This chapter was updated in October 2019 to reflect changes to the management of biosecurity risks, including weeds, pests and plant and animal diseases.

Trees and plants are a common cause of disputes between neighbours. In NSW legislation largely regulates the planting, pruning, destruction and removal of trees and plants and also deals with some of the disputes. The overall aim, wherever possible, is to conserve vegetation, especially in the urban environment. In rural areas, the threat of bushfires is also taken into account. Below is an outline of the laws most relevant to neighbours.

**Biosecurity**

Since 1 July 2017 the *Biosecurity Act 2015* (NSW) and Biosecurity Regulation 2017 (NSW) have replaced the *Noxious Weeds Act 1993*. The new Act provides a comprehensive framework for identifying, preventing and managing biosecurity risks, including weeds, pests and plant and animal diseases.

The *Biosecurity Act 2015* applies to all NSW land and waters and sets out a general duty of any person who deals with any plant that poses a biosecurity risk, to ensure that risk is prevented, eliminated or minimized, so far as is reasonably practicable (Parts 1 and 2 and section 22).

The Act gives local councils power over the control and management of weeds (section 370). It also creates a range of offences and provides for the establishment of Biosecurity Zones, Control Orders and mandatory measures to deal with a biosecurity threat.

An authorised officer can issue a biosecurity direction to manage a weed outbreak (Part 9). There is also the duty to notify of the presence or suspected presence of prohibited matter, listed in Schedule 2 of the Act (Part 4).

NSW Local Land Services are responsible for co-ordinating Regional Weed and Pest Animal Committees that develop Regional Strategic Weed Management Plans and Regional Strategic Pest Animal Plans. These Plans provide guidance and strategies for weed and pest management in your local area.
NSW WeedWise

Under the Biosecurity Act, all plants are assessable for their biosecurity risk. NSW WeedWise [12] profiles over 300 high risk plants, giving details of the plant's description, the type of biosecurity risk it poses, any duty imposed to reduce or eradicate the risk, as well as various methods to control it.

If you have a problem with your neighbour’s weeds, talk to them about it to try to resolve the matter. If this isn’t possible or productive, you can contact your local council weeds officer to inspect the property for an assessment as to whether the weeds pose a significant biosecurity risk.

You can contact the NSW Department of Primary Industries (DPI) Biosecurity Helpline 1800 680 244 to report a pest, disease, weed or other biosecurity concern. You can also contact a Community Justice Centre for mediation with your neighbour about your concerns.

Protection of Trees and Plants

In NSW the Environmental Planning and Assessment Act 1979, the Biodiversity Conservation Act 2016 and Local Land Services Act 2013 and their associated regulations and environmental planning instruments operate together with local council measures to protect most trees and other vegetation on public and private land.

For example, in urban areas, the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 [13], called the Vegetation SEPP, requires landowners to obtain consent from local council before removing vegetation on their land.

Tree Works

In most areas of NSW, before you prune or remove a tree you must apply for permission from your local council. Permission may be in the form of a permit or a development approval. Exemptions may apply, depending on the type of work or the species, type and condition of the tree.

If the offending tree belongs to your neighbour, many councils require your neighbour’s consent before any work can be undertaken. Check with your council.

Most local council websites contain helpful and important information, including procedures for applying for approval to carry out tree works and information about the management of trees in your local area.

In rural areas, clearing vegetation on your land may require other approvals, licences or permits. Contact your local Land Services Office.

Bushfire Prone Areas

If you are living in a designated Bushfire Prone 10/50 Entitlement Area, you may be allowed to prune or remove trees on your property that are within 10 metres of your home and remove other vegetation (other than trees) growing within 50 metres of your home. Contact council to check the status of your property and check the Rural Fire Service's 10/50 Vegetation Clearance Code of Practice [14].

If you are a landowner wishing to clear native vegetation using management burning you may need a permit under the Rural Fires Act 1997 (NSW). Check the RFS website and contact the local Fire Brigade Caption or Fire Control Officer.

Case study - chopping down trees without council approval

In February 2016 Ms Yueling Liu engaged a tree lopper to cut down two of her neighbour’s trees in the leafy Sydney suburb of Hunters Hill. She did not have her neighbour’s consent and did not have a permit from the Hunters Hill Council.
Ms Liu had approached the council to apply for a permit, saying the trees sparked during storms and were dropping leaves into her pool. However she did not lodge the application and went ahead with cutting the trees.

