

TREES (DISPUTES BETWEEN NEIGHBOURS) ACT 2006: A NEW LAW IN NSW CONCERNING TREES & NEIGHBOURS

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ABSTRACT

In late 2006, a new piece of legislation regarding trees and neighbours was enacted in the NSW State Parliament. The first case was heard in March 2007. The *Trees (Disputes Between Neighbours) Act 2006* is designed to provide a simple, inexpensive and accessible process for the resolution of disputes about trees between neighbours. The Act comes under the jurisdiction of the NSW Land and Environment Court. The Chief Justice of the Court has appointed two Acting Commissioners with expertise in Arboriculture to assist the permanent Commissioners of the Court. At the time of writing of this paper, over thirty cases have been heard. Very few orders have been made for tree removal, some have been made for pruning of branches or roots and some have determined payment of compensation.

This paper provides the background to this new law and summarises the key elements contained within it. It also outlines the operation of the Act.

BACKGROUND

It would be reasonable to assume that for as long as people have lived in close proximity to one another, there have always been disputes between neighbours. In recent times, these disputes have typically involved noise, dividing fences, easements for joint services such as sewerage, access issues and trees.

In late 1987, the NSW Law Reform Commission received a request from the Attorney General to inquire into and report on the existing laws that defined and regulated relationships between neighbours with respect to these common areas of dispute. This request arose from the Commission's Community Law Reform Program and associated consultations. To take the project further, and to find out what aspects of the law might need reviewing, the Commission held a conference that was attended by representatives of Chamber Magistrates, Community Justice Centres, the Public Solicitor's Office and four Community Legal Centres. It also distributed a Community Law Reform pamphlet to a range of community and interest groups.¹

These consultations confirmed the typical areas of dispute between neighbours: dividing fences, joint use of services, noise and problems caused by large trees.

In 1991, the NSW Law Reform Commission released Discussion Paper 22: *Neighbour and Neighbour Relations*. Submissions were sought from the general public and from specific interest groups including government departments, councils, Community Justice Centres, the Australian Dispute Resolution Association and the Local Government & Shires Association of NSW. It also set up a neighbourhood disputes hotline that received almost 300 calls on the first day. The results of these processes provided valuable information on the range of problems and of the experiences of those on the inside and the outside of the legal profession in terms of the dispute resolution process.

¹ Law Reform Commission (1998) Report 88(1998) – Neighbour and Neighbour Relations.

REPORT 88

In 1998, the Commission published Report 88 (1998): *Neighbour and Neighbour Relations* that focused on disputes about trees and noise. It considered the existing laws regulating these issues and made recommendations for reform. [In 1997, the NSW Parliament passed the *Protection of the Environment Operations Act 1997*. It replaced the *Noise Control Act 1975*.]

A number of issues relating to trees were raised in this report:

- There were no restrictions on the type or number of trees that people may plant on land they own or occupy. Thought was given to the regulation of tree planting as it is with building. That is, anyone wanting to plant trees should get approval from the Council. [This was not favoured by the Commission as it was seen to be expensive, time-consuming and a disincentive for planting trees.]
- Apart from control of noxious plants, the main regulation relating to trees was to preserve them.
- There was a need to educate the community about tree planting to minimise detrimental effects on neighbours;
- Better information on rights and procedures relating to tree matters would increase chances of neighbours resolving their disputes;
- The common law of nuisance provided a legal means of dealing with damage or injury as a result of trees. This required there to be actual or imminent damage.
- The law of nuisance provided little or no protection for loss of sunlight nor any remedy to a loss of a view.
- Where a tree was found to cause damage, the courts tended to require the tree to be removed; for those where damage had not yet occurred, injunctions to prevent damage were only applied in a very narrow set of circumstances and did not include likely damage due to roots;
- The court could award damages or compensation to a person affected by trees causing a nuisance but the person must have suffered actual physical damage.
- The common law allowed a person to abate the nuisance, for example, by pruning over-hanging branches. However, the rules of trespass applied and whatever was removed had to be placed on the owner's property.
- The person who suffers the problem ends up bearing the costs of prevention, abatement and repair.
- In many local government areas, if a person wished to abate the nuisance caused by a neighbour's tree, the local council's Tree Preservation Order required that person to get permission from the tree owner. This may not have been forthcoming.
- Conflicts relating to private trees tied up resources of local councils, chamber magistrates, members of Parliament, legal aid and the police. If they went to court, the process was expensive.
- The submissions included complaints about damage due to falling branches, damage to walls and paving from roots, blocking of drains, leaves blocking gutters, hay fever, interfering with TV reception, blocking of light and the blocking of views.

