

8 March 2018

The Hon. P. D. Cummins AM
Chair
Victorian Law Reform Commission
Level 3, 333 Queen Street
Melbourne VIC 3001

Dear Mr Cummins

Neighbourhood Tree Disputes - A Community Law Reform Project

The Law Institute of Victoria (LIV) welcomes the opportunity to provide feedback on the issues raised in the Victorian Law Reform Commission's (VLRC) consultation paper, Neighbourhood Tree Disputes (the Consultation Paper), as part of the VLRC's inquiry into improving the way neighbourhood tree disputes are handled in Victoria.

The LIV understands that neighbourhood tree disputes occur with relative frequency and often affect an individual's right to quiet enjoyment of their land, which can have a significant impact on their livelihood. Such disputes may be complex, protracted, expensive, stressful, and acrimonious.

The LIV has responded to some of the issues raised in the Consultation Paper below, in particular Chapters Two, Three, Four and Six, set out as follows:

Examples of Tree Disputes

Tree Roots

Damage to property from trees (for example, by the growth of tree root or invasive species, or through falling limbs) often necessitates their removal. The wanton growth of roots, branches or leaves of trees that encroach on neighbouring property may become a source of neighbourhood dispute and can give rise to actions for nuisance in certain circumstances.

Damage to established trees during building works or development may likewise cause injury and disturbance to neighbours and may give rise to disputes over what is seen to disturb a neighbour's legitimate enjoyment of their property.

Conservation covenants by private landholders

Conservation covenants may be used by private landholders to protect native vegetation on their property against future development. Conservation measures may take a variety of forms, including proprietary interests, personal interests enforceable through contract, charitable ownership through Bush Heritage or Wildlife Conservancies, and trust arrangements. Conservation covenants have the potential to spark a dispute about trees or vegetation on private land.

For example, where farming and conservation interact, each landowner may be concerned that the neighbouring operations will create obstacles for their individual goals as landowners: a farmer may be concerned by the spread of weeds, or an increase in native fauna such as kangaroos, as a result of the conservation covenant, whereas the covenantor might be concerned with chemical spray drift, soil disturbance and noise, caused by farming operations.

Competing private owners' conservation goals

One example of competing conservation goals is preserving a heritage landscape, and the environmental value of sustainable energy through windfarms. Windfarms often pose an interruption to an existing significant landscape, including significant trees, and can give rise to grievances.

Resolving Neighbourhood Tree Disputes in Victoria

The LIV acknowledges that there are several broad matters, as discussed in the Consultation Paper, which represent difficulties with the current scheme in place in relation to neighbourhood tree disputes, which the LIV considers warrant reform.

There is currently no statutory framework in place for the resolution of neighbourhood tree disputes. Rather, disputes about trees are governed by the common law torts of negligence and nuisance, which are inherently complex. Parties may view the current law as complex, and may not have a clear understanding of their rights and duties under the common law. Broadly, the options for parties to resolve a neighbourhood tree dispute are:

Informal resolution between the parties

The complexities of the common law, and the resultant difficulties parties may encounter in understanding their duties and rights, mean it is often hard for parties to resolve their dispute informally.

Mediation

Mediation is a popular means of dispute resolution, with tree disputes being the third most common dispute referred to Dispute Resolution Services Victoria (DRSV). However, decisions of the DRSV (and private mediation services) are non-binding on the parties, and there is no recourse for a party to enforce compliance with a resolution achieved at mediation.

Litigation

Neighbourhood tree disputes that reach court are usually heard before the Magistrates Court, but can also be heard in the County and Supreme Courts. The relevant court filing fees apply, in addition to any legal costs parties may incur if they choose to be represented. The cost and time consuming nature of litigation may discourage parties from seeking formal resolution.

Planning Law and Regulation Affecting Trees on Private Land

Falling Trees

Large trees have the potential to be highly dangerous, especially when located on private land close to neighbouring residential dwellings. This can be particularly so with native Australian trees and eucalypts (colloquially known as “widow makers”). Currently, the removal of such trees can be subject to local laws or Tree Preservation Orders made under the *Local Government Act 1989* (Vic). A neighbourhood dispute can be triggered where a council declines to approve a Local Law permit to remove such trees.

In *Timbs v Shoalhaven City Council* [2004] NSWCA 81, the Court considered the case of a landowner, Mr Timbs, who had spent several years petitioning the Council to remove a dangerous tree on his land, which was subject to a tree preservation order. A Council Officer’s visual inspection and reports deemed the tree ‘safe’ and removal was denied. A strong wind blew the tree over, killing Mr Timbs. The Court found Council negligent for its failure to identify the tree as posing an unacceptable risk and for failing to take appropriate action, including failing to adequately inspect the tree. The Court of Appeal found that the existence of the factor of control was critical to Council’s liability towards Mr Timbs, particularly noting the responsibility of Council where homeowners bring dangerous trees to the attention of Council, and Council opt to advise homeowners about the danger of the trees.

Planning and Regulation Preventing Tree Removal

Planning controls that prevent tree removal may create problems for land owners wishing to construct or build dwellings. The development of land in areas with stringent planning controls concerning trees can often affect the capacity of private land owners to maximise their land value, particularly in areas of highly significant intact remnant natural bushland.

Inversely, injunctions may be used by neighbours as a tool to prevent the sale of land for development purposes that would necessarily have seen significant native vegetation landscapes destroyed.

Planning Law and Regulation Preventing Development

In some circumstances, unused land may pose problems for passive landowners.

Naturally occurring vegetation growth can at times revert the land to its original vegetation status, making it available for an offset credit scheme. In certain circumstances, changes to the natural state of unused land may prevent future development, resulting in a dispute about the responsibility of a land owner to maintain the vegetation on their land in a particular way.