Ms Liu was subsequently charged with an offence under subsection 125(1) of the Environmental Planning and Assessment Act 1979 of removing two trees that were protected by the Hunters Hill Local Environment Plan 2012 (LEP) without obtaining the consent of the Hunters Hill Council.

In 2018 Ms Liu pleaded guilty to the offence and the NSW Land and Environment Court, after taking various factors into account, fined her $48,000. The Court also ordered costs of $35,000 be paid directly to the Hunters Hill Council within 28 days and that Ms Liu engage a qualified arborist to plant 2 replacement trees on the neighbour’s property and provide a certificate verifying the plantings.


Case study - overhanging branches

Bob was fed up with the overhanging branches of his neighbour’s tree. Each time he got out of the car in his driveway he had to duck and dive around the low hanging foliage. When it rained he had to fight the canopy of wet leaves to reach his back door. There was no risk of injury or damage to his property but nonetheless these branches were a pest.

Several times, Bob had asked his neighbour, Tom, to prune the tree. Tom was agreeable enough but just never got around to it. When Bob put the request in writing and offered in frustration to do the job himself, Tom refused to allow Bob to touch the tree.

So Bob did some investigating. He found out from his local council that a permit would be needed for the pruning work and Tom’s consent to the work would also be needed.

Bob decided that before things got nasty, he would try to have the matter resolved amicably. He contacted the Community Justice Centre [16] and asked about mediation. The CJC then contacted Tom and asked if he would agree to mediation.

As it happened, Tom had a few gripes of his own about his neighbour Bob: the parties and the noise, the dividing fence and the dog poo. Here was an opportunity to have these headaches addressed.

Bob and Tom attended mediation and were surprised at the level of anger that had built up between them. With the help of the trained and skillful mediator, and with renewed goodwill as neighbours, they made a list of problems and actions that they could agree on to restore peace to their lives. They also made a timeline and an agreement about sharing costs.

Three months on, things are much friendlier: with council approval the tree has been pruned, the noise level is a bit lower, both neighbours attend each other’s parties, the dividing fence has been repaired and so the dog poo stays on Bob’s side of the fence now: a win/win situation.

Tree disputes

The Trees (Disputes Between Neighbours) Act 2006, called the ‘Trees Act’, provides a much cheaper and simpler method for resolving some of the tree disputes between neighbours than the legal remedy that was previously available. Before the Trees Act, a common law action for nuisance had to be taken in the Supreme Court. Now, an application can be made to the Land and Environment Court for orders concerning a neighbour’s tree or trees that cause or are likely to cause harm, or trees that form high hedges obstructing sunlight or views.

Land and Environment Court

The Land and Environment Court has helpful information on its tree dispute pages [17], including how to make an application, practice and procedure, the preliminary hearing, the final hearing, outcomes and orders, and links to
other material including a practice note, a guide to understanding the Trees Act, tree dispute principles (see below) and case studies.

Although the evidence can sometimes be technical, parties often represent themselves in Trees Act cases. A helpful guide for Litigants in Person in the Land and Environment Court [18] can be found on the Court’s website.

Under the Act, the Court can order a range of actions to stop, prevent or remedy the harm or obstruction. Failure to comply with an order can result in further proceedings and a fine of up to $110,000 (Trees Act, section 15). In addition, it can result in the local council carrying out the work required in the order and recovering the costs together with an administrative fee. If these costs are not paid, the debt against the council can eventually be registered as a charge on the land (section 17).

The major parts of the Trees Act are:

- Part 2 – dealing with orders relating to damage to property and injury to people.
- Part 2A (introduced in 2010) – dealing with orders concerning obstruction of sunlight or views by trees that form a hedge.

For the Court to have jurisdiction, or power, to make any order under the Trees Act, the offending tree must be on land adjoining the applicant’s (sections 7 and 14B). This can include land across a public roadway (P Baer Investments Pty Ltd v University of NSW [2007] NSWLEC 128 [19]) from the applicant or properties that adjoin diagonally, having only a corner post in common (Cavalier v Young [2011] NSWLEC 1080 [20]). However it would not include land further away. For example, where an applicant seeks orders concerning damage from a tree that is located several houses away, it is unlikely the Court would have the power to make the orders.

