

Neighbourhood Tree Disputes report— Summary

Introduction and process

- 1 This inquiry was initiated by the Commission as a community law reform project in June 2017 in response to calls from community to review the law to make resolving tree disputes easier. Early discussions with the Dispute Settlement Centre of Victoria (DSCV) confirmed that it receives many enquiries about trees. The Commission decided that a review of the current law governing the resolution of these disputes was timely.
- 2 The aim of the review has been to provide for fair, effective and timely methods for resolving neighbourhood tree disputes on private land in Victoria.
- 3 We have not looked at disputes concerning trees on public land and disputes concerning the obstruction of sunlight and views by neighbouring trees.
- 4 In December 2017, we published a consultation paper asking for community responses. We received 38 submissions from many different interested parties including arborists, academics, legal practitioners, private home owners, local councils, industry bodies and associations, and the Magistrates' Court of Victoria. In response to our online survey, we received 124 responses.¹

The scope of the neighbourhood tree disputes problem

- 5 Local councils, government bodies, arborists and lawyers told the Commission that many tree disputes occur in Victoria. DSCV is part of the Victorian Department of Justice and Community Safety and provides free dispute resolution services across Victoria. It advised that concerns about neighbourhood trees were the third most common enquiry it received from December 2011 to May 2017 (comprising 18,727 of 109,039 community enquiries or 17.2 per cent of DSCV's total workload for that period). More of these enquiries came from metropolitan than from regional areas.
- 6 Most tree disputes are about overhanging branches, encroaching roots and the perceived threat of large trees. Sometimes neighbours

¹ See Chapter 1 of full report.

are concerned about the loss of vegetation on neighbouring land. Other issues include:

- bushfire risk
- economic loss
- tree works undertaken without consent
- issues that are unique to rural settings.

7 These disputes often turn out to be more complex than they seem. A range of factors can prevent them from being resolved, including:

- different expectations about living near trees
- the breakdown in communication between neighbours
- an emotional or sentimental attachment to trees
- incorrect assumptions about the causes of problems
- difficulties obtaining arboricultural advice
- a lack of knowledge about how trees grow and interact with built structures.

8 For people who face physical or financial difficulties carrying out tree works, maintaining vegetation or negotiating with a neighbour, these disputes may have a greater impact.

9 These disputes can place an ongoing strain on relationships with neighbours and cause significant distress, especially when they challenge a person's sense of ownership and enjoyment of their land. Sometimes tree disputes escalate to trespass, criminal damage or other criminal behaviour.²

Difficulties with the current ways of resolving tree disputes

10 The current methods for resolving neighbourhood tree disputes—from informal negotiation to litigation—can be unclear and confusing.

11 Although tree disputes are common, not many go to court or are resolved with legal assistance. This is because going to court is expensive and outcomes are uncertain. The law is not stated in a single document, so it is hard to know what can and cannot be done to resolve concerns and hard to negotiate a resolution.

12 Depending on the circumstances and the resources available, current options to resolve disputes include:

- making an insurance claim

² See Chapter 2.

- abatement (a 'self help' remedy of pruning encroaching branches back to the property boundary)
- neighbour-led informal resolution (talking and negotiating with each other)
- alternative dispute resolution (ADR), including free community-based mediation conducted by DSCV
- legal action in court (usually in the Magistrates' Court of Victoria).

13 Legal action in relation to tree disputes in Victoria is currently based on the laws of negligence, nuisance and trespass, which involve disputes between individuals and are not criminal matters.

Law	Circumstances
Nuisance	Where there is unreasonable interference with the use and enjoyment of land (which includes damage to property)
Negligence	Where damage, loss or injury results from a negligent act
Trespass	Where there is an unauthorised entry to land

14 The report identifies problems with the current approach:

- It is difficult to obtain a remedy that will *prevent* damage or harm; instead, neighbours may have to wait until the damage is done before taking action.
- Courts can impose injunctions or award sums of money (damages), but they do not address wider concerns about the aesthetic, cultural or environmental values associated with trees.

