



Justice &
Attorney General

**Review of the
*Trees (Disputes Between Neighbours) Act 2006 (NSW)***

November 2009

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Executive Summary

The *Trees (Disputes Between Neighbours Act) 2006* (NSW) established a new procedure in the Land and Environment Court for resolving disputes about urban trees which are causing damage to property or risk of injury.

When the Act was before Parliament, the then Attorney General noted that when the Act was eventually reviewed, consideration would be given to whether the scope of the Act should be expanded to cover:

- trees on Council land,
- trees which block light or views, and
- trees situated in non-residential or non-urban zonings.

In addition, section 23 of the Act requires the Attorney General to review the Act two years after its assent. The aim of this review is to determine whether:

- the policy objectives of the Act remain valid, and
- whether the terms of the Act remain appropriate for securing those objectives.

This report is the result of the statutory review process, which involved seeking submissions from interested stakeholders and members of the public. 231 submissions were received overall, including on the topic of expanding the Act to trees on Council land, light and views, and additional zonings.

It appears that the policy objectives of the Act remain valid, having regard to mediation statistics regarding tree disputes, the number of trees matters filed in the Land and Environment Court, the level of public interest generated by the review, and the nature of submissions to the review.

Several submissions highlighted the opportunity for technical improvements to the legislation, and this report suggests some minor amendments to close potential loopholes and improve procedures. Changes to support enforcement of Court orders by Councils are also suggested.

An expansion of the Act to cover disputes about trees on Council land is not recommended in light of the significant resource and risk-management implications of such a change, and having regard to the fact that Councils (unlike private landholders) employ professional tree management staff and already have procedures in place to respond to concerns about trees.

More than half of the submissions to the review requested the expansion of the Act to cover trees that block light and views. The report suggests that a strictly limited power for the Land and Environment Court to make orders in relation to high hedges could be appropriate. A potential model for this expanded jurisdiction is outlined, along with necessary limitations and safeguards.

Submissions were received requesting the expansion of the Act to trees on 'rural-residential' land. The report recommends expansion on the grounds that it

would be consistent with the *Native Vegetation Act 2003*, but only if this expansion were limited to trees causing damage or risk of injury.

This report also considered the issue of tree branches which overhang onto neighbouring property, as a large number of submissions referred to disputes or concerns in this regard. The report recommends that all Councils consider amending their Tree Preservation Orders and other policies to dispense, in appropriate cases, with the requirement that the tree owner give consent to pruning of overhanging branches before Council approval is given.

Summary of Recommendations

1	<p>That the Act be amended to:</p> <p>a) allow Councils, if they elect to enforce an LEC order under the Act, to recover an administration fee in addition to the costs of carrying out work to satisfy the order.</p> <p>b) provide that any costs and fees payable to a Local Council relating to enforcement action under the Act are a charge on the tree owner's land.</p>
2	<p>That the need for additional options to enforce orders under the Act be evaluated after the new Council enforcement powers have been in operation for some time.</p>
3	<p>That the <i>Trees (Disputes Between Neighbours) Regulation 2007</i> be amended to prescribe vines as a tree for the purposes of the Act.</p>
4	<p>That the Act be amended so that its procedures can still be used in cases where the tree in question has been wholly removed.</p>
5	<p>That the Land and Environment Court be given jurisdiction to hear and determine matters arising under the <i>Dividing Fences Act 1991</i>, where an application has been made to the LEC under the <i>Trees (Disputes Between Neighbours) Act 2006</i>, in relation to:</p> <ul style="list-style-type: none"> • a tree which is causing or is likely to cause damage to a dividing fence, or • where that tree is itself part of a dividing fence and is causing or is likely to cause damage to the applicant's property, or risk of personal injury.
6	<p>That provision be made to allow notations on planning certificates to be deleted or amended in the event that orders under the <i>Trees (Disputes Between Neighbours) Act 2006</i> have been finally complied with.</p>
7	<p>That where the Court has made a work order in relation to a tree that is or will cause damage or poses a risk of injury, provision be made to allow the applicant's successor in title to bind the tree owner (or their successors in title) to comply with the order.</p>

8	That the exemption in s4(2)(a) of the Act remain unchanged, so that the Act continues not to apply to trees situated on land that is vested in, or managed by a Council.
9	<p>a) That the <i>Trees (Disputes Between Neighbours) Act 2006</i> be amended to allow the Land and Environment Court to hear and resolve disputes between neighbours about high, dense hedges which are causing a severe impact on views from, or solar access to, a dwelling.</p> <p>b) That this jurisdiction be strictly limited, with applications restricted to hedges which:</p> <ul style="list-style-type: none"> • are both high and give the effect of a solid barrier, and • are causing severe impact for a dwelling, and • have caused the impact to the applicant (not to the previous occupant), and • are located between neighbours on adjoining land. <p>c) That in determining the dispute, the Court balance the respective rights of neighbours to use and enjoy their land, having regard to privacy and other considerations, and the broader benefits of urban vegetation.</p> <p>d) That the new procedure be drafted so as not to create a right to light or views.</p> <p>e) That orders not be enforceable by the applicant's successors in title, and that they only be enforceable against the respondent's first successor in title.</p> <p>f) That hedges on land zoned 'rural-residential' be excluded from this jurisdiction.</p>
10	<p>a) That the Act be amended to extend the Act to trees on privately owned land which is zoned 'rural-residential'.</p> <p>b) That this extension apply only in relation only to trees causing damage or risk of injury.</p>
11	That if Schedule 1 item 14 of the <i>Native Vegetation Act 2003</i> is amended to reflect new zoning categories, consequential amendments be made to the <i>Trees (Disputes Between Neighbours) Act 2006</i> to preserve the relationship between the two Acts.
12	That all Councils consider amending their Tree Preservation Orders and other policies to dispense, in appropriate cases, with the requirement that the tree owner give consent to pruning of overhanging branches before Council approval is given.

Introduction

Background to the legislation

Disputes about trees were once governed by the common law, and specifically the tort of nuisance. Where a person's tree had caused damage to a neighbour's property the neighbour could sue for compensation in the Supreme, District or Local Court, depending on the amount claimed (as each court has a limit on the amount of compensation it can award). However, if the neighbour was seeking an order requiring the tree owner to take action (for example to prevent further damage), the case had to be heard in the Supreme Court.

This situation was problematic for a number of reasons. First, the common law focussed on granting compensation after the damage had already occurred – preventative injunctions were only granted in exceptional circumstances. Second, unless the person suing had a working knowledge of court procedure and the law of nuisance, the assistance of a lawyer was probably required. Third, the cost of the court proceedings would often be far greater than the cost of work to fix the problem being caused by the tree. And fourth, the time taken to finalise the court case was likely to escalate any conflict between neighbours.

The issue of disputes about trees in the urban environment was considered by the NSW Law Reform Commission in its *Neighbour and Neighbour Relations* report, published in 1998.¹ The Law Reform Commission recommended (among other matters) that legislation be enacted which provides a simple, inexpensive and accessible process for the resolution of disputes about trees.²

In 2006, the Government created a new dispute resolution procedure relating to urban trees.

Trees (Disputes Between Neighbours) Act 2006

The *Trees (Disputes Between Neighbours) Act 2006* partially replaced the common law of nuisance, by creating a new procedure for resolving disputes about trees in certain residential and industrial zonings.

It established a separate statutory scheme in which the Land and Environment Court can make orders to remedy, restrain or prevent damage to property as a result of a tree situated on adjoining land, or to prevent injury to any person.

¹ New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998). The Report may be accessed on the internet at <<http://infolink/lrc.nsf/pages/R88TOC>>.

² Recommendation 5, New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.51].

However, the Court can only make an order if it is satisfied that the person applying for the order has made a reasonable effort to reach agreement with the owner of the land on which the tree is located. The intention is to ensure that wherever possible, people attempt to resolve the matter without resort to the Land and Environment Court – for example, through discussions with their neighbours, or mediation.

The Court process is as follows:

- 1) A person can apply for an order under the Act if they are the owner or occupier of land which adjoins the land on which the tree is located.³ Application forms (along with the application fee) can be lodged at the Land and Environment Court, or at any Local Court, or by post.
- 2) When the application is lodged, the date for a preliminary conference is set by Court staff.
- 3) The applicant must then give a copy of the application and the orders which are being sought to the owner of the land on which the tree is located, the Local Council and the Heritage Council (if their consent would otherwise be required to interfere with the tree), and any other person who may be affected by the orders which are sought.⁴ This information has to be provided at least 21 days before the date of the first hearing, unless the notice period is changed (eg. because there are safety concerns so the first hearing must be held urgently).
- 4) The preliminary conference is an informal conciliation conference, usually before a Commissioner. These are often held by telephone. The Commissioner tries to assist the parties to resolve the application.

If the parties can agree on a course of action, then in some cases consent orders can be made to implement the agreement.⁵ If the parties are not able to agree, the date for a second hearing is set, along with a timetable for exchange of reports and other information before the day.

- 5) The second hearing usually takes place on site, and in almost all cases a decision and reasons for decision are also given on site at the end of the hearing. A written version is provided to the parties three or four weeks later.

Each incoming application is examined by one of the Commissioners of the Land and Environment Court. If an application is made on the basis that a tree poses a risk of injury to a person, an assessment is automatically made as to whether the application should be dealt with urgently, with a shorter timetable than the one described above.

³ *Trees (Disputes Between Neighbours) Act 2006*, section 7.

⁴ *Trees (Disputes Between Neighbours) Act 2006*, sections 8 and 13.

⁵ Consent orders can only be made if they relate to activities which would not infringe a Tree Preservation Order. Consent orders authorising involve removal of or interference with a tree are still subject of a hearing to determine if the court has jurisdiction to make the order and that the order is appropriate.

The Court can make any orders it sees fit, or can decline to make any orders in relation to the tree. It is not limited to the particular orders which were requested by the applicant. Orders can include:

- any action to remedy or prevent damage to property, or prevent injury to a person;
- authorisation for land to be entered to carry out work or obtain quotations for work,
- payment of costs of any work,
- payment of compensation for damage, and
- replacement of trees which the court orders to be removed.⁶

However, the Court cannot make any orders unless it is satisfied that the tree has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or that the tree is likely to cause injury to a person.⁷

Before making a decision on an application, the Court must consider all of the following matters:

- a) the location of the tree concerned in relation to the boundary of the land on which the tree is situated and any premises,
- b) whether interference with the tree would, in the absence of section 6 (3), require any consent or other authorisation under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977* and, if so, whether any such consent or authorisation has been obtained,
- c) whether the tree has any historical, cultural, social or scientific value,
- d) any contribution of the tree to the local ecosystem and biodiversity,
- e) any contribution of the tree to the natural landscape and scenic value of the land on which it is situated or the locality concerned,
- f) the intrinsic value of the tree to public amenity,
- g) any impact of the tree on soil stability, the water table or other natural features of the land or locality concerned,
- h) if the applicant alleges that the tree concerned has caused, is causing, or is likely in the near future to cause, damage to the applicant's property:
 - a. anything, other than the tree, that has contributed, or is contributing, to any such damage or likelihood of damage, including any act or omission by the applicant and the impact of any trees owned by the applicant, and
 - b. any steps taken by the applicant or the owner of the land on which the tree is situated to prevent or rectify any such damage,

⁶ *Trees (Disputes Between Neighbours) Act 2006*, section 9.

