Trees (Disputes Between Neighbours) Act 2006 No 126

New South Wales

The provisions of the *Trees (Disputes Between Neighbours) Act 2006* are provided with:

- notes from the Land and Environment Court (surrounded by borders single line borders like this box);

- notes to s 18 were included by Parliament (shaded and surrounded by single line borders like this box).

The Court has provided the notes in order to assist understanding of the approach which the Court has taken to various provisions of the Act. These notes are provided for guidance only and do not constitute legal advice or a judgment on the interpretation or application of the provisions of the Act.

The notes provided to s 18 were included by Parliament and are not a commentary made by the Court.

The notes provided by the Court do not form part of the Act nor do the notes to s 18 form part of the Act.

An Act to provide for proceedings in the Land and Environment Court for the resolution of disputes between neighbours concerning trees; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Trees (Disputes Between Neighbours) Act 2006*.

In *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para [136], Preston CJ considered the basis of the Act. He said:

> The *Trees (disputes Between Neighbours) Act 2006* establishes a separate, statutory scheme whereby:
>
> (a) a specified class of person who has suffered, is suffering or is likely to suffer a specified harm may apply to the specified court (the Land and Environment Court of New South Wales) for orders of a specified nature in relation to trees (as defined) situated on specified land;
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> (b) the Court must be satisfied that certain preconditions have been met before it can make an order under the Act;
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> (c) the Court must consider specified matters in determining the application; and
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> (d) the Court is given a wide charter to make orders to remedy, restrain or prevent specified harm as a consequence of the tree the subject of the application.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

The Act originally commenced operation on 2 February 2007.

The Act was revised and amended in 2010 to broaden its scope. A copy of the report by the Department of Justice and Attorney General can be found on the following link. Review of the Trees (Disputes between Neighbours) Act 2006.

The current version commenced on 2 August 2010.

3 Definitions

(1) In this Act:

council has the same meaning as it has in the *Local Government Act 1993*.

Crown land has the same meaning as it has in the *Crown Lands Act 1989*, and includes land dedicated for a public purpose under Part 5 of that Act.

interfere with a tree includes cut down, fell, remove, kill, destroy, poison, ringbark, uproot or burn a tree or any part of a tree (including its roots).

owner of land includes the occupier of the land.

the Court means the Land and Environment Court.

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

Clause 4 of the *Trees (Disputes Between Neighbours) Regulation 2007* prescribes that bamboo and any plant that is a vine is a tree for the purposes of the definition of tree in s 3 of the Act.

Amendments to the Act in 2010 prescribe that vines are now trees for the purpose of the Act see *Timmins v Park* [2010] NSWLEC 1178.

For a general commentary on "tree" in this Act, see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [137] to [139] (note that the comment in para [140] has since been amended).

In *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para [147], Preston CJ also dealt with how the word "tree" should be considered when only parts of trees or dead trees remained. His Honour said:

> The concept of a "tree" is wide enough to include a tree that has been reduced to a bare trunk or a stump that is still connected to the soil of the land. The concept of a tree also includes a tree that has died: see *Ridley v Gyler* [2007] NSWLEC 220; *Karaboulis & anor v Berbeniuk & anor* [2010] NSWLEC 1191; and *Just v Nel* [2010] NSWLEC 1126.

window includes a glass sliding door, a door with a window, a skylight and any other similar thing.

Solar panels are not windows for the purpose of the Act, see *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 at paras [29] to [30]).

(1A) For the purposes of this Act:

(a) a reference to land within a zone designated "rural-residential" includes a reference to land within a "large lot residential" land use zone, and

(b) a reference to land within a particular designated zone includes a reference to land within any zone prescribed by the regulations as a zone equivalent to that particular designated zone but does not include a reference to land within any zone prescribed by the regulations as a zone that is not equivalent to that particular designated zone.

(2) Notes included in this Act do not form part of this Act.

4 Act applies to trees on certain land

(1) This Act applies only to trees situated on the following land:

(a) any land within a zone designated "residential", "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,

> Before the Court can make orders under this Act, it must be satisfied that a number of conditions exist. One such condition is that the tree is situated on land that falls within one of the abovementioned zones. It is the applicant's responsibility to check the zoning of properties to ensure that they fall within one of the zoning categorisations prior to lodging the application.
>
> The Court has decided two cases about a zone *having the substantial character* as a residential zone. In *Aaron v Haynes* [2007] NSWLEC 294 – the Living Bushland Conservation Zone under the *Blue Mountains Local Environment Plan 2005* was held to be so characterised but in *Bayley & Waller v Kiernan* [2008] NSWLEC 1291 – the 7(c2) Scenic Protection - Rural Small Holdings zone under Gosford Council's Interim Development Order 122 was held not to be so characterised. The 2010 amendment of the Act now enables applications to be made pursuant to s 7 Part 2 for trees growing on land zoned 'rural residential' see *Schutz v Kotsis* [2010] NSWLEC 1332. However this does **not** apply to applications made pursuant to Part 2A.

(b) any land of a kind prescribed by the regulations for the purposes of this section.

> No kind of land has been prescribed by the regulations for the purposes of this sub-section.

(2)This Act does not apply to trees situated on:

(a) any land that is vested in, or managed by, a council, or

> While the Act does not apply to trees on land owned or managed by a council, it does apply to trees on Crown land (for example, schools, public housing and hospitals). Applications have been made about trees on Crown land – see Maguire v Crown in the Right of the State of New South Wales (North Ryde Public School) [2007] NSWLEC 587; Risk v Department of Housing [2007] NSWLEC 297; Taylor v Department of Housing [2010] NSWLEC 1172. The Act does make some restrictions on the Court dealing with trees on Crown land and these can be seen in s11 of the Act.

(b) any land of a kind prescribed by the regulations.

> No kind of land has been prescribed by the regulations pursuant to this sub-section.

(3) For the purposes of this Act, a tree is situated on land if the tree is situated wholly or principally on the land.

(4) Without limiting subsection (3), a tree that is removed following damage or injury that gave rise to an application under Part 2 is still taken to be situated on land for the purposes of the application if the tree was situated wholly or principally on the land immediately before the damage or injury occurred.

In *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [144] and [145], Preston CJ discussed the necessity for the tree to be in existence at the time an application is made under the Act. However, subsequently subsection 4 was inserted by the *Trees (Disputes Between Neighbours) Amendment Act* 2010 which deems a tree that has been removed still to be situated on land in certain circumstances. See *Baker v Grabovac* [2010] NSWLEC 1289.

Determining the land on which the tree is situated is necessary in order to identify the person who is an owner of land adjoining the land on which the tree is situated and who may make an application under the Act in relation to the tree: see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [150] to [157].

Trees on boundaries

The applicant will need to satisfy the Court that the tree is "wholly or principally" on the respondent's land. In some circumstances a survey of the properties may be required for that purpose. At the preliminary hearing the Court may direct that a survey be undertaken to define the location of trees which appear to be straddling a property boundary (*Vella v The Owners of Strata Plan 8670* [2007] NSWLEC 365) or in situations where the boundary is unclear (*Barnett v NSW Land & Housing Corporation* [2011] NSWLEC 1033). The survey must accurately depict the configuration of the base of the tree and its location with respect to the boundary (see *Awad v Hardie (No 2)* [2010] NSWLEC 1258.)

This also applies in situations where there is uncertainty regarding the ownership of the property alleged to have been damaged by a tree – see *Wazrin Pty Ltd v Pearson* [2009] NSWLEC 1420 and the use of land as a right of carriageway – see *Liu v Morris* [2012] NSWLEC 1345

A tree may take different forms, such as a single trunk, multiple trunks,epicormic growth from a lignotuber or suckering from a common root system, so that a single definitive statement of when a tree will be "situated… principally" on land may not be possible.

In one case, concerning a Cypress Pine straddling a boundary, the Court held that this tree, where more than 50% of the base of the tree was located on the respondent's property, should be regarded as being "*situated…principally*" on that property (see *Brown & anor v Weaver* [2007] NSWLEC 738).

The burden of proof lies with the applicant to prove, on the balance of probability, that the tree(s) in question is/are situated substantially on the respondent's land – see *Drolz v Sinclair* [2008] NSWLEC 34. In some instances, the dividing fence between the parties' properties may not be an accurate representation of the actual boundary – see *Ross v Filactos & anor* [2012] NSWLEC 1315.

5 Action in nuisance

No action may be brought in nuisance as a result of damage caused by a tree to which Part 2 applies or as a result of an obstruction of sunlight to the window of a dwelling, or of a view from a dwelling, caused by trees to which Part 2A applies.

In *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [218] to [219], Preston CJ noted that this provision limits some, but not all, actions in nuisance and does not affect other common-law actions. His Honour said:

> 218. Section 5 of the *Trees (Disputes Between Neighbours) Act 2006* provides that "no action may be brought in nuisance as a result of damage caused by a tree to which this Act applies". Hence, if damage is caused by a tree to which the Act applies, a person whose property is damaged by the tree cannot bring a common law action in nuisance but must instead make application under the *Trees (Disputes Between Neighbours) Act 2006* to the Land and Environment Court. However, if the damage is caused by a tree to which the *Trees (Disputes Between Neighbours) Act 2006* does not apply, such as a tree on land within zones not covered by s 4(1)(a) or on land vested in or managed by a council (s 4(2)(a)), a common law action in nuisance can still be brought.
>
> 219. The *Trees (Disputes Between Neighbours) Act 2006* contains no limitation on bringing common law actions in trespass or negligence, regardless of whether the tree concerned is one to which the *Trees (Disputes Between Neighbours) Act 2006* applies. The Land and Environment Court, however, has no original jurisdiction to hear and determine such common law actions, nor would such actions be ancillary to a matter that falls within jurisdiction such as an application under the *Trees (Disputes Between Neighbours) Act 2006* but rather are separate causes of action: see *National Parks & Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 at 582; *Mitchell v Waugh* (1993) 82 LGERA 44 at 49; *Nix and Dunn v Pittwater Council* (1994) 84 LGERA 199 at 203-205..

6 Authorisation of work or activity regulated by or under other Act

(1) Except as provided by subsection (3), an order under Part 2 or 2A does not authorise or require a person:

(a) to carry out any work or engage in any activity for which a consent or other authorisation must be obtained under any other Act without that consent or authorisation, or

(b) to carry out any work or engage in any activity that is prohibited by or under any other Act.

(2) Except as provided by subsection (3), a person may not apply to the Court for an order under Part 2 or 2A if the carrying out of the work or engagement in the activity concerned is prohibited by or under another Act.

(3) An order under Part 2 or 2A has effect despite any requirement that would otherwise apply for a consent or other authorisation in relation to the tree concerned to be obtained under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977*.

For example, an order made by the Court authorising or requiring interference with or removal of a tree has effect despite any applicable Council tree preservation order that might otherwise prevent or restrict such interference or removal. The roles of the Council and the Court are discussed in *Ghazal v Vella (No. 2)* [2011] NSWLEC 1340

Part 2 Court orders – trees that cause or are likely to cause damage or injury

7 Application to Court by affected land owner

An owner of land may 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 situated on adjoining land.