Also, for the Court to issue an order against a party concerning a tree on their land, the tree must be located wholly or mainly on their land, that is, where at least fifty per cent of the tree’s trunk enters the ground (Trees Act, section 4(3)) (Brown v Weaver [2007] NSWLEC 738 [21]; Drolz v Sinclair [2008] NSWLEC 34 [22]; Inbari v Rankin [2010] NSWLEC 1236 [23]). The Act and regulation defines ‘tree’ as including bamboo, tiger vines/giant clumping grass and vines as well as any woody perennial plant (shrub) (Lentfer v Hopkins [2008] NSWLEC 1452 [24]) or plant that resembles a tree (Trees Act, section 3 and Trees (Disputes between Neighbours) Regulation 2019, reg 4).

If the property where the tree is located is sold during proceedings under the Trees Act, the Court may require the purchaser be notified and have the opportunity of being added as a party to the proceedings (Haindl v Daisch [2011] NSWLEC 1145 [25]). Court orders made under the Trees Act may, under certain conditions, be binding on a subsequent owner (sections 16 and 16A). Also, a local council or the Heritage Council may be made part of the proceedings if their consent is needed for any work to be done on the tree (sections 13 and 14G).

The usual practice of the Court in any action under the Trees Act is to make a site visit. The Court’s Commissioner hearing the case, together with the parties and any experts involved in the case, attend the applicant’s property and the tree (or hedge) to thoroughly inspect the problem and better understand the evidence.

Parties often use experts such as arborists, engineers, architects or builders in their evidence. In general, for this to be given proper weight by the Court, any expert providing a report or appearing as a witness must acknowledge reading and agree to be bound by the Court’s Expert Witness Code of Conduct (Spillane v Burgess [2009] NSWLEC 1289 [26]). This is contained in Schedule 7 of the Uniform Civil Procedure Rules 2005. It can also be found on the Land and Environment Court’s [27] website.

What follows are the specifics of the two main parts of the Trees Act.

**Damage to property or injury to people**

Under Part 2 of the Trees Act, a landowner or occupier can apply to the Court for an order to remedy, restrain or prevent damage to property or injury to any person that is caused or is likely to be caused by a tree on adjoining land (section 7).

Part 2 applies to trees in areas zoned as:
• residential
• rural residential
• village
• township
• industrial
• business or
• having the substantial character of one of these zones (section 4).

It does not apply to trees on council land (section 4).

The types of orders the Court can make under Part 2 (section 9) include an order:

• to remedy damage to property
• to restrain or prevent damage or further damage to property
• to prevent injury to any person
• requiring an application for consent be made to a body such as the Heritage Council
• authorising the applicant to take specific action to remedy, restrain or prevent damage or injury
• authorising entry onto land for the purpose of carrying out an order
• for the payment of costs associated with the carrying out of an order
• for compensation for damage to property
• requiring that a tree be replaced.

Some examples are for orders to:

• remove a tree, grind or poison its stump and remove offending roots
• prune overhanging tree limbs
• pay for roofing work and replacement of tiles damaged by fallen tree limbs
• pay for repair/replacement costs for sewer pipes, cracked walls or paths badly damaged by tree roots
• pay for installation of a root control barrier.

Orders for repair of property or compensation for damage or injury can still be issued by the Court though the tree may have been already removed (section 4(4)).

The person applying for the Part 2 order must give 21 days notice of the application (including the terms of the order sought) to the owner of the land where the tree is located and to any relevant authority that may become involved in the proceedings and any other person that may be affected by the order. If appropriate, the Court may direct that the notice be given in a certain way or to a certain person, that the notice requirement be waived or that the notice period be changed (section 8).

Importantly, under section 10, the Court cannot make an order under Part 2 unless it is satisfied that:

• the applicant has made a reasonable effort to reach agreement with the other party and
• the applicant has given the proper notice of the application to the other party (unless it has been waived by the Court) and
• the tree concerned has caused, is causing, or is likely, in the near future (that is, in the next 12 months) (Yang v Scerri [2207] NSWLEC 592 [28]; Bailey v Gould [2011] NSWLEC 1062 [29]) to cause damage to the applicant’s property, or
• the tree concerned is likely to cause injury to any person.