⁷ *Trees (Disputes Between Neighbours) Act 2006*, section 10.

- i) if the applicant alleges that the tree concerned is likely to cause injury to any person:
 - a. anything, other than the tree, that has contributed, or is contributing, to any such likelihood, including any act or omission by the applicant and the impact of any trees owned by the applicant, and
 - b. any steps taken by the applicant or the owner of the land on which the tree is situated to prevent any such injury,
- j) such other matters as the Court considers relevant in the circumstances of the case.⁸

Once the Court has made its orders, it provides a copy to the parties and to the relevant Local Council. A copy is also provided to the Heritage Council if it participated in the proceedings.⁹

The Local Council is obliged to list the orders on planning certificates relating to the land on which the tree is situated.¹⁰

If the land is to be sold, the vendor must disclose any applications under the Act or orders to undertake work in the contract of sale. However, orders which require work to be carried out in relation to a tree need not be disclosed in the contract if the work has been fully carried out in compliance with the order.¹¹

Conduct of the review

The *Trees (Disputes Between Neighbours) Act 2006* (NSW) received assent on 6 December 2006. Section 23 of the Act requires the Attorney General to review the Act two years after this date. Accordingly, on 10 December 2008, an advertisement was placed in the Sydney Morning Herald and Daily Telegraph newspapers, calling for submissions on the operation of the Act. Notices were also placed on the webpage of the Legislation, Policy and Criminal Law Review Division of the Attorney General's Department, and the NSW Lawlink homepage.

Letters were sent to key stakeholders (including community groups, local government groups, professional organisations, the Land and Environment Court and relevant Ministers), to alert them to the commencement of the review, and to invite submissions.

The due date for submissions was 18 February 2009, however late submissions were also considered. In all, 231 submissions were received, as well as a document listing 81 names and addresses, submitted as a petition. Most of the submissions were from private individuals. These numbers are an indication of the significance to the community of laws relating to trees and neighbour

⁸ *Trees (Disputes Between Neighbours) Act 2006*, section 12.

⁹ *Trees (Disputes Between Neighbours) Act 2006*, section 14.

¹⁰ Clause 279 and Schedule 4 item 13 of the *Environment Planning and Assessment Regulation 2000*.

¹¹ *Conveyancing (Sale of Land) Regulation 2005*, cl 8 and 15, and Schedule 3, Part 3, item 17.

relations, as it is very unusual for a statutory review to attract such a high volume of submissions (see Appendix A for an overview of the issues raised in submissions).

1. Are the policy objectives of the Act still valid?

The first question which this review is required to answer is whether the policy objectives of the Act remain valid.

The objective of the *Trees (Disputes Between Neighbours) Act 2006* was to provide 'a simple, inexpensive and accessible process for the resolution of disputes about trees between neighbours'.¹²

Of course, the intention was not that all disputes about trees should be resolved by the Land and Environment Court (LEC). Rather, the intention was that neighbours would continue to make informal efforts to resolve questions about trees, and that a simple process for seeking a legal remedy could be used if necessary.

Since early 2007 when the Act came into force, a significant number of people have attempted to resolve tree disputes through mediation, or by seeking orders from the LEC. In the financial years 2007-08 and 2008-09 Community Justice Centres received over 900 requests for tree disputes to be mediated. Meanwhile, in the 2007 and 2008 calendar years, the LEC received over 300 applications for orders under the Act.

The number of applications to the LEC for resolution of tree disputes which cannot be resolved through other means (and the volume of correspondence from individuals received in response to this statutory review) indicate that the policy objectives of the Act are still valid – there remains a need in NSW for a simple, inexpensive and accessible process for resolving disputes between neighbours regarding trees.

This view is supported by the Local Government Tree Resources Association (LGTRA), which stated in its submission that 'the policy objectives of the Act are valid, current and appropriate'.¹³

¹² New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 October 2006, 3502 (Bob Debus, Attorney General).

¹³ Local Government Tree Resources Association, *Submission* (18 February 2009).

2. Are the terms of the Act appropriate for securing those objectives?

The second question is whether the terms of the Act remain appropriate for securing its objective of a simple, inexpensive and accessible process for resolving disputes between neighbours about trees.

This question also requires consideration of whether the Act's enforcement mechanisms to encourage compliance with court orders are adequate, and whether any technical improvements are required to improve the operation of the legislation.

Each of these aspects is considered in turn below.

Securing policy objectives

Are the terms of the Act appropriate for ensuring simplicity, accessibility, and cost-effectiveness in the resolution of neighbourhood tree disputes?

Few submissions addressed this issue directly, so to answer this question it has been necessary to look primarily to the Court's caseload statistics, as well as to comparative information. (Appendix B is an overview of the Court's statistics for the calendar years 2007 and 2008).

Simplicity

The process set out in the Act is certainly very simple, relative to the process of conducting tort proceedings using the common law action of nuisance, which was the only recourse prior to the enactment of the Act in 2006. More importantly however, it is important to ascertain whether the new procedures are objectively simple.

One submission was received from a couple who had applied twice regarding the same tree. The couple had only been successful on the second occasion because they had the assistance of a solicitor, and their submission indicated that they did not find the procedures under the Act simple or inexpensive.

However, the LEC's statistics indicate that in most cases the new procedure is simple enough to be understood and used by ordinary citizens without the need for a lawyer.

The LEC finalised 284 trees matters in 2007 and 2008. In over 70% of these matters neither party was legally represented. Lawyers were used by one side in 22% of cases, and by both sides in only 19 of the 284 finalised cases (or 6.6%).

Another indication that the procedure is straightforward in most cases is the lack of bureaucratic complexity or delay in the way proceedings are conducted:

- in 2008, 85% of tree matters were finalised after only two attendances before court (the hearing and the preliminary conference).
- across 2007 and 2008, 98% percent of matters were finalised within 6 months, and the average time from lodgement of the application to finalisation was 82 days (less than 3 months).
- the clearance rate¹⁴ for trees matters was 82% in the first year of operation (when the new Act and new procedures were first being tested) and 98% percent in 2008, the Act's first full year of operation. The clearance rate for 2008 compares favourably with the overall clearance rate for all civil matters in NSW Local Courts, which was 93.5% in 2007-08.¹⁵

Accessibility

There are no statistics available from Local, District or Supreme Courts regarding number of trees matters filed before 2007 when the Act came into force, so it is not possible to assess the accessibility of the new procedures by comparing the number of matters which went to court before and after the introduction of the new Act.

Nevertheless, it is clear that the LEC has made efforts to implement the Act in a way which makes its procedures highly accessible to the public.

Provision of resources and information

The Court has developed and published extensive information on the legislation, and on the process for resolving tree disputes in the LEC. This includes

- a 'frequently asked questions' document on the legislation and on the court procedures,
- a Practice Note setting out the practice and procedure for tree disputes before the LEC, and
- an annotated copy of the *Trees (Disputes Between Neighbours) Act 2006*, which contains plain English commentary about the way the Court has applied the Act, including hyperlinks to key cases.

This information is gathered on a dedicated 'Tree disputes' page¹⁶ on the LEC website. Generally, annotated legislation is published in textbook or looseleaf format, and is not available for free. It is highly unusual – if not unique – for a Court to have developed, published and maintained such a valuable resource, and made it available without charge.

¹⁴ The 'clearance rate' is the number of applications finalised compared to number of applications lodged in any given period.

¹⁵ Productivity Commission, *Report on Government Services 2009* (30 January 2009), Ch 7 p7.37. The Report is available online at <<http://www.pc.gov.au/gsp/reports/rogs/2009>>.

¹⁶ See <http://infolink/lawlink/lec/ll_lec.nsf/pages/LEC_tree_disputes_information>.

The LEC's Tree Dispute webpage also provides

- notes on enforcement and the Court's Standard Tree Directions,
- a set of links to decided cases, which are grouped by outcome (eg. order for tree to be removed, order for compensation only, application refused etc) to assist people to research how the law and the procedures have worked in other cases. Again, these are the kinds of legal research resources which are not generally produced or made available without charge, and
- simple forms for making applications under the Act.

The Law Society noted in its submission that "the level of information and assistance provided to applicants, tree owners and Local Councils contributes greatly to the Court being able to deliver a simple and low cost dispute resolution system."¹⁷

Education

The Land and Environment Court has undertaken a program of education about the legislation, and the Court's role in resolving tree disputes. The Court has conducted a number of seminars in conjunction with professional bodies such as the College of Law and the Law Society of NSW, on the operation of the legislation. Lectures and speeches have also been given by Commissioners to tertiary institutions and professional arboricultural associations.

The Chief Judge and one of the Court's Commissioners have also published an article on the operation of the legislation in the Local Government Law Journal.¹⁸

Conduct of preliminary conferences and final hearings

The manner in which the Land and Environment Court conducts trees matters has also maximised accessibility.

As noted above, the majority of matters only require one hearing, and one pre-hearing conference. The Court schedules preliminary conferences so that they are as convenient and easy to attend as possible. The dates on which preliminary conferences will be held are published in advance on the Court's website.¹⁹ The conferences are held either by phone, or in person at Hornsby Local Court, Sutherland Local Court, or at the LEC in the Sydney CBD.

Meanwhile, final hearings generally take place on site, no matter where in NSW the tree in question is located. If an on site hearing is not necessary (for example because the tree has already been removed and the only question is compensation), then it is held at a Local Court house near the location of the dispute.

¹⁷ Law Society of NSW, *Submission* (20 February 2009).

¹⁸ The Hon Justice Brian J Preston and Commissioner Tim Moore, *The Trees (Disputes Between Neighbours) Act 2006 – background and operation* (2008) 14 Local Government Law Journal 84.

¹⁹ See < http://www.lawlink/lec/ll_lec.nsf/pages/LEC_tree_conference_dates > .

Since the commencement of the Act, the LEC has also used two Acting Commissioners who are arborists – one or other of these Acting Commissioners have been involved in virtually all (but not entirely all) final hearings of matters under the Act. In addition, before the Act commenced, all the (then) full-time Commissioners undertook a short, intensive arboriculture course at Ryde TAFE’s School of Horticulture. This means that the Court and the parties will not always require external arborist advice before making decisions as to the appropriate orders in a matter.

Over 2007 and 2008, the LEC heard cases relating to trees in 64 Local Government Areas across the State (see Appendix C for a breakdown by area).

It appears that the Court has been successful in ensuring that the processes under the Act are available to resolve eligible tree disputes all around the State.

Cost

Two people wrote to express concern that they had found the process under the Act expensive.

The fee for filing an application under the *Trees (Disputes Between Neighbours) Act 2006* is \$197 for an individual, or \$394 for a corporation.