Preston CJ discussed general issues concerning this provision in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [150] to [160].

"An owner …"

"*Owner of land*" is defined in s 3(1) of the Act to include *"the occupier of the land*". As to the potential scope of the concepts of owner of land and occupier of the land under the Act, see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [158] to [160].

The Court's procedure, if an application is made on the basis of a tree causing "*damage to property*" and more than one property is alleged to be subject to the damage, is to require separate applications for each affected property (see, for example, *Po & Dossan v Warham* [2008] NSWLEC 1238 where an application was purportedly made in the name of two applicants with separate properties but concerns about the same tree). Examples of separate applications about the same trees include *Leahy v Godbier; Horvath v Godbier* [2007] NSWLEC 313 and *Hill v Drysdale & Harvey; Craike v Drysdale & Harvey* [2010] NSWLEC 1147

However, if a property has multiple owners, any one of them can apply as the application may be made by **an** owner [emphasis added] - see *Treeves v Hedge* [2010] NSWLEC 1344 paras [17] to [21].

The necessity to ensure that the appropriate person makes an application regarding damage to property and or compensation is outlined in *Russell v Parsons* [2009] NSWLEC 1026 .

Similarly, the applicant must own the property they say has been damaged by a tree on adjoining land. The Court has no jurisdiction over damage to property that is situated on the respondent's land – see *Wazrin Pty Ltd v Pearson* [2010] NSWLEC 1020, *Shagrin v O'Neil* [2010] NSWLEC 1368.

"… damage …"

Preston CJ discussed damage, generally, in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [168] to [173]. In this discussion, his Honour also specifically noted at para [171] that:

> 171. However, annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind is not "damage to property on the land" within s 7 of the *Trees (Disputes Between Neighbours) Act 2006*. Hence, leaves, fruits, seeds, twigs, bark or flowers of trees blown onto a neighbour's land might cause annoyance or discomfort to a neighbour, but unless they also cause damage to property on the neighbour's land they will not be actionable under s 7.

A significant number of applications are made on the basis of annoyance or discomfort associated with the dropping of leaves, fruit, twigs and other material naturally shed from trees. The Court has published a Tree Dispute Principle in *Barker v Kryiakides* [2007] NSWLEC 292 which states that:

> For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis.
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> 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.

There are many examples of the application of this Principle. To date it has been adopted consistently and there have been no examples where the applicant has convinced the Court of exceptional circumstances. Some recent examples include – *Inbari & anor v Rankin* [2010] NSWLEC 1236, *Lazarus v Le* [2010] NSWLEC 1118. In *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 the Principle was extended to include the cleaning of mould and slime - paras [11] to [14].

"… to property on the land … "

Preston CJ discussed this phrase in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [162] to [167]. In this discussion, his Honour noted that the term "*property*" is not confined to real property and may include "buildings, fences, paving or other structures, or to fruit trees, crops, ornamental gardens or other vegetation growing on a neighbour's land" (para [166]) or "moveable objects or corporeal chattels, such as animals, vehicles or furniture, that may be located on, but are not attached to or part of the groun*d*" (para [167]). (See *Lee v Martin* [2010] NSWLEC 1146 (garden plants); *McHugh & anor v Schmiedte* [2010] NSWLEC 1163 (outdoor furniture); *Russell v Parsons* [2009] NSWLEC 1026 (car)).

In *Robson v Leischke* at [166], Preston CJ considers that "damage to the surface of the land such as raising a mound of earth or drying the soil without consequential damage to other property" would not be covered by the Trees Act - see *Ardagh v Ellston* [2012] NSWLEC 1235 at paras [41]-[42].

"Pipecam" video footage inside a sewer line has been used in conjunction with above ground measurements to determine causes of damage to terracotta sewer pipes: see *Ding & Anor v Phillips* [2008] NSWLEC 1268 and *Payn v Allen* [2010] NSWLEC 1315.

The property must be in existence at the time the application is made – see *Riachi v Kerslake* [2010] NSWLEC 1153 and *Holden v Smith* [2011] NSWLEC 1066.

The fact that the property must be on the applicant's land has already been covered.

The applicant must own the property alleged to be damaged by the tree at the time the damage occurred. This is discussed in *Liang & anor v Marsh & anor* [2011] NSWLEC 1026 at paras [33] to [35].

An application for compensation for damage to property must be made against the owner of the tree at the time the damage occurred; this may not be the current owner of the tree – see *Thornberry & Anor v Packer & Anor* [2010] NSWLEC 1069 at para [5]. If a property has changed hands over the period which the damage is said to have occurred, an applicant may make an application against the current owner/s but the former owner/s may be joined in the proceedings - see *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 and *Cincotta v Huang & ors* [2011] NSWLEC 1086.

"… injury …"

The Act does not include any definition of the term "*injury*". In *Tuft v Piddington* [2008] NSWLEC 1249, it was held that, for the purposes of the Act, "*injury"* encompasses allergic reactions or other medical conditions (in *Tuft*, the injury was an asthmatic reaction to pollen).

In addition, where an application is made based on injury said to arise from a medical condition, the Court gives specific Supplementary Standard Directions requiring an applicant to provide properly qualified medical or scientific evidence of a link between the injury and the trees which are the subject of the application. These Supplementary Standard Directions are in the following terms:

1. Further to Direction (5) of the principal directions in this matter, the applicant is to provide, by the close of business on (*date*), any statement of medical or arboricultural evidence and any supporting medical or arboricultural peer reviewed literature relied upon in support of a claim that a tree which is the subject of the application is a *likely cause of injury to any person*;

2. Any expert evidence prepared after the date of these directions concerning matters contained in (1) above is to include acknowledgement of and agreement to be bound by Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules.

A similar issue to that in *Tuft,* concerning an application based on a claim of an allergic reaction to wattle, arose in *Hurditch v Staines* [2008] NSWLEC 1351 where the above Supplementary Standard Directions had been given and no relevant evidence produced. The Court held that injury as a consequence of the tree concerned had not been established. Other examples include *Oakey v Owners Corporation Strata Plan 22678; Oakey v Owners Corporation Strata Plan 5723* [2009] NSWLEC 1108 concerning fibres from a Norfolk Island Hibiscus, and *Turner v O'Donnell* [2009] NSWLEC 1349 at paras [16] to [17] in regards to parts of a eucalypt causing sinusitis.

Further, as discussed by Preston CJ in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para [175], the applicant's concern about likely injury can be but does not necessarily have to be injury to a person who would be on the applicant's land. Hence, an application can be made when an applicant is concerned that a tree on adjoining land is likely to cause injury to persons on public land in the vicinity. In *Ashworth v Joyce* [2007] NSWLEC 357 an application was made concerning dead trees which, the applicant contended, were likely to cause injury to persons on an adjacent public beach reserve. Orders have been made for the removal or pruning of trees on the basis they may cause injury to persons on the respondent's land - see *Reuben v Lace* [2010] NSWLEC 1024.

"… as a consequence of …"

Preston CJ discussed this requirement for a nexus between the tree and damage to property or injury to any person in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [176] to [189]. In particular, his Honour makes it clear that this statutory scheme does not require any finding of fault by a person to be made to establish causation (at para [184]). However, fault may be relevant in determining what, if any, order should be made (at para [185]). His Honour also noted that the cause must be the tree itself and that the mere fact that the tree might provide habitat to animals or insects which cause damage does not mean such damage is "as a consequence of" the tree. He said:

> 189. Finally, the specification of the tree as being a cause of damage to property or injury to any person excludes damage or injury directly caused by animals, such as mammals, birds, reptiles or insects, which may be attracted to a tree or use it for habitat. Thus, although a tree when it flowers might attract bees seeking nectar in the flowers, and the presence of the bees might increase the risk of persons in the vicinity being stung by bees, it is not the tree itself that is likely to cause such injury of bee sting to any person, but rather it is the bees: see *Immarrata v Mourikis* [2007] NSWLEC 601. Similarly, the fact that an animal which has caused, is causing or is likely to cause in the near future damage to property on adjoining land, uses a tree as habitat, such as for feeding, roosting or nesting, does not result in the tree itself having caused, causing or being likely to cause in the near future damage to the applicant's property: *Dooley v Newell* [2007] NSWLEC 715 at [22]-[23].

Similar findings are found in *Clune v Falconer* [2008] NSWLEC 1458 with respect to mosquitoes and termites, in *Moase v McMahon* [2010] NSWLEC 1123 at paras [17] to [19] with respect to bats, and in *Ratay v Allen* [2010] NSWLEC 1086 in regards to

cockatoos.

The risk of fire damage to the applicant's property as a consequence of the flammable nature of trees is discussed in *Freeman v Dillon* [2012] NSWLEC 1057 at para [86].

"… a tree to which this Act applies …"

As to what is a "tree", see commentary on "tree" in s 3 above and *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [137] to [140].

The Act will only apply to a tree if it is situated on land to which the Act applies: see commentary on s 4(1) above and *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [148] and [149].

"… is situated …"

As to whether a tree is situated on land if it is removed, see commentary on s 4(4) above.

" … on adjoining land".

The Court has applied the decision of the Court of Appeal in *Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429, in which the Court of Appeal held that adjoining does not mean immediately linked to or contiguous with. Trees located across a public street (*P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128) or separated by a public walkway (*Murray v Shoebridge* [2007] NSWLEC 785) from the applicant's property have been held to be "*on adjoining land*". See also *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para [157].

In *Cavalier v Young* [2011] NSWLEC 1080, the Court held that land joined only by a corner post is adjoining land for the purpose of the Act.

Further, the Court has held that a person whose rights to land might make him an "owner" of the land for the purposes of the Act, cannot make an application about a tree situated on that land - see *McCormack v Spencer* [2008] NSWLEC 1285) and *Liu v Morris* [2012] NSWLEC 1345.

Making a second application
When the Court has made a decision on a tree application, even if the application was refused, it is possible for an applicant to make a subsequent or fresh application. However, a fresh application can only be made if circumstances have changed since the Court determined the earlier application (*Hinde v Anderson & anor* [2009] NSWLEC 1148) Changed circumstances can include further damage to property or that damage that existed at the time of the earlier application has been made worse. Likewise, an application originally made on the basis of damage to property does not preclude a subsequent application on likely cause of injury to any person. Equally, an earlier injury application does not preclude a subsequent damage-based application. Further, an application concerning impacts from the canopy of a tree does not preclude another application concerning the roots of that tree or vice versa.

