

Victorian Law Reform Commission  
Level 3  
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28/2/2018

## **Submission in response to the Neighbourhood Tree Disputes Consultation Paper**

We would like to commend the VLRC in preparing a comprehensive and balanced Consultation Paper that effectively lays out the issues and options with regard to neighbourhood tree disputes.

There is no doubt that the current processes to resolve genuine tree disputes are difficult to navigate and do not provide an easily understood situation for the common person.

In principle, we support action to clarify and simplify the situation in a manner that provides an appropriate balance between the benefits that trees confer on our community and genuine harm that they may cause. That said, we harbour some strong reservations about the form this might take and the potential for an increase in disputes as a result.

### **Scope of the problem**

The Paper quotes figures from the Dispute Settlement Centre Victoria (DSCV) of 18,727 tree related disputes over a 5.5-year period, or 3404 per year on average. What is not provided in this data is the number of these that were trivial matters, such as falling leaves. It is reasonable to expect that most trivial complaints would not go beyond an initial enquiry. The DSCV statistics provided suggest that few of these may actually be cases of genuine or substantial harm as only 5.3% of cases are successfully resolved with DSCV assistance. A better analysis of the available data, or better data, may provide a more accurate picture of the scope of the problem that actually requires an avenue of resolution provided through reform of the law.

This begs the question of whether there is actually a significant issue, or just a high level of unreasonable expectation or confusion in the community?

Is the current number of enquiries unexpected or unreasonable given the millions of trees in our community?

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Could the number of enquiries/disputes be reduced through public education about reasonable expectations of living in a community?

Would providing an easily accessible system actually increase the overall workload in the system and burden on the community by facilitating more unreasonable “disputes” going further than an enquiry to DSCV?

**Providing balance**

Experience indicates that there is a wide range in community perception of what is reasonable regarding trees in our community.

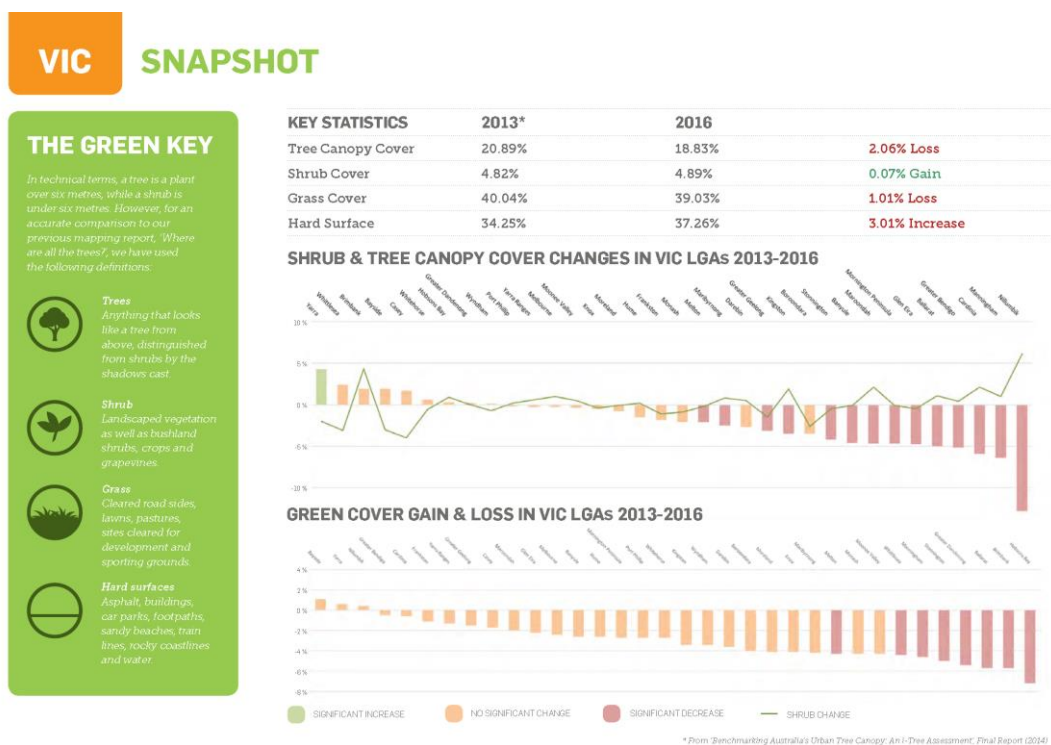
Any reform needs to provide a balance between genuine harm, or risk thereof, and the unreasonable expectations of some in the community, such as often occurs with complaints about falling leaves, or the propensity to attribute causation to trees without proof for phenomena such as soil subsidence or blocked pipes.