By way of contrast, in 2005 the fees charged by Councils in the UK to hear hedge dispute matters were an average of £347 in England, and £320 in Wales.²⁰ Some Councils have chosen not to charge a fee at all, while the Sevenoaks District Council charges £650.²¹

The fees for starting civil proceedings for matters in NSW Courts are:

Court	For an individual	For a corporation
Supreme Court	\$749	\$1,498
Land and Environment Court - general	\$749	\$1,498
District Court	\$534	\$1068
Local Court	\$197	\$394
Tree disputes in LEC	\$197	\$394
Administrative Decisions Tribunal	\$68 or \$142 if the application must be determined by the Tribunal constituted of 2 or more members	N/A

While the fee for lodging an application at the Administrative Decisions Tribunal (ADT) is lower than that for trees matters before the LEC, it should be remembered that unlike in ADT matters, members of the LEC consistently travel to conduct hearings on site, or else at a Local Court house close to the dispute.

²⁰ North Tyneside Council, *Overview and Scrutiny Report – High Hedges: Fees and Charges* (2005). Available at

<http://www.northtyneside.gov.uk/pls/portal/NTC_PSCM.PSCM_Web.download?p_ID=29991>.

²¹ See <<http://www.sevenoaks.gov.uk/environment/1755.asp#fees>>.

The fee for trees matters in the LEC was set to be the same as that for filing an application in the Local Court. As with other court fees, it is possible for individuals to apply for the fee to be waived or remitted on the grounds of hardship.²²

The fee is the same for all tree applications, and does not vary depending on the value of the claim, or the location of the tree in question.

Along with the fact that preliminary conferences are held by telephone, the practice of conducting on site hearings saves the parties a significant amount of costs in travel, and a great deal of time.

Similarly, the great majority of applicants are able to conduct their proceedings without the help of a lawyer. This saves applicants a significant amount in legal professional costs.

Finally, the LEC has issued a Practice Direction which allows the use of court-appointed experts which are paid for jointly by the parties, to assist the Court.²³ The cost of such an expert is much less than if each party were to hire their own.

Some people may prefer or require the services of their own consulting arborists or other experts, or the assistance of lawyers in conducting their matters, and this inevitably adds to the cost of the proceedings for those parties.

However, the Court fees have been set at a low level, and the LEC has made significant efforts to minimise the need for any additional expenditure on behalf of the parties to a tree dispute.

The Law Society advised in its submission that:

“in 2006, the Law Society was concerned that giving sole jurisdiction to a Sydney-based Court would limit accessibility and increase costs. The EPD Committee and PL Committee are pleased to acknowledge that this fear has not been realised.”²⁴

Conclusion

One submission recommended repeal of the Act on the grounds that it is not working as intended. It was suggested that powers regarding neighbourhood trees be given to the District Court and Local Court instead. Another submission suggested that the tree dispute procedure should be handled by Local Councils, rather than by a Court.

Overall however, it appears that the procedure established by the Act and implemented by the Land and Environment Court is meeting the objectives of the legislation.

²² See the Attorney General's Guidelines on Fee Waiver. These can be found online: from the following website <<http://www.lawlink.nsw.gov.au/ucpr>> (then click the link for UCPR publications).

²³ Land and Environment Court Practice Direction 1 of 2005: Court Appointed Experts.

²⁴ Law Society of NSW, *Submission* (20 February 2009).

This view is also supported by the Environmental Planning and Development Law Committee (EPD Committee) and the Property Law Committee (PL Committee) of the Law Society of NSW, who commented in their submission to the review that:

“As experienced practitioners in the Land and Environment Court, the EPD Committee members are of the view the Act works well and provides the Court with appropriate mechanisms to deal with disputes about trees... The Court has exercised its jurisdiction well. It has developed sound Tree Dispute Principles and provides valuable assistance to people seeking to resolve a dispute with neighbours about trees.”²⁵

This view is also supported by the Local Government Tree Resources Association (LGTRA) which submitted that:

“We continue to support the Act being heard in the Land and Environment Court (LEC) and consider its implementation has been well managed. The LEC’s employment of expert arboricultural Acting Commissioners has ensured that specialised assessments, using current industry methodologies, are consistent and appropriate.”²⁶

Enforcement of Court orders

The second question when considering whether the terms of the Act are appropriate for ensuring its policy objectives is whether the Act’s provisions for enforcement of court orders are adequate.

As noted earlier, the Court can decline to make orders in relation to a tree, or make any orders it sees fit. Orders can include:

- action to remedy or prevent damage to property, or prevent injury to a person;
- authorisation for land to be entered to carry out work or obtain quotations for work,
- payment of costs of any work,
- payment of compensation for damage, and
- replacement of trees which the court orders to be removed.²⁷

If a person does not comply with an order for work to be carried out, the other party can ask their Council to step in and do the work instead. If the Council chooses to intervene, it can recover the cost of the work from the person who was subject to the order.

It is an offence not to comply with any Court orders within the time specified. The maximum penalty is 1000 penalty units (currently \$110,000).²⁸ Failure to

²⁵ Law Society of NSW, *Submission* (20 February 2009).

²⁶ Local Government Tree Resources Association, *Submission* (18 February 2009).

²⁷ *Trees (Disputes Between Neighbours) Act 2006*, section 9.

comply with the Court's orders may also result in a criminal prosecution for contempt of court, or civil proceedings for enforcement.

If a person does not comply with an order, the other party has five options:

- (a) “ the local council might be requested to, and it may elect to, carry out the work ordered by the Court;
- (b) criminal proceedings may be brought against the person in default for the offence of failing to comply with the order of the Court;
- (c) contempt proceedings may be brought against the person in default for failure to comply with the order of the Court;
- (d) the order of the Court may be enforced by committal (imprisonment) of the person in default or by sequestration of that person's property; or
- (e) civil proceedings may be brought against the person in default to enforce an obligation under the Trees Act.”²⁹

Consistent with the civil nature of proceedings under the Act, none of the enforcement options from (b) to (e) are pursued by the State. Each of these must be initiated by the person who is seeking to ensure that the orders are complied with. Consequently, the simplest option for people is generally to request that the Council consider enforcing the orders.

Currently, Councils have the power to recover the costs of undertaking the work from the owner of the land on which the tree is situated. However, they do not have the power to recover ancillary costs (such as, for example, the administrative and financial outlay involved in pursuing enforcement action for the cost of the work). And even if they do succeed in obtaining a court order for payment of the work costs, they may have difficulties securing payment of this money from the owner of the land.

The review received two submissions from individuals expressing concern at their inability to enforce judgment, where they had not been able to secure agreement from their Council to assist with enforcement. The Land and Environment Court advises that enforcement proceedings have been commenced in only three matters under the Act, since it came into force.

The Department of Justice and Attorney General's LawAccess service (a free legal information and referral service which assists over 190 000 callers a year) also advises that a number of callers have reported being unable to secure the agreement of their Council to intervene in enforcing orders under the Act. However, it is not possible to know the precise circumstances of complaints, nor of the number of callers reporting this specific problem.³⁰

²⁸ *Trees (Disputes Between Neighbours) Act 2006*, section 15.

²⁹ See < http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_tree_disputes_information> then follow the link called 'Enforcement of Orders under the Trees Act'.

³⁰ It is not possible to obtain an exact number as calls are classified by general subject area, and all tree dispute enquiries are grouped with calls about fences and other neighbourhood disputes.

It is appropriate that Councils should have the choice of whether or not to assist in enforcing orders under the Act, as they must have regard to the impact of this intervention on their resources. Resources are required both to do the work required to satisfy the court order (or locating and engaging a contractor) as well as to undertake paperwork to recover costs from the person subject to the order.

Changes to the law could be made to support and encourage Councils to undertake enforcement activities, by ensuring that they are not out of pocket if they choose to intervene.

Councils could be empowered to recover administrative and other costs from the owner of the land on which the tree is situated, as well as the costs of doing the work. Rather than the Councils having to assess and provide proof of the specific administrative and other costs involved in enforcing each LEC orders under the Act, an administration fee could be set by Regulation. The fact that this fee could be imposed would act as an additional incentive for landowners to comply with LEC orders before there is a need for Council intervention.

In addition, any costs and administration fees payable to Councils under the Act could be given the status of a charge (ie. a statutory mortgage) on the tree owners land, so as to ensure that the Council can recover the debt in question. This would be consistent with the legal status of rates and other charges owing to Councils under the *Local Government Act 1993*.³¹ It would also be consistent with section 60 of the *Noxious Weeds Act 1993*, which provides for expenses payable to Local Control Authority for control of noxious weeds on a person's land to be a charge on that land.

Recommendation 1

That the Act be amended to:

a) allow Councils, if they elect to enforce an LEC order under the Act, to impose an administration fee in addition to the costs of carrying out work to satisfy the order.

b) provide that any costs and fees payable to a Local Council relating to enforcement action under the Act are a charge on the tree owner's land.

If these measures were implemented, it would also be beneficial to assess whether they were of sufficient assistance in ensuring compliance with the Court's orders under the Act, or whether additional enforcement options should be developed.

³¹ *Local Government Act 1993*, section 550.

Recommendation 2

That the need for additional options to enforce orders under the Act be evaluated after the new Council enforcement powers have been in operation for some time.

Technical improvements to the Act

The third question when considering whether the terms of the Act are appropriate for ensuring its policy objectives is whether any technical improvements are required.

A number of submissions made practical suggestions for improvements to the Act. These related either to the Court's jurisdiction, or to procedures set out in the Act.

Jurisdiction - definition of a 'tree'

Currently, landowners can only apply to the Court for orders in relation to 'trees'. Section 3 of the Act defines a tree as follows.

tree includes any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations.

Bamboo, which is technically a grass, is prescribed in the regulations as a tree for the purposes of the Act.

The Court has found that vines which do not have the quality of being self-supporting are not trees within the definition above.³² This means that no applications relating to vines can be made under the Act, and the Court has no power to make orders in relation to damage or risk of injury being caused by a vine.

Vines may be situated wholly or principally on a person's property, but still be causing damage to their neighbours property, or posing a risk of personal injury.

For example, a vine may be damaging the paintwork on the outside of a house, or causing water damage by blocking a downpipe or drain. The owners of the house may be unable to reach agreement regarding maintenance or removal of the vine with the owner of the vine.

In such cases (that is, where the problem otherwise fits the criteria for an order under the Act) it is appropriate for disputes about vines to be eligible for resolution by the Land and Environment Court under the Act. There is no

³² *Buckingham v Ryder* [2007] NSWLEC 458 [28]. Medium neutral citation will be used throughout this report, for ease of reference on the LEC's caselaw database.

reason why disputes about vines which are causing damage should have to be resolved using the more complicated procedure in nuisance.

Recommendation 3

That the *Trees (Disputes Between Neighbours) Regulation 2007* be amended to prescribe vines as a tree for the purposes of the Act.