However, it is not possible to make a further application if the circumstances have not changed (*McCallum v Riordan & anor* [2011] NSWLEC 1009; Awad v Hardie (No.3) [2012] NSWLEC 1067). If the nature of the application remains the same but all that has changed is that there is further evidence to support the application, such an application cannot be successful if the new evidence is evidence that could have been available at the time of the original hearing. For example, if an application for damage allegedly caused by the roots of a tree could not be proved because no roots had been exposed and there were no other indicators that could demonstrate satisfactorily that the roots of the tree were the cause of the damage, subsequently exposing the roots to demonstrate them to be the

cause of the damage is not a basis for a new application to succeed because the roots could have been exposed at the time of the hearing of the first application (*Zangari v Miller (No 2)* [2010] NSWLEC 1093; *MacPhail & anor v Ware & anor* [2012] NSWLEC 1230). Further, it is not appropriate to make a second application in the hope that a different Commissioner will be appointed to hear the matter and thus might give a different decision to that made on the first application.

8 Notice of application for order to be given to owners of affected land

(1) An applicant for an order under this Part must give at least 21 days notice of the lodging of the application and the terms of any order sought to:

(a) the owner of the land on which the tree is situated, and

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The Court may use this provision to make what are known as "orders for substituted service" so that the Court can permit notice of an application, for example, to be given to the owner of a rented property by giving a copy of the application to the real estate agent who manages the property. This will usually only be done when attempts to give the application direct to the property owner have proved unsuccessful - for example, see *Foran v Khiabany & anor* [2008] NSWLEC 1294 at para [24].

Information on title searches that will establish who owns the property can be found on the NSW Government's Land and Property website www.lpi.nsw.gov.au.

(b) any relevant authority that would, in accordance with section 13, be entitled to appear in proceedings in relation to the tree, and

The first hearing before the Court is primarily a procedural one which sets a timetable leading up to a final hearing of the application. The final hearing will usually be an on-site hearing. Appropriate directions in the Court's Standard Directions for tree applications are made.

In order to ensure that the relevant local council is aware of this process, if it has not taken part in the preliminary hearing, the Court will require that a copy of the directions be provided to the local council and that the Court be satisfied that this occurs (see Standard Directions 3 and 4).

A similar position will apply if the Heritage Council is entitled to be a party to the application.

(c) any other person the applicant has reason to believe will be affected by the order.

(2) The Court may direct that notice of an application be given to a person or that notice be given in a specified manner or within a specified period.

The Court may also use this power to give notice to a person other than the tree owner who might be liable to be ordered under the Act to pay compensation and/or undertake remedial work.

For example, where damage to a house may have been caused by the failure of the builder who constructed the house to provide adequate foundations and the inadequacy of those foundations permitted otherwise avoidable damage by tree roots, the Court has directed that notice of an application made in these circumstances be given to the builder in the event that the Court were to consider making an order that the builder pay compensation and/or undertake remedial work (no case is cited as the proceedings where this occurred were discontinued).

(3) The Court may waive the requirement to give notice or vary the period of notice under this section if it thinks it appropriate to do so in the circumstances.

All applications which are based on s 10(2)(b) – that the tree is "*likely to cause injury to any person"* – are assessed by the Court to see if there appears to be, from the documents filed with the application, any reason justifying the Court shortening the requirements for the notice period and accelerating the hearing process. The Court has accelerated the timetable in a number of cases because of the possibility of risk of injury if a tree were to fail.

9 Jurisdiction to make orders

(1) The Court may make such orders as it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person, as a consequence of the tree the subject of the application concerned.

Preston CJ discussed the Court's power to make orders in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [211] to [217].

Although the Court's powers are not unlimited (as discussed in the paragraphs in *Robson* referred to immediately above), the Court does have a wide discretion to make those orders it considers appropriate "to remedy, restrain or prevent damage to property, or to prevent injury to any person" in light of the facts of the case.

Before making any order, the Court must, first, be satisfied that there has been a reasonable effort to reach agreement [s 10(1)] and that one of the four prerequisite tests in s 10(2)(a) or (b) has been satisfied. The Court is then required to consider any relevant matters set out in s 12. Having been satisfied on these steps, the Court will then consider what are the appropriate orders for it to make in the circumstances of the particular application.

If the parties have reached agreement and propose agreed or consent orders, the Court is still obliged to go through the process outlined above (see *Breen & Anor v Caronna & Anor* [2008] NSWLEC 293 and *Alegounarias v Williams; Barnes v Williams*; [2012] NSWLEC 1052). If the Court agrees that the proposed orders are ones appropriate "to remedy, restrain or prevent damage to property, or to prevent injury to any person", the Court will make those orders. However, if the Court considers that some other orders are appropriate "to remedy, restrain or prevent damage to property, or to prevent injury to any person", the Court will make those orders which it considers appropriate and is not required to accept the orders proposed by the parties (see *Breen & Anor v Caronna & Anor (No 2)* [2008] NSWLEC 1424).

When the Court has made orders under the Trees Act, the Court retains its general supervisory jurisdiction concerning such orders. This means that Judges of the Court have the power to suspend (stay) or rescind orders if, for example, a successful applicant who is ordered to provide access to their property for the purpose of undertaking work on a tree on their neighbour's property refuses to permit such access (see *Vieira v Kaleski*

[2008] NSWLEC 159).

For a commentary on the effect of orders and the obligation to carry them out, see *Urquhart v Hayman (No 2)* [2012] NSWLEC 269.

The Court's website categorises all of the cases heard to date on the basis of the type of orders made **Tree disputes: helpful materials**

(2) Without limiting the powers of the Court to make orders under subsection (1), an order made under that subsection may:

(a) require the taking of specified action to remedy damage to property, or

The Court has ordered, in appropriate cases, the undertaking of repairs to an applicant's property. The work is undertaken by the applicant and is accompanied by an order for whole or partial reimbursement of the costs by the tree owner. Some examples of the types of orders appear below:

- **Re-laying of paths or driveway**

  Spence v Syed and Anor [2008] NSWLEC 1331

  Dean v Ellsworth [2010] NSWLEC 1032

- **Relaying of courtyard paving**

  Collaro v Tate and ors [2008] NSWLEC 1337

  Prince & anor v Davies & anor [2011] NSWLEC 1087

- **Replacement of sewer pipes**

  Gan v Anderson & anor [2008] NSWLEC 1257
  Fairfull v Nichols [2009] NSWLEC 1247
  Treeves v Hedge [2010] NSWLEC 1344

- **Repair of retaining walls**

  Bentley v Hinchen [2008] NSWLEC 1348

  Liang & anor v Marsh & anor [2011] NSWLEC 1026

(b) require the taking of specified action to restrain or prevent damage or, if damage has already occurred, further damage, to property, or

Tree removal or pruning or removal of deadwood

The Court has ordered, in appropriate cases, the removal of a tree, pruning of live branches or removal of dead wood from the canopy of a tree. Cases where such orders have been made can be found in the relevant case list in the Tree Dispute practice collection on the Court's website at *Decisions where an order has been made for the removal of a tree* and *Decisions where an order has been made for pruning or other work on a tree.*

Typically, orders for pruning require compliance with AS4373:2007 *Pruning of Amenity Trees*. Similarly orders for pruning or tree removal generally require the work to be

undertaken by an AQF level 3 arborist with appropriate insurance cover.

All work is required to be undertaken in accordance with the WorkCover NSW *Code of Practice for the Amenity Tree Industry.*

In instances where it is considered that wildlife may be present and potentially at risk if a tree is ordered for removal, orders may be made to ensure that any wildlife is protected or rescued - *Stipancic v Macdonell* [2010] NSWLEC 1261

Root barriers and/or root pruning

Where appropriate, the Court has ordered the installation of root barriers and/or root pruning (some examples are *Sidebottom v Cairney* [2007] NSWLEC 356; *Storey & anor v Button* [2007] NSWLEC 743; *Tomasetta v Gregory* [2007] NSWLEC 420; *Collaro v Tate and ors* [2008] NSWLEC 1337, *Spillane v Burgess* [2009] NSWLEC 1289 and *Zignic v Waistell* [2010] NSWLEC 1188). In *Haines v McNally* [2007] NSWLEC 202 the Court included a photograph in the judgment showing which roots could be cut.

Orders to prevent interference with the tree

The Court has the power to place restrictions on activities in the vicinity of a tree if these are necessary to ensure that the tree itself will not cause damage to the applicant's property or become a risk of injury to a person. For example, the Court has imposed limits on excavation in the vicinity of tree to address possible future stability issues *(see Blue v Camelleri* [2007] NSWLEC 138).

(c) require the taking of specified action to prevent injury to any person, or

Ongoing maintenance orders

The Court has interpreted the wide discretion given by this provision to permit it to order ongoing maintenance of trees when there will be a likely continuing risk of injury to a person (examples include *Adamski v Betty* [2007] NSWLEC 200 (maintenance de-coning of a Bunya pine), and *Po & Dossan v Warham* [2008] NSWLEC 1238), *Sahyoun v Jessop* [2009] NSWLEC 1313 (periodic removal of deadwood).

(d) require the making of an application to obtain any consent or other authorisation referred to in section 6 (1) (a), or

(e) authorise the applicant concerned to take specified action to remedy, restrain or prevent damage or (if damage has already occurred) further damage to property, or

An example of such an authorisation occurred where the applicants were authorised to prune (at the tree owner's expense) the tree owner's tree away from the applicants' house power supply wires because the pruning was to take place over the applicants' property: *Tomasetta v Gregory* [2007] NSWLEC 420

(f) authorise the applicant concerned to take specified action to prevent injury to any person, or

Grinding of trip hazards

The Court has also ordered the grinding of trip hazards in order to eliminate the likelihood of future injury to people (see, for example, *Tomasetta v Gregory* [2007] NSWLEC 420).

(g) authorise land to be entered for the purposes of carrying out an order under this section (including for the purposes of obtaining quotations for the carrying out of work on the land), or

Orders for access to an applicant's property for the purposes of carrying out work required by orders of the court

It is usual for the Court to order access to an applicant's property to enable a tree owner to permit effective pruning or safe removal of tree. Access will also be ordered if this is a more cost effective way of carrying out the Court's orders.

Access may be ordered not merely for the purposes of carrying out work on a tree but also to permit work on other structures such as fences or retaining walls. Access may also be ordered for the purpose of obtaining quotes for work to trees and or structures.

Such access may be needed simply because pruning or cutting needs to take place in the airspace over the applicant's property (see, for example, *Bentley v Hinchen* [2008] NSWLEC 1348) or access from the applicant's property enables the work to be completed in a safer and more efficient manner (*Owners Corporation SP11222 v Jones* [2010] NSWLEC 1327).

If the Court orders access, it will require that any access:

- is on reasonable notice to the person whose property is to be visited;
- is at a reasonable hour of the day; and
- the person whose property is to be visited has the right to supervise that access.

Refusal to permit access when ordered to do so

When the Court has made orders under the Trees Act, the Court retains its general supervisory jurisdiction concerning such orders. This means that the Court has the power to suspend (stay) or rescind orders if, for example, a successful applicant who is ordered to provide access to their property for the purpose of undertaking work on a tree on their neighbour's property refuses to permit such access (see *Vieira v Kaleski* [2008] NSWLEC 159).