If these conditions are met, the Court must then consider a number of other matters contained in section 12. They include:

• the location of the tree in relation to the boundary and any premises
- the impact that any pruning would have on the tree
- any contribution the tree makes to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land it is on
- whether the tree has any historical, cultural, social or scientific value
- any contribution the tree makes to the natural landscape or scenic value of the land or the locality
- any contribution the tree makes to the local ecosystem and biodiversity
- the tree’s intrinsic value to public amenity
- any impact the tree has on soil stability, water table or other natural features of the land or the locality
- where the application relates to damage to the applicant’s property or likely injury to any person:
  - anything other than the tree that has contributed, including any act or omission by the applicant, and the impact of any trees owned by the applicant
  - any steps taken by the applicant or the owner of the land that the tree is on, to prevent or rectify the damage or prevent the injury.

Tree Dispute Principles

In deciding cases under Part 2 of the Trees Act, the Land and Environment Court has developed some Tree Dispute Principles [30]. For example, where the neighbour’s tree has damaged the applicant’s home or risks injuring people around the home, the Tree Dispute Principle from the case of Black v Johnson [No. 2] [2007] NSWLEC 513 [31] and Moroney v John [2008] NSWLEC 32 [32] helps the Court decide who should pay for the tree work or repairs. If the neighbour’s tree existed before the applicant built the home and the applicant could have located the home elsewhere on the property or constructed it in such a way as to avoid future damage or risk of injury from the tree then the applicant may well have to contribute to the costs of the tree work or repairs.

Another Tree Dispute Principle concerns the normal mess of leaf litter and debris associated with trees. In several cases the court has emphasised that the usual dropping of leaves, flowers, fruit, seeds or small amounts of deadwood will not ordinarily justify an order to interfere with or remove a tree. In Barker v Kyriakides [2007] NSWLEC 292 [33] the Court said that with the aesthetic and environmental benefits of having trees, especially in urban environments, we should accept the responsibility to do a reasonable amount of regular maintenance, like clearing our gutters and house surrounds, of leaf litter and debris (See also Robson v Leischke [2008] NSWLEC 152 [34]; Moroney v John [2008] NSWLEC 32 [32]; Lowe v Cottrell [2011] NSWLEC 1003 [35]).

In other cases, although not established as Tree Disputes Principles, the Court has decided the following:

Risk of injury

- Injury includes illnesses, allergic reactions and other similar conditions (Tuft v Piddington [2008] NSWLEC 1249 [36]).
- Mere annoyance or discomfort is not enough to justify the granting of an order (Oakey v Owners Corporation Strata Plan 22678; Oakey v Owners Corporation Strata Plan 5723 [2009] NSWLEC 1108 [37]).
- There must be a likely risk of injury not just a fear of injury (Oakey v Owners Corporation [37]).
- To establish a likely risk of injury it will not be enough to provide internet literature, or a council listing of a particular type of tree as undesirable. The Court will generally need expert medical evidence provided according to the Expert Witness Code of Conduct in Schedule 7 to the Uniform Civil Procedure Rules 2005 (Oakey v Owners Corporation [37]).

Damage to property

- The damage must not be minor or insignificant, for example, a negligible displacement of a fence or a badly secured vent pipe being knocked over (Bailey v Gould [2011] NSWLEC 1062 [29]).
- The damage must be directly caused by the tree. For example the Court did not consider stains on clothing caused by the crushing of jacaranda flowers when the washing was folded, to be damage caused directly by a tree (Bailey v Gould [2011] NSWLEC 1062 [29]).
- The tree must be a cause but does not have to be the sole cause of the damage (Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 [38]).
In *McLevie v Anderson* the applicants purchased their property at Glebe in 2004 but it was not until 2009 when they were removing a built-in shelf that they discovered a large crack in an internal wall of their home.

They immediately contacted their neighbour, Ms Anderson, about the crack as they believed it was caused by the Kaffir Plum tree on her property.

Ms Anderson was agreeable about removing the tree but would not agree to paying for it or paying for repairs to the wall. In 2010 the dispute was taken to the Land and Environment Court.

Reports from an arborist, engineer and a structural engineer were provided by the parties and the Court made a site visit. From all the evidence the Court was satisfied that the growth of the tree and its root system were the main, if not the sole cause of the cracking in the wall and should be removed.

The Court also found that the applicants should not have to contribute to the costs of removal and the associated repairs as the tree is wholly on Ms Anderson’s property, the applicants did not delay in contacting her about the damage once it was discovered and the applicants had not contributed at all to the damage.

