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Victorian Law Reform Commission  
Level 3, 333 Queen Street  
MELBOURNE VIC 3000

***By Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)***

Dear Commissioners,

**Neighbourhood Tree Disputes – Inquiry section 5(1)(b) of the Victorian Law Reform Commission Act 2000 (Vic)**

Thank you for the opportunity to provide a submission in relation to the commission's enquiry into neighbourhood tree disputes. The reference paper contains an admirable summary of the present state of the law, although at 156 pages evidences the complexity embodied in this area.

I provide herewith my opinions in relation to the questions which have been asked by the Commission:

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

I have been in practice as a lawyer in Victoria for 15 years, most of which have involved disputes arising in this area of law from time to time. Occasionally, matters do proceed to litigation in either the Magistrates' Court or sometimes the County Court. However, in my experience a great number of matters are abandoned, unresolved, because parties do not have the resources to proceed to Court.

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

My experience as a lawyer is that DSCV mediations are usually unsuccessful, and that in this area of law, an informal arbitration process would be more useful to participants.

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

I have acted mainly for plaintiffs in Magistrates' Court or sometimes County Court proceedings. Most matters also involve a dispute under the *Fences Act* and therefore proceed to the Magistrates Court. Others, where for example a tree has been allegedly

poisoned by a neighbour, have proceeded to the County Court due to the monetary value of the tree.

Whilst litigation in the Magistrates' or County Court does provide an outcome, the avenue is not open to everyone, as the expense is considerable. Simple matters can cost in the order of \$30,000 to bring to trial. More complicated matters can, and do, cost in excess of \$100,000. This is a significant impediment to parties wishing to litigate.

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

In my opinion, the law is satisfactory, however the *process* for resolving neighbourhood tree disputes is simply not available to those who cannot afford to go to Court. Therefore the enactment of an Expert Tribunal to resolve simple disputes between neighbours relating to trees would make justice accessible to all Victorians, rather than only those who are able to finance the significant costs involved with litigation.

Whilst this criticism (i.e. cost disincentive) could potentially be made of any civil or commercial dispute, disputes between neighbours are particularly damaging to the local community and the families involved.

Many of these disputes can be simply and effectively resolved by an Expert Tribunal in a position to identify relevant controls, and adopting an informal hearing process (similar to the way in which the Building Appeals Board operates in Victoria).

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

No comment.

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

I would propose that:

- (a) An Expert Tribunal be enacted to determine disputes between private owners or occupiers of land relating to trees.
- (b) That the tribunal be constituted by one or more members with specialist knowledge of the key issues that are likely to arise (potentially lawyers, arborists, town planners, environmental consultants, etc). They might also include conciliators from the DSCV, who would have significant experience in this area.
- (c) That an owner or occupier of private land adversely affected by a tree partly or wholly on a proximate (not necessarily adjoining) private property that poses a nuisance or risk of injury to property or person, may seek a **removal order** or **trimming order** (trimming should also include the ability to install protective measures such as root barriers).
- (d) That upon receiving an application, all affected persons are to be notified (including the municipal council). The onus would be on the applicant to identify the affected parties.

- (e) The municipal council to provide prescribed information to the tribunal (detailing any controls affecting the tree).
- (f) At the hearing, if it thinks fit, the tribunal may order:
  - (i) trimming of the tree;
  - (ii) removal of the tree (or other matters such as the installation of a root barrier, etc);
  - (iii) that a party do, or not do, something that potentially affects the tree;
  - (iv) how the costs should be borne by the parties.
- (g) The tribunal should not be given jurisdiction to determine **compensation** in relation to damage caused by overhanging branches, falling branches or debris, tree roots etc. I would propose that this be left to the state courts as determining compensation will significantly complicate the nature of the hearing.
- (h) I would propose that any party unsatisfied with the outcome be entitled to seek a review in the Magistrates' Court, and that this right of appeal operate as a hearing *ab initio*. In this way, parties wishing to have complicated matters determined by the courts are not shut out from doing so. However parties with simpler disputes (which are the overwhelming majority of disputes), would be entitled to have their dispute resolved in an informal, yet effective manner.
- (i) I submit that the availability of such a Tribunal to resolve these disputes would discourage misguided "self help" measures (e.g. poisoning the tree), which is invariably the turning point between a resolvable dispute, and one where positions are well and truly entrenched.
- (j) To be effective, it would be important that such a Tribunal operate in clear view of the public. Hearings should be open to the public and written reasons for decisions should be published and freely available to all.