Pre-hearing access

The Court has ordered access for the purpose of enabling inspections by experts retained by the parties to prepare their evidence. Such orders are made prior to a hearing as part of the preliminary hearing process.

This access provision is contained in Direction 13 of the Court's Standard Directions for tree applications. This direction requires that any access:

- is on reasonable notice to the person whose property is to be visited;
- is at a reasonable hour of the day; and
- the person whose property is to be visited has the right to supervise that access.

It should be noted that pre-hearing inspection access by an expert is made available to both the applicant and the tree owner by these directions. This is because a need for pre-hearing expert inspection can include a need for access to the applicant's property when, for example, structural damage is claimed by the applicant to have occurred to the applicant's dwelling.

(h) require the payment of costs associated with carrying out an order under this section, or

Legal costs, costs of expert reports, application fees to the Court and other expenses (including personal expenses)

Applications under the Act are usually heard and determined by Commissioners of the Land and Environment Court rather than by Judges of the Court. Commissioners do not have the power to order payment of legal costs, costs of expert reports, application fees to the Court and other expenses (including personal expenses) (see *Colling v Wilson* [2009] NSWLEC 1061 paras [2] – [3]; *Hansen v Hetherington* [2009] NSWLEC 1178 at para [24] and *Russell v Parsons* [2009] NSWLEC 1026 at para [46]).

Claims for these costs must be made by a Notice of Motion, which is heard and determined by a Judge or the Registrar [Notice of motion form - PDF version; a Word version is also available at Form 20 on the list accessed via this link]. Costs must be 'costs' within the meaning of the *Uniform Civil Procedure Act 2005* and the Land and Environment Court Rules 2007 – see *McLaren v Lewis (No 2)* [2011] NSWLEC 176.

Examples of cases where applicants have applied for and have been awarded costs are *Tou v Maskiney* [2010] NSWLEC 105 and *Fox v Ginsberg (No 3)* [2011] NSWLEC 139 (partial costs). Examples where respondents have applied for and have been awarded costs are *Low v Elliot* [2008] NSWLEC 111, *Bailey v Gould* [2011] NSWLEC 96 and *Bailey v Gould (No 2)* [2011] NSWLEC 103.

Reimbursement

Payment of expenses associated with carrying out an order is usually provided for by requiring reimbursement of expenses within a nominated period after a receipted account for the completed work is served on the party who is to make the reimbursement: see, for example, the reimbursement order proposed in *Collaro v Tate and ors* [2008] NSWLEC 1337 at para [27], *St Ingunger Pty Ltd v Falkner* [2009] NSWLEC 1118 at para 14, *Treeves V Hedge* [2010] NSWLEC 1344, and *Urquhart v Hayman* [2010] NSWLEC 1248.

Setting the amount

When the Court orders that work is to be undertaken on a tree (removal, pruning, root barriers and the like) or that rectification works for property damage be undertaken (rebuilding retaining walls, relaying of concrete slabs and the like) and the person who is to pay for or contribute to the expense of the works is not the person actually undertaking the works, the Court will generally limit the amount to be made by the person paying but not undertaking the work.

When the Court does limit a financial contribution, it is usually done in one of three ways:

- by fixing a money amount of the contribution;
- by setting a limit to the amount of the contribution; or
- by requiring the person undertaking the work to get multiple quotations and then setting a limit (as an amount or a proportion) of the lowest of those quotations.

Examples of set limits to compensation include *Heller v Dan & anor* [2008] NSWLEC 90, *Spence v Syed & anor* [2008] NSWLEC 1331, and *Shields v Wiblin* [2009] NSWLEC 1053; *McLevie & anor v Anderson* [2010] NSWLEC 1091

Time for payment

When a contribution is required for works which are to be undertaken after the Court's decision, any order for reimbursement will also specify a time limit for such payment after the person paying has been provided with a receipted invoice for the work undertaken – see *Fenwick v Hueffel* [2009] NSWLEC 1250, and *Moase v MacMahon* [2010] NSWLEC 1123.

Time for carrying out of rectification work and lapsing of reimbursement orders

To ensure that a person who is required to reimburse all or part of the expense of rectification of damage is not left waiting for an indefinite period within which the rectification can be undertaken and reimbursement claimed, the Court may impose a time limit within which such works are to be undertaken and reimbursement claimed. Orders may be made to ensure that the right to reimbursement lapses if the works are not undertaken within the time specified in the orders: see, for example, *Zhang & anor v Long & anor* [2007] NSWLEC 632 at para 136 [orders 14 to 17], *Treeves v Hedge* [2010] NSWLEC 1344, and *Lee & anor v Waugh* [2012] NSWLEC 1341.

Terracotta sewer pipes

The Court has considered a number of cases involving claims for repairs to terracotta sewer pipes. In determining expense sharing, the Court has taken into account that:

- such sewer connections are usually at least 30 or more years old; and
- some pre-existing jointing defects or other crack is likely to have existed before the tree's roots could enter the pipe; and
- such pipes have a useable lifespan and will eventually need replacement.

Court has considered these factors in deciding whether apportionment of repairs or replacement expenses should be ordered. The Court has applied a *rule of thumb* that it is generally appropriate to order apportionment after considering these factors. Examples are *Hill v Dance* [2007] NSWLEC 642, *P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128, *Colling v Wilson* [2009] NSWLEC 1061.

Who pays

In most instances, the respondent pays for the pruning or removal of a tree, However, there are a number of cases where the applicant was deemed to have caused the death of or damage to the tree(s) the subject of the application and the applicant was ordered to pay for the removal of the tree(s) (see *Joaquim v Adamson* [2009] NSWLEC 1312 and *Freeman v Dillon* [2012] NSWLEC 1057).

(i) require the payment of compensation for damage to property, or

No money limit on the amount of compensation

The Court has no money limit on the amount of compensation which can be claimed for property damage.

Compensation only for "damage to property"

The Court is only able to make an order for the payment of compensation for damage to property. As to what constitutes "damage to property", see commentary on s 7 above and *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [161] to [173].

As a consequence, the court has rejected claims for compensation for personal injury or stress (see *Konn v Wisbey & Ors* [2007] NSWLEC 799).

Time limit for compensation claims for past damage

The Court has held that the *Limitation Act 1969* [s 14(1)(d)] applies to compensation claims under the Trees Act. The consequence is that there is a general six-year time limit, as from the date of filing an application under the Trees Act, for compensation claims for past damage to an applicant's property (see *Moroney v John* [2008] NSWLEC 32 at paras [32] and [33]).

Time limit for damage to house foundations

However, the time limit for claims for damage to house foundations commences to run only from the time when such damage "*is first known or manifest*". In *Council of the Shire of Sutherland v Heyman* [1985] HCA 41; (1985) 157 CLR 424, Deane J said:

> The alternative, and in my view preferable, approach is that any loss or injury involved in the actual inadequacy of the foundations is sustained only at the time when that inadequacy is first known or manifest. It is only then that the actual diminution in the market value of the premises occurs

See also *Scarcella v Lettice* [2000] NSWCA 289; (2000) 51 NSWLR 302 at 306 (para [16]).

Compensation when there is a failure to undertake ordinary maintenance

The Court might not order compensation for damage where the damage is caused by a failure to undertake the ordinary maintenance required for trees in an urban setting (see Tree Dispute Principle in *Barker v Kyriakides* [2007] NSWLEC 292).

Apportionment of compensation

In determining a compensation claim, the Court may consider a wide range of factors on the question of apportionment of any damages. The factors include how long has the person making the application known of the damage; what steps, during that period, have been taken in order to prevent further damage; and what other factors unrelated to the tree might have contributed to or cause some or all of the damage (see *Zhang & anor v Long & anor* [2007] NSWLEC 632 and *Karaboulis & anor v Berbeniuk & anor* [2010] NSWLEC 1191 as examples of substantial property damage and the factors considered by the Court in dealing with the circumstances of that case). It is important to remember that the circumstances that apply to each matter are unique and any question of apportionment of compensation will depend on the facts and circumstances of the individual application.

(j) require the replacement of a tree that the Court orders to be removed and for the new tree to be maintained to a mature growth.

An example of such a requirement is *Szabo v Ciacchi* [2007] NSWLEC 675

10 Matters of which Court must be satisfied before making an order

(1) The Court must not make an order under this Part unless it is satisfied:

(a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated, and

For a general discussion of this requirement, see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [191] to [196].

The "*reasonable effort to reach agreement with the owner of the land on which the tree is situated"* does not need to happen prior to lodgement of an application under the Act or prior

to the preliminary hearing of a tree application. This provision of the Act makes it clear that such an attempt must have occurred prior to the making of an order as a result of a hearing an application **not** prior to the making of the initial application to the court (see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para [194] – Preston CJ observing that it is **desirable** that the discussion takes place prior to commencement of proceedings under the Trees Act).

As to what might be involved in making a reasonable effort to reach agreement, see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [195] and [196].

(b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 8.

If the owner of the tree (or the local council and, if relevant, the Heritage Council) does not attend the first hearing, the Court will enquire how the application was given to the owner of the tree and the local council. If they have not been given the application, the matter will be adjourned to permit this to occur.

If they have been given the application but do not attend the first hearing, Standard Directions 3 and 4 for tree applications will be made requiring that the timetable be given to these parties and proof of this be provided to the Court.

(3) The Court must not make an order under this Part unless it is satisfied that the tree concerned:

Satisfied

In many matters an assumption is made that due to the proximity of a tree to a structure (that may or may not be damaged), the tree is likely to have caused, or could in the future cause, damage to that structure. In *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29, Craig J discussed the obligation created by s 10 for the Court to be satisfied of the causal nexus between the tree the subject of an application and the damage claimed by the applicants. This requires an assessment of all the evidence before the Court. This evidence may be factors other than the tree and which may require the input of a range of expert witnesses. At para [62] Craig J stated

> “something more than a theoretical possibility is required in order to engage the power under [the Trees Act]…In the language of Jenkinson J in *MacDonald*, confidence on a “bare preponderance of probability” has not been engendered on the evidence adduced that the Sydney Blue Gum was a cause of damage to the applicants’ dwelling. Embracing the language of the applicants’ submission, I have not been left in a state of belief, on the balance of probabilities, that the tree is a cause of that damage.”

Damage or risk of injury must be caused by the tree

The damage or risk of injury, which is the subject of the application, must be caused by the tree itself.

The Court has decided that the fact that termites, birds, bees, wasps, possums or other animals or insects may be attracted by or nest in a tree and those animals do or may cause damage to or risk of injury to a person or their property does not mean that the property damage or risk of injury is caused by the tree. The Court has held that such damage or risk

of injury arises from the animals rather than the tree and that the Court has no jurisdiction to deal with applications concerning trees harbouring or attracting such animals (see *Dooley & anor v Nevell* [2007] NSWLEC 715). See commentary in s 7.