Jurisdiction - where a tree has been wholly removed

In *Robson v Leischke*,³³ the Court found that it has no jurisdiction to make orders to remedy damage to property, or require payment for compensation for damage caused by a tree, if that tree has been wholly removed.

This is because section 7 of the Act uses the present tense when describing the location of the tree on adjoining land (“a tree ... that is situated on adjoining land”). That section describes the only circumstances in which a person is entitled to apply to the Court for an order in relation to damage caused by the tree. So if the tree was situated on adjoining land, the Court has no power to consider the dispute.

The consequence of this drafting is that a person who would otherwise be liable for damage caused by a tree on their land can avoid having to pay any compensation or repair costs, by acting promptly to completely remove the tree from their land. In such cases, the neighbour who has suffered the damage would only have the option of suing in nuisance to attempt to recover their losses.

A number of submissions suggested that the Act be amended to allow the Court jurisdiction where the tree has been wholly removed.

It is preferable for all cases of damage caused by trees in eligible zonings to be dealt with by the LEC under the Act, rather than matters being heard under the common law in other Courts simply because the tree in question has been wholly removed.

³³ *Robson v Leischke* [2008] NSWLEC 152 at [142]-[145]. Note that this judgment was also reported in (2008) 72 NSWLR 98, and (2008) 159 LGERA 280.

Recommendation 4

That the Act be amended so that its procedures can still be used in cases where the tree in question has been wholly removed.

The usual statutory limitation period of six years would apply to claims. If the property on which the tree was located were sold after the tree was removed, the new owner would not be liable even if a claim were brought within six years.

Jurisdiction – trees and dividing fences

The Chief Judge of the Land and Environment Court has noted that where a tree to which the Act applies causes damage to a dividing fence, issues can arise that concern the *Dividing Fences Act 1991*. It was suggested that in such circumstances, the Land and Environment Court be given jurisdiction to hear matters and make orders under the *Dividing Fences Act 1991*.

Allowing the LEC to deal with disputes under the *Dividing Fences Act 1991* where they arise in the context of a tree dispute, would be consistent with the approach to trees currently taken in the *Dividing Fences Act 1991*. This Act permits a Local Land Board or a Local Court to make an order relating to vegetation (including trees), to the extent necessary for settling a dividing fence dispute.³⁴

The proposal would also be consistent with the policy aims of the *Trees (Disputes Between Neighbours) Act 2006*, of providing a simple, accessible and inexpensive dispute resolution process. It would mean that the Land and Environment Court could resolve all of the matters in dispute, rather than the parties being obliged to make and pay for a separate application to the Local Court in relation to the dividing fence.

Recommendation 5

That the Land and Environment Court be given jurisdiction to hear and determine matters arising under the *Dividing Fences Act 1991*, where an application has been made to the LEC under the *Trees (Disputes Between Neighbours) Act 2006*, in relation to:

- **a tree which is causing or is likely to cause damage to a dividing fence, or**
- **where that tree is itself part of a dividing fence and is causing or is likely to cause damage to the applicant's property, or risk of personal injury.**

³⁴ Section 14 of the Act allows orders for fencing work. Section 3 defines 'fencing work' to include both (a) the trimming, lopping or removal of vegetation along or on either side of the common boundary of adjoining lands for the purpose of surveying or preparing land, and (b) the planting, replanting and maintenance of a hedge or similar vegetative barrier.

Procedure - notation of orders on planning certificates.

When the Court makes orders under the Act, it must provide a copy to the parties and to the relevant Local Council.³⁵

The *Environmental Planning and Assessment Regulation 2000* provides that where a Council has been notified of an order to carry out work in relation to a tree under the *Trees (Disputes Between Neighbours) Act 2006*, any planning certificates issued by the Council regarding the land on which the tree is situated must specify that the order has been made.³⁶

This is an appropriate safeguard for potential buyers of the property.

However, there is no provision for the notation on the planning certificate to be amended or deleted once the work has been satisfactorily completed in accordance with the Court order.

This is in contrast to the fact that if the owner proposes to sell their land, they need not disclose any applications under the Act or orders to undertake work to prospective buyers, if the work has been fully carried out in compliance with the order.³⁷

The result is that in order to be compliant with legal requirements, planning certificates for a parcel of land will always need to specify that the court has made an order, even if the order has been carried out. This is the case even if the order which has been complied with was for removal of the tree altogether.

Recommendation 6

That provision be made to allow notations on planning certificates to be deleted or amended in the event that orders under the *Trees (Disputes Between Neighbours) Act 2006* have been finally complied with.

Deletion would only be appropriate where the work which was ordered can be finally complied with (eg. installation of a root barrier, removal of a particular branch) and is not of an ongoing nature (eg. maintenance of a hedge so that it does not exceed a certain maximum height).

³⁵ *Trees (Disputes Between Neighbours) Act 2006*, section 14.

³⁶ Section 149(2) of the *Environmental Planning and Assessment Act 1999*, Clause 279 of the *Environmental Planning and Assessment Regulation 2000*, and Schedule 4 item 13 of that Regulation.

³⁷ *Conveyancing (Sale of Land) Regulation 2005*, cl 8 and 15, and Schedule 3, Part 3, item 17.

Procedure - successors in title

Currently, section 16 of the Act makes provision for cases in which the Court has ordered a tree owner to carry out work, but the land on which the tree is situated is subsequently sold. The neighbour who applied for the order can ensure that the new owner of the tree is bound by the order, if they serve a copy of the order on the new owner.

The Act currently makes no provision for cases where the applicant subsequently sells their land (or where both the applicant and the tree owner sell their land before the order is carried out).

The Chief Judge of the Land and Environment Court has suggested that that the applicant's successors in title should also be able to continue to benefit from the Court's order, by being able to serve the successor in title to the tree owner with a copy of the order.

Where the Court has ordered work so as to prevent or remedy damage to property, or to prevent risk of injury to a person, it is appropriate that the successor in title to the applicant should have the ability to ensure that the current tree owner or any future tree owner are bound by that order, until the work required is carried out.

This right should be restricted to the applicant's immediate successor in title. Otherwise, the provisions could have the effect of burdening the tree owner's title to the land indefinitely, particularly in the case of orders relating to ongoing maintenance.

Recommendation 7

That where the Court has made a work order in relation to a tree that is or will cause damage or poses a risk of injury, provision be made to allow the applicant's successor in title to bind the tree owner (or their successors in title) to comply with the order.

3. Trees on Council Land

Currently, the Act does not apply to trees situated on any land that is vested in, or managed by a Council.³⁸ Examples include trees which are in parks, reserves, traffic islands, public footpaths and laneways and the grounds of Council facilities.

In addition to the statutory considerations set out in section 23 of the Act, this review is also required to consider whether the scope of the Act should be expanded to cover trees on Council land.

When the Act was before Parliament, the then Attorney General the Hon Bob Debus MP noted in his second reading speech that ‘trees on Council land are also exempt from the operation of the legislation, but only in the short term... local government should expect to be covered by the scheme in two years time, when a review of the legislation will take place. Unless the review reveals compelling reasons in support of an ongoing exemption, it is anticipated that local government will then be included’.³⁹

The review received a number of submissions which dealt directly with the question of whether the Act should be expanded to cover trees on Council land. Views on the issue were divided.

The Property Law Committee of the Law Society and some members of the Environmental Planning and Development Law Committee were in favour of the exemption being removed,⁴⁰ as was a private firm of solicitors.

The arguments in favour of removing the exemption for Local Councils were that:

- Councils have been on notice for two years that the exemption may be removed,
- the current exemption for Local Councils is discriminatory against other large land owners such as Government departments and authorities,
- the current exemption in favour of Local Councils is inequitable, and
- reports that some Local Councils had not always been mindful of the need to properly assess the variety and location of their plantings. The implication appeared to be that bringing Councils within the scope of the Act would encourage better planting policy in future.

In addition, seven individuals requested that the Act apply to trees on Council controlled land, although four of these submissions described tree concerns which did not appear to relate to damage or risk of injury, and which the Court

³⁸ *Trees (Disputes Between Neighbours) Act 2006*, section 4(2)(a).

³⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 October 2006, 3502 (Bob Debus, Attorney General).

⁴⁰ NSW Law Society, *Submission* (20 February 2009).

could not therefore make orders about in any event (falling leaves,⁴¹ tree height and choice of past plantings).

Five submissions opposed removal of the exemption for local Councils, for a range of reasons including:

- Councils already have a duty of care and can be liable if a tree causes damage or injury,
- if trees on Council controlled land were included in the scope of the Act, Councils would be subject to a large volume of additional claims,
- a proportion of these would be speculative or vexatious, because Councils are seen by some constituents as an easier target than approaching private neighbours,
- managing and responding to these additional claims would require significant legal, expert and administrative resources (even if all vexatious claims were dismissed by the court), and would be extremely costly for Councils,
- Councils' resources would be diverted from other Council business and existing tree management activities,
- for financial reasons, Councils would be discouraged from making future plantings, and would be motivated to remove trees pre-emptively, and
- the increased expenditure of Councils would lead to pressure to increase local government rates.

The Institute of Australian Consulting Arboriculturists and the Local Government Tree Resource Association opposed making Councils subject to the Act, on the grounds that it would unduly expose Councils to speculative or vexatious claims, and have significant resource implications for Councils, including increased costs of independent experts, legal fees, risk management, tree management and compliance staff.⁴²

The Property Law and Environmental Planning and Development Law Committees of the Law Society noted that if the exemption for local Councils were removed, the potential liability of Councils, and consequently of rate payers, would be inordinately excessive. It was also noted that Councils might restrict future plantings, which would not be in the interest of local environments.⁴³

⁴¹ As LEC has stated in a tree dispute principle, 'The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.' *Barker v Kyriakides* [2007] NSWLEC 292. This is because there is no power to make an order in relation to the tree unless such debris of the tree 'has caused, is causing, or is likely in the near future to cause, damage to the applicant's property' on the land: *Trees (Disputes Between Neighbours) Act 2006*, sections 7 and 10(2)(a).

⁴² Institute of Australian Consulting Arboriculturists, *Submission* (11 February 2009), Local Government Tree Resource Association, *Submission* (16 February 2009).

⁴³ NSW Law Society, *Submission* (20 February 2009).

Similar to private landholders under the *Trees (Disputes Between Neighbours) Act 2006*, Councils can currently be liable in general tort law if trees on Council-controlled land:

- damage another person's property,⁴⁴ or
- cause personal injury.⁴⁵

However unlike private landowners, Councils can also be liable for trees on land which they do not control (such as a private back yard), if such trees pose a risk to users of Council land (such as a park or footpath).⁴⁶ If a Council knows that a tree is posing a risk, it must take reasonable steps to respond, such as exercising its powers under section 124 of the *Local Government Act 1993*, or ordering the owner of the tree to prune or remove the tree.

In addition to their current liability for trees being broader than the liability of private landholders, the context in which disputes about Council trees take place is also very different to disputes between private neighbours.

This is because Councils already manage their tree populations on a day-to-day basis. Unlike private landholders, Councils have processes in place to receive, investigate and respond to complaints about trees, using professional staff.