The Court ordered that the tree be removed, the wall be repaired as per the engineer’s estimate (to a maximum of $4500) and a television aerial (also damaged by the tree) be replaced, all at Anderson’s expense.

*McLevie v Anderson [2010] NSWLEC 1091* [39]

**Case study - Tree Root Damage**

In *Dean v Ellsworth* the applicants, Mr and Mrs Dean, wanted two Eucalypts on their neighbours’ property to be removed because the tree roots were damaging their driveway and could potentially damage the underground services buried beneath. They were also worried branches could damage their home.

The neighbours, Mr and Mrs Ellsworth, did not want the trees removed as they valued the shade that they provide, the wildlife they attract and their visual amenity.

During the site visit, an examination of the cracks in the driveway showed that some of the cracks that were not near the trees had radiating patterns and some were straight lines in the direction of the driveway. The driveway was 22 years old and of thin asphalt.

The Court found that the Ellsworth’s trees had contributed to the damage of the Dean’s driveway but that the age and construction of the driveway were the main causes of its deterioration. The Court also found that there was no evidence that the tree roots would in the near future, that is, in the next 12 months, cause damage to the underground services. As for the tree branches, the Court found no evidence of a likely risk of injury.

The Court dismissed the application to remove the trees and ordered that the two sections of the Deans’ driveway near the trees be removed and replaced properly without damaging major tree roots and that the Ellsworths contribute 40 per cent of these costs.

*Dean v Ellsworth [2010] NSWLEC 1032* [40]

**Case study - Bunya Pine Cones**

In *Ghazal v Vella* large cones dropping from a neighbour’s Bunya pine were creating problems for the Ghazal household in Blacktown. When they had bought their home in 1986 the pine had not been there but by 2010 it was overhanging their backyard by almost three metres.

As retirees, Mr and Mrs Ghazal were keen gardeners and together with their extended family they spent considerable time in their backyard where they had an outdoor sink, vine-covered pergola, fruit trees, landscaping and a nearby shed. But each summer since 2004 the Bunya pine had been dropping large cones weighing up to 10 kg. As the cones would fall without warning, the Ghazals had become increasingly worried that someone would be hurt and so applied to the Court for orders that the tree be de-coned.
At Court the neighbours, Mr and Mrs Vella, presented an arborist’s report. It argued that there have been no recorded fatalities from a falling cone and that the mathematical chance of harm from a cone and its cost in dollar terms is far cheaper than the cost of ongoing de-coning.

The Court criticised this report on a number of grounds, including its failure to fulfil several of the criteria for expert reports in the Expert Code of Conduct. In considering all of the evidence, the Court found that as large, mature cones do fall from the tree and as the backyard is used intensively by the Ghazals, the risk of injury is foreseeable and it is unreasonable to place the burden of managing this risk on the Ghazals.

Unlike other cases involving Bunya pines, where the risk of injury was not considered likely, the Court here ordered that each year the neighbours, Mr and Mrs Vella, must pay for a thorough inspection of the tree by an arborist and the removal of cones before they reach a dangerous size.

Ghazal v Vella [2011] NSWLEC 1105 [41]

Trees falling in a storm

When a tree falls in a storm, the owner of the tree is not automatically liable for the damage it causes. For trees that cause damage, subsection 9(1) of the Trees Act gives the Court power to make such orders ‘as it thinks fit’ to remedy the damage.

Case Study - Falling tree

In June 2007 during a violent storm on the NSW Central Coast that ran the ore carrier, the Pasha Bulker, aground onto a Newcastle beach, not far away Mr Leischke’s 80-year-old grey ironbark tree was blown over onto his neighbour’s, Mrs Robson’s, home. Luckily no one was hurt. The SES attended and managed to cut dangerous branches and erect a tarpaulin over the affected parts of the house.

In October, Mrs Robson made an application under the Trees Act to the Land and Environment Court for compensation for the damage caused by the tree. Mr Leischke and his insurer AAMI denied any liability for the damage.

An arborist’s report found the tree had fallen due to a combination of storm event, waterlogged localised soils and minor root damage from a root pathogen caused by the construction of a retaining wall nearby impacting on the tree’s critical root zone. The tree and indeed the retaining wall had been there long before Mr Leischke bought the property and although old, the tree appeared extremely robust and healthy until the fatal storm.

