



The Law Society  
of New South Wales

170 Phillip Street, Sydney NSW 2000  
Australia; DX 362 Sydney  
Tel (02) 9926 0333 Fax (02) 9231 5809  
ACN 000 000 699 ABN 98 696 304 966  
www.lawsociety.com.au

Our Ref: JJC:SRC:EPD10/2009

**COPY**

20 February 2009

Ms Kathrina Lo  
Director  
Legislation, Policy and Criminal Law Review Division  
NSW Attorney General's Department  
G P O Box 6  
SYDNEY NSW 2001

Attention: Ms Monika Ciolek

Dear Ms Lo

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

The Law Society's Environmental Planning and Development Law Committee (EPD Committee) and its Property Law Committee (PL Committee) appreciate the opportunity to participate in the review of the Trees (Disputes Between Neighbours) Act 2006 (the Act).

The EPD Committee has responsibility to consider and deal with any matters relating to or associated with environmental planning and development law, and to advise the Council of the Law Society on all issues relevant to that area of practice. Membership of the Committee is drawn widely from experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentality, corporate and private clients.

The PL Committee has responsibility to consider and deal with any matters relating to property law and to advise the Council of the Law Society on all issues relevant to that area of practice. The members of the PL Committee are senior property law practitioners and experts. Some of them have acted for applicants and respondents in proceedings under the Act.

**OPERATION OF THE ACT:**

When the Trees (Disputes Between Neighbours) Bill was before Parliament 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.



The Law Society of  
New South Wales is a  
constituent body of the  
Law Council  
of Australia



As experienced practitioners in the Land and Environment Court, EPD Committee members are of the view the Act works well and provides the Court with appropriate mechanisms to deal with disputes about trees that have damaged or may damage property, or cause injury to a person.

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. 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.

#### EXPANSION OF THE ACT:

- **Preservation of light and views**

When the legislation was under debate before Parliament, questions were asked about the potential to extend the legislation to enable the Court to consider disputes about the preservation of sunlight and views. These issues were extensively explored by the Law Reform Commission in its previous inquiries into the problems between neighbours caused by trees<sup>1</sup>.

The Government indicated that issues about disputes over access to sunlight and views would be canvassed in the first review of the Act, noting that it would be preferable to allow some time to assess the new scheme before considering if and how it might be applied in situations that do not involve damage to property or risk of injury<sup>2</sup>.

Specific mention was made of hedge plantings, such as Leighton's Green cypresses (*Cupressocyparis Leylandii*) that have the potential for excessive growth. In this regard, Mr Gaudy indicated that the Attorney General had written to the then Minister for Planning requesting that consideration be given to introducing an appropriate form of regulation regarding hedges. It is understood that Minister declined to make that regulation.

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.

While local council planning requirements do have regard to questions of adequate sunlight and privacy, controls and regulation are not consistent. 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.

More and more Australians are recognising the benefits of installing solar systems in their homes, and are taking up the government subsidies and rebates that are being offered at both State and National level. Homeowners currently have no protection from the limitations to the proper functionality of panels caused by overshadowing, increased costs of powering homes and reduced the benefits gained by selling excess power back to the electricity grid. The EPD Committee believes that governments should act to address the problem of solar

---

<sup>1</sup> Law Reform Commission NSW: Discussion Paper 22 (1991) – Community Law Reform Program: Neighbour and Neighbour Relations (Chapter 3) and Report 88 (1998) – Neighbour and Neighbour Relations (Chapter 2).

<sup>2</sup> Trees (Disputes Between Neighbours) Bill Second Reading Debate, Legislative Assembly Hansard 15 November 2006, Bryce Gaudry MP, Parliamentary Secretary.

panel shadowing and the issue of "solar rights". The PL Committee agrees that to deal with the issue of solar rights in legislation designed to provide a simple, inexpensive and accessible process for resolving disputes about trees between neighbours is not necessarily appropriate. This issue is worthy of further consideration in a broader context.

### *Conclusion*

In recognition of the recommendations made by the Law Reform Commission in its 1998 Report, the EPD Committee believes it would be appropriate to extend the dispute resolution mechanism available under 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.

The PL Committee does not support such an extension 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, in the PL Committee's view, 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.

Limitations on amenity disputes could include restricting the Court's jurisdiction to disputes about "spite" hedges on boundaries, or to certain species types that the particular local council has identified should not be planted. There could also be a strict impact threshold on applications, as recommended by the Law Reform Commission. In relation to general enjoyment, the LRC recommended that the Court's resolution process should be available if trees interfere unreasonably with a neighbour's enjoyment of land. With respect to the impact of sunlight and views, the LRC recommended that a person may apply to the Court if their enjoyment of their property has been severely affected by a neighbour's tree<sup>3</sup>.

The Committees' proposal that the Court's jurisdiction should be strictly limited arises out of concern about a number of issues to which the review should have regard:

- the potential impact that widening the jurisdiction of the Court would have on Court resources;
  - the potential for pressure to be brought to bear to further expand the Court's jurisdiction beyond any limitations initially imposed;
  - the potential cost to local councils should the current exemption be removed (see below);
  - the potential for the making of orders by the Land and Environment Court that will run with land and bind successors in title.
- **Removal of exemption granted to local councils**

The Government indicated in Parliament that the exemption from the operation of the legislation granted in respect of trees on land vested in or managed by local councils would be removed unless this review reveals compelling reasons in support of retaining it.

The EPD Committee has identified a range of issues that the review will need to take into account.

---

<sup>3</sup> Report 88, Recommendations 5, 6 and 7.

*Considerations in support of removing the exemption*

- Councils have been on notice for two years that the exemption may well be removed.
- All property owners should be alert to any potential for damage that may be caused by trees on their property. The obligation for risk management is ongoing. There are concerns that some local councils have not always been mindful of the need to properly assess the variety and location of their plantings.
- The current exemption in favour of local councils is discriminatory against other large land owners, such as Government departments and authorities.

*Considerations in support of retaining the exemption*

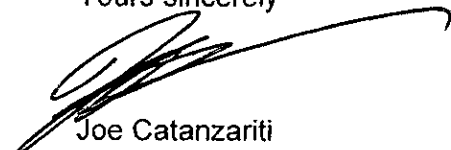
- The potential liability of councils, and consequently rate payers, would be inordinately excessive.
- Councils would have to undertake extensive risk analysis of all trees under their ownership and control. This may well result in councils removing all trees that would be deemed to pose a threat of damage to property or are likely to pose a threat of injury to a person at some time in the future.
- Councils also have ownership and control of trees planted on council roadways. As such, the liability of councils differs from that of Government department and authority landowners.
- Councils may restrict future plantings. This would not be in the interests of local environments.

*Conclusion*

The question of removing local councils' exemption under the Act is one that the review is required to consider. It is a matter that divides legal practitioners. The PL Committee is firmly of the view that the exemption granted to councils under the Act should be removed. Councils have been aware that the exemption may be removed and to continue the exemption is inequitable. A number of lawyer members of the EPD Committee agree with this point of view. However, the Committees are also mindful of the potential impact on rate payers and local environments.

Thank you once again for the opportunity to participate in the review of the Trees (Disputes Between Neighbours) Act 2006. If you would like to make any inquiries about this submission, please contact Liza Booth by telephone on 9926 0202, or by email on [ljb@lawsocnsw.asn.au](mailto:ljb@lawsocnsw.asn.au).

Yours sincerely



Joe Catanzariti  
President