Further, Councils have an obligation to use ratepayers' contributions responsibly, and have limited budgets and resources with which to manage their tree populations. Accordingly, they must balance the degree of risk to the public or to property with the resources required to reduce that risk, and then prioritise their work appropriately across the whole local government area.

Another key difference between Councils and owners of private land is that Councils are public authorities. Therefore, in addition to considerations of damage and potential personal injury, they must also look beyond individual preferences and take into account broad public considerations when making tree management decisions, including:

- public amenity, aesthetic appeal and recreational opportunities,
- the contribution of the tree to the local ecosystem,
- the effect of the tree on the local environment (noise absorption, filtering toxic particles such as lead, ozone, cadmium, sulphur dioxides and carbon monoxide from the air, maintenance of nutrient levels in soil, reducing erosion, salinity and stormwater run-off, providing windbreaks, removing carbon-dioxide from the atmosphere, and moderating extremes of temperature).

Finally, local Councils in NSW manage hundreds of thousands of trees on vast areas of public land, including Crown reserves, community land and public

⁴⁴ *South Australia v Simionato* (2005) 143 LGERA 128 and *Owners of Strata Plan No 13218 v Woollahra Municipal Council* (2002) 121 LGERA 117 at 149.

⁴⁵ *Dungog Shire Council v Babbage* [2004] NSWCA 160.

⁴⁶ *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

roads. Whereas private land in urban areas might, on average, adjoin the properties of four or five other landholders, local Councils are effectively neighbours to almost every landholder in each local government area.

The concerns raised above regarding Councils' exposure to a large number of new claims if the Act was applied to trees on Council land must be taken seriously.

Firstly because the cost to Councils of responding to additional claims would be high. The Local Government Tree Resources Association has noted that in the case of claims for damage occurring underground, the cost of digging a trench along a footpath to assess root location, growth and impact on a structure is \$1000 per lineal metre on average, in addition to the costs of staff, equipment, permits to open footpaths and underground utility locations, public liability insurance and other necessary insurances.⁴⁷

Secondly, given Councils' limited resources, there is potential for trees posing a genuine risk of injury to be left unaddressed for long periods of time if Councils were required to respond to tree claims in the order they are filed and according to a strict Court timetable, rather than according to the risk management considerations of existing complaints processes.

Finally, tree claims already take up more than half of some Councils' yearly budget for all legal claims against them. If the Act were extended to cover trees on Council land, and there was even a modest increase in the overall number of tree claims against Councils, there is a real possibility that for financial reasons alone Councils might stop planting new trees and start removing existing trees (whether or not they were causing damage), simply in order to avoid possible claims in future. The resulting loss of urban forest would be to the detriment of local environments, local air quality, and the broader community. It could also have a negative on house prices in areas where trees were removed, as there is evidence of a strong correlation between high real estate values and suburbs with a high percentage of tree cover.⁴⁸

As noted above, where a Council is remiss in not responding to a genuine concern, there are legal remedies available. According to the Institute of Australian Consulting Arboriculturists, local government tree management staff generally respond in a timely manner to requests from the public to maintain or remove trees.⁴⁹ The Local Government Tree Resource Association also advises that the majority of Councils respond in a timely and considered manner once an issue is brought to Council's attention.⁵⁰

All other things being equal, it could well be desirable to ensure the same simple dispute resolution process for all urban trees. However, as set out

⁴⁷ Local Government Tree Resource Association, *Submission* (16 February 2009).

⁴⁸ A Correy (1972) 'Trees in Streets Rethought', *Architecture in Australia* 61 (5) 535-546, cited in A Correy (1992) 'Landscape Design Dilemma: Australian Native Trees and Solar Access Conflict', *Landscape Australia* (2) 101-169.

⁴⁹ Institute of Australian Consulting Arboriculturists, *Submission* (11 February 2009).

⁵⁰ Local Government Tree Resource Association, *Submission* (16 February 2009).

above, the context in which disputes take place are very different depending on whether the tree is on private land or on Council controlled land.

The practical and policy reasons for retaining the exemption for trees on Council-controlled land are compelling enough to outweigh the arguments in favour of bringing Council managed trees within the scope of the Act.

Recommendation 8

That the exemption in s4(2)(a) of the Act remain unchanged, so that the Act continues not to apply to trees situated on land that is vested in, or managed by a Council.

4. Trees which block views or sunlight

Currently, the *Trees (Disputes Between Neighbours) Act 2006* provides that the LEC may only make orders in relation to a tree if it is satisfied that the tree concerned: (a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or (b) is likely to cause injury to any person and (c) the person applying for the order has made a reasonable effort to reach agreement with the owner of the land on which the tree is located.

If a tree blocked sunlight and caused damage or likelihood of damage as a result (for example by causing mould or exacerbation of rising damp), the Court would have jurisdiction to consider the dispute. However, there is no power to make orders solely on the ground that light or views are being blocked.

When the Act was before Parliament, the then Attorney General the Hon Bob Debus MP noted that while concerns had been raised relating to trees blocking light and views, the Government was 'mindful that the... legislation pioneers new ground and at this stage does not consider it appropriate to address such concerns of trees blocking light and views. They will be kept under review'.⁵¹

The review received a large volume of submissions on this issue. In fact, over half of the submissions received related to whether the Act should be extended to cover trees that block light or views. Almost all the submissions which raised the issue were in favour of extending the Act. A document with 81 names was also submitted, requesting a mechanism for neighbours to seek to control the height of trees, hedges or vegetative screen plantings which block sunlight or views.

Arguments against extending the Act to cover sunlight or views

Extending the Act to allow orders to interfere with a tree on the sole ground of access to light or views raises a number of concerns.

To a greater or lesser extent, every tree blocks sunlight and screens a view. There are legitimate concerns that if orders to prune or remove trees could be sought solely on the ground of access to a view or to sunlight, there could be considerable loss of tree canopy across all urban areas in NSW.

This would obviously be undesirable, as trees provide numerous community benefits, including:

- absorbing noise,
- filtering toxic particles such as lead, ozone, cadmium, sulphur dioxides and carbon monoxide from the air,

⁵¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 October 2006, 3502 (Bob Debus, Attorney General).

- maintaining nutrient levels in soil,
- reducing erosion, salinity and stormwater run-off,
- providing windbreaks,
- underpinning local ecosystems and providing a habitat for flora and fauna,
- removing carbon-dioxide from the atmosphere, and
- moderating extremes of temperature in their immediate vicinity.

Significant loss of tree canopy could result in poorer health for residents, dramatic losses to local environments and a substantial decrease in amenity. It could also impact on real estate values across entire suburbs.⁵²

Other concerns about extending the Act in this way relate to the difficulty of a Court making appropriate and consistent decisions in the event that the Act covered trees that block light and views.

- Some views are broadly recognised as being desirable and adding significant value to land or a property, but these and other views can also be the subject of widely varying personal preferences.
- While the removal of trees may benefit an individual landowner by ensuring access to a view, it may also deprive another nearby resident of the benefits associated with being able to look out on a tree, or sit underneath it.
- Loss of sunlight may have negative environmental effects through higher energy use for heating and lighting, or loss of light to solar panels. However, these do not necessarily outweigh the environmental benefits of reduced electricity use for cooling, and the benefits of the tree's work in reducing pollution and participating in the local ecology. It would be extremely difficult, if not impossible, to try and balance these arguments in any single dispute.

Meanwhile, there are many legitimate reasons for which a person may wish to plant or preserve a tree which is blocking light or views for their neighbours. These include privacy, shade for a playground or part of a dwelling, aesthetic considerations of landscaping or garden design, screening an undesirable view of a road, wall or fence, or seeking to block noise, smells or smoke.

⁵² A Correy (1972) 'Trees in Streets Rethought', *Architecture in Australia* 61 (5) 535-546, cited in A Correy (1992) 'Landscape Design Dilemma: Australian Native Trees and Solar Access Conflict', *Landscape Australia* (2) 101-169.

Finally, requests for pruning for access to light and views are vulnerable to abuse. Compared to a claim that a tree is causing damage, a claim about a tree blocking light is more easily used as a pretext for vexatious complaints against a neighbour, or for matters which the Act does not address such as complaints regarding small volumes of leaves falling onto a property from a neighbouring tree.

Arguments in favour of extending the Act to cover sunlight and views

It is clear that in many cases, severe loss of sunlight can lead to loss of amenity and enjoyment of a person's home, increased damp, reduced airflow and attendant health problems.

As for views, some trees which have been planted in a line can form a hedge which is the equivalent to a wall, blocking lines of sight from a neighbour's dwelling. Unlike with built structures however, there is no scope for the neighbour to have input on the nature of these hedges, nor any rules or controls on their height and shape.

Some submissions described cases where neighbours seemed to have deliberately planted hedges to negate the effect of view-sharing conditions in their development consent. Other submissions reported that people had planted species which are prohibited by Council development application processes immediately after their development application was approved. In these cases, Council has no ability to enforce its prohibition until the next time a development approval application is lodged.

The Environmental Planning and Development Committee, and the Property Law Committee of the Law Society of NSW noted that 'it is very well recognised that the desire to preserve a property's amenity is the cause of many bitter disputes between neighbours. And the common law of nuisance offers little protection against loss of amenity in relation to either sunlight, views or privacy.... Conditions in Development Consents require landscaping to be shown on plans and enable Councils to limit plantings to certain species, however there are no satisfactory controls otherwise.'⁵³ Similarly, the Institute of Australian Consulting Arboriculturists, noted that disputes about hedges which restrict solar access or severely restrict a view from an adjoining property are an issue of increasing concern and frustration within the NSW community.⁵⁴

A number of community groups, including Problem Hedges Australia and HedgeWise, have formed to seek the creation of a legal mechanism to address hedge disputes.

The fact that there is currently no legal mechanism for resolving these kinds of problems not only exacerbates neighbour disputes on these issues, but also poses a risk that people will attempt to address their concerns through unlawful means such as poisoning or other vandalism.

⁵³ NSW Law Society, *Submission* (20 February 2009).

⁵⁴ Institute of Australian Consulting Arboriculturists, *Submission* (11 February 2009), Local Government Tree Resource Association, *Submission* (16 February 2009).

More broadly, the fact that there is no legal recourse for such issues can make it far more difficult for neighbours to negotiate informally to resolve them. The NSW Law Reform Commission's remarks about the problems caused by the lack of a simple mechanism for resolving tree disputes about damage or personal injury are equally pertinent to current disputes about trees that block light or views. The Commission noted that

the inadequacy of the common law and the legal process leaves a legal vacuum for neighbours in dispute about trees. Mediation using Community Justice Centres is useful for some of these disputes but is not successful or appropriate for a considerable proportion of cases. The current law provides little incentive for a neighbour whose trees are causing problems to negotiate. Traditionally, these disputes are characterised as being disputes between private citizens in which public authorities should not become involved. However, the legal vacuum has meant that considerable amounts of public resources are spent managing, or dealing with the consequences of, these disputes. Conflicts over trees occupy considerable resources of local councils, chamber magistrates, members of Parliament, legal aid and the police.⁵⁵

This review received 127 submissions which were concerned about high hedges, 125 which argued that trees that block light should be covered, and 115 that argued that a blocked view should also be a ground for interfering with a tree. Most were from individuals, and it is worth noting again that this is an unusually high number of individual submissions to have been received as part of a statutory review process. In addition, a document with 81 names and addresses was submitted as a petition requesting a mechanism for neighbours to seek to control the height of trees, hedges or vegetative screen plantings which block sunlight or views.

