the completion of the works.
- This is not only illogical, but in the end it is expensive both economically and environmentally. The level of fines for illegal tree removals tends to be very low and so is hardly a disincentive for removal. Many developers factor in the fines as a cost of business.
- It is very pleasing to see LGAs with local laws protecting trees. However, it would be worth knowing how effective they are in protecting safe and healthy trees. While it is difficult to gather data, as I understand it, nationally 97% of requests made to LGAs for tree removals are ultimately approved and the figure for Victoria is about 95%.
- I have made attempts to confirm these numbers and personal contacts have indicated that they are correct, but there is nothing definite. It would be worth gathering this sort of data.

Urban Tree removals and urban trees and utility services

- I am aware of instances where healthy, safe and well-managed trees have been removed unnecessarily using the fire Management overlay as the excuse for removal. This brings the overlay into disrepute and is both time consuming and costly. I cite the case of City of Casey versus the National Trust before VCAT as an example. I believe on the basis of my involvement in the case that it was forced by councillors, not officers of the council.
- In such situations, there should be the requirement of proof that the trees represent a genuine fire risk, rather than the regulations being used as a spurious excuse for removal for other reasons.
- Line clearing regulations need to be considered in relation to the other values and functions of trees. Clearly I am one who believes that utility services should be undergrounded.

- However, I also believe that undergrounding utilities is a more economical approach for our society, especially in areas of high population density. That said heritage values and environmental values provided by trees need to be properly recognised.
- Enforcement of the Australian Standard of Pruning for line clearing operations should also be mandatory and not subject to a trip mechanism of complaint after the damage has been done. Surely protection should be pro-active.
- I have noticed that the complicity of insurance industry in under-valuing trees and advocating for their removal is not addressed in the consultation paper.
- Since their de-mutualisation, insurance companies have become highly risk averse in the interests of benefitting their shareholders, but often at the cost of their customers. Anecdotally, Insurance companies have been said to be behind the removal of trees on golf courses (to minimise risks and reduce claims) the same is said to have happened at local Government level.
- There is also an advertisement on TV (for Youi) that suggests the possibility of a discounted premium, if there are no trees on a property. However, such an approach were it to succeed would see the complete removal of trees in urban areas and it does not seem to contemplate the high costs of urban removal of trees such as poor human health , higher numbers of excess deaths during heat waves and increased storm damage among many others.
- It seems strange that insurances companies and not seeing the bigger picture, especially at a time of climate change, as it would be in their interests to do so.

Some aspects of urban trees and the legal system

- I would strongly recommend that any legislation dealing with urban trees makes reference to relevant standards such as the Australian Standards on **Pruning, Risk Management and Protection of Trees on Development Sites**.
- These standards if properly applied could significantly reduce tree disputes between neighbours and also reduce the likelihood of tree damage and the costs of damage to trees and litigation.
- It is also worth noting that these can be useful beyond their defined purposes.
- Many problems relating to urban trees end up in VCAT. One of the problems with VCAT involvement in tree related matters is that when orders are made or conditions set, there is no follow up to ensure compliance.
- In cases when there are disputes involving organisation such as VicRoads, or private land developers, VCAT may set conditions for works to proceed, but there is no capacity for checking that the conditions are followed.
- This problem is especially of concern 5-10 years out from the work, when for example seedlings are planted after a tree(s) is removed but after a number of years none have survived.
- One of the advantages of the NSW Land and Environment Court in dealing with trees was that it appointed people with arboricultural expertise as commissioners to deal with cases involving trees.
- The recently retired Commissioner Fakes had a long career teaching horticulture and arboriculture at Rhyde TAFE before her appointment and was highly respected for her knowledge of trees.
- It is interesting to note that there are some Victorian based part-time commissioners of the court who deal with tree-related cases. It would be worth considering following this model in Victoria.

- While I do not have detailed knowledge, I understand that in Germany there are regulations that apply to trees where experts inform the court and the court determines the outcome of the dispute.
- For example, unlike in Australia, there is an agreed tree amenity value formula/system and so this is not in dispute between conflicting parties. The aim is to simplify the process, reduce the elements in dispute and lower costs.
- I support the notion of a boundary tree, regardless of who planted it, being owned jointly in proportion to the cross sectional area of the trunk at ground level. I have seen this work very well when both parties have a joint sense of ownership and responsibility – in a sense it forces people to work together to achieve a mutually agreed outcome.

Some technical matters:

- Actions taken to deal with urban trees often do not take into account the bigger picture, and they may fail to resolve the perceived problem and in some cases such actions make things worse. I wrote a paper that includes this aspect of things in 2014 for the Treenet conference in Adelaide, with a flow chart diagram that might be useful and have included a reference to it at the end of this submission.
- Summer or sudden limb drop or failure probably does occur (Footnote #25), but whether it is as sudden (or occurs without warning) as it seems remains to be determined. Species which are said to be more prone to the phenomenon earn the reputation anecdotally, as there are few, if any, data on the phenomenon.
- For example, river red gums, *Eucalyptus camaldulensis* are said to be prone to sudden summer limb drop and I have seen occurrences myself. However, the river red gum is a very widely-distributed species, grows where people tend to go (waterways) and they are often subjected to severe soil compaction. So events are more likely to be witnessed, but whether they shed more limbs and suddenly than other species are not really known.
- Similarly, spotted gum, *Corymbia maculata* are often said to be “shedders”. They do shed leaves flowers and fruits, but there is no evidence to suggest that they shed large limbs more frequently or that they are more hazardous than other native or exotic tree species. Anecdotal evidence is notoriously unreliable and often biased.
- Often tree failure such as windthrow and/or major limb drop can be traced back to the inappropriate management of trees in an urban context. Not all instances are a result of human activity, but many are, which means that they might be avoided by proper future management of the urban forest. I have listed a reference at the end of the submission.
- The formative pruning of young trees on private and public land is a cost effective means of ensuring that trees have a better and safer structure in future as they grow and develop. Such an approach could reduce the number of issues that arise in dispute between neighbours. I have listed a reference at the end of this submission.

Conclusion

There is an issue that trees provide community benefits to all, but costs are borne by the owner of the tree. If the community benefits are of such significance then there needs to be some community contribution to costs. While subsidies or grants are often suggested, I tend to prefer some sort of concession over the longer term such as a remission in rates or tax deductibility for tree related expenses. This would allow proper maintenance of the tree over the longer term of its lifespan and give the owner a greater stake in its proper management. In short the tree becomes recognised as the asset that it is.

Dr Greg Moore
February 2018

Some references that may be of interest

- Moore G M (2014) *Windthrown Tree: Storms or Management?* Journal of Arboriculture and Urban Forestry. **40** (1), 53- 69.
- Moore G M and Ryder C (2015) *The use of ground penetrating radar to locate tree roots*, Journal of Arboriculture and Urban Forestry **41** (5), 245- 259.
- Moore G M (2014) *Defending and expanding the Urban Forest: Opposing Unnecessary Tree removal requests*. Williams G Editor, Proceedings of the Fifteenth National Street Tree Symposium, 70-76. University of Adelaide/Waite Arboretum, Adelaide, ISBN 978-0-646-92686-5.
- Ryder C and Moore G M (2013) *The Arboricultural and Economic benefits of Formative Pruning Street Trees*, Journal of Arboriculture and Urban Forestry **39** (1), 17- 23.