15 Because of the difficulties in accessing a court-based solution, the current resolution framework relies upon neighbours negotiating outcomes for themselves, sometimes with professional help from DSCV or an arborist. A lack of clear guidance from the law and the need for both parties to be willing to negotiate means that informal resolution is not always successful. Problems include:

- A difficulty collecting information published by different government and community agencies to work out a possible resolution process. People get frustrated when they cannot obtain clear advice and may find themselves caught in a cycle of referrals between different organisations.
- Many people think that the law favours the tree owner, because there are no obligations on the owner to maintain their tree. The lack of clear guidance from the law means that there is little to encourage a tree owner to negotiate with their neighbour.

- Negotiations may not be appropriate when neighbour relations are hostile.
- Agreements made between neighbours are not binding.
- The legal requirement to return abated branches can create disputes when cuttings are dumped back over the fence.
- There is a lack of understanding in the community about which experts can assist and about the role and qualifications of arborists.³

A new Neighbourhood Tree Disputes Act

- 16 The Commission recommends a new Neighbourhood Tree Disputes Act for Victoria, managed by the Victorian Civil and Administrative Tribunal (VCAT). A new Act is the best way to ensure that disputes are resolved in a quick, inexpensive and effective way. Community responses overwhelmingly support this option.⁴
- 17 New South Wales, Queensland and Tasmania have legislation that provides an inexpensive and accessible process for resolving neighbourhood tree disputes in either a specialist court or a tribunal.
- 18 The number of applications handled each year in these jurisdictions is relatively low, and matters can be resolved quickly and affordably. The recommendations in this report build on and adapt these interstate reforms for Victoria.⁵

Policy themes that should underpin the proposed Act

- 19 A new Act should clearly state when a case can be brought in VCAT and the range of outcomes available. It should encourage people to resolve disputes informally and provide greater certainty for people who take legal action.
- 20 The policy aims of the proposed Act are to:
- provide a clear dispute resolution pathway that encourages people to resolve disputes informally between themselves
 - enable disputes to be resolved efficiently and inexpensively
 - establish clear decision-making principles to guide the community about how the law applies and help the community resolve their own disputes
 - provide practical and effective remedies

³ See Chapter 3.

⁴ See recommendation 1.

⁵ See Chapter 4.

- balance competing rights and interests fairly and transparently and use evidence-based decision making
- interact as simply as possible with other relevant laws without disrupting established policy wherever possible. **See Chapter 4.**

Applying the proposed Act

The problems the Act will address

- 21 Under the proposed Act an affected neighbour would be able to bring a matter in VCAT to:
- prevent or remedy damage to the affected neighbour’s land or property that is caused by a tree
 - prevent damage that is likely to occur within the next 12 months
 - address existing harm to anyone on the affected neighbour’s land that is caused by a tree or prevent harm that is likely to occur within the next 12 months.⁶
- 22 Claims would be able to be made about damage to property or land (for example, a garden).
- 23 Owners, occupiers and visitors to the affected neighbour’s land would be able to make an application to prevent harm. It would not be possible to seek compensation for harm suffered, because this is a remedy that is better sought through the courts. Instead, the focus of the Act is on practical tree management to address harm. This is consistent with the interstate Acts which are also preventative in nature. VCAT should develop a specific Practice Note about claims that involve harm, including the need for expert evidence.⁷
- 24 The 12-month time limit for future claims is in line with arborists’ advice that suggests that beyond this period it is difficult to make accurate assessments. It is also consistent with the interstate approach.
- 25 The Commission considers that it should continue to be possible to bring an action in the torts of trespass, negligence and nuisance.
- 26 Interference caused by a tree which is merely annoying (but does not cause actual property damage or harm) should not be actionable under the proposed Act. Falling leaf litter that accumulates in a neighbour’s driveway or gutters are an ordinary part of life in urban environments. This also applies to overhanging branches that do not cause damage or harm. The Commission is concerned that the inclusion of interference claims may result in trivial or vexatious

⁶ See recommendation 12.

⁷ See recommendation 28.

applications and may discourage neighbours from resolving these types of matters amongst themselves.

- 27 However, if the interference causes damage or harm, the affected neighbour would be able to bring a matter in VCAT. For example, if leaf litter was so continuous and extensive that it led to a roof leak, or if an overhanging branch hung in such a position that it posed a risk of property damage or injury to the neighbour.