Local governments have also expressed the view that there should be a way of addressing these kinds of neighbour disputes. At the 2006 Local Government Association Annual Conference, it was resolved that:

- the Association establish a working party to negotiate with the Department to encourage action to address the issue of inappropriate neighbour plantings that impact on solar access and view lines,⁵⁶ and
- the Local Government and Shires Association work with Department of Planning to formulate a planning control which allows Councils to control the height of all hedge planting in their respective Local Government urban and rural areas.⁵⁷

Suggestions for reform

A number of submissions made specific suggestions for reform.

⁵⁵ New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) at [2.23].

⁵⁶ Resolution 87, Local Government Association Annual Conference 2006, as set out in the Local Government Association Conference Action Report 2007. See <<http://www.lgsa-plus.net.au/resources/documents/2007-lga-action-report-110907.pdf>>.

⁵⁷ Resolution L27, Local Government Association Annual Conference 2006, as set out in the Local Government Association Conference Action Report 2007. See <<http://www.lgsa-plus.net.au/resources/documents/2007-lga-action-report-110907.pdf>>.

Representatives of the Problem Hedges Australia and HedgeWise community groups suggested implementing a mechanism similar to the hedge provisions in the *Anti-Social Behaviour Act 2003* (UK).⁵⁸ Under this Act, applications can be made to the relevant Local Council to resolve disputes regarding high hedges. In deciding whether to order any remedial work, the Council balances the competing rights of the neighbours to enjoy their property, and the rights of the community in general.

The Environmental Planning and Development Committee, and Property Law Committee of the Law Society of NSW proposed that 'it would be appropriate to extend the Act to provide the court with a strictly limited jurisdiction to assist in resolving disputes about loss of amenity in relation to sunlight, views and privacy'. It was suggested that the limitations could be imposed by:

- restricting the Court's jurisdiction to disputes about 'spite' hedges on boundaries, or to certain species types that the particular Council has identified should not be planted, or
- setting a strict impact threshold on applications, as recommended by the NSW Law Reform Commission regarding trees which "interfere unreasonably with enjoyment", or in relation to sunlight and views, where "enjoyment of property is severely affected" by a tree.

The Property Law Committee also made clear that it does not support an extension of the Court's jurisdiction 'if that extension involves the making of orders by the Land and Environment Court that will run with land and bind successors in title. Such orders... would arguably confer on the land burdened and benefited by the order quasi easement rights with the potential to affect the value and use of the land.'⁵⁹

The Institute of Australian Consulting Arboriculturists (IACA) expressed its support for changes specifically to control the growth of hedges. The IACA suggested that the Land and Environment Court should have the power to require pruning and maintenance of a hedge to a specified height and spread. However, the Court would not have the power to make such an order unless it were satisfied that the hedge is likely to

- 'restrict solar access to a property causing undue shading or excessive damp, or impede the effective operation of existing solar devices' or
- 'severely restrict or obliterate the amenity of an existing view from an adjoining neighbouring property'.

The IACA submitted that in making any orders, the Court should adopt a balancing approach between the relative amenity and privacy of the neighbours, and have regard to

- the existing view sharing principles used by the Court in planning matters, and

⁵⁸ See <http://www.opsi.gov.uk/acts/acts2003/ukpga_20030038_en_1>.

⁵⁹ NSW Law Society, *Submission* (20 February 2009).

- the matters to be taken into account in damage and risk of injury matters, as currently set out in section 12 of the Act , and
- the species and stage of development of the trees which comprise the hedge in dispute.⁶⁰

Other submissions suggested planning controls on the height of all hedges, or that any requirements to control hedge height could be limited to the southern border of the hedge owner's property, or to introduced species only.

Conclusions

It would not be appropriate, as some submissions requested, to create a power for a Court or a Council to order removal or pruning of an individual tree on the sole grounds that it obscures a view from the applicants land, or blocks light to their land. As noted above, all trees do both of these things, to a greater or lesser extent.

However, the most frequent and most serious concerns raised in submissions to the review related to high, dense hedges on immediately adjoining private properties, where the hedge is wall-like, and severely obstructs solar access to, or views from, a dwelling.

It appears feasible to create a strictly limited avenue in the Land and Environment Court for seeking orders in relation to such hedges. This would be consistent with the accepted practice of regulating the height of fences and other built barriers between neighbours.

Some submissions suggested planning controls on hedge heights. However, blanket rules on the height of all hedges are not the best way to solve concerns about high hedges, for two reasons. First, most hedges will not cause concern, and second, unlike built structures hedges can grow and increase in height over time. If a blanket maximum height of hedges were imposed, universal enforcement of hedge-heights regardless of whether they were causing problems would be both unnecessary, and extremely time-consuming and resource intensive.

Accordingly, it would be preferable to create a procedure to resolve hedge concerns on a case-by-case basis if and when they occur, by applying to the LEC for orders in relation to a high hedge.

The key features of a suggested procedure are as follows.

Strictly limited scope

Given the environmental and other benefits of urban vegetation, and the fact that this would be a new procedure, it is preferable that the circumstances in

⁶⁰ Institute of Australian Consulting Arboriculturists, *Submission* (11 February 2009), Local Government Tree Resource Association, *Submission* (16 February 2009).

which a person could apply for orders in relation to a hedge should be limited to the most clearly problematic cases.

Having regard to the photos and descriptions which were received on the subject of high hedges, it would be appropriate to place the following restrictions on the new procedure. The Court would only have the power to hear matters regarding:

- hedges which are both high, and similar to a wall in their visual effect.
- hedges which affect people's homes (rather than their gardens or other structures on their property).
- cases of severe impact on views and light. This is consistent with the recommendations of the NSW Law Reform Commission in its 1998 report on *Neighbours and Neighbour Relations*, where it was recommended that there be a legal remedy if 'enjoyment of property has been severely affected by a neighbour's trees blocking out sunlight' or 'enjoyment of property has been severely affected by a neighbour's trees blocking out a view'.⁶¹
- cases where the applicant themselves has lost the light or view. It would not be appropriate, for example, for a person to purchase a property knowing there is a high hedge next door, and then be able to seek orders against their neighbours so as to gain additional solar access which had not existed at the time of purchase.
- hedges which are directly next door (not one or two properties over).

There should not be any presumption that a high hedge is a problem, or that all hedges should be maintained to a certain height. Rather, in recognition of the significant health, environmental and other benefits of urban vegetation, there could be a presumption in favour of maintaining the existence and health of urban trees.

It is acknowledged that although these kinds of disputes are likely to be rarer in rural-residential zonings where blocks are bigger and houses further apart, there are nevertheless some concerns about high hedges in rural areas. A number of submissions were made in this regard.

Nevertheless, it is preferable that the new procedure not apply to hedges on rural-residential land in the first instance. The suggested hedge-dispute procedure should be available for all hedges, including those made of native species. However, the *Native Vegetation Act 2003* also applies to rural-residential land, and it is important to ensure that the new procedure will not interfere with the broader environmental goals of the *Native Vegetation Act*

⁶¹ New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.54] and [2.57].

2003. This is a restriction which can be revisited after the procedure has been in operation for some time.

Balancing process

It is suggested that the new procedure seek to strike a balance between the respective rights of adjoining landholders to use and enjoyment of their property.

A balancing-type process would be consistent with the principles of private nuisance, and common law reasoning relating to 'unreasonable user', and. The LEC summarised this reasoning in *Robson v Lieschke* at [54] and [84]:

Private nuisance involves balancing, on one hand, the right of one owner or occupier of land to do what he or she likes on their land with, on the other hand, a right of a neighbour not to have his or her use or enjoyment of their property interfered with: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903. The tipping point in the balance is where the consequences of the use by the first person of his or her land unduly interferes, in ways recognised by the law as constituting a nuisance, with the use and enjoyment by the neighbour of his or her property. Three kinds of interference are recognised by the law as constituting a nuisance:

- (a) causing encroachment on the neighbour's land, short of trespass;
- (b) causing physical damage to the neighbour's land or any building, works or vegetation on it; and
- (c) unduly interfering with a neighbour in the comfortable and convenient enjoyment of his or her land.⁶²

Nuisances of the third kind arise where there is an excessive user by the defendant of his land resulting in an unreasonable interference with the enjoyment by the plaintiff of his land, having regard to the ordinary usages of humankind living in a particular society. In determining whether there has been such an unreasonable interference, a balance must be maintained between the right of the occupier to do what he or she likes with his or her own land and the right of the neighbour not to be interfered with.⁶³

A balancing process would also be consistent with the current reasoning of the Land and Environment Court in its planning jurisdiction, where it regularly takes into account competing concerns regarding view sharing,⁶⁴ solar access to dwellings,⁶⁵ overlooking and privacy.⁶⁶

The Court could take into account a range of factors when carrying out this balancing exercise, including the effect of the hedge on privacy, lines of sight,

⁶² *Robson v Leischke* [2008] NSWLEC 152 at [54].

⁶³ *Robson v Leischke* [2008] NSWLEC 152 at [84].

⁶⁴ Planning principles in *Tenacity Consulting v Waringah* [2004] NSWLEC 140, considered in 8 subsequent decisions.

⁶⁵ Planning principles in *Parsonage v Ku-ring-gai* [2004] NSWLEC 347, considered in 23 subsequent decisions.

⁶⁶ Planning principles in *Super Studio v Waverley* [2004] NSWLEC 91, considered in 33 subsequent decisions.

landscaping or garden design, heritage values, shade, wind, noise, smells and smoke.

The Court could also take into account the current factors in section 12 of the Act (see p7).

Avoiding the creation of new property rights

The aim of the new hedge-dispute procedure which is suggested above would be to allow the hearing and resolution of disputes between neighbours about a high hedge, and to seek to balance the respective rights of those neighbours to the enjoyment of their property.

Accordingly, it would not be appropriate for views or solar to override the privacy and other concerns of the hedge-owner, or the environmental and other benefits of leaving the hedge as it is.

Creating this kind of presumption in favour of views or solar access would run the risk of creating a new kind of legal right, similar to an easement. The common law has never recognised the blocking of light or views as an action in nuisance, and it would not be appropriate for the new procedure to approximate a 'right to a view' or of a 'right to solar access'.

This concern was expressed by the Property Law Committee of the Law Society, along with a related suggestion regarding enforcement against successors in title. The Committee noted that it did not support any extension of the Act regarding trees that block light or view, if this would result in LEC orders that run with land and bind successors in title. Such orders... would arguably confer on the land burdened and benefited by the order quasi easement rights with the potential to affect the value and use of the land.⁶⁷

Creating approximations of a right to a view or to solar access, or allowing orders to run with the land indefinitely, would be inconsistent with the aims of the dispute resolution procedure which is proposed.

