

28 February 2018

Victorian Law
Reform Commission
GPO Box 4637
Melbourne VIC 3001

Neighbourhood Tree Disputes: Consultation Paper

To the Chair, Commissioners and Reference Team,

Firstly, well done on such a comprehensive Consultation Paper published in December. It sets out the background, the current situation, possible directions and terms of reference very clearly.

I write to offer a few brief insights based on my experience as Acting Commissioner at the NSW Land and Environment Court, where I've been hearing tree disputes under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) since 2010. (I have also been involved in tree disputes in Victoria, providing expert evidence as a consulting arborist.)

Benefits of a statutory scheme

In my experience, there is much to be gained from enacting legislation to specifically deal with tree disputes. Having heard more than 200 cases, I find the NSW Trees Act is functional and practical, achieving the purposes for which it was enacted.

As you rightly point out, trees commonly contribute to neighbours' disputes. The NSW Trees Act provides a relatively cheap and quick process for neighbours to get an informed outcome when other channels for resolving a dispute have been unsuccessful.

A requirement that land be adjoining

The NSW Trees Act requires the affected neighbour's land to adjoin the tree owner's land. Two properties separated by narrow strips of public land have been held to be adjoining (see *P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128 and *Murray v Shoebridge* [2007] NSWLEC 785).

In *Dive v Lin & anor* [2017] NSWLEC 1348, the applicant sought orders to prevent damage from a tree that was found to be principally situated on a property not adjoining his own. It is possible that a tree can cause damage on land that is not adjoining, either by shedding limbs, falling over entirely, or via root growth. It might be possible to include these situations in a statutory scheme, but care

must be taken to avoid the scheme being applied beyond its purpose. For instance, the NSW Trees Act allows an application for orders to prevent injury to any person, not restricted to a person on the applicant's land. If there were no requirement for the tree to be on adjoining land, this might allow an application for a tree on any land.

Which court or tribunal?

In my experience, appointing decision makers with some arboricultural expertise to hear these matters allows discerning review of the situation and any specialist evidence. Experts' evidence may occasionally be misleading, despite the experts' obligation to a court. If the decision maker has some expertise in the matter, this also allows many parties, especially in less complex matters, to come to court without having to pay for expert evidence. In NSW, the Commissioner hearing the matter has suitable expertise and can view the situation at the onsite hearing. *Having the hearing onsite is invaluable.* Most matters in NSW are also completed onsite. There are often many factors to consider in a tree dispute, and the interaction between these can be important. It can be difficult to fully present this in a court.

Dividing fences

It is not uncommon for trees to cause damage to dividing fences, requiring orders for repair or compensation. Often, such fences require repair or replacement for their entirety, or for sections beyond that part damaged by a tree. Typically, no further level of expertise is required for this. It seems reasonable for such a jurisdiction to extend to orders for the remainder of a fence, when orders are being made for a part of that fence damaged by a tree.

Injury

The NSW Trees Act does not include any jurisdiction for the making of orders for past injury (e.g. compensation for any costs resulting from an injury). However, past injury (e.g. caused by falling limbs, or allergies) can and should be considered when determining the likelihood of future injury and what orders, if any, should be made for this.

I note that the table in the appendix of the Victorian Consultation Paper (p 136) may mislead the reader into believing the NSW Trees Act may provide some relief for those who have suffered an injury as a result of a neighbouring tree.

Factors to be considered

I would suggest any statutory scheme should give significant consideration to the benefits of the tree to the broader community, including its ecosystem services and amenity. This is one clear advantage of a statutory scheme over the traditional common law process, reflecting current scientific understanding, social attitudes and government policy.

Nature of a statutory scheme

Any statutory scheme has to cover a broad range of issues while remaining relatively succinct and avoiding loopholes or clauses that are open to interpretation beyond their purpose. The NSW Trees Act, in my experience, has proven robust and fit for purpose.

Future consultation

I would be happy to be included in future consultation meetings with the Commission should you believe my experience would be helpful.

Yours sincerely,

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