The scope of the Act

Definition of tree

- 28 The Commission recommends a broad definition of tree that includes all parts of a tree, as well as dead trees and trees that have already been removed. Indeed, a definition should include plants that 'resemble a tree in form and size', capturing more unusual species that don't have a single trunk (for example, a Mallee). It should also cover vegetation known to cause disputes, such as bamboo, palms, large shrubs and weeds.⁸

Land covered by the Act

- 29 Tree disputes mainly affect people in urban areas who live close to each other. The Act should apply to specified land zones that provide for residential uses (including some rural land) while also giving VCAT the discretion to consider land that has the substantial character of a zone that is listed. Some farming and rural land should be excluded, as well as land used for commercial timber plantations. The effectiveness of these zoning provisions should be assessed when the Act is reviewed after five years.⁹

The parties

- 30 Actions should be able to be brought in VCAT by the legal owner of land (or, if the owner has refused to act, an occupier of land). A matter would only be able to be pursued against the person who is the owner of the land that the relevant tree is on.

Proximity of neighbours

- 31 The affected neighbour's land would need to adjoin the tree owner's land or be separated by a thoroughfare or other area, as specified in the Act. If a tree straddles the two properties, either property owner could commence an action if the other requirements of the Act can be met. The respective proportions of ownership, determined by the location of the base of the trunk at ground level, could be considered

⁸ See recommendations 2 and 3.

⁹ See recommendations 4, 5 and 63.

by VCAT when it determines liability or responsibility for trees, for example, how much each neighbour should pay for tree works.¹⁰

Application form and notice

- 32 VCAT should consider developing a single application form similar to those used interstate. Seeking extensive information from the parties upfront will assist in determining if a matter is suitable for ADR and may narrow the issues in dispute if the matter proceeds to a hearing.
- 33 Notice of an application should be provided to specified affected parties as well as to any relevant authority that might be involved in deciding about the tree (for example, a local council). Notified parties could then determine their level of involvement in the matter.¹¹

Informal resolution of neighbourhood tree disputes

- 34 Resolving disputes informally allows neighbours to come up with their own solutions and maximises the chances of preserving neighbourly relations. It is also cheaper than going to court. Clearer laws will greatly assist people to resolve their disputes informally.
- 35 The proposed Act should clearly state that nothing in the Act prevents the parties from resolving their tree disputes informally. Specific examples of informal resolution tools should be included in the Act.
- 36 Community information that supports the Act should include information about informal resolution tools, strategies about how to negotiate effectively with a neighbour and a sample standard letter to send to a neighbour.¹²

Modification of abatement

- 37 Abatement is an effective tool for resolving many tree disputes and may prevent them from escalating. In keeping with interstate reforms, it should be modified so that pruned tree branches and other material are not required to be returned to the tree owner. The Commission does not support modifying abatement in other ways, namely:
- to allow an affected neighbour to recoup from the tree owners any costs incurred
 - to remove liability for trespass

¹⁰ See recommendations 6–11.

¹¹ See recommendations 13–16.

¹² See recommendations 17, 18 and 57.

- to require that abatement is only exercised by a qualified arborist in accordance with the Australian standards.¹³

Community-based mediation

- 38 Greater clarity in the law will assist to reduce the number of enquiries to DSCV and help it to respond to those enquiries and mediate disputes. Even a partially successful community-based mediation may help parties to narrow the issues in dispute for a subsequent VCAT hearing. Community education recommendations aim to promote the valuable services of DSCV to the community.

Other informal resolution mechanisms

- 39 At the five-year review, Government should consider whether there is a need to introduce a notice process to remedy overhanging branches that do not cause damage or harm. In Queensland and Tasmania an affected neighbour can issue a notice requesting the tree owner to trim certain types of overhanging branches. Failure to respond to the notice entitles the affected neighbour to carry out the work themselves and to recoup the associated costs to a capped amount (\$300 in Queensland and \$500 in Tasmania). The costs of the affected neighbour's own labour cannot be recovered.
- 40 A formal branch removal notice process could be added to the Act later if needed. It is not recommended in this report, as it could complicate the proposed Act, and a clear need has not been established.¹⁴
- 41 Other resolution tools that are a feature of interstate Acts were considered but not adopted by the Commission. These include:
- A formal requirement for parties to show that they have made 'reasonable attempts to reach agreement' before initiating any legal action. Legal action is generally only likely to be initiated as a last resort and the Commission is not persuaded to include any formal pre-condition in the proposed Act.
 - Non-binding tree owner responsibilities. The inclusion of non-binding responsibilities and a civil cause of action for damage and harm may cause confusion in the community and would complicate the Act. Clear decision-making principles and community information will guide the community about the application of the law to their disputes. The ability of an affected neighbour to bring a matter in VCAT and obtain a quick remedy may motivate neighbours to find solutions to manage trees in mutually-beneficial ways.