(a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or

"… caused ….", "… causing …." and "… cause…."

Preston CJ discusses the concept of causation in the context of these provisions in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [176] to [189]. An important point to note from this discussion (at para [179]) is that the tree which is the subject of the application does not need to be the sole cause of the damage. An application can still be made under the Trees Act where there are multiple causes of the damage and these include a tree about which an application can be made under the Trees Act. See also *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 at para [30].

"… in the near future …."

In *Yang v Scerri* [2007] NSWLEC 592, the Court applied a "rule of thumb" that the appropriate timeframe for "*in the near future*" was 12 months. This has been considered and adopted as appropriate in the factual circumstances of other cases (see *Smith v Sheehan* [2008] NSWLEC 1243; *Newman v Smith* [2008] NSWLEC 1293; *Cachia v O'Connor* [2008] NSWLEC 1278; *Aldridge & anor v Pymble Bowling Club* [2008] NSWLEC 1467 as examples).

"… damage …"

There must be actual damage to the applicant's property (see discussion by Preston CJ in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [168] to [170]).

In *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para [171], Preston CJ considered the question of minor deposition of leaves etc from trees. He said:

> However, annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind is not "damage to property on the land" within s 7 of the Trees (Disputes Between Neighbours) Act 2006. Hence, leaves, fruits, seeds, twigs, bark or flowers of trees blown onto a neighbour's land might cause annoyance or discomfort to a neighbour, but unless they also cause damage to property on the neighbour's land they will not be actionable under s 7.

See the discussion of damage in s7.

"… the applicant's property"

Preston CJ discussed the meaning of this expression in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [164] to [167]. For the reasons that His Honour set in theses paragraphs, the term "property' is not confined to real property and may include "buildings, fences, paving or other structures, or to fruit trees, crops, ornamental gardens or other vegetation growing on a neighbour's land" (para [166]) or "moveable objects or corporeal chattels, such as animals, vehicles or furniture, that may be located on, but are not attached to or part of the ground" (para [167]).

The damage must be to property on the applicant's land. The Court has no jurisdiction over damage to property situated on the respondent's land – see *Jantti v Cormie* [2008] NSWLEC 1290 at paras [7] to [8] and *Wazrin Pty Ltd v Pearson* [2010] NSWLEC 1020.

Consent orders

The Court must be satisfied that at least one of the tests under s 10(2)(a) or (b) is met before the Court has jurisdiction to order removal of or some other interference with a tree, even if the parties reach agreement and propose consent orders for such an activity. One means the Court may employ to satisfy itself is to undertake an onsite inspection to ensure that one of these tests is met (examples of the Court satisfying itself of the appropriateness of consent orders is *Aird v Frost & anor* [2007] NSWLEC 707, *Alegounarias v Williams; Barnes v Williams*; [2012] NSWLEC 1052, and *Holmes v Walburn & anor* [2010] NSWLEC 1090).

The Court has refused to make consent orders where none of the tests under s 10(2)(a) or (b) is satisfied (an example of refusal of consent orders is *McKinney v Ziliotto* [2007] NSWLEC 263).

(b) is likely to cause injury to any person.

"… injury …

Section 3 of the Act does not include any definition of the term ***injury***. In *Tuft v Piddington* [2008] NSWLEC 1249, the Court held that, for the purposes of the Act, ***injury*** encompasses allergic reactions (in *Tuft*, the injury was an asthmatic reaction to pollen).

Where an application is made based on injury said to arise from a medical condition, the Court gives specific Supplementary Standard Directions requiring an applicant to provide properly qualified medical or scientific evidence of a link between the injury and the trees which are the subject of the application. These Supplementary Standard Directions are in the following terms:

1. Further to Direction (5) of the principal directions in this matter, the applicant is to provide, by the close of business on (*date*), any statement of medical or arboricultural evidence and any supporting medical or arboricultural peer reviewed literature relied upon in support of a claim that a tree which is the subject of the application is a likely cause of injury to any person;

2. Any expert evidence prepared after the date of these directions concerning matters contained in (1) above is to include acknowledgement of and agreement to be bound by Division 2 of Pt 31 of the Uniform Civil Procedure Rules and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules.

"… any person …"

As discussed by Preston CJ in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at para 175, the applicant's concern about likely injury does not have to be injury to a person who is on the applicant's land.

As a consequence, an application can be made when an applicant is concerned that a tree on adjoining land are likely to cause injury to persons on public land in the vicinity (see *Ashworth v Joyce* [2007] NSWLEC 357 where an application was made concerning dead trees which, the applicant contended, were likely to cause injury to persons on an adjacent public beach reserve).

11 Trees on Crown land referred to local land board

(1) The Court must not make an order under this Part if the tree concerned is on Crown land and the matter has been referred to a local land board, or a Chairperson of a local land board, under section 22 of the

Crown Lands Act 1989 or section 10A of the *Western Lands Act 1901* unless:

(a) any inquiry, report or recommendation provided for in that section in relation to the matter has been completed or made, and

(b) the applicant has been advised of any decision made by the Minister administering the *Crown Lands Act 1989* or the *Western Lands Act 1901* in relation to the matter.

12 Matters to be considered by Court

Before determining an application made under this Part, the Court is to consider 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,

> See notes on s 4(3) above.
>
> See the note in s 12(h)(i) below concerning "**The tree was there first**" and the Tree Dispute Principle in *Black v Johnson (No 2)* [2007] NSWLEC 513.

(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,

(b1) whether interference with the trees would, in the absence of section 25 (t) (Legislative exclusions) of the *Native Vegetation Act 2003*, require approval under that Act,

(b2) the impact any pruning (including the maintenance of the tree at a certain height, width or shape) would have on the tree,

> In *Morris v Kedziora* [2011] NSWLEC 1156, the Court considered the "lopping" proposed by the applicant to be detrimental to the tree's health and structure however, the removal of dead wood, in accordance with the relevant Australian Standard, was appropriate.
>
> Pruning is not always confined to the canopy of a tree and root pruning may be required in order to rectify paving and the like. In *Missenden v Thomson & anor* [2012] NSWLEC 1226, the Court determined that root pruning required to prevent futher damage to a pipe would compromise the health and stability of the tree and the removal of the tree was ordered.

(b3) any contribution of the tree to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which it is situated,

(c) whether the tree has any historical, cultural, social or scientific value,

> In *Tunsted v Stead* [2009] NSWLEC 1069 the respondent was advised by a council heritage officer that the tree in question was included in the property's listing as a heritage item in the

Local Environmental Plan.

(d) any contribution of the tree to the local ecosystem and biodiversity,

See *Clarke v Halloran* [2009] NSWLEC 1397 (koalas); *Stipancic v Macdonnell* [2010] NSWLEC 1261 (hollows); and *Tadros v Alexander* [2010] NSWLEC 1155 (endangered ecological community).

(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,

In *Lee & anor v Waugh* [2012] NSWLEC 1341, the Court found that the tree was likely to be important for soil stability

(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:

(i) 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

Preston CJ discussed general issues concerning this provision in *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [204] to [210].

The tree was there first

The Court has considered what approach should be taken where the structure that is the subject of a damage claim was erected in the vicinity of an existing tree. The Court has published a Tree Dispute Principle which says, in summary, that the fact that the tree was there first should not impact on whether or not some order should be made about the tree but, subject to a range of matters discussed in the Principle, the prior existence of the tree may be a relevant matter to be considered when deciding who should meet the cost of carrying out any orders which the Court might make (see *Black v Johnson (No 2)* [2007] NSWLEC 513). This consideration also applies with respect to compensation – see *Sait v Mason* [2007] NSWLEC 293 and *Day v Merrylees and anor* [2009] NSWLEC 1110 at paras [20] to [22].

Poor design

Following on from 'the tree was there first', structures built beneath existing trees may be of a design that fails to take account of an existing adjacent tree and thus exacerbate problems – see *Hodgson v Woodward* [2009] NSWLEC 1283 (box gutters); *Smith v Miller* [2010] NSWLEC 1063 (cricket nets); and *Tadros v Alexander* [2010] NSWLEC 1155 (play area in a child care centre).

Possible damage from the applicant's own trees

The responsibility rests with the applicant to prove the nexus between the damage and the tree subject to the application. There have been instances where, on the balance of

probability, the Court has not been satisfied that the damage was caused by the respondent's tree but rather the likely cause was a tree on the applicant's property – see *O'Connell v Gallagher* [2007] NSWLEC 718; *Culgan & Anor v Bradley* [2009] NSWLEC 1347.

Identification of the right tree

It is incumbent on the applicant to identify the particular tree(s) on the respondent's property that the applicant contends are the cause of the problem. This is highlighted in *Lewis and anor v Tilney and anor* [2009] NSWLEC 1042 at paras [43] to [55].

Age and nature of the structure

A certain amount of wear and tear is expected to arise with any structure over time. The Court considers these matters when determining the extent to which a tree may or may not have caused the alleged damage. For examples see *McCormick v Cranch* [2007] NSWLEC 298 at paras [8] to [10] (pool); *Bentley v Hinchen* [2008] NSWLEC 1348 (retaining wall); *McLeod & anor v Bruce* [2010] NSWLEC 1322 (fence); *Woo v Chan* [2010] NSWLEC 1317 (concrete driveway). Many cases have involved terracotta sewer pipes.

Failure to give notice to the tree owner when damage was noticed

If an applicant becomes aware of damage being caused to their property and do not inform the tree owner in a timely fashion of the damage, this failure can be taken into account by the Court when considering whether or not to make orders relating to the damage: for an example see *Osborne v Hook* [2008] NSWLEC 1231; *Lazarus v Lee* [2010] NSWLEC 1118 paras [11] to [13].

Failure to give the tree owner an adequate opportunity to respond to the damage

If an applicant becomes aware of damage being caused to their property and repairs the damage without providing the tree owner any opportunity to assess the damage of be consulted about the method and cost of repairs, this failure can be taken into account by the Court when considering whether or not to make orders relating to the damage: for an example see *Osborne v Hook* [2008] NSWLEC 1231 and *Turner v O'Donnell* [2009] NSWLEC 1349 at para [23].

Failure of an applicant to maintain their own property

The Court has taken into account the time delay after applicants became aware of damage and the failure of the applicants to maintain their own property (see *Zhang & anor v Long & anor* [2007] NSWLEC 632 at paras [94] to [104].

Poisoning of a tree by the applicant

In *Horn & anor v Latter* [2007] NSWLEC 744, the Court ordered the removal of a tree which was dying and was likely to cause damage to the applicants' property. However, as the Court decided that the reason the tree was dying was because the applicants had earlier poisoned roots of the tree, the applicants were ordered to pay for the cost of removing the tree. A similar situation arose in *Joaquim v Adamson* [2009] NSWLEC 1312 and *Joaquim v Adamson (No 2)* [2009] NSWLEC 1367

Other factors

Several cases illustrate the multitude of factors other than the tree that may have contributed to the damage – see *Eriksson and anor v Malik* [2008] NSWLEC 1416 at paras [14] to [16]; *Fisher v Nassar & anor* [2008] NSWLEC 1459; *Wong and Anor v Neue and Neue-Bartocha* [2008] NSWLEC 1122.