**7. Should a statutory scheme for resolving tree disputes be adopted in Victoria? What should the overarching aims of a new scheme be?**

As above. The overarching aim should be an expedient and a low cost regime available to all Victorians.

**8. What type of vegetation should be covered by a statutory scheme? Is there any vegetation that should not be covered?**

I would not propose that there be any exclusions, save that the regime operate only in respect of the private rights. Thus, the ability of a party to conduct trimming or removal of a tree on a neighbouring property would still be subject to the requirement (if applicable) to obtain a planning or local law permit if applicable.

**9. Should the application of a statutory scheme be limited to land in particular zones? If so, which zones?**

No.

**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?**

There should be no requirement that the lands be adjoining. It is unnecessary to spell out the relevant degree of proximity required – this is a task best left to the Tribunal.

**11. How should trees that are partially on the tree owner's land be dealt with under a statutory scheme?**

As above, I would propose that this distinction not be made.

**12. Who should have standing to bring a legal action in tree disputes under a new scheme?**

Any person affected, being the owner of the land on which the tree is wholly or partially situated, or a nearby owner affected by tree branches, debris or roots.

**13. Who should be liable for harm or damage caused under a new scheme?**

I would suggest that this not be determined by the Tribunal – the sole focus should be on providing a forum for expedient resolution of the issue, not in determining compensation which is a task better suited to a Court.

**14. Should interference (not causing damage) be actionable under a new scheme? If so what degree of interference?**

Yes, but only in the case of the party seeking in effect some form of injunction prohibiting or modifying an interface affecting a tree.

**15. What degree of damage should be sufficient to bring an action under a new scheme?**

It is unnecessary to answer this question.

**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?**

It is unnecessary to answer this question.

**17. Should future damage be actionable under a statutory scheme? If so, should a particular time period be specified?**

It is unnecessary to answer this question.

**18. What degree of harm should be sufficient to bring an action under a statutory scheme?**

It is unnecessary to answer this question.

**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?**

It is unnecessary to answer this question.

**20. Should future harm be actionable under a statutory scheme? If so, should a particular time period be specified?**

It is unnecessary to answer this question.

**21. Which court/s or tribunal should have jurisdiction over neighbourhood tree disputes under a statutory scheme?**

It is unnecessary to answer this question.

**22. What preconditions, if any, should parties have to satisfy under a statutory scheme before any orders are made?**

I would propose that the Magistrates' Court continue to have jurisdiction. In my experience, most of the matters that involve trees, also involve disputes under the *Fences Act*. If a proceeding is commenced, the same court should be permitted to make orders in relation to both fences and trees. This again does not alleviate the need to obtain necessary planning or local law permission prior to an order being enforceable.

**23. What factors should be taken into account by the decision maker before making any determinations under a statutory scheme?**

A party seeking to apply, should be required to serve a notice outlining what orders they are seeking, in the same way that a fencing notice operates.

**24. Should there be a hierarchy or relative weight for each of these factors? If so, how should this be determined?**

As above.

**25. What types of orders should be available under a statutory scheme?**

As above.

**26. How should these orders be enforced?**

As above.

**27. Should the common law right of abatement remain available to affected neighbours under a statutory scheme? Should it be modified in any way?**

I do not believe the common law should be modified.

**28. To what extent, if any, should orders made under a statutory scheme override or modify:  
(a) local laws?  
(b) other legislation?**

As above. I would not propose that local law or other legislation be overridden.

**29. What factors should be taken into account in relation to the appointment or qualifications of experts giving evidence about neighbourhood tree disputes?**

I do not believe that it is necessary to codify this – it will be a matter for the Tribunal as to what weight they attach to evidence in the circumstances.

**30. Should the decision-making body issue guidelines or model reports to guide expert evidence?**

No.

**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?**

No. In my opinion this will be too difficult to implement fairly.

**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?**

No, as above.

**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?**

In my opinion, at no point.

**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?**

It should be a matter for the parties as to whether they wish to seek to join new owners.

**35. Should a searchable database of orders relating to trees be made available in Victoria?**

Yes, this would greatly assist.

**36. What types of resources should be made available to community members to complement a statutory scheme?**

An online portal which assisted community members to quickly and accurately identify any relevant planning and local law controls would greatly assist.

**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?**

Yes, this would greatly assist the community. I make no comment as to who is best placed to administer such a platform, as this is a resourcing issue.

**38. Are there any other specific features of a statutory scheme that the Commission should consider?**

No further comment.

**39. Do you have an alternative option for reform that you would like to see introduced in Victoria?**

No.

Yours faithfully

**Pointon Partners Pty Ltd**



**Matthew Francke**  
**DIRECTOR**