¹³ See recommendation 19.

¹⁴ See recommendation 63.

- A general notice process that allows an affected neighbour to request action, as occurs in Tasmania. This would add an unnecessary layer of complexity. A sample letter is recommended as a separate community resource in Chapter 12.¹⁵

Resolving neighbourhood tree disputes in VCAT

- 42 Tree disputes should be heard in VCAT because its processes are most suited to the needs of the community—costs are far lower, matters can be resolved quickly, ADR programs are in use and many members have expertise in planning, environment matters and civil claims. VCAT is specifically designed for parties without lawyers and is less formal than a court.¹⁶
- 43 The Commission made several recommendations about VCAT’s processes for tree disputes under the proposed Act.

VCAT-referred ADR

- 44 Clearer laws will provide for improved resolution through community-based mediation and also through VCAT-referred ADR, which should be used where it is appropriate. The Commission is encouraged by the successful resolution of tree disputes in this way in Queensland and Tasmania. VCAT-referred ADR may still be appropriate and successful even where community-based mediation is not. VCAT should consider expanding the fast-track mediation program (administered by DSCV) to suitable tree disputes. It is designed for less complex matters: if they do not settle at mediation, they can progress to a hearing later the same day.¹⁷

Expertise of decision makers

- 45 Government should consider appointing members to VCAT with extensive arboricultural experience to hear these disputes on site, as occurs in the NSWLEC. Alternatively, VCAT should consider the Queensland approach of using Tribunal-appointed independent tree assessors to conduct on-site inspections and provide reports to VCAT (as occurs interstate), with the cost shared by the parties. On-site inspections or hearings are identified as important for the effective resolution of these disputes.¹⁸

¹⁵ See Chapter 6.

¹⁶ See recommendation 20.

¹⁷ See recommendation 22.

¹⁸ See recommendations 23 and 24.

Decision-making principles

- 46 The Act should include mandatory and comprehensive decision-making principles to promote evidence-based, transparent and consistent decision making. These broader considerations will not detract from consideration of the alleged damage or harm but will help the decision maker to balance competing rights and interests fairly and transparently in making orders. Decision-making principles are included interstate and in some local council and planning laws in Victoria. The list should provide VCAT with the discretion to consider additional relevant matters. Recommended principles include:
- the broader benefits of the tree to the community
 - the requirements of other laws
 - the location and health of the tree
 - whether anything other than the tree may have contributed to the damage or harm
 - whether the tree existed first in time
 - any steps taken by the affected neighbour or owner to resolve the dispute.¹⁹

Expert evidence

- 47 VCAT hearings should be informed by expert evidence. Arborists and independent tree assessors providing evidence to VCAT should meet minimum qualification standards (AQF 5) to ensure that trees are assessed in accordance with industry-approved risk assessment methods. These requirements will guide the community when hiring arborists. Expert report writing guidelines are also recommended and VCAT should remind experts about their duties to the Tribunal. If parties bring their own experts VCAT should consider exercising its powers to ask experts to confer or hear expert evidence concurrently.²⁰

Remedies

- 48 Timely, practical and effective remedies are needed for tree disputes. Possible orders include: entry to land to carry out works; payment of costs for tree works; payment of compensation for property or damage; replacement tree planting and ongoing maintenance orders. Tree works conducted pursuant to orders should comply with Australian pruning standards and be carried out by a suitably-qualified arborist as determined by VCAT. Copies of

¹⁹ See recommendation 25.

²⁰ See recommendations 26–28.

orders should be provided to relevant parties including any relevant authority, for example, the local council.²¹ Although parties are expected to pay for their own costs in VCAT, it may be appropriate for VCAT to exercise its current power to order costs where a tree dispute has been initiated purely to annoy or distress the tree owner or if obvious steps were not taken to prevent harm or damage.

