

# Trees

***Problems with trees result in many disputes between neighbours. Generally, there are no restrictions on the type or number of trees that land owners or occupiers may plant or allow to grow on their land. The law provides for the control and eradication of noxious plants, but apart from this the main aim of regulation has been to preserve trees.***

On 2 February 2007, a new law, the *Trees (Disputes Between Neighbours) Act 2006* commenced. The Act was designed to provide a simple, inexpensive and accessible process for resolving disputes between neighbours about trees. Previously the law relied on areas of the common law to resolve issues regarding trees. 'Nuisance', was a common law protection of the right of a land owner to enjoy their property without interference. 'Abatement' is a common law remedy for nuisance, that allowed the landowner whose enjoyment was being interfered with to take matters into their own hands. These areas of law were not considered to be well-suited to resolving disputes between neighbours in the urban environment.<sup>1</sup>

## **PLANTING TREES**

The *Noxious Weeds Act 1993* prohibits the planting or growing of 'noxious' plants in your garden. Under this Act, occupiers must also control noxious weeds on their land. You can find a list of 'noxious weeds' at [www.dpi.nsw.gov.au/agriculture/pests-weeds/weeds/noxweed](http://www.dpi.nsw.gov.au/agriculture/pests-weeds/weeds/noxweed). Local councils are responsible for the control of noxious weeds in their local government area and may issue a 'weed control notice', requiring an occupier to carry out weed control.

Apart from noxious weeds, you do not need to get council approval before planting a tree or plant. However, as trees can block drains, damage buildings or block views, it is best to carefully consider where you will plant a tree to avoid future problems.

## **TREE PRESERVATION ORDERS**

Local councils have the power to make orders for the protection of trees in their local government area. 'Tree Preservation Orders' (TPOs) are Environmental Planning Instruments made under the *Environmental Planning and Assessment Act 1979* (NSW). Tree Preservation Orders may prohibit, unless the council has consented, the ring barking, cutting down, lopping, removing, injuring or wilful destruction of any tree or trees specified in the TPO. The council may impose any conditions it thinks fit on giving that consent. The council must publish TPOs in the NSW Government Gazette and publicise them in the local newspaper. Many councils have provisions about tree preservation as part of their Local Environmental Plans. These may include detailed provisions about applying for consent.

It is important *before* pruning or lopping a tree to find out if the tree is protected by a TPO. Contact your local council for a list of protected trees in your area. There are heavy fines for breaching a TPO.

If the tree is protected, approval may be obtained from the local council to prune or remove it if:

- the tree is dead or damaged or about to fall or cause some other immediate damage
- there are problems with roots blocking sewerage or other pipes
- the tree is threatening a building or structure
- the tree is on a boundary and you or your neighbours want to erect a dividing fence
- branches are threatening roof tiles or some other damage, or if overhanging branches are causing a nuisance

If the council does not grant approval to prune or remove a tree subject to a tree preservation order, you can appeal to council to review their decision. If the council rejects your appeal, you can appeal to the Land and Environment Court.

The local council is responsible for any trees in a public area so any problems should be referred to the council.

## TREES (DISPUTES BETWEEN NEIGHBOURS) ACT 2006

The new legislation only applies to trees in areas that are zoned under an environmental planning instrument as:

- residential
- township
- industrial
- business.

Your local council can help you with information about zoning. Trees that are on land owned or managed by local council are currently exempt, but it is expected that they may be covered by the scheme, possibly after the legislation is reviewed in 2009.

The *Trees (Disputes Between Neighbours) Act* removes the previous action for 'nuisance' as a result of damage caused by a tree (section 5). An owner (or occupier) of land may apply to the Land and Environment Court for orders to:

- remedy, restrain or prevent damage to property
- prevent injury to any person

as a consequence of a tree on an adjoining property. The court must be satisfied that the person who is applying for the order has made a reasonable effort to reach an agreement with their neighbour.

The person applying for the order must give 21 days notice of the application to the owner of the land on which the tree is situated, the relevant authorities and anyone else they believe would be affected by the order. If the court considers it appropriate to do so, it may waive this requirement if, for example, it is considered urgent for safety reasons.

The first hearing of the application will involve an informal conciliation conference aimed at resolving the dispute.

The court can order that:

- action be taken to remedy damage to property; or to prevent damage to property, or to prevent further damage where damage has already occurred
- action be taken to prevent injury to any person
- an application to obtain consent be made
- entry on to land is authorised for the purposes of carrying out an order (including for obtaining quotations for carrying out the work)
- costs associated with carrying out an order be paid
- compensation for damage to property be paid
- a tree that is removed by court orders is replaced, and that the new tree is maintained to a mature growth.

### CASE STUDY

The case concerned (in part) the falling of leaves and small pieces of deadwood from a tree onto the applicant's Erina property. The applicant wished to have the tree removed as he found the maintenance required too difficult for him to carry out personally. The court formed the conclusion that the tree was healthy and not defective, and that the amount of material it dropped was quite normal.

The court stated as a principle to be applied in similar cases:

*"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.*

*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."*

Barker v Kyriakides [2007] NSWLEC 292

The court can only make an order if it is convinced that the tree in question has caused, is causing or is likely to cause in the near future, damage to the applicant's property, or is likely to injure someone. (As mentioned earlier, the court must also be satisfied that the applicant has made a reasonable effort to resolve the dispute with their neighbour, and that 21 days notice of the application has been given.)

The court takes into consideration a wide range of matters under section 12 before making an order. The section includes such things as:

- the location of the tree in relation to the land boundary,
- whether the tree has any historical, cultural, social or scientific value,
- the contribution of the tree to the local landscape, ecosystem and biodiversity,
- its public amenity value
- impact on soil stability and the water table
- other factors that could contribute to the damage or danger posed by the tree
- any steps taken by the landowner to prevent the damage or injury

Any orders made by the court remain with the land, so if the land is sold without the work having been carried out, the new owners will have to carry out the work if they are given notice of the orders.

Where the landowner does not carry out the work, the council may choose (but is not obliged) to arrange for the work to be carried out and can take court action to recover reasonable costs for carrying out the work.

It is considered that the Land and Environment Court is better suited to dealing with disputes over trees, as it is a specialist environmental court. The court's judges and commissioners have extensive experience in dealing with matters relating to trees and vegetation, as well as in dealing with local environmental planning instruments.

The Act does not specifically cover disputes between neighbours over light access and views. The NSW Government stated when the Act was introduced that these matters would be kept under review.<sup>2</sup>

The Land and Environment Court website has information about applications and details about applications that were successful or unsuccessful. Application forms are also available from the Land and Environment Court webpage which is part of the Attorney-General's Lawlink website. Go to [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au) and select 'Courts & tribunals' from the left side; then select 'Land and Environment Court' under NSW. Click on 'Tree disputes' in the Quick Links box. Local council can help you with the lot and deposited plan (DP) numbers that are needed to fill out an application (they are also on council rate notices).

1. See the NSW Law Reform Commission Report No 88 'Neighbours and Neighbour Relations', 1988. Available online at [www.lawlink.nsw.gov.au/lrc.nsf/pages/R88TOC](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R88TOC).

2. NSW Legislative Assembly Hansard.