The court, in deciding what order or orders ‘it thinks fit’ to remedy the damage, took guidance from the common law torts of trespass, nuisance and negligence that applied before the Trees Act.

As Mr Leischke had no knowledge of the tree’s problems and did nothing that contributed to the demise of the tree, the court felt that he wasn’t under any duty to prevent or minimize the risk of any damage to Mrs Robson’s property nor should he be held responsible for the damage that resulted. The mere fact that a tree is situated on a person’s land is insufficient in itself, to justify holding that person responsible for any harm it does to other people or their property.

The court said it is obliged under section 9 to consider what order, if any, best meets the justice of the situation and here it decided to ‘leave the loss where it falls, namely on Mrs Robson. An order to shift the loss to Mr Leischke by requiring him to pay compensation to her would not be fit or just’.

The application for compensation was dismissed.

Robson v Leischke [2008] NSWLEC 152 [34]

Financial Rights Legal Centre

For helpful information about insurance cover when a tree falls, see the Financial Rights Legal
Centre’s factsheet When a tree falls in a storm, who pays for its removal? [42]

The Financial Rights Legal Centre [43] is a community legal centre specialising in financial services, particularly in the areas of consumer credit, banking, debt recovery and insurance. It provides telephone assistance and financial counselling as well as legal advice and representation. The Financial Rights Legal Centre also operates the Insurance Law Service [44], a national specialist consumer insurance advice service.

Find a range of fact sheets [45] or call the Insurance Hotline on 1300 663 464 or the Credit & Debt Hotline on 1800 007 007.

High hedges

Under Part 2A of the Trees Act, a landowner or occupier can apply to the Land and Environment Court for an order to remedy, restrain or prevent a severe obstruction of sunlight to a window of a dwelling or a severe obstruction of any view from a dwelling, if the obstruction is from trees on adjoining land (section 14B).

The trees must:

- be a group of two or more
- be planted to form a hedge, and
- rise to a height of at least 2.5 metres above existing ground level (section 14A(1)).

A Part 2A order is not available where a single tree is causing the obstruction.

Part 2A does not apply to trees situated on Crown land or on land owned or managed by a council (section 14A(2) and section 4).

Similar to the notice requirements in Part 2, under Part 2A the applicant must give at least 21 days notice of the application (including the terms of the order sought) to the owner of the land where the tree is located. Notice must also be given to any relevant authority and any person that may be affected by the order sought. If appropriate in the circumstances, the Court has the power to waive or to change the notice requirements (section 14C).

Orders under Part 2A to remedy, restrain or prevent the obstruction can require action such as:

- pruning the trees and maintaining them at a certain height, width or shape
- removing the trees and replacing them with trees of a different species
- authorising entry to the land to carry out the orders
- payment of the costs of the work.

An order for compensation for the obstruction, however, is not available (section 14D).

Under section 14E, to make an order, the Court must first be satisfied that:

- the applicant has made a reasonable effort to reach agreement with the owner of the land where the tree is located
- the applicant has given the proper notice (unless it has been waived by the Court)
- the trees concerned are severely obstructing the sunlight to a window of the applicant’s dwelling or obstructing a view from the applicant’s dwelling
- the obstruction is so severe or of such a nature that the applicant’s need to remedy the situation outweighs the undesirability of interfering with the trees (section 14E).

As the Act does not define ‘a reasonable effort to reach agreement’, the Court would consider the circumstances of each case. In the case of Voeten v Adams [2011] NSWLEC 1106 [46] the applicant’s letter requesting the hedge be pruned was considered a reasonable effort.
If the conditions in section 14E are met, the Court must then consider a number of other matters (Bowen v Martin [2011] NSWLEC 1195 [47]), including:

- the location of the trees in relation to the boundary and the dwelling
- whether the trees existed before the dwelling (or window)
- whether the trees have grown to a height of 2.5 metres or more since the applicant purchased or occupied the dwelling
- whether interference with the trees would normally require consent from the local council or the Heritage Council and if so, whether it has been obtained
- whether there are any other development consent requirements or conditions relating to either the applicant’s land or the land where the trees are located
- whether the trees have historical, cultural, social or scientific value
- the contribution of the trees to the local ecosystem and biodiversity
- the contribution of the trees to the natural landscape and scenic value of the land and of the locality
- the trees’ intrinsic value to public amenity
- the trees’ impact on soil stability, the water table or other natural features of the land or locality
- the impact that pruning would have on the trees
- the trees’ contribution to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land where they are situated
- anything other than the trees that has contributed or is contributing to the obstruction
- any steps taken by the applicant or the owner of the land where the trees are located, to prevent or rectify the obstruction
- the amount and number of hours per day, of any sunlight that is lost from from the obstruction throughout the year and the time of the year during which the sunlight is lost
- whether the trees lose their leaves during certain times of the year and if so, for what portion of the year
- the nature and extent of any view affected by the obstruction and the nature and extent of any remaining view
- the part of the dwelling from which the view or sunlight is obstructed (section 14F).

Issues dealt with in cases decided under Part 2A include the following:

- trees can be a ‘hedge’ regardless of whether they were intentionally planted as a hedge (Barry v Stelzer; Barry v Lucas [2011] NSWLEC 1104 [48])
- a single tree that is obviously separate from other trees cannot be included as part of a hedge (Wisdom v Payn [2011] NSWLEC 1012 [49])
- To form a hedge, the trees must:
  - have been planted and not be self-sown (Wisdom v Payn [2011] NSWLEC 1012 [49])
  - have reached the required minimum height at the time of the hearing (Salisbury v Harrison [2011] NSWLEC 1069 [50]) and
  - be arranged in a linear fashion, that is, side-by-side, exhibiting a degree of regularity. This doesn’t mean the trees must form neat lines, for example, they can form a triangular shape (Cavalier v Young [2011] NSWLEC 1080 [20]). However, a copse or forest arrangement or a purely random planting won’t be a ‘hedge’ for the purposes of the Act (Wisdom v Payn [2011] NSWLEC 1012 [49]).
- Concerning a severe obstruction of sunlight, the obstruction of sunlight must be to a window. For example, it cannot be to a garden (Nevins v Yeomans [2011] NSWLEC 1037 [51]; Holden v Smith [2011] NSWLEC 1066 [52]).

In sunlight cases the Court has often made use of shade diagrams provided by the parties in their evidence. The Court has also referred to minimum sunlight requirements contained in planning policies.

**Case Study - High Hedging**

Mr and Mrs Tonoli at St Ives wanted the neighbours’ Photinia hedge pruned so they could enjoy the winter sun again. When they purchased their home in 2006 they had plenty of sun through the north facing windows of their living room, dining room and kitchen. However, as the hedge grew they lost winter sun to these areas where they spent most of their time.
In 2007 the Tonolis approached their neighbours, Mr and Mrs Rappo about pruning the hedge. But the Rappos refused. As their property was a local heritage item they did not want the height of the hedge changed. They felt the Tonolis should have realised the hedge would grow this high before they bought next door.

The Tonolis then tried the Community Justice Centre but the Rappos wouldn't agree to take part in mediation. Reluctantly, in 2010, Mr Tonoli applied to the Land and Environment Court for an order under Part 2A of the Trees (Disputes Between Neighbours) Act 2006 for the hedge to be pruned to allow sunlight back through the windows.

At Court, aspects of the hedge and the dwelling as well as the sunlight, were examined. Typical planning controls for building developments generally require three hours of sunlight to living areas and private open space for at least 50 per cent of these areas between 9am and 3pm on June 22nd, the shortest day. Although no shade diagrams were provided, the Court accepted Mr Tonoli’s uncontested testimony that he lost sunlight to four windows between early May and late August each year and found that this amounted to a severe obstruction.

The Court acknowledged the hedge was of scenic value and contributed to the Rappos’ privacy and amenity but did not find that it had any heritage value itself. The hedge would respond well to moderate pruning without severely impacting on the Rappos’ privacy or amenity. In any event, the obstruction to sunlight outweighed any negative impact the pruning would have.

The court ordered the hedge be pruned to a height of 4.2 metres to allow regrowth up to 4.5 metres and be maintained at the height of 4.5 metres, at the Rappos’ expense.