(i) 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,

Pruning

Some tree preservation orders permit a neighbour to remove specified branches from a neighbouring tree without requiring permission from the tree owner. In some instances this has been ignored by an applicant and they have not availed themselves of a simple remedy – see *Watson v Herbert* [2009] NSWLEC 1357; *Parison v Kelly* [2010] NSWLEC 1300

Installation of a root barrier

There are several cases where either the applicant or the respondent has installed a root barrier in an attempt to limit root growth from either their neighbour's or their own tree – see *Nolan v Psaltis* [2007] NSWLEC 764 at para [9]; *Lewis and anor v Tilney and anor* [2009] NSWLEC 1042 at para [24].

(i) if the applicant alleges that the tree concerned is likely to cause injury to any person:

(i) 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

(ii) 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.

13 Appearance by local council or Heritage Council

A local council or the Heritage Council (a ***relevant authority***) may appear before the Court in any proceedings under this Part in relation to a tree if the consent or other authorisation of the relevant authority to interfere with the tree would be required, in the absence of section 6 (3), under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977*.

14 Court to provide copy of order to local council and Heritage Council

The Court must provide a copy of any order it makes under this Part (other than an order dismissing an application) to:

(a) the council of the local government area in which the tree is situated, and

The Court has a standard letter which is sent to the council of the local government area in which the tree is situated with a copy of the Court's orders to inform the council of its obligations to make the appropriate notation on the database for planning certificates which are issued under s 149(2) of the *Environmental Planning and Assessment Act 1979.* This notation of the Court's orders under this Act is required by the provisions of s 279 and Schedule 4(13) of the *Environmental Planning and Assessment Regulation 2000*. To assist with this, the standard form of orders made by the Court under this Act includes not only details of the street address of the property but also the relevant lot and deposited plan

numbers to give the formal title details.

The Court also categorises decisions on its website by local government area Trees Act decisions by local government area and sorted by year.

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(b) the Heritage Council if the Heritage Council appeared in the proceedings concerned under section 13.

Part 2A Court orders — high hedges that obstruct sunlight or views

This Part came into effect on 2 August 2010 and to date only a limited number of cases have been heard. The Tree Dispute Practice Collection on the Court's website contains all cases heard under Part 2A. The list is regularly updated. Decisions involving applications under Part 2A - High hedges

14A Application of Part

(1) This Part applies only to groups of 2 or more trees that:

(a) are planted (whether in the ground or otherwise) so as to form a hedge.

In *Johnson v Angus* *[2012]* NSWLEC 192, Preston CJ provides a detailed analysis of the construction of this subsection. So as to satisfy this jurisdictional test, the trees must be 'planted' (that is 'set in the ground or otherwise by human agency') rather than self-sown, with the intent or purpose 'so as to form a hedge' and continue to form a hedge. At para [37], Preston CJ states in part:

> ...The earlier grammatical analysis establishes that s 14A(1)(a) requires that the trees that are subject to the application under s 14B of the Trees Act be 'trees that are planted...so as to form a hedge'. As I have explained earlier, this requires that the trees, at the time of planting, be planted so as to form a hedge and, having been so planted, the trees continue that state of affairs of being planted so as to form a hedge. The requirement of having been planted so as to form a hedge is to be understood as requiring the trees to be planted in order to form a hedge, or with the result or purpose of forming, a hedge.

“Planted”

The use of the word ‘planted’ in this section is not interchangeable with ‘situated’ or ‘located’. The word situated is used elsewhere in this act to refer to the location of the tree on the land. The word ‘planted’ has been used deliberately here to differentiate what is required in this section from situations where a tree’s location on land need be identified.

A tree will be seen to have been planted, or be identified as planted, when it has been put or set in the ground by human agency, in tree form, or, in the form of seeds, seedlings or young trees. A self-sown seed has not been planted.

A self-sown tree cannot be a ‘planted’ tree as an unintentionally sown seed, by definition, cannot be found to have been sown purposefully ‘so as to form a hedge’ with other trees. To satisfy the requirements of this section, trees need to have been planted with the purpose of forming a hedge and this state of affairs needs to continue to the present (*Johnson v Angus* [2012] NSWLEC 192 paras [31]-[39]).

Criteria relevant to a determination that trees form a hedge, and were planted ‘so as to form a hedge

Being sufficiently close is relevant to determining whether the trees are planted so as to form a hedge. What is sufficiently close will depend upon the species, the age of the tree, the health and growth of the tree, and the scale of the landscape (*Johnson v Angus* [2012] NSWLEC 192 at para [40]). The age of the tree is relevant as a tree planted a number of years before other trees could not have been planted so as to form a hedge with such trees as they were not in existence (*Johnson v Angus* [2012] NSWLEC 192 para [43]).

In *Johnson v Angus* [2012] NSWLEC 192 at para [41], Preston CJ states:

> 41 But the criterion of sufficient proximity does not exhaust the relevant criteria to be considered in determining whether trees are planted so as to form a hedge. Section 14A(1)(a) construed in its own terms and in the context of Part 2A, does not so circumscribe the criteria that may be considered in determining whether the trees are planted so as to form a hedge. Other criteria are relevant, including the species of trees planted; whether the trees are all of one species or different species and, if different species, the similarity or dissimilarity and compatibility or incompatibility of the different species in terms of morphology (the form and structure of the trees), function and growth of the trees; the planting arrangement of the trees, such as whether the trees are planted in a linear, curvilinear, or another spatial relationship conducive to the trees forming a hedge.

The Court has generally taken a purposive approach in its interpretation of s 14A(1)(a). In *Wisdom v Payn* [2011] NSWLEC 1012 at para [45], Moore SC and Hewett AC state:

> 45….We are satisfied that the words *forming a hedge* mean that there must be a degree of regularity and arrangement, in a linear fashion, of the trees being considered. Whilst such an arrangement may be more than one tree deep and does not need to be in a perfectly straight line, the impression that is given by the planted arrangement of the trees must be one that, in an ordinary English understanding of the word, would be perceived as a hedge.

The trees subject to the application may be planted in containers however the containers must be arranged in a manner that forms a hedge and continue to form a hedge at the time of the hearing (*Blau v Levi* [2010] NSWLEC 1371).

What may be considered a tree that can form a hedge is wide ranging. A hedge may comprise one or many species. As in Part 2, bamboo is a ‘tree’ for the purpose of the Act

(*Hough & anor v Rettenmaier & anor* [2010] NSWLEC 1354 at paras [3] to [6]).

This subsection does not apply the following:
Height is not relevant for this determination- it is a requirement of s 14 A (1)(b).

Part 2A does not apply to single trees (*Johnson v Angus* [2012] NSWLEC 192) or to trees that are remnants of the original vegetation – see *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 at paras [18] to [27].

Nor does this Part apply to randomly planted groups of trees *Cavalier v Young* [2011] NSWLEC 1080.

(b) rise to a height of at least 2.5 metres (above existing ground level).

The trees subject to the application must be at least 2.5m at the time of the hearing. This is a jurisdictional test. The word 'rise' does not envisage a future height. This is discussed at length in *Wisdom v Payn* [2011] NSWLEC 1012 at paras [53] to [59].

The Court has also taken a purposive approach to its interpretation of s 14A(1)(b). The Court will generally verify the height of the trees during the site inspection. In *Wisdom v Payn* [2011] NSWLEC 1012 at paras [66] to [67] it was determined that as long as two or more trees in the 'hedge' have reached the prerequisite height of 2.5 m, the entire 'hedge' is deemed to have satisfied the test in s 14A(1)(b).

However, if an entire hedge is less than 2.5m, the Court has no jurisdiction to make orders with respect to that hedge – *Bowen v Martin* [2011] NSWLEC 1195.

A common misconception is that 2.5m is the prescribed 'legal' height to which hedges must be maintained. This is noted in *McLaren v Lewis* [2011] NSWLEC 1170 at para [34].

(2) Despite section 4, this Part does not apply to trees situated on the following land:

(a) any land within a zone designated "rural-residential" 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 that zone,
(b) Crown land.

The application of this Part is more restricted than Part 2.

14B Application to Court by affected land owner

An owner of land may apply to the Court for an order to remedy, restrain or prevent a severe obstruction of:

(a) sunlight to a window of a dwelling situated on the land, or
(b) any view from a dwelling situated on the land,

if the obstruction occurs as a consequence of trees to which this Part applies being situated on adjoining land.

Severe – the Macquarie Dictionary defines 'severe' as *harsh, harshly extreme, grave, causing discomfort or distress by extreme character or conditions, as weather, cold, heat etc* and *hard to endure, perform or fulfill.* The Oxford Dictionary includes *austere, strict, harsh, rigorous, unsparing, violent, vehement, extreme, trying; making great demands on endurance, energy, skill or other quality.* Thus the Act sets a high bar and one that should be understood as requiring more than moderate annoyance or inconvenience to the party be shown – *De Zylva &anor v Staas & anor* [2012] NSWLEC 1242 at para [31]. This assessment of severity involves both qualitative and quantitative elements and will be applied with regard to circumstances. See *Haindl v Daisch [2011] NSWLEC 1145* at para [64].

Sunlight – The Court has accepted the word 'sunlight' to be 'direct sunlight' rather than just daylight. (*Drewett v Best* [2010] NSWLEC 1305 at para [17])

Window – Section 3(1) defines 'window' as: includes a glass sliding door, a door with a window, a skylight and any other similar thing. Solar panels are not windows for the purpose of the Act (see *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 at paras [29] to [30]). The Act does not apply to severe obstruction of sunlight to a garden (*Clancy v Bell* [2011] NSWLEC 1017; *Holden v Smith & anor* [2011] NSWLEC 1066).

Dwelling – The Court has accepted that decks and balconies attached to a dwelling are part of that dwelling. Thus views from a dwelling can be views from a deck or a balcony. However, the Act does not apply to views from driveways or from gardens (see *Campbell v Voller* [2010] NSWLEC 1351 at paras [7] and [14]).

View – The Court's interpretation of the words 'a view' is discussed at length in *Haindl v Daisch* [2011] NSWLEC 1145, Moore SC and Hewett AC at para [26] state:

> 26 However, we are of the opinion that the words *a view* used in s 14 relate to the totality of what can be seen from the viewing location and does not permit some slicing up of that outlook – thus requiring separate assessment of the severity of the obstruction of the view from a particular viewing location on some incremental, slice by slice basis.

14C Notice of application for order to be given to owners of affected land

(1) An applicant for an order under this Part must give at least 21 days notice of the lodging of the application and the terms of any order sought to:

- (a) the owner of the land on which the trees are situated, and
- (b) any relevant authority that would, in accordance with section 14G, be entitled to appear in proceedings in relation to the trees, and
- (c) any other person the applicant has reason to believe will be affected by the order.

