

## NEIGHBOURHOOD TREE DISPUTES

<b>Number</b>	9
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### **1 Have you been involved in a neighbourhood tree dispute? What was it about and what was the outcome?**

As a municipal tree officer I was involved in countless tree disputes involving Council's trees and residents. In this role disputes were mediated by Council's insurance company lawyers.

Initially in this role, 12 years ago, there were not many processes involved in dealing with tree disputes. As a result things could escalate easily with council officers and Councillors being threatened personally or legally.

I was in this role all through the millennial drought and my municipality was on shrink swell montmorillonite clay soils. Subsoils shrank during this 10 year drought and residents in older houses were desperate to blame building damage on trees. I was part of a process of working with insurance company lawyers to develop processes and procedures for dealing with these disputes.

I was also called upon regularly to provide expert information and opinions on the trees. As a soil scientist as well as an arborist, I was also asked to comment on many construction reports by engineers, builders and geotechnical engineers. Having a defined process for dealing with complaints helped residents and council officers. It meant that real data had to be compiled by complainants, especially with regard to building damage.

Residents would regularly ask my advice on neighborhood tree disputes. so i am familiar with the problems these cause and how hard it is for people to find centralised information regarding the law and trees and their rights.

I have also been involved in numerous disputes with residents regarding nuisance caused by pollen, leaves, fallen branches and overhanging branches.

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

No

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

Yes several. In each case there was a settlement before it actually got to court. These cases were for property damage. I was involved as an expert on tree roots and soils.

Property damage is always a multi-factorial issue. Especially on shrinking clays in a long drought. It was never possible to attribute all the damage to the tree, once data such as moisture at footing depth, footing information, age of the house and construction information have been taken into consideration.

Once real data was collected and examined the complainants came to understand that the tree was not the sole cause of the damage. Property damage was never attributed to any more than 20% of the cost of repairs. In many cases collecting data on soil moisture at footing depth would eliminate the tree altogether. This soil moisture data often showed that cracked pipes, failed Victorian footings or damaged down pipes were the cause of damage. If the footings were damp where damage had occurred it was often leaking pipes or failed storm water that had caused footings to slump.

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

I think they probably are. However there are so many different laws relevant to tree disputes, and also different codes of practices. And they are all in different places.

There are also many deeply held beliefs about trees that bear no rigorous scrutiny when our understanding tree biology and arboriculture is used to examine them. This is especially so regarding tree roots.

There needs to be a centralised place for people to go for information regarding trees and the law before they get into disputes. As well as a place to access information about their rights under the legislation.

With all my years of experience and expertise in horticulture I still failed on of the quiz questions on trees and the law.

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

Not so far I my reading of the discussion paper has informed me.

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

A centralised place for information on tree legislation and people's rights and obligations under this legislation is needed.

This should also include information on the relevant Australian standards for pruning trees and for protecting trees on construction sites.

Procedures and processes need to be more detailed prior to mediation.

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

It would seem that this has merit since self help and mediation is not proving satisfactory to many. Aims should be:

1. To clarify the rights and responsibilities of tree owners and affected neighbours so that disputes can be prevented from arising.
2. Reduce the cost of taking legal action.
3. Allow for rapid resolution of disputes.
4. Provide binding and ongoing outcomes that can be enforced.
5. Reduce escalation of disputes to litigation.
6. Bring the law up to date with technical knowledge in horticulture, arboriculture, soils science and building construction. And Risk Management, eg: AS/NZ ISO 3100:2009
7. Bring the law up to date with community views and expectations where possible.

NB there will be relevant standards for footing construction that will be relevant also. And also AS 4970-2009 Protection of trees on development sites. The risk management standard is used by local government for assessing risk in trees. It provides a consistent and accepted methodology for assessing risk.

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

I believe that trees should be covered principally, as defined in the Australian Standard for Pruning of Amenity Trees. AS 4373-2007. But other types of woody perennial vegetation should be included. Such as woody shrubs, vines, cacti, palms and bamboo should be included. Noxious weeds should also be considered for inclusion. Dead vegetation should also be covered. Fruit, seeds, pollen, leaves and flowers of a plant should also be included. Roots should be included, as should suckers.