Tonoli v Rappo [2010] NSWLEC 1320

In cases concerning severe obstruction of views the Court has applied relevant planning principles from the case of Tenacity Consulting v Warringah [2004] NSWLEC 140. Using these Tenacity Principles, the steps in assessing the obstruction (from cases such as Hough v Rettenmaier [2010] NSWLEC 1354 and Ball v Bahramali [2010] NSWLEC 1334) are:

1. Assess the views to be affected. Water views are valued more highly than non-water views. So too are views containing icons (such as the Opera House) and whole views (such as a water view that contains the land meeting the water).
2. Consider from which part of the property the views are obtained. Protection of views across side boundaries is more difficult than those from front or rear boundaries. Also determine whether the views are from a sitting or standing position. Sitting views are more difficult to protect. The expectation to retain side and sitting views is often unrealistic.
3. Assess the extent of the impact the obstruction has on the view. Impact on the views from living areas is more significant than from bedrooms or service areas. Assess the impact for the whole property, not just the view that is affected and assess it qualitatively as negligible, minor, moderate, severe or devastating.
4. If the impact is severe, assess the reasonableness of the proposal that is causing the impact.

Case study - bamboo hedging

In Hough v Rettenmaier the neighbour’s eight metre bamboo hedge was obscuring the applicants’ view of Port Hacking from their upper and lower balconies and family/kitchen area. The neighbours argued it was necessary for privacy to their backyard and swimming pool.

Applying the Tenacity Principles, the Court assessed the views and the severity of the obstruction. They found that the view from the family/kitchen area would not be of water as it was largely of another neighbour’s vegetation and the sky, and was only accessed from the windows by walking through the area or from a sitting position.

The views from the upper and lower rear balconies however, were of the water and were impacted significantly by the bamboo. The Court found that the upper balcony, being adjacent to the bedrooms, was not primary living space but the lower balcony was the main private outdoor entertaining space adjacent to the living areas and from this balcony the bamboo almost entirely obliterated the water view. This obstruction was considered severe.

In weighing up the impact of the obstruction with the impact of pruning the hedge, the Court found that the...
Rettenmaiers’ wish for privacy was reasonable and that some pruning could retain their privacy and still improve (although not totally restore) the view. The Court ordered the bamboo be pruned and maintained at a point equal to the ridge-line of the Rettenmaiers’ roof, at their expense.

Hough v Rettenmaier [2010] NSWLEC 1354 [55]

Case study - obstructed view

Since 2001 Ms Ingham has lived on the leafy outskirts of Blackheath beside the Blue Mountains National Park. Her home is on a long, narrow block set back from the road and while the front of the home faces south to the road, the rear faces north to the National Park. To take advantage of the sunlight and expansive views, the living room and kitchen, with its large windows as well as an outdoor raised deck, are located at the rear.

Her neighbours on both sides have extensive hedges of vigorous Leyland Cypress trees and although they were only 2 to 3 metres high when she first moved in, in time, these trees grew to a height of 16 metres obstructing both her sunlight and views. Ms Ingham tried unsuccessfully to reach an agreement with both neighbours to prune their hedges and eventually she applied to the Land and Environment Court for an order under the Trees Act.

In 2016 the court heard the dispute as two separate cases and although there were some differences, the cases were decided in a similar fashion. In the case of one neighbour, the obstruction to sunlight was not considered severe but the obstruction to the views was. In the case of the other neighbour, both the obstruction to sunlight and to views was considered severe.

The court held that instead of having views of a broad landscape, including sky and distant trees, Ms Ingham now had only a narrow view down to the rear of her property. “This is not an inner urban environment where views are inherently more restricted. It seems reasonable for someone living on a large residential property on the outskirts of a town such as Blackheath to expect broader views, especially when such a view was enjoyed earlier.”

The court went on to decide that the hedges were not considered to be of historic or cultural value, have no great public amenity, do not impact on soil stability and don’t seem necessary for privacy. Also they are evergreen and so provide a year-round obstruction.

In both cases the court ordered that the hedges be pruned and/or removed and replanted using a different species, all at the neighbours’ cost.

Ingham v Scenna [2016] NSWLEC 1001 [57]

Ingham v Pettigrew [2016] NSWLEC 1002 [58]

A decision made under the Trees Act can be appealed on a question of law only. This means, if you do not like the Court's decision, you can only appeal it on the grounds that an error of law has been made (Land and Environment Court Act 1979, section 56A).

For disputes that do not fall within the Court’s jurisdiction under the Trees Act, for example where the offending tree is on a property that is not technically an ‘adjoining’ property, an action in the Supreme Court for nuisance would be required.

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