As a result of the consultation process and based on the many submissions, the Law Reform Commission made a number of recommendations in its 1998 report. These were:

- The operation of the common law right to abate a nuisance by cutting off over-hanging branches and roots be modified so that the person who wants to abate the nuisance give the owner 28 days written notice and that the requirement to place the removed parts on the owner's property be abolished.

- The making of a State Environmental Planning Policy listing undesirable non-native trees that would be exempt from Tree Preservation Orders.
- Tree Preservation Orders should not require the consent of the tree owner to allow a neighbour to trim overhanging branches in order to abate a nuisance.
- Amending a section of the NSW Local Government Act to give local councils the power to order an owner or occupier to take measures to prevent a tree causing further or future damage.
- That legislation be enacted that provides a simple, inexpensive and accessible process through the Local Court for the resolution of disputes about trees. That this legislation provide for the owner of the tree to be responsible for any damage, to bear costs and to compensate neighbours for any damage.
- That a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out sunlight should be able to apply to a Local Court under the proposed new procedure.
- That this new legislation also apply to trees blocking views.

Along the way, thought was also given to how these disputes should be resolved and the role of local government. The importance of negotiation and mediation before going to court was highlighted. Some considered that councils should play a role in the dispute resolution process as they seemed to be the logical first step, especially as many councils have arborists and manage their own trees. Councils and their representatives argued that they should not be involved as they are private disputes, they would not have enough resources and nor did they have the necessary expertise in conflict resolution. It was also noted that in NSW, councils do have the power (s 124 of the *Local Government Act 1993*) to order owners of trees to prevent further or imminent damage but councils are often reluctant to use this power.

The Report 88 also considered the range of orders that the court might make.

THE DRAFT BILL

In 2006, an exposure draft of the Trees (Disputes Between Neighbours) Bill was released for public comment. The draft drew on the work undertaken by the NSW Law Reform Commission and considered in Report 88 but took a different approach to a number of the Commission's recommendations. As a result of the submissions the government received on the draft bill, it was amended and the bill was introduced and read in October and November 2006.

In the second reading of the Bill, Bob Debus, the then Attorney General, outlined the principle provisions of the bill. These are addressed in the next section of this paper. It is important to note that the Attorney General made it very clear that trees are important environmental assets. *The provisions that require the court to consider environmental factors prior to making an order are in recognition of the importance of urban trees as an environmental asset. Urban trees play a proven environmental role in every urban society. They provide energy savings through lower cooling costs, reduce stormwater run-off, help reduce salinity and provide aesthetic and social benefits associated with being in proximity to nature. The bill therefore recognises the environmental contribution of urban trees as a factor that the court must take into consideration in determining applications.*

There are a couple of parts of this speech that are worth quoting as they may have significant implications for tree management in the future.

The first applies to trees on council land. The Attorney General stated *Trees on council land are also exempt from the operation of the legislation, but only in the short term. It is appreciated that some councils have limited resources and that many already spend considerable time and money dealing with tree disputes.*

However, 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.²

The second applies to trees interfering with light and views. *A number of submissions relating to the exposure bill raised concerns relating to trees blocking light and views. The Government appreciates these issues are important to some members of the community. However, the Government is mindful that the proposed 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.*

Hansard records cross-party support for the proposed bill when it was read for the second time in the upper house, the Legislative Council, of the NSW Parliament³. The bill was passed by both houses at the end of 2006 and the Act came into effect on 2nd February 2007.

THE CURRENT ACT

The Act⁴ is administered by the NSW Land and Environment Court and cases are heard by Commissioners of the court. In anticipation of this Act, the Chief Justice of the LEC appointed two part-time Acting Commissioners with specialist expertise in Arboriculture to assist the fulltime Commissioners.