It is clear that the 21day period relates to notice of an application having been made **not** of an intention to lodge an application. See *Ball v Bahramali* [2010] NSWLEC 1334 at paras [28]; [38] and [39].

(2) The Court may direct that notice of an application be given to a person or that notice be given in a specified manner or within a specified period.

(3) The Court may waive the requirement to give notice or vary the period of notice under this section if it thinks it appropriate to do so in the circumstances.

14D Jurisdiction to make orders

(1) The Court may make such orders as it thinks fit to remedy, restrain or prevent the severe obstruction of:

(a) sunlight to a window of a dwelling situated on the applicant's land, or
(b) any view from a dwelling situated on the applicant's land, if the obstruction occurs as a consequence of trees that are the subject of the application concerned.

(2) Without limiting the powers of the Court to make orders under subsection (1), an order made under that subsection may do any or all of the following:

(a) require the taking of specified action to remedy the obstruction of sunlight or of a view,
(b) require the taking of specified action to restrain or prevent the obstruction of sunlight or of a view,
(c) require the taking of specified action to maintain a tree or trees at a certain height, width or shape,

The Court has ordered pruning and ongoing maintenance of trees to a nominated height. The Orders may require the initial pruning to be below the height at which the hedge is to be maintained. This is to take into account the fact that plants grow and to minimise the frequency and cost of subsequent pruning. See *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 at paras [31] to [33] and *Tonoli v Rappo* [2010] NSWLEC 1320 at paras [30] to [31].

Pruning may also be ordered on a periodic basis – see *Cockinos & anor v Coorey & anor; and Cockinos & anor v O'Sullivan* [2011] NSWLEC 1091 and be required to be carried out by an arborist or horticulturist (*Nicolson v Fekete & anor [2012] NSWLEC 1281*).

Depending on the loss of view/sunlight orders may be made for pruning only some trees in the hedge (*Sheahy & anor v Juffermans & anor* [2011] NSWLEC 1135).

Pruning requirements may be specific to the site and style of the hedge. For example it may be required that pruning is uniform across the hedge (*Atkinson v Matherson* [2011] NSWLEC 1121).

In *Haindl v Daisch* [2011] NSWLEC 1145 at [47], the Court determined that if all but one of the trees forming a hedge was ordered for removal, Orders could be made for the ongoing maintenance of the remaining tree provided the Orders are made at the time the residual tree formed part of a hedge.

(d) require the removal of a tree or trees and the replacement of the tree or trees with a different species of tree,

In *Ingram v Sebel* [2011] NSWLEC 1010, ten trees were ordered for removal and replacements allowed subject to agreed height limits. In *Shagrin & anor v O'Neil & anor* [2010] NSWLEC 1368, only one tree was ordered for removal with a requirement that it not be replaced.

(e) require the making of an application to obtain any consent or other authorisation referred to in section 6 (1) (a),
(f) authorise the applicant concerned to take specified action to remedy, restrain or prevent the obstruction of sunlight or of a view,
(g) authorise land to be entered for the purposes of carrying out an order under this section (including for the purposes of obtaining quotations for the carrying out of work on the land),
(h) require the payment of costs associated with carrying out an order under this section.

The costs of undertaking the work may be the responsibility of one party or may be apportioned between the parties depending on the facts and circumstances of the case.

(3) However, the power to make an order under subsection (1) does not extend to an order that requires the payment of compensation.

No orders can be made for a perceived loss of property value resulting from a loss of view or sunlight.

Consent orders

Even if the parties reach agreement and propose consent orders for any intervention with one or more trees, the Court must be satisfied that it has jurisdiction to make those orders. This requires satisfaction of all jurisdictional tests in the Part, especially s 14A and s 14E(2). To verify the parties' positions, all consent orders hearings are held on site. See *Salmon v Kibble & anor [2012] NSWLEC 1359*.

14E Matters of which Court must be satisfied before making an order

(1) The Court must not make an order under this Part unless it is satisfied:

(a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the trees are situated, and

For a general discussion of this requirement, see *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 at paras [191] to [196] and in *Ball v Bahramali* [2010] NSWLEC 1334 at paras [39] to [45]. While a concerted effort to negotiate an amicable and mutually acceptable outcome is desirable before an application under this Act is made to the Court, the Court accepts that opportunities exist until the end of the hearing for negotiations between the parties to occur.

(b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 14C.

(2) The Court must not make an order under this Part unless it is satisfied that:

(a) the trees concerned:

(i) are severely obstructing sunlight to a window of a dwelling situated on the applicant's land, or

In order to determine whether there is a *severe* obstruction of sunlight to a window of a dwelling, the Court has considered the usual minimum development standards for sunlight (solar amenity) required by most councils for new developments. This is typically at least 3 hours of sunlight to living room windows for at least 50% of their area on 22 June between 9.00 am and 3.00 pm.

Shadow diagrams are very helpful in these matters however while the Court recommends them, it has not mandated their production. The onus is on the applicant to prove that the obstruction of sunlight to a window is severe – *Clancy v Bell* [2011] NSWLEC 1017.

Care should be taken in preparing the diagram required in the application. In *Ball v Bahramali* [2010] NSWLEC 1334 the north point was found to be out by 40°. Accurate plans/ diagrams must be provided – *Voeten & anor v Adams* [2011] NSWLEC 1106.

As previously mentioned, Part 2A does not apply to solar panels or to gardens.

(ii) are severely obstructing a view from a dwelling situated on the applicant's land, and

While s 14B Act enables an owner of land to apply to the Court for orders to remedy, restrain or prevent a severe obstruction of any view from a dwelling, the use of the word ***are*** in this provision requires the trees the subject of the application to be severely obstructing the view (or sunlight) at the time of the hearing. See *Tooth v McCombie* [2011] NSWLEC 1004 at paras [14]-[15] with further discussion in *Granthum Holdings Pty Ltd v Miller* [2011] NSWLEC 1122 at paras [43]-[52].

In order to determine whether the trees concerned are *severely* restricting a view from a dwelling, the Court has gained some assistance from a Planning Principle on view sharing published in *Tenacity Consulting v Warringah Shire Council* [2004] NSWLEC 140. This is a four-step assessment process to assist in determining view sharing issues associated with development. The first three steps of this Planning Principle are of some relevance to Part 2A applications. The reasoning process using those steps is given in *Hough & anor v Rettenmaier & anor* [2010] NSWLEC 1354 at paras [8] to [21]. In this case a severe

obstruction to a view was found. A similar process was used in *Ball v Bahramali* [2010] NSWLEC 1334 and *Boddington v Julian & anor* [2011] NSWLEC 1172 and a severe obstruction was not found in either case.

As previously discussed, the view must be from a dwelling and not from a garden or driveway or similar.

(b) the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order under this Part.

If the Court determines that there is a *severe* obstruction of sunlight to a window of a dwelling or of any view from a dwelling, the Court must balance the interests of the applicant in removing the obstruction against those of the trees and the tree owner. This requires consideration of the relevant discretionary matters in s 14F. See *Haindl v Daisch* [2011] NSWLEC 1145 at paras [83] to [92].

If the applicant's interests are found to outweigh other interests, then the Court may make any order it thinks fit remedy, restrain or prevent the severe obstruction in accordance with s 14D.

14F Matters to be considered by Court

Before determining an application made under this Part, the Court is to consider the following matters:

(a) the location of the trees concerned in relation to the boundary of the land on which the trees are situated and the dwelling the subject of the application,

See commentary on s12. See also *Blau v Levi* [2010] NSWLEC 1371 at paras [6] to [8]

(b) whether the trees existed prior to the dwelling the subject of the application (or the window or part of the dwelling concerned where the dwelling has been altered or added to),

(c) whether the trees grew to a height of 2.5 metres or more during the period that the applicant has owned (or occupied) the relevant land,

(d) whether interference with the trees would, in the absence of section 6 (3), require any consent or other authorization 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,

See *Haindl v Daisch* [2011] NSWLEC 1145 at paras [94] to [103] in regards to Tree Preservation Orders and Council policy.

(e) any other relevant development consent requirements or conditions relating to the applicant's land or the land on which the trees are situated,

In some instances a council may have imposed a condition of consent on a development, either on the respondent's or the applicant's land, requiring the planting of trees in accordance with an approved landscape plan or specifically to ensure a degree of privacy between adjoining properties. See *Ridley v The Owners Strata Plan No 60662* [2011] NSWLEC 1107 at para [37] and *Smyth v Hayim* [2012] NSWLEC 1318

(f) whether the trees have any historical, cultural, social or scientific value,

(g) any contribution of the trees to the local ecosystem and biodiversity,

In *Coleman v Scern; Dunn v Scern* [2011] NSWLEC 1146 the Court made orders requiring a wildlife carer to be present during pruning operations in the event a resident possum may require rescue.

(h) any contribution of the trees to the natural landscape and scenic value of the land on which they are situated or the locality concerned,

(i) the intrinsic value of the trees to public amenity,

(j) any impact of the trees on soil stability, the water table or other natural features of the land or locality concerned,

(k) the impact any pruning (including the maintenance of the trees at a certain height, width or shape) would have on the trees.

While a number of species used for hedging tolerate regular pruning, their health and structure may be compromised if a significant reduction in height or width is required – see *Fardouly v ZeritisIssa v Zeritis* [2012] NSWLEC 1355 at para [39].

(l) any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated,

Hedges are a commonly used element in landscape design. The needs of the respondent for privacy and protection must be balanced against the impacts of the hedge on the applicant's sunlight and views. See *Haindl v Daisch* [2011] NSWLEC 1145 at paras [83] to [92].

(m) anything, other than the trees, that has contributed, or is contributing, to the obstruction,

In matters concerning obstruction of sunlight, the Court has considered the aspect of the window *Drewett v Best* [2010] NSWLEC 1305 at para [17], the presence of structures such as pergolas and eaves *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 at paras [32] to [40]; the presence of trees on the applicant's or other adjoining properties *Boddington v Julian & anor* [2011] NSWLEC 1172 at para [34], and shadows cast by adjoining buildings *Campbell v Voller* [2010] NSWLEC 1351.

(n) any steps taken by the applicant or the owner of the land on which the trees are situated to prevent or rectify the obstruction,

Typically, the extent, frequency and timing of any past pruning would be considered.

(o) the amount, and number of hours per day, of any sunlight that is lost as a result of the obstruction throughout the year and the time of the year during which the sunlight is lost,

As previously stated, shadow diagrams are of great assistance to the Court (see *Ball v Bahramali* [2010] NSWLEC 1334). However, a party is not obliged to produce them. In some cases an understanding of the movement of the sun and the orientation of the site is sufficient to determine whether sunlight is severely obstructed - see *Pham v Papaioannou* [2011] NSWLEC 1044 at paras [15] to [19]. If shadow diagrams are used they must be accurate to be of any use to the Court - *Voeten & anor v Adams* [2011] NSWLEC 1106 at paras [28] to [31].