It is also important to balance the benefits of large trees in urban environments with the degree of harm – some small harm may be reasonable to preserve a large tree.

Further to this, it is necessary to understand that large trees provide benefit to communities, not just their owners, and as such, it is reasonable to defray some reasonable “cost” of the tree beyond the legal owner of the land on which it stands.

Urban tree canopy cover is being lost, both through overall reduction in tree numbers, as well through “replacement” of trees with smaller growing species and shrubs. Planting a new tree is not a replacement of the loss of a mature tree, even if it is replaced by the same species, as the decades of growth required to develop to maturity are lost. It is therefore necessary to prevent the removal of mature trees without solid justification.

Figure 1 demonstrates tree canopy loss in Victoria from 2013-2016.



WHERE SHOULD ALL THE TREES GO? VICTORIA

Figure 1 taken from Where should all the trees go? Horticulture Innovation Australia Ltd 2017

## Risk

Management of unreasonable risk is appropriate; however, the elimination of all risk from any cause, including trees, is not practical. The very small risk of physical harm to persons that the total population of trees represent is outweighed by the benefits that the trees provide. Overall risk from trees is extremely low. Norris (2010) compiled statistics from a 53-month period and calculated the fatality rate from accidental tree failure in an urban area at 1:17.7 million annually during that period.

### *Risk versus Hazard*

There is often confusion between risks and hazards when assessing tree risk. Risk and hazard are not the same. A hazard is the presence of, or ability of, something to cause harm. With all mature trees, there may be a hazard present, just as there may be with any man-made structure. For example, the ceiling of a building could fall into a room. This is a hazard. It is a hazard that, if it falls on a person, will most likely cause some level of injury. This injury is classified as a consequence. The likelihood of the ceiling failing is extremely remote. The likelihood of the ceiling failing when it could cause an injury is even more remote, as the room will not be occupied at all times over a 24-hour period.

The combination of the consequence and the likelihood is the risk. In the example above the risk is so small that a reasonable person would take no particular action to avoid the risk. A risk assessment aims to categorise risks to identify risks that are unacceptably high. A decision then can be made on the most appropriate way to manage the risk down to an acceptable level.

## Expertise

Misinformation and poor understanding of trees and their interactions with people and property is rife. This is further complicated by the difficulty in accessing quality, impartial expert advice.

### *Arboricultural expertise*

Arboriculture is a specialist skillset and knowledgebase that is still relatively new and evolving. Many people, both lay persons and other professions, believe they “know trees” without having the training and experience of an arborist. Expertise must be demonstrated through formal training, experience and ongoing updating of knowledge in arboriculture, and not, as is often found in practice, from related disciplines such as landscape architecture or horticulture, or outdated training. The arboricultural training packages under the Australian Qualifications Framework have been updated regularly and substantially since first introduced. Practitioners who were qualified under the earlier versions, or even before the AQF, and have not updated their qualifications, are out of date.

Further, the AQF is structured in such a way that persons with a qualification below AQF Level 5 would not be expected to provide consultancy or expert witness testimony.

Unfortunately, arboriculture is an unregulated profession, meaning that there is a wide variation in the quality of training, experience and up-to-date knowledge amongst practitioners. There is also no professional recourse to address unethical behaviour as there is in licenced professions. There are also many practitioners that provide both consultancy/advice and undertake practical tree work, leading to a potential conflict of interest in providing impartiality.

Establishing impartiality of expertise will be crucial to good outcomes.

## **Jurisdiction**

The preferred appropriate jurisdiction for resolution of tree disputes would be a specialist forum such as the Land and Environment Court (NSW).

In the absence of such a body in Victoria we believe it is most important that appropriate impartial expertise is available to whomever the decision maker may be. To this end a tribunal forum as provided by VCAT, using appropriately qualified members, may be more appropriate than a law court.

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