Planning controls and political disputes

The LIV understands that it is not infrequent that neighbours in dispute over trees become involved politically via action to enforce planning controls. This may play out on a subtle level where disputing neighbours draw on Council to enforce planning controls, or members of the community “dob in” neighbours for damaging or destroying trees.

Trees valued by a community can give rise to disputes of a political nature. One recent example was a tree whose canopy extended over land owned by persons who opposed its removal. Through use of social and local media, landowners were able to stall or prevent adjacent development, involving the tree's removal, even though approved development plans existed.

Vehicle Crossovers

A vehicle crossing (or 'crossover') is a legal right of access to property, under the *Local Government Act 1989* (Vic). Although usually built on Council land, the placement of crossovers may be affected by tree placement or protection of a tree under Local Laws. Where a crossover cannot be established due to a tree, this may affect the ability of a landowner to access their own property.

Despite being commonplace, crossovers impact roads, footpaths, nature strips and street trees alike and, as a result, are tightly regulated at a local government level. They can give rise to neighbourhood disputes concerning the amenity of private property as impacted by proximate street trees and local neighbourhood amenity as it impacts individual private land.

Councils have powers with respect to crossovers under s 206 of the *Local Government Act 1989* (Vic), and most have additional provisions in their Local Laws, along with crossover policies.

Although crossovers generally occur on Council land, any alteration, repair or construction of a vehicle crossing undertaken by an abutting landowner requires a Council permit. A failure to carefully understand relevant regulations and specific municipal crossover policy can leave private landowners vulnerable to a Council requirement to remove a redundant vehicle crossing, or its refusal to permit a crossover and thus preventing site access due to disputes concerning street trees.

Bushfire Management Overlays

Disputes can arise between private owners in bushfire prone areas.

For example, private owners whose land is affected by a Bushfire Management Overlay must undertake pre-emptive work to plan and prepare for bushfire, often including the removal of trees or vegetation, which may result in a dispute. Similarly, disputes may arise where an individual perceives that trees or vegetation on a neighbouring property pose a bushfire risk to their own property, and may seek to have their neighbour's trees removed.

Any permit application for subdivision or construction must be accompanied by a Locality and Site Description and a Bushfire Management Statement, which describe the context of the site and the proposed bushfire protection measures. As vegetation coverage and character are integral considerations in assessing a site's bushfire risk, a comprehensive Vegetation Management Plan is generally required to complement the Bushfire Management Statement. VCAT has rejected undertakings to make personal effort when a fire is approaching regarding them insufficient to defend a property.

Historically and Ecologically Significant Trees

The LIV notes that Indigenous Heritage and Heritage legislation protects historically and ecologically significant trees on private land in certain circumstances.

Heritage landscapes

Since 1979, the Victorian chapter of the National Trust of Australia has maintained a register of significant landscapes, which include trees, many of which are on private land.

Planning Schemes generally include culturally significant landscapes within a 'Significant Landscape Overlay' with a particular Schedule linking the purpose of the Overlay to its cultural heritage significance.

Heritage Victoria also classifies, manages and assesses landscapes of State significance. Aesthetic, archaeological, architectural, historical, scientific and social values are all considered in determining what constitutes an area of cultural heritage significance. Use and development on land registered under the Heritage Act requires approval of the Heritage Council, which can feed into neighbourhood disputes about trees.

Ecological Vegetation Classes

One method used for protection of native trees and vegetation is 'vegetation classification', a system by which vegetation is grouped together based on characteristic features (Victoria's Ecological Vegetation Classes). Such classification can become relevant to neighbourhood disputes concerning trees including those that find their way into the planning system.

Vegetation offset provisions

Offset Schemes allow applicants to remove biodiversity values on one site by improving them elsewhere or, where this is impossible, to purchase credits. In Victoria, most permits and planning scheme amendments require that offsets be made where native vegetation is removed as a result of development, or in breach of a planning scheme. Native Vegetation credits are gains in the quality or quantity of native vegetation and can provide a private owner of high conservation value with tangible financial gain paid for by another private landowner. Offsets are subject to a secure and ongoing agreement registered on land title.

In neighbourhood tree disputes involving contested tree removal, vegetation offsets may be a factor. The LIV understands that neighbours also often cooperate regarding vegetation offsets, and offsets themselves can be used as a tool in resolving disputes.

Approaches to Tree Disputes in Other Jurisdictions

Tasmania

The LIV notes that Tasmania adopted a new process late last year and the progress of its implementation is as yet unclear. This legislation originated from a recommendation of the Tasmanian Law Reform Institute in its report of January 2016, available online.

It is understood that the new process invited considerable community interest and many calls from the public to legal services. A fact sheet prepared by the Environmental Defenders Office Tasmania concerning the *Neighbourhood Disputes About Plants Act 2017*, which is available online, discusses this in greater detail. Government information and template forms are also available online.

New South Wales

The New South Wales Land and Environment Court website has a guide to disputes between neighbours over trees, and the Act is the *Trees (Disputes between Neighbours) Act 2006*. The Court's website indicates operational aspects, legislation and cases.

Other States and Territories

The LIV understands that Western Australia has no new legislation or procedures. The LIV is unable to comment on other Australian States or the Territories.

Options for Reform to the Law of Neighbourhood Tree Disputes

The LIV considers that reform to the existing framework in relation to neighbourhood tree disputes is required in order to simplify the law in this area and to improve accessibility to resolution services for all members of the community.

We would welcome the opportunity to meet with you to discuss the above issues, and to continue to be involved in discussions with the VLRC and relevant stakeholders about shaping any proposed reforms to this area.

Yours sincerely



Stuart Webb
President Elect
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