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

No I don't believe so. especially as so many urban dwellings are in the urban edge these days, next to public or agricultural land. There can also be disputes regarding trees on agricultural land. Dwellings also are adjacent to areas zoned industrial, retail etc. it should be acknowledged that trees change over time too. Just because trees are protected on a development now, this does not mean that they may not be a nuisance or hazardous over time.

**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?**

Not necessarily.

The cases cited in the discussion paper where properties were separated by a lane, road or drainage easement are relevant. As is the case where trees on private land could fall on users of public land.

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

Depends on whether this is an individual tree, suckers, or vines or bamboo. If they have originated

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

An owner, tenant or licensee

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

An owner or licensee. A tenant should not bear responsibility for tree damage.

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

Nuisance caused by excessive leaf or bark drop.

Pollen causing allergic reactions, such as asthma or contact dermatitis

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

Substantial, ongoing unreasonable interference, nuisance and damage
<b>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?</b>
Both
<b>17 Should future damage be actionable under a statutory scheme? If so, should a particular time period be specified?</b>
Only within a specific time frame, 12 months would be appropriate. Especially in relation to of trunk or branches. And only when assessed according to the Australian Standard for risk Management. May cause damage at some unknown time in the future is not sufficient.
<b>18 What degree of harm should be sufficient to bring an action under a statutory scheme?</b>
Harm to people or pets or livestock.  Whilst special medical conditions do exist, they are rare. So for medical conditions medical certificate should be provided stating the tree is the cause of the medical condition. Many trees thought to be allergenic are actually not, and claims need to be evidence based.
<b>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?</b>
All three.
<b>20 Should future harm be actionable under a statutory scheme? If so, should a particular time period be specified?</b>
Within 12 months. Whilst trees are always changing, there needs to be a specified time frame.
<b>21 Which court/s or tribunal should have jurisdiction over neighbourhood tree disputes under a statutory scheme?</b>
Outside my expertise
<b>22 What preconditions, if any, should parties have to satisfy under a statutory scheme before any orders are made?</b>

I think clauses 6.193, 6.194 and 6.195 are reasonable. As does 6.197.

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

Potential for harm, nuisance or damage. But these factors should be assessed with relevant data. Eg risk assessment, data on buildings and footings, moisture at footing depth if tree implicated in construction damage.

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

The highest weight should be always determined based on a risk assessment. It is no good saying heritage or conservation value should take precedence, if the risk cannot be mitigated or managed. Condition and age indices should be considered as should the contribution to neighborhood character, the environment and heritage values.

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

Pruning, removal or other management of the nuisance tree. Pruning of roots or canopy, removal of vines from fences. Removal of bamboo.

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

By inspection by a nominated professional and reporting back to the statutory authority.

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

Yes,

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

Local laws in relation to trees are often knee jerk and made for political reasons. They are frequently not well thought out. For example they frequently do not relate to the urban forest properties of a municipality. They also often do not have methods of appeal. And the penalties included in them are also very small for removing or damaging trees. So yes, a statutory scheme should be able to override local laws. No a statutory scheme should not over ride other legislation. Especially that related to powerlines and risk associated with them and trees.

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

Arborists should have a minimum of Certificate IV. Construction and geotechnical engineers with the appropriate degrees should be involved in disputes regarding property damage.

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

Yes.

Basic information about the tree and its location with regard to boundaries and property should be detailed. Information about species, age and condition also need to be documented. Details of canopy, branches, branch unions, the trunk, the trunk flare and roots also need to be documented.

Tick the box prescription templates are unhelpful. More detail and description of a tree is always needed in assessing risk. The likelihood and consequences of failure of a whole tree or tree branches need to be outlined.

**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?**

Yes. Or another unnecessary dispute may arise.

**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?**

Yes. Or the dispute resolution process or legal action is wasted.

**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?**

Out of my expertise

**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?**

Out of my expertise

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

This is certainly desirable.

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

Information on tree legislation and their rights and obligations under this. information about processes and procedures involved in making a claim. Information on professional advice they may seek on the relevant tree or vegetation or property damage pertinent to the claim.

**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. In this era of mobile phones, apps and the internet these things should be available online.

Information included could be as above in 36, and also online forms to be filled in prior to mediation. Rights about abatement would also be helpful.

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

There are many features that could be included. I like the NSW scheme with Tree Commissioners. But the legal details are outside my expertise.

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

No