



28 February 2018

Victorian Law Reform Commission
GPO Box 4637
MELBOURNE 3001
Victoria

Dear Sir/Madam,

SUBMISSION TO THE NEIGHBORHOOD TREE DISPUTES REVIEW

HVP's concern is not so much about the *resolution* of neighbourhood tree disputes, as about what the law governing neighbourhood trees should be in rural situations. As the VLRC's discussion paper notes, the law regarding boundary trees is largely the common law. The common law in this area has evolved largely from single/small group tree disputes in urban areas. This is unhelpful in (a) determining how the law might be applied in a rural setting, and (b) in developing law that is well fitted to this setting.

For example, HVP has estimated that its 240,000 hectares of land has around 920 kilometres of direct boundaries to other private land holders (not including effective common boundaries to licensed unused roads). The issues of managing boundaries at this scale, and in sparsely inhabited areas, cannot be considered on the same basis as the boundary between suburban houses.

Neighbourhood problems with trees in rural areas are essentially:

1. Trees falling over fences, requiring fence repair and potentially allowing livestock to escape; and
2. Where treed land adjoins habitation, the risk that trees will fall across people or buildings.

Considering these in the context of the torts of negligence and nuisance:

NEGLIGENCE

The law as it has evolved in the urban landscape has essentially distinguished between latent and patent defects in trees. If a tree causes harm due to a latent defect, or has no prior defect, the tree's owner will not be held responsible for that harm, whereas if the harm is due to a patent defect, then the trees owner will have had a duty of care to protect their neighbours from any damage the defective tree may have caused. This

formulation is not unreasonable in the urban environment, where the number of trees managed by any one land owner is generally few, and a land owner may reasonably be expected to keep an eye on the state of the trees in their garden, but in a rural environment, large numbers of trees over significant lengths of boundary can be involved. Regular inspection of such trees is mostly impractical, and a tree which is “defective” is also likely to be a tree with significant habitat value which is valued by the community. The risk in such a circumstance is largely a risk to property, rather than to life and limb. Management of this risk, and environmental care are at odds in this circumstance.

In the situation where treed rural lands adjoin habitation, the same considerations apply, but the risk of harm to people is much greater. This situation more closely approximates the typical urban situation, except that the rural owner may still face a large and impractical inspection task. This may well not be a task of their own making. It is unjust if a neighbour can subdivide their land and make a large sum of money from so doing, but in so doing impose a significant and ongoing cost of tree inspection and management on their neighbour.

NUISANCE

Nuisance arising from damage to property by falling trees or limbs is almost inevitable in rural areas. Such a “nuisance” to neighbours can only be certainly abated by keeping trees back from fences to a distance equal to the height of the trees. Particularly in higher rainfall areas, where trees can exceed 35 metres in height, this would not be a desirable outcome.

Today, more than ever, the dichotomy between the requirements that society has to be kept safe, and its requirement for the provision and protection of the environmental and amenity values of trees is starkly on show. Where boundary trees are native vegetation, their removal is subject to the native vegetation clearing controls in section 52.17 of planning schemes. Even where vegetation does not meet the definition of “native”, most people would prefer that the objective of total safety from falling trees and branches be compromised to maintain the environmental and amenity values of trees in the landscape. In other words, HVP submits that most people in our community would not want a strict view of the law of nuisance to guide the management of rural trees. This is even more true with respect to the protection of property such as boundary fences from falling trees and branches.

WHAT SHOULD THE LAW REQUIRE WITH RESPECT TO BOUNDARY TREES IN RURAL AREAS?

The unwritten law is built up of the cases that present themselves before the courts. The application of this law to certain areas of life (for example motor accidents) has been worked out in great detail, but in the case of the requirements of neighbours to manage boundary trees, this is not the case, and the current state of the law can only be estimated by extrapolation from cases that have considered boundary trees in urban settings. These cases tend not to provide a useful consideration of the issues in a rural setting. There is thus a case for statutory intervention to provide guidance to rural land owners in treed environments, and to draw a contemporary compromise between the benefits and the risks that trees bring to neighbours.

Such a statute should distinguish between risks to people and to property, and seek to define standards of care with respect to each that are practical given the long lengths of boundaries that exist between rural neighbours, and the large numbers of boundary trees frequently involved. HVP submits that the balance between protecting the environmental and amenity benefits brought by trees, and protection of property such as boundary fences from falling trees and limbs should be drawn in favour of the former. To make the owner of boundary trees responsible for protection of infrastructure adjacent to that boundary would be to provide an incentive for tree removal that is quite out of step with contemporary environmental values.

Where boundary trees represent a hazard to humans, of course the calculus is different. Whilst the community in general does not want to be protected absolutely from the risk of harm by trees (which can only be accomplished by keeping people well separated from trees), It is however appropriate that where a tree or trees represent a particular hazard to life and limb, that the tree owner should have a responsibility to abate, or to allow the abatement of that hazard.

The justice of allocating the costs of managing such hazards is always difficult, requiring consideration of who came first, the trees or the people at risk from them, who is better able to adapt their activities, to reduce the risks, and protecting the rights of a land owner to use their land as they wish.

Whilst in general, it may be best to leave consideration of these questions to the discretion of a court in a particular case, the situation of the development of housing estates adjoining treed land is worthy of particular prescription in any future statute. The development of residential subdivisions is a lucrative venture, which can and does impose a range of costs on rural neighbours, without compensation. With respect to boundary trees, these costs include the costs of protecting the new neighbours from falling trees and limbs, and providing abatement of the risk of bush fire. In this circumstance, at least, it would be just for a rural land owner to be able to claim compensation from a developer for the imposition of these costs as a lump sum at the time of subdivision.

Thank you for the opportunity to submit to this review. HVP is willing to provide any further assistance to the review that the VLRC may require.

Yours faithfully,



Warwick Williams
CORPORATE COUNSEL