The disputes to be resolved by the court under this procedure are, by their nature, between the particular neighbours at the time of the dispute. A new owner may not be concerned by a neighbour's high hedge, even though the previous owner had been. Accordingly, it is appropriate for any orders made in this jurisdiction to be enforceable only by the applicant, and not by their successors in title.

Similarly, it is recommended that the applicant should be able to enforce the court's orders against the hedge-owner's first successor in title. It would be undesirable if a person subject to an order to carry out work on a hedge could sell their property without first doing the necessary work, in compliance with the court order. The fact that the order is enforceable against their direct successor

⁶⁷ NSW Law Society, *Submission* (20 February 2009).

in title may discourage potential buyers and would therefore encourage the original hedge-owner to do the work prior to selling.

However, it is not recommended that the orders be enforceable against any subsequent successors in title. Where the first successor in title is replaced by a second, the original applicant will need to try and resolve any issues to do with the height of the hedge informally with the newest owner. If this does not succeed, then a fresh application can be made to the LEC in relation to the hedge.

Recommendation 9

a) That the *Trees (Disputes Between Neighbours) Act 2006* be amended to allow the Land and Environment Court to hear and resolve disputes between neighbours about high, dense hedges which are causing a severe impact on views from, or solar access to, a dwelling.

b) That this jurisdiction be strictly limited, with applications restricted to hedges which:

- are both high and give the effect of a solid barrier, and
- are causing severe impact for a dwelling, and
- have caused the impact to the applicant (not to the previous occupant), and
- are located between neighbours on adjoining land.

c) That in determining the dispute, the Court balance the respective rights of neighbours to use and enjoy their land, having regard to privacy and other considerations, and the broader benefits of urban vegetation.

d) That the new procedure be drafted so as not to create a right to light or views.

e) That orders not be enforceable by the applicant's successors in title, and that they only be enforceable against the respondent's first successor in title.

f) That hedges on land zoned 'rural-residential' be excluded from this jurisdiction.

Leighton greens/cypress leylandii

A large number of submissions expressed concern about a specific kind of tree, the Leyland Cypress, also known as a Leighton Green.

These are fast growing evergreens, which can grow over 30 metres high and 4m wide. Submissions commonly argued that due to the density and height of its growth, the species is not suitable for planting in residential or rural areas, particularly when it is planted in a hedge formation. Excessive use of the tree was the primary concern expressed in the submission of Mrs Jan Hainke of

HedgeWise, a community group which aims to encourage appropriate planting.⁶⁸

The tree has been considered as a 'problem species' in some areas. In 2006, the Local Government Association Conference resolved that the tree should be declared a noxious weed.⁶⁹ Many Councils, including Warringah Council,⁷⁰ Mosman Council,⁷¹ and Pittwater Council,⁷² have exempted the Leyland Cypress from the protections afforded by Tree Preservation Orders. Sutherland Shire has exempt them from development controls.⁷³ And in Councils such as Lane Cove and Pittwater⁷⁴, removal of this species is a condition of Development Application Approval, or issue of an occupancy certificate.

Many submissions requested specific measures against this species, including banning (by various means) its sale in NSW. The most common request was for the species to be banned by being declared a noxious weed.

It would not be appropriate for this review to recommend declaration of any particular plant under the *Noxious Weeds Act 1993*. That Act sets out specific criteria for when a plant may be declared noxious by the Minister for Primary Industries,⁷⁵ and the Department of Industry and Investment has established a structured process for applying for declarations.⁷⁶

Similarly, it would not be appropriate for this review to recommend prohibition of a particular species of tree. The purpose of the Act is to allow resolution of disputes about trees causing certain kinds of problem, rather than to regulate the planting of certain species, or their location relative to a boundary, pipes or electricity lines.

Even if the Leyland Cypress were completely banned, similar kinds of neighbourhood concerns would continue to arise from other kinds of tall, dense trees and hedges. Accordingly, it is more appropriate to address the problem caused by the tree and others like it than to take measures against one particular species.

⁶⁸ Ms Jan Hainke of Hedgewise, *Submission* (12 February 2009).

⁶⁹ Resolution 87, Local Government Association Annual Conference 2006, as set out in the Local Government Association Conference Action Report 2007. See <<http://www.lgsa-plus.net.au/resources/documents/2007-lga-action-report-110907.pdf>>.

⁷⁰ Warringah Council has exempt all Cypresses from its Tree Preservation Order. See <<http://www.warringah.nsw.gov.au/environment/documents/TreePreservationOrder.pdf>>.

⁷¹ Mosman Council advises that it has exempt the species on its website. See <<http://www.mosman.nsw.gov.au/environment/trees#leightons-green-cypress>>.

⁷² See <http://www.pittwater.nsw.gov.au/__data/assets/pdf_file/0013/4801/Tree_Preservation_Order.pdf>.

⁷³ See *Sutherland Shire Local Environmental Plan 2006*, clause 57.

⁷⁴ See policy entitled 'Ban of Leightons Cypress Pine' which can be accessed from the following page <http://www.pittwater.nsw.gov.au/Council/policy_register>.

⁷⁵ *Noxious Weeds Act 1993*, section 8: the plant must either pose a potentially serious threat to primary production or the environment, or pose a threat to primary production, the environment or human health, or be likely to spread in the State.

⁷⁶ The Policy for Declaration of Noxious Weeds (O067, effective date 16/02/2009) may be accessed from this web-page: <<http://www.dpi.nsw.gov.au/agriculture/pests-weeds/weeds/legislation>>.

5. Trees in non-urban areas

In the course of debate when the Act was before Parliament in 2006 it was noted that the restricted application of the new scheme to certain zonings would be reconsidered as part of the statutory review.⁷⁷

Currently, the Act applies only to urban land (such as land zoned as residential, township or industrial).

On review, four submissions raised concerns that the types of zoning to which the Act applies are not sufficiently broad. Two were from individuals who were not able to bring proceedings relating to damage or risk of injury under the Act, because the zoning of the private land on which the tree was situated was outside the scope of the Act. One of these related to a tree that had reportedly been found unsafe by the Local Council. When the owner of the tree did not do any work, the adjoining neighbours applied to the Land and Environment Court for orders that work be done on the tree. However, after a preliminary hearing their application was dismissed because the tree was found to be on land zoned 'rural-residential'. In these situations, the only legal recourse is to sue in nuisance.

These submissions requested extension of the Act to 'rural-residential' zoning.

What would be the implications of such an extension?

Rural-residential land was intentionally excluded from the scope of the Act in 2006, on the grounds that trees on non-urban land may be subject to various other statutory regimes, including legislation relating to land clearing and native vegetation. It was considered prudent to ensure that the new tree disputes procedure would not interfere with these other schemes.

However, the *Native Vegetation Act 2003* contains exceptions if it can be proven that interference with vegetation was 'reasonably considered necessary to remove or reduce an imminent risk of serious personal injury or damage to property'.⁷⁸ Accordingly, while an extension to allow orders under the *Trees (Disputes Between Neighbours) Act 2006* would create an overlap between it and the *Native Vegetation Act 2003*, this would not lead to any interference with either scheme.

It appears appropriate to extend the scope of the Act to land which is zoned 'rural-residential', to respond to the concerns raised during this review.

Recommendation 10

a) That the Act be amended to extend the Act to trees on privately owned land which is zoned 'rural-residential'.

b) That this extension apply only in relation only to trees causing damage or risk of injury.

⁷⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 November 2006, 4011 (Bryce Gaudry, Parliamentary Secretary).

⁷⁸ *Native Vegetation Act 2003*, section 11(1)(i).

New planning terminology for zoning categories

The scope of the *Trees (Disputes Between Neighbours) Act 2006* was deliberately designed to be the exact reverse of the scope of the *Native Vegetation Act 2003* (NSW).

Accordingly, section 4(a) of the *Trees (Disputes Between Neighbours) Act 2006* currently provides that the Act applies only to trees on land:

within a zone designated “residential” (but not “rural-residential”), “village”, “township”, “industrial” or “business” under an environmental planning instrument (within the meaning of the *Environmental Planning and Assessment Act 1979*) or, having regard to the purpose of the zone, having the substantial character of a zone so designated.

Meanwhile, Schedule 1, item 14 of the *Native Vegetation Act 2003* provides that the *Native Vegetation Act 2003* does not apply to the following land:

"Land within a zone designated “residential” (but not “rural-residential”), “village”, “township”, “industrial” or “business” under an environmental planning instrument or, having regard to the purpose of the zone, having the substantial character of a zone so designated, not being land to which a property vegetation plan applies."

A review of the *Native Vegetation Act 2003* is currently underway.

Meanwhile, the names and descriptions of various zoning categories have been changed, and the terms used in the *Standard Instrument (Local Environmental Plans) Order 2006* do not reflect those in the *Native Vegetation Act 2003* or the *Trees (Disputes Between Neighbours) Act 2006*.

It is anticipated that the *Native Vegetation Act 2003* will eventually be amended to use the new planning terminology. If this occurs, consequential amendments should also be made to the *Trees (Disputes Between Neighbours) Act 2006* to preserve the relationship between the two Acts.

Recommendation 11

That if Schedule 1 item 14 of the *Native Vegetation Act 2003* is amended to reflect new zoning categories, consequential amendments be made to the *Trees (Disputes Between Neighbours) Act 2006* to preserve the relationship between the two Acts.

6. Tree branches encroaching onto neighbours' property

The review received submissions from 47 people expressing concern about branches which overhang into their property from a tree on adjoining land.

At law, trees and tree roots are not considered a danger or a nuisance in themselves.⁷⁹ However, tree branches and roots encroaching onto another person's land can be a 'nuisance'.⁸⁰ Like trespass and negligence, nuisance is a legal category of wrongful behaviour which – in certain circumstances – others can sue the wrongdoer for.

In relation to nuisance, the common law position is as follows:

- The neighbour whose land is being encroached upon has a legal right to take action themselves to stop the nuisance⁸¹ eg. by pruning the branches back to the boundary (but no further).⁸² The neighbour does not need to notify the neighbour that they propose to prune the tree, and the court's permission to do this is not required. However, giving notice is prudent, as well as being a basic courtesy.
- The common law does not recognise any right on the part of the neighbour to recover the cost of pruning from the owner of the tree. The only situation where the court might recognise such a right is where the pruning was necessary to stop damage which was already occurring as a result of the branches.⁸³ Of course, irrespective of the legal position, the owner and the neighbour can seek to agree between themselves about who should pay the cost of pruning done by the neighbour.