Appeals and enforcement

- 49 Existing appeal mechanisms are appropriate. The proposed Act should also allow the parties to apply once each year to VCAT to vary or revoke the original order where new circumstances are not accommodated in the original order. This provision reflects the fact that trees are dynamic, living organisms, and that the facts relating to disputes can change over time.²²
- 50 The proposed Act should include a penalty for failure to comply with an order. A party should also be able to apply to VCAT for permission to enter the tree owner's land and carry out the works themselves where an order is not complied with. Reasonable costs incurred as a result should be able to be recouped from the non-complying party as a debt in the relevant court. Safeguards should apply for entry to the neighbour's land.²³

Interaction of the proposed Neighbourhood Tree Disputes Act with other laws

- 51 Existing laws may limit action that can be taken in relation to a tree on private land or require that a permit is obtained before works can be undertaken. To avoid the involvement of multiple decision makers and multiple legal processes, changes to the operation of some existing Acts are recommended, subject to safeguards. VCAT should consider relevant information that another relevant authority would have considered, and that authority should be invited to participate in the hearing process. Additional safeguards are recommended for particular laws.

The need to obtain a permit under planning law

- 52 The existing permit exemptions in the Victoria Planning Provisions under the *Planning and Environment Act 1987* (Vic) (P&E Act) should be expanded to orders made under the proposed Act. If the requirements of the proposed Act are satisfied, a party would not need to obtain a permit to carry out tree works under specified overlays and native vegetation particular provisions before applying

²¹ See recommendations 29–31.

²² See recommendations 32–35.

²³ See recommendations 36 and 37. See Chapters 7, 8 and 9.

to VCAT for a remedy. The operation of the Bushfire Management overlay and other bushfire provisions in planning schemes should not be altered.²⁴

Amending an existing planning permit to resolve a dispute

- 53 An existing permit may need to be amended to resolve a tree dispute, for example, to remove a tree that was required to be planted as a condition of a planning permit. It is difficult for a third party to amend an existing permit under the P&E Act and compensation issues may arise. Because of the complex policy considerations, Government should consider this issue further. The report provides preliminary views about key issues that require further consideration

Section 173 agreements

- 54 Section 173 of the P&E Act allows councils to enter into agreements with private residents to protect vegetation on private property or to achieve other planning objectives in relation to the land. These agreements can be recorded on title so that future land owners can be bound by conditions under the agreement. It is difficult to amend or cancel a section 173 agreement. Given the complex nature of these agreements, Government should consider further consultation with councils about how they operate and how they would interact with the proposed Act.

Local laws

- 55 Local laws made under the *Local Government Act 1989* (Vic) often protect 'significant' trees and require the owner to obtain a permit to carry out works to the canopy or the tree protection zone or root zone. Decisions are generally made at the council officer level and there are no appeal rights and no advertising requirements. An affected neighbour is often unable to apply for a permit to conduct works on a protected tree because local laws generally only allow the tree owner (or someone with their written permission) to apply for a permit. An order under the proposed Act should override local laws. Additional safeguards should include giving significant weight in the decision-making process to local laws and policies already in place.²⁵

The Heritage Act

- 56 Generally, a permit or permit exemption is required to carry out works to heritage-listed trees or heritage-listed places containing trees under the *Heritage Act 2017* (Vic). Heritage laws will allow only

²⁴ See recommendations 39 and 40.

²⁵ See recommendations 41 and 42.

the owner of a tree (or someone with their written permission) to apply for a permit or exemption. An affected neighbour may be unable to resolve their dispute if the tree is heritage-listed. The Heritage Act should be amended so that that it is subject to any order made pursuant to the proposed Act where the tree has been assessed as posing an imminent danger to life or property. VCAT should consider the factors Heritage Victoria would have addressed in a permit decision and any replanting requirements to maintain the heritage value of the landscape.²⁶

The Aboriginal Heritage Act

- 57 The *Aboriginal Heritage Act 2006* (Vic) aims to protect Aboriginal cultural heritage. The Act requires a permit or a permit exemption to carry out works to protected vegetation (for example, an Aboriginal scarred tree). Because ownership of Aboriginal cultural heritage is determined by traditional owners, the Act does not limit those who may apply for a permit or exemption. The Commission concludes that decisions about works to protected trees under this Act should be made by Registered Aboriginal Parties or by Aboriginal Victoria.