Key components include:

- For the purpose of the Act, “tree” includes any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations.[Cases to date have included palms, shrubs and vines.] (s3)
- Owner of the land includes the occupier of the land. (s3)
- The Act only applies to trees on land that is zoned “residential” (but not “rural residential”), “village”, “township”, “industrial” or “business” (s4).
- It does not apply to any land vested in, or managed by, a council (s4).
- The tree must be wholly or principally situated on the land (s4).
- No action may be brought in nuisance as a result of damage caused by a tree to which this Act applies (s5).
- Orders made by the Court can over-rule a Tree Preservation Order (s6).
- The Act allows an owner of land to apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree to which this Act applies that is on adjoining land(s7). .[In *Boar v UNSW*, adjoining land included trees across the road]
- Applicants must give at least 21 days notice of the lodging of an application to the tree owner, any relevant authority (local council +/- Heritage Office) and anyone else who would be affected by any orders the Court may make (s8).
- The Court has quite wide-ranging powers to make orders to remedy, restrain or prevent damage to property or injury to persons. These can apply to the applicant and the owner. The Court can also order the payment of costs by either party and can order the payment of compensation (s9).

² Hansard NSW Legislative Assembly 25th October 2006 – Trees (Disputes Between Neighbours) Bill; second reading, Mr Bob Debus <http://parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20061025048> accessed 3rd July 2007

³ Hansard NSW Legislative Council 22nd November 2006 – Trees (Disputes Between Neighbours) Bill; second reading; various members; <http://parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LC20061122058> accessed 3rd July 2007.

⁴ *Trees (Disputes Between Neighbours) Act 2006 (NSW)*

Before the Court can hear a case and make orders, it must be satisfied (under s 10) of four matters:

- That the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated;
- That the applicant has given the required notice of the application;
- That the tree has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or
- Is likely to cause injury to any person.

The Court must use its discretion to determine if the facts of the matter present a serious enough situation for the Court to make an order. In many cases there is a "fear" of something happening but the on-site inspection shows that this fear is very unlikely to be realised. If the Court makes an order it also has to decide what should be done and who pays.

Section 12 outlines the many matters that must be considered by the Court in determining an application. These include:

- The location of the tree in relation to the boundary;
- Whether a Tree Preservation Order or similar applies to the tree;
- Whether the tree has historical, cultural, social or scientific value;
- Any contribution it makes to the local ecosystem or to biodiversity;
- The contribution of the tree to the natural landscape and scenic value of the land;
- The intrinsic value of the tree to public amenity;
- If anything other than the tree could have contributed to the alleged damage;
- Any steps taken by the applicant or the owner to abate, rectify or repair the damage or potential injury; and
- Any other matters the Court considers relevant.

The Act allows for the appearance by local councils or the Heritage Council (s13) if consent to do anything to the tree would normally be required to be granted from those authorities. Likewise, the Court must provide a copy of any orders that it makes to the local council, and if necessary, to the Heritage Council (s14). In Schedule 2 of the Act, either the fact that an application or an order has been made under the Act must appear in Schedule 3 – Prescribed Warranties section of the *Conveyancing (Sale of Land) Regulation 2005* and likewise, any orders made under the Act are to be listed in Schedule 4 - Planning Certificates of the *Environmental Planning and Assessment Regulation 2000*.

If a person fails to comply with the orders the Court makes, it is an offence and they could be fined up to 1,000 penalty points (s 15) (currently \$1,100.00 per point). The orders that the Court makes go with the title of the land. So that if the owner who has been given the order sells before the set completion dates for the works, the new owner, or successor in title, is bound by that order. However, this is only if the applicant gives a copy of the Court orders to the new owner (s16).

The local council may, but is not bound to, check whether the works have been completed, and if not, may even do the works specified in the Court orders. Section 17 sets out in detail what the council must do if it intends to go down that pathway in terms of authorisations and notification. The council would then be able to recover costs through the relevant court.

THE ACT IN OPERATION

The first case under this Act was heard on site on 15th March 2007 [P. Baer Investments Pty Limited v University of New South Wales [2007] NSWLEC 12]. Since then, to the time of writing of this paper (22nd July) there have been 31 published judgments⁵. The NSW Land and Environment website⁶ has an excellent section on trees including notes on how the Act works, how to make an application, how the Court deals with the application, procedures for on-site hearings, standard directions given at preliminary conferences and links to the cases where applications were refused and where approvals were granted.