The common law position outlined above has been modified by the *Trees (Disputes Between Neighbours) Act 2006* to the extent that where that Act applies to a tree,⁸⁴ it is no longer possible to bring an action in nuisance regarding damage caused by that tree - all legal action relating to nuisance must be brought under the *Trees (Disputes Between Neighbours) Act 2006*.⁸⁵

The Act does not affect the right of abatement in relation to overhanging branches that are not causing damage.⁸⁶ However, the common law position in

⁷⁹ *Robson v Leischke* [2008] NSWLEC 152 at [64].

⁸⁰ *Robson v Leischke* [2008] NSWLEC 152 at [55], *Young v Wheeler* [1987] Aust Tort Reports 68,966 (80-126), *Lemmon v Webb* (1894) 3 Ch 1 at 24.

⁸¹ *Robson v Leischke* [2008] NSWLEC 152 at [57], *Lemmon v Webb* (1894) 3 Ch 1 at 13-24, *Butler v Standard Telephone and Cables Ltd* (1940) 1 All ER 121 at 402-403.

⁸² *Robson v Leischke* [2008] NSWLEC 152 at [57], *Gazzard v Hutchesson* [1995] Aust Tort Reports 62,352 (81-337) at 62,360.

⁸³ *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 487-8.

⁸⁴ Section 4 of the *Trees (Disputes Between Neighbours) Act 2006* sets out the trees to which the Act applies.

⁸⁵ *Trees (Disputes Between Neighbours) Act 2006*, s5.

⁸⁶ Section 5 of the Act removes any action in nuisance for damage caused by trees to which the Act applies. However, there was never any action in nuisance unless there was actual damage,

relation to abatement has been significantly modified by Tree Preservation Orders (TPOs). These are made under Environmental Planning Instruments initiated by Local Councils under the *Environmental Planning and Assessment Act 1979* (NSW).⁹ Their aim is to protect and manage valuable trees in a local government area, by requiring Council consent for actions which are likely to affect the health of the tree, or the landscape of an area. Disobeying a TPO is an offence.

Typically, TPOs prohibit pruning and lopping of trees (as well as removal, destruction, ring barking or other injury) unless the owner of the land on which the tree is situated has obtained consent from the Council. Similarly, TPOs and other Council policies will often require that if a person seeks permission to cut back the overhanging branches of a neighbouring tree, Council will not grant permission under the TPO unless the owner of the tree consents in writing.

NSW Law Reform Commission heard during its inquiry into neighbour relations that:

A number of submissions say that TPOs can create more conflict in relation to a nuisance tree. They say TPOs make the right of abatement even more burdensome for the person affected because he or she must apply to the council for permission to trim the tree. One submission says that if the owner will not ask for permission, or consent, to trim the tree the victim is stuck with the problem. Some councils will not give permission to lop or cut down unless the owner consents and owners impose all kinds of conditions on consent, for example, that the costs be borne by the person affected or that the trimmings not be placed on the owner's land.⁸⁷

Similar concerns were raised to this review, about the fact that some Councils require the tree owner's consent before ordinary or minor pruning is permitted. This requirement can be the cause of disputes, or can exacerbate existing disputes between neighbours.

Under the *Environmental Planning and Assessment Act 1979*, consent is only required of the owner of the land on which the development (in this case, pruning of trees) is carried out: see s 49(1) of the *Environmental Planning and Assessment Regulation 2000*. If the pruning can be carried out without entry onto the tree owner's land, their consent ought not be required under the *Environmental Planning and Assessment Act*. Whether this legal position is applied by all councils or all TPOs is unclear.

A NSW Council advised the review that it amended its policies several years ago, so that the tree owner's consent is no longer required before the Council approves pruning of overhanging branches. Instead, Council notifies the tree owner that an application has been received, advising them of nature of the work which Council's permission is being requested for. This change has been very well received, and of great benefit to residents. The Council's arborists

or imminent damage. At common law, abatement could be undertaken without any requirement for there to be actual or imminent damage. Accordingly, section 5 of the Act cannot have affected the right of abatement in relation to branches which are not causing damage.

⁸⁷ New South Wales Law Reform Commission, *Neighbour and Neighbour Relations*, Report No 88 (1998) [2.18].

have been contacted by residents to say that due to this pruning policy, long standing disputes which had been caused by overhanging branches had finally been resolved, and that friendly relations had been re-established between neighbours.

Several Councils have also issued TPOs which allow minor pruning for abatement, without the need to obtain the consent of the tree owner. These include Warringah Council,⁸⁸ Pittwater Council,⁸⁹ Manly Council,⁹⁰ Hornsby Council,⁹¹ and Great Lakes Council.⁹²

Given the number of complaints about overhanging branches which were received by the review, and given the positive effects on neighbour relations which can flow from removing the requirement of the tree owner's consent for minor pruning, consideration could be given by other Councils to amending their TPOs and other policies accordingly.

Recommendation 12

That all Councils consider amending their Tree Preservation Orders and other policies to dispense, in appropriate cases, with the requirement that the tree owner give consent to pruning of overhanging branches before Council approval is given.

Appropriate cases would include where the pruning is minor, can be carried out without entry into the tree owner's land, and in accordance with relevant Australian Standards (so to ensure no future safety risks are created by inappropriate pruning, and the health of the tree is maintained).⁹³

⁸⁸ See <<http://www.warringah.nsw.gov.au/environment/documents/TreePreservationOrder.pdf>>.

⁸⁹ See <http://www.pittwater.nsw.gov.au/__data/assets/pdf_file/0013/4801/Tree_Preservation_Order.pdf>.

⁹⁰ See <<http://www.manly.nsw.gov.au/Tree-Preservation-Order.html>>.

⁹¹ See <<http://www.hornsby.nsw.gov.au/uploads/documents/ED-PL-TPO-resolution.pdf>>.

⁹² See <<http://www.greatlakes.local-e.nsw.gov.au/environment/74341/74363.html>>.

⁹³ For example AS 4373–2007 Pruning of Amenity Trees. This can be accessed from the Standards Australia website by searching for the standard number, and then choosing the 'Preview' option. See <<http://www.standards.org.au>>.

Appendix A – Submissions to the Review

The review considered 231 submissions, most of which were from private individuals. Given that the legislation and the review deals with neighbourhood disputes, a presumption of anonymity was applied to all submissions.

The following stakeholders made their submissions public, or agreed to be named as having made a submission to the review:

- The Hon Barbara Perry MP, Minister for Local Government
- The Hon Kristina Kenneally MP, Minister for Planning
- The Hon Justice Preston, Chief Judge of the Land and Environment Court
- Manly Council
- Councillor Dom Lopez, Mosman Council
- Law Society of NSW (Environmental Planning and Development Committee and Property Law Committee)
- Local Government Tree Resource Association
- Institute of Australian Consulting Arboriculturists
- Ms Julie Giannesini of Problem Hedges Australia
- Mrs Jan Hainke of the HedgeWise community group

An overview of the most frequent concerns raised in submissions is as follows:

Concern	Submissions raising this issue
High hedges	127
Trees that block light should be covered	125
Trees that block views should be covered	115
Leighton Green/Cypress Leylandii	81
Overhanging branches	47

In addition, a document was submitted as a petition requesting a mechanism for neighbours to seek to control the height of trees, hedges or vegetative screen plantings which block sunlight or views. The document did not meet one of the formal requirements for a petition (that it be signed by each person whose name is listed, using their own signature or mark). However, the document did list 81 different names and addresses.

Appendix B – Statistics on applications under the Act

Below are Land and Environment Court statistics regarding applications under the *Trees (Disputes Between Neighbours) Act 2006* for the calendar years 2007 and 2008.

The Act commenced on 2 February 2007.

2007

1. Caseload:

- There were 176 new tree applications in 2007 (11% of all 2007 registrations)
- 144 tree matters were finalised (32 tree applications remain pending)
- Clearance ratio: 82%
- 78% of tree matters required up to 1 pre-hearing attendance

2. Time standards:

- 2 pending tree applications are > 6 months old
- Mean completion time: 80 days
- Median completion time: 80 days
- 99% completed within 6 months

3. Appeals:

- There were no s 56A appeals

4. Type of applications:

- 71% claimed a risk of injury.
- 93% claimed a risk of damage to property.
- 44% sought compensation. Compensation was awarded in 27 cases (18.8%) at an average of \$2,042.24 per award.
- 54% of applications involved an 'expert'.
- In 7% (10) of matters both parties were legally represented; at least 1 party was legally represented in 28% (40) of applications.
- Council was only represented at hearing in 19 applications.
- 7% of the trees were subject to a tree preservation order.
- Only 1 property was subject to a council heritage order.

2008

1. Caseload:

- There were 143 new tree applications in 2008 (9% of all 2008 registrations)
- 140 tree matters were finalised
- 33 tree applications remain pending
- Clearance ratio: 98%
- 85% of tree matters required up to 1 pre-hearing attendance

2. Time standards:

- No pending tree applications are > 6 months old
- Mean completion time: 84 days
- Median completion time: 78 days
- 97% completed within 6 months

3. Appeals:

- There was 1 s 56A appeal (dismissed as out of time and no error of law)

4. Type of applications:

- 72% claimed a risk of injury.
- 88% claimed a risk of damage to property.
- 36% sought compensation. Compensation was awarded in 12 cases (8.5%) at an average of \$3,312.54 per award.
- 36% of applications involved an 'expert'.
- In 6% (9) of matters both parties were legally represented; at least 1 party was legally represented in 17% (24) of applications.
- Council was only represented at hearing in 3 applications.
- 27% of the trees were subject to a tree preservation order.
- Only 3 properties were subject to a council heritage order.

Appendix C – Applications by Local Government Area

71% of tree disputes completed in 2007 & 2008 were city matters, where the property was in the region spanning from the Gosford Local Government Area (LGA), south to the Wollongong LGA & west of Sydney to the Blue Mountains LGA. The number of completed disputes by LGA for the two years is:

LGA	No. of applications
Albury	2
Ashfield	5
Auburn	1
Bankstown	9
Bathurst	1
The Hills	9
Bellingen	1
Blacktown	8
Blue Mountains	4
Botany Bay	1
Burwood	5
Campbelltown	13
Canada Bay	2
Canterbury	4
Cessnock	2
Coffs Harbour	8
Cootamundra	3
Cowra	1
Dubbo	1
Fairfield	1
Gosford	13
Goulburn Mulwaree	1
Great Lakes	1
Greater Taree	2
Hawkesbury	1
Holroyd	3
Hornsby	19
Hunters Hill	1
Hurstville	4
Kogarah	2
Ku-ring-gai	13
Lake Macquarie	14
Lane Cove	5
Leichhardt	2
Liverpool	4
Maitland	3
Manly	3
Marrickville	4
Mosman	3
Mudgee	1
Newcastle	13
North Sydney	2
Orange	1
Parramatta	4
Penrith	2
Pittwater	4
Port Macquarie Hastings	3
Port Stephens	4
Randwick	3
Rockdale	4
Ryde	5
Shoalhaven	5
Strathfield	2
Sutherland	13
Tamworth	1
Tweed	4
Wagga Wagga	1
Warringah	9
Waverley	6
Willoughby	4
Wingecarribee	8
Wollongong	3
Woollahra	2
Wyang	3