The Fences Act

- 58 The Magistrates' Court has jurisdiction to decide matters under the *Fences Act 1968* (Vic). If a tree is causing damage to a fence, or forms part of a fence that is causing or is likely to cause damage or harm, VCAT should have the jurisdiction to make orders in relation to both the tree and the fence. It would be prudent for orders to be made about the tree and the fence at the same time by the same decision maker. The Fences Act should be amended accordingly.²⁷

The Catchment and Land Protection Act

- 59 The *Catchment and Land Protection Act 1994* (Vic) places obligations on land owners to manage listed weeds. Directions can be made to land owners to take measures to control or eradicate weeds. The proposed Act should apply to recognised weeds that meet the definition of 'tree' where the weed is causing damage or harm in the required way. VCAT should consider any past actions taken by the landowner under this Act when determining the scope of orders.²⁸

Other Acts and laws

- 60 Given the complexity of the mechanisms that can be created under the *Victorian Conservation Trust Act 1972* (Vic) and the

²⁶ See recommendations 43–45.

²⁷ See recommendation 46.

²⁸ See recommendation 47.

Conservation, Forests and Lands Act 1987 (Vic) to protect and conserve vegetation on private land, it is recommended that Government consult further to determine their possible interaction with the proposed Act.

- 61 If works under the proposed Act are likely to have a significant impact on a matter of National Environmental Significance or other protected matter, then the VCAT hearing should be vacated and the applicant should work through the Commonwealth assessment and approval process under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).²⁹

New owners

- 62 The proposed Act should specify the rights and obligations of new tree owners and new affected neighbours towards trees that have been or are the subject of a formal tree dispute hearing in VCAT. This will provide finality and certainty to the parties and avoid the duplication of legal proceedings. A searchable data base of orders is not recommended. The proposed Act should:
- require relevant matters to be disclosed to potential purchasers before sale
 - hold new owners responsible for complying with orders from the date of settlement
 - provide that only immediate new owners may benefit from orders made in the original owner's favour
 - provide notice in the Due Diligence Check List and in the Section 32 Vendor Statement to avoid adding extra steps or complexity to the sale of land process
 - allow purchasers, if not informed, to seek recourse under the Sale of Land Act.³⁰

Community resources

- 63 The Commission provides recommendations about what community resources would be most helpful:
- A new website, hosted by the Department of Justice and Community Safety, to provide an overview of the proposed Act, information about how to engage effectively with a neighbour in negotiations, how to engage professional assistance and how to identify other laws that may be relevant to a dispute.³¹

²⁹ See Chapter 10.

³⁰ See recommendations 48–56. See Chapters 5 and 9.

³¹ See recommendation 57.

- A VCAT information guide explaining processes for tree disputes, an annotated Act that contains examples of how provisions have been interpreted in cases, a link to information about DSCV and key practice notes.³²
- Information about responsible tree planting from local councils, as well as more accessible information about the applicability of local laws and how to engage arborists. Information about identifying suitably-qualified arborists and what they can do should also be provided by the arboricultural industry.³³

64 It would also be helpful to promote DSCV's services more broadly through community engagement workshops, particularly with arborists.³⁴

Future review and other conclusions

65 The proposed Act should be reviewed after five years of operation to determine if it is achieving its objectives. The Commission identifies matters for consideration when the Act is reviewed:

- The effectiveness of zoning provisions in the Act.
- The appropriateness of the definition of adjoining land.
- The appropriateness of including a formal branch removal notice process in the Act.
- Whether there is a need to expand the scope of the Act to trees that block access to sunlight and views (including high hedges).³⁵

66 The Commission supports the use of online dispute resolution for tree disputes. However, it may not be appropriate for all disputes or for all phases of the dispute resolution process in VCAT.

67 The report provides preliminary views on some matters beyond the scope of this inquiry (trees on public land, access to sunlight and views, and the illegal removal of vegetation). The report also considers reform options suggested in community responses.³⁶

32 See recommendation 58.

33 See recommendation 60 and 61.

34 See recommendation 59. See Chapter 12.

35 See recommendations 62 and 63.

36 See Chapter 13.