The general process is as follows:

- The applicant lodges an application at either the Land and Environment Court in Sydney or at any Local Court in NSW. The number of copies and to whom they must be provided, are specified in the guidance notes.
- The application is assessed by a Commissioner and a date is set for a preliminary hearing at one of three courts in Sydney or by telephone conference for regional applications.
- At the first hearing or preliminary conference, the parties are encouraged to resolve the matter. If this happens, the Commissioner can make consent orders implementing the agreement. If the parties cannot resolve the matter, the Commissioner makes formal directions, including a strict timetable for the lodging of additional information, for the final hearing on site. The on-site hearing is usually four or five weeks after the preliminary conference.
- To date, the on-site hearings have involved one or two permanent Commissioners with usually one of the specially appointed Acting Commissioners with specialist knowledge in Arboriculture.
- On site, introductions are made, the “terms of engagement” are stated and the tree is inspected from both properties. Both the applicant and the respondent (owner) must hear everything that is said by anyone. Both parties are entitled to have legal representation and or their own arborist/ engineer or anyone else if they desire. If they do engage a specialist, they are required to make sure that that person understands their responsibilities to the Court⁷. The council may also attend. The evidence is assessed, the parties heard, and at the end, a decision is recorded on site. This is then transcribed and sent to all parties, including the local Council.
- In making judgments and orders, consideration is given to each person’s capacity to pay, the urgency of the works and so on.
- Whilst this decision is final and cannot be appealed, it does not mean that the applicant can’t make an application in the future

If someone is considering making an application under the *Trees (Disputes Between Neighbours) Act 2006*, it would be prudent for them to go to the Land & Environment web site and have a look at the decisions that have been made; especially those where the application has been refused. It would also be wise to consider any “tree dispute principles”. A tree dispute principle is a statement of probable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a determination⁸.

⁵ <http://www.lawlink.nsw.gov.au/lecjudgments/2007nswlec.nsf> Accessed 22.07.2007

⁶ http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf

⁷ LEC Expert Witness Practice Directions

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_pd_expertwitnesses accessed 22.07.2007

⁸ Tree Dispute Principles published by the Court see

http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwPrint1/LEC_tree_dispute_principles.

The only Tree Dispute Principle published at the time of writing of this paper is as follows: The Principle: *Urban trees and ordinary maintenance issues*; Specific Aspect: *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.* The case reference is *Barker v Kyriakides* [2007] NSWLEC 292. This has been an important determination as many of the applicants have desired the removal of a neighbour's tree because it drops leaves.

To date there have been very few orders made to remove trees. Several have been made to prune trees and where this has been the case, a marked-up photograph of the part to be removed has been included in the orders published on the web site [see *Brady v Shashoua* [2007] NSWLEC 203; *Haines v McNally* [2007] NSWLEC 202 and *Ridley v Gylar* [2007] NSWLEC 220⁹]. Several more orders have also included marked up photos.

In *Blue v Camelleri* [2007] NSWLEC 138, the Court ordered that *for precautionary reasons, it would be appropriate to order that no excavation deeper than 100 mm take place within 3 m of the outside of the base of the trunk of the tree without further order of the Court. This element of our determination is designed to provide a protective basis for the tree without doing so in a fashion that would totally preclude further excavation if it were warranted to some reason. However, further excavation would require an application to the Court to permit it to occur.*¹⁰

Several cases have involved compensation and costs and these may be shared between the parties. The Court considers things like the pre-existing condition of sewer pipes/ concrete driveways; whether the tree was there before the applicant/ house/ pool etc; and the steps taken by both parties in maintaining the tree or the structure.

Where works such as pruning, removal of Bunya Pine cones or tree inspections have been ordered, the Court has prescribed the level of qualification (using the Australian Qualification Framework – AQF) that the arborist must possess. This has been AQF level 3 in Arboriculture for tree pruning and generally AQF level 5 for hazard/ risk assessments. All pruning work must comply with AS4373:2007: *Pruning of Amenity Trees*. Any other requirements are clearly specified.

To date, several applications have been withdrawn after the first hearing or the on-site hearing. One concerned a tree that was mostly on public land and thus the Act did not apply; another involved the blocking of light by a Leyland Cypress Hedge (in this case the parties settled the matter); and another matter was settled after all parties, including the Council, agreed that a tree subject to a development application could be removed.

CONCLUSIONS

It has been very interesting experience to be involved with the implementation of a new Act involving trees. The Act recognises the importance of trees in the urban environment but provides an accessible and relatively inexpensive method for those people for whom neighbourly negotiation has broken down. The range of orders that have been made so far show that tree removal is not as necessary as many people may think and that for those living in urban leafy environments, fallen leaves are par for the course.

⁹ <http://www.lawlink.nsw.gov.au/lecjudgments/2007nswlec.nsf> accessed 22.07.2007

¹⁰ *Blue v Camelleri* [2007] NSWLEC 138 in <http://www.lawlink.nsw.gov.au/lecjudgments/2007nswlec.nsf> accessed 22.07.2007