The Court will generally consider that winter sun is more valued than summer sun – *Tonoli v Rappo* [2010] NSWLEC 1320.

(p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves,

(q) the nature and extent of any view affected by the obstruction and the nature and extent of any remaining view,

See the commentary for s 14E(2)(a)(ii) for the application of the Planning Principle in *Tenacity*.

Haindl v Daisch [2011] NSWLEC 1145 contains an extensive commentary on views.

If the desirable view is a narrow view constrained by structures (*Drewett v Best* [2010] NSWLEC 1305 at [20], [24-25]; *Gillis v Seferian* [2011] NSWLEC 1199 at paras [14] to [15])

its loss is likely to be considered more severe than the loss of a small portion of an extensive desirable view (*Boddington v Juilan & anor* [2011] NSWLEC 1172; *Bowen v Martin* [2011] NSWLEC 1195).

The qualitative nature of the view is considered, as is the quantitative extent of the loss. Qualitatively, views may be of iconic structures such as the Sydney Opera House *Shagrin & anor v O'Neil & anor* [2010] NSWLEC 1368 or of weed infested riparian zones *Wisdom v Payn* [2011] NSWLEC 1012. Quantitatively the loss may be minor *Salisbury v Harrison & anor* [2011] NSWLEC 1069 or severe *Gillis v Seferian* [2011] NSWLEC 1199.

(r) the part of the dwelling the subject of the application from which a view is obstructed or to which sunlight is obstructed,

See the commentary for s 14E(2)(a)(ii) for the application of the Planning Principle in *Tenacity*.

In general, living areas, including kitchens, are given a higher priority than bedrooms and other areas. This is discussed at length in *Haindl v Daisch* [2011] NSWLEC 1145 in respect of views and in *Voeten & anor v Adams* [2011] NSWLEC 1106 at paras [43]-[45] in regards to sunlight.

(s) such other matters as the Court considers relevant in the circumstances of the case.

14G Appearance by local council or Heritage Council

A local council or the Heritage Council (a ***relevant authority***) may appear before the Court in any proceedings under this Part in relation to trees if the consent or other authorisation of the relevant authority to interfere with the trees would be required, in the absence of section 6 (3), under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977*.

14H Court to provide copy of order to local council and Heritage Council

The Court must provide a copy of any order it makes under this Part (other than an order dismissing an application) to:

(a) the council of the local government area in which the trees are situated, and
(b) the Heritage Council if the Heritage Council appeared in the proceedings concerned under section 14G.

14I Review of Part

(1) The Minister is to review this Part to determine whether the policy objectives of the Part remain valid and whether the terms of the Part remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 2 years from the date of commencement of this Part.

Public submissions were called for this review on 15 August 2012. Submissions closed on 30 September 2012. The outcome of the review is not currently known (15 January 2013).

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

Part 3 Enforcement of orders

Prosecution for an offence against s 15, immediately below, is not the only method by which orders of the court can be enforced. However, it is not the role of the Court to initiate enforcement of its orders. Notes on Enforcement of judgments and orders of the Court **are provided separately on the Court's Web site.**

15 Failure to comply with order

(1) A person must not fail to comply with any requirement imposed on the person by an order under Part 2 or Part 2A.

Maximum penalty: 1,000 penalty units.

(2) Proceedings for an offence under subsection (1) may be taken before the Court in its summary jurisdiction.

16 Successors in title bound by order

(1) If the Court makes an order under Part 2 requiring a person who is an owner of land on which a tree is situated (an ***original owner***) to carry out work in relation to the tree within a specified period and the original owner ceases to be the owner of the land before the work is carried out, a successor in title to the owner:

(a) is required to carry out that work, and

(b) to that extent, is bound by the order in the same way as the original owner (except as provided by this section).

(1A) If the Court makes an order under Part 2A requiring a person who is an owner of land on which 2 or more trees are situated (an original trees owner) to carry out work in relation to a tree or trees within a specified period and the original trees owner ceases to be the owner of the land before the work is carried out, the immediate successor in title to the owner:

(a) is required to carry out that work, and

(b) to that extent, is bound by the order in the same way as the original trees owner (except as provided by this section).

(2) The successor in title is bound by the order only if the applicant for the order, or the immediate successor in title of the applicant who is entitled to the benefit of the order under section 16A gives a copy of the order to the successor in title.

> When the Court sends a copy of its formal orders to an applicant, it does so with a standard letter advising the applicant of the provisions of this section and, as a consequence, the steps that the applicant must take to ensure that the orders remain in force if the tree owner sells the property in which the tree is located.

(3) For the purposes of this section the specified period within which the work is required to be carried out under the order is taken to commence from the date on which the copy of the order is given to the successor in title.

16A Immediate successor in title to benefit from certain tree orders

If the Court makes an order under Part 2 in relation to a tree that has caused, or is causing, damage to the applicant's property, or is likely to cause injury to any person, a person who is the immediate successor in title to the applicant is entitled to the same benefits and rights as the applicant in respect of the order.

17 Carrying out of work by local council

(1) If the Court has made an order under Part 2 or 2A requiring the owner of land on which a tree is situated to carry out work in relation to the tree within a specified period, a person authorised by the council of the local government area in which the tree is situated (an ***authorised person***) may enter the land for the purpose of either or both of the following:

(a) ascertaining whether the owner has carried out the work in accordance with the order,

(b) carrying out the work if the owner has failed to carry out the work in accordance with the order.

(2) An authorised person may enter land under this section only if the applicant for the order concerned has requested the council to act under this section.

(3) Before an authorised person enters land under this section, the council must give the owner of the land written notice of the intention to enter the land.

(4) The notice must specify the day on which the authorised person intends to enter the land and must be given before that day.

(5) This section does not require notice to be given:

(a) if entry to the land is made with the consent of the owner of the land, or

(b) if entry to the land is required because of the existence or reasonable likelihood of a serious risk to safety, or

(c) if entry is required urgently and the case is one in which the general manager of the council has authorised in writing (in the particular case) entry without notice.

(6) An authorised person may not enter or inspect, or carry out work on, land under this section unless the authorised person is in possession of an authority and produces the authority if required to do so by the owner of the land.

(7) The authority must be a written authority that is issued by the council and that:

(a) states that it is issued under this Act, and

(b) gives the name of the person to whom it is issued, and

(c) describes the land to which the authority applies, and

(d) states that the person has the power to enter the land and states either or both of the following:

(i) that entry to the land is required for the purpose of ascertaining whether the owner has carried out work in accordance with an order under Part 2 or 2A of this Act,

(ii) that the person has the power to carry out work in accordance with such an order, and

(e) identifies this section as the source of the powers referred to in paragraph (d), and

(f) states the date (if any) on which it expires, and

(g) bears the signature of the general manager of the council.

(8) The council may recover, in a court of competent jurisdiction, the following from a person who is bound by an order under Part 2 or 2A:

(a) the reasonable costs of carrying out work under this section,

(b) the amount prescribed by the regulations as the administrative cost for arranging the carrying out of work under this section.

17A Registration of judgment debt as charge on land

(1) The council may, after obtaining an order of a court in proceedings against an owner of land for the recovery of costs in accordance with section 17 (8), apply to the Registrar-General for registration of the order in relation to that land.

(2) An application under this section must define the land to which it relates.

(3) The Registrar-General must, on application under this section and lodgment of the court order, register the order in relation to the land in such manner as the Registrar-General thinks fit.

(4) There is created by force of this section, on the registration of the order, a charge on the land in relation to which the order is registered to secure the payment to the council of the amount payable under the order.

(5) Such a charge ceases to have effect in relation to the land:
   (a) if the council certifies in writing that the amount payable under the order has been paid to the council or that the council has otherwise agreed to the cancellation of the charge—on registration of the cancellation of the charge by the Registrar-General, or
   (b) on the sale or other disposition of the property with the consent of the council, or
   (c) on the sale of the land to a purchaser in good faith for value who, at the time of the sale, has no notice of the charge, whichever first occurs.

(6) Such a charge is subject to every charge or encumbrance to which the land was subject immediately before the order was registered and, in the case of land under the provisions of the Real Property Act 1900, is subject to every prior mortgage, lease or other interest recorded in the Register kept under that Act.

(7) Such a charge is not affected by any change of ownership of the land, except as provided by subsection (5).

(8) If:
   (a) such a charge is created on land of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, land of that kind, and
   (b) the charge is so registered,
   (c) a person who purchases or otherwise acquires the land after the registration of the charge is, for the purposes of subsection (5), taken to have notice of the charge.

(9) If such a charge relates to land under the provisions of the Real Property Act 1900, the charge has no effect until it is registered under that Act.

(10) A council that makes an application under this section for registration of a court order may, by notice in writing, require the person against whom the order was made to pay all or any of the reasonable costs and

expenses incurred by the council in respect of the registration of the court order. The council may recover any unpaid amounts specified in the notice as a debt in a court of competent jurisdiction.

(11) In this section, a reference to an order of a court includes a reference to a judgment of a court.

Part 4 Miscellaneous

18 Rights under other Acts or laws

Except as provided by section 5, nothing in this Act affects the rights that a person has under any other Act or law to interfere with any tree that is not owned by the person.

> **Note.** For example, under the *Access to Neighbouring Land Act 2000*, a Local Court may make a neighbouring land access order that authorises an owner of land to access, and carry out work on, adjoining land for any of the following purposes:
>
> (a) ascertaining whether any hedge, tree or shrub is dangerous, dead, diseased, damaged or insecurely rooted,
>
> (b) replacing any hedge, tree or shrub,
>
> (c) removing, felling, cutting back or treating any hedge, tree or shrub.
>
> By way of another example, under the *Electricity Supply Act 1995*, an electricity network operator may, in certain circumstances, trim or remove a tree if the operator has reasonable cause to believe that the tree:
>
> (a) could destroy, damage or interfere with its electricity works, or
>
> (b) could make its electricity works become a potential cause of bush fire or a potential risk to public safety.

19 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

> The Court has heard and determined applications relating to a variety of NSW government departments or instrumentalities (for example, see *Maguire v Crown in the Right of the State of New South Wales (North Ryde Public School)* [2007] NSWLEC 587 and *Rizk v Department of Housing* [2007] NSWLEC 297).
>
> This provision has meant that, under some circumstances, the Court has jurisdiction to determine applications relating to trees on some properties owned by Commonwealth Government instrumentalities or departments (an example is the Defence Housing Authority – see *Warwick Medway Pty Limited v Defence Housing Authority* [2007] NSWLEC 698).

20 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

21 Savings, transitional and other provisions

Schedule 1 has effect.

22 (Repealed)

23 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 2 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

Schedule 1 Savings, transitional and other provisions

(Section 21)

1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Proceedings relating to liability in nuisance

Section 5 does not apply in respect of any proceedings commenced in a court before the commencement of that section.