Victorian Law Reform Commission

Neighbourhood Tree Disputes

REPORT JULY 2019

A COMMUNITY LAW REFORM PROJECT

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Preface

> *The tree which moves some to tears of joy is in the eyes of others only a green thing that stands in the way.* —William Blake, *The Letters* (1799)

This report responds to a number of suggestions from the community about an urgent need to improve the law to help neighbours resolve their disputes about trees. The inquiry was initiated by the Commission as part of its community law reform program.

Neighbourhood tree disputes affect many people in the Victorian community and may become more common as our population expands and our gardens get smaller. Similarly, as our communities place increasing importance on the urban forest, and become more aware of climate change, there may be more objections about the removal of vegetation in our neighbourhoods.

Tree disputes are often about overhanging branches, encroaching roots, leaf litter, the presence of large trees close to boundary lines, and the loss of vegetation. Because of the proximity of neighbours and the tendency of these disputes to harm neighbour relations, it is important to resolve them quickly. Often this does not occur because the current methods for resolving tree disputes are unclear and confusing. As a result, disputes may remain unresolved and neighbourly relations may be strained. In exceptional cases, criminal actions may occur.

It is hoped that the recommendations made in this report will bring greater clarity to the law governing the resolution of neighbourhood tree disputes in Victoria.

The key recommendation is for the introduction of a Neighbourhood Tree Disputes Act that will assist people to resolve their disputes quickly, affordably and effectively. Management of the new Act should be given to the Victorian Civil and Administrative Tribunal (VCAT). VCAT's processes are informal, flexible and widely accessible, and its matters are concluded quickly.

I wish to thank the many people who provided submissions, met with the Commission, completed the online survey and otherwise assisted in this inquiry. Your valuable contributions have helped the Commission formulate its recommendations and we are grateful for your time and attention to the issues.

This inquiry was led by the Hon. Philip Cummins AM, Chair of the Commission, until his passing in February 2019. The report's delivery has been consequently delayed. Philip was passionate about involving the community in law reform and believed that the Commission's community law reform function was fundamental to its role. He enjoyed engaging with people about how the law could be improved and how it could keep pace with community ideas and expectations. Philip approached this inquiry with great enthusiasm and guided the direction of the final report.

I thank the Commissioners who comprised the Division that worked on this Inquiry: Liana Buchanan, Dr Ian Hardingham QC, Alison O'Brien PSM, Professor Bernadette McSherry and Gemma Varley PSM. They have contributed as a group to the Commission's thinking about the practical problems facing the community and the recommendations for change. I particularly thank Gemma Varley who gave her time generously and provided additional expert guidance and input.

The production of this report has been a lengthy and complex undertaking, involving consideration of many areas of law. I am grateful to the research and policy team who have worked tirelessly to produce high quality work. Emma Cashen completed the Commission's consultations and led the production of the report with expertise and commitment. I thank Hana Shahkhan and Anna Woods for their dedication to this project. Their research, writing and analytical skills were invaluable.

My thanks to Natalie Lilford, Community Law Reform Manager, who led the development of the consultation paper and conducted early consultations that shaped the direction of this report before she commenced parental leave. Andrea Lane provided invaluable research assistance in the final stages. Nick Gadd expertly guided the editing and production process. Gemma Walsh has provided invaluable research and library resource support. Finally, my thanks to the CEO, Merrin Mason, for her assistance and guidance over the course of this inquiry and Lindy Smith, Acting CEO, in the final stages.

I commend this report to you.

Bruce Gardner PSM

Acting Chair
Victorian Law Reform Commission

June 2019

Terms of reference

Matter initiated by the Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 8 June 2017.

The Victorian Law Reform Commission will examine the current legal framework for resolving disputes between neighbours about trees on private neighbouring land that cause damage and/or harm ('neighbourhood tree disputes'), and consider whether the law should be amended to provide just, effective and timely methods for resolution of neighbourhood tree disputes.

In conducting this review, the Commission will have particular regard to:

- recent legal developments in Australian and international jurisdictions, including the relevant statutory schemes in New South Wales and Queensland, and
- any alternative schemes for resolving neighbourhood tree disputes.

The Commission will not consider:

- disputes concerning trees situated on public land
- disputes concerning the obstruction of sunlight and views by neighbouring trees.

The Commission will report to the Attorney-General by 9 May 2019.

Glossary

Abatement	A common law self-help remedy that in the context of this report allows **affected neighbours** to remove parts of a tree that **encroach** onto their land up to their boundary line.
Affected neighbour	The person whose land (or use of the land) is affected by the neighbour's tree; usually the plaintiff (aggrieved party) in court proceedings.
Alternative dispute resolution (ADR)	Any formal process, other than court or tribunal proceedings, in which an impartial person assists parties to resolve their disputes.
Arborist	A qualified professional trained in cultivating, caring for, and maintaining trees.
Australian Qualification Framework (AQF)	The national policy for regulating qualifications in Australian education and training, incorporating the qualifications from each education and training sector into a single comprehensive national framework. The AQF sets out specific formal training standards for **arborists** and people working in the tree-care industry.
Cause of action	The facts that give rise to a legal claim and entitle a person to have a matter heard in a tribunal or court.
Damage	A term used in the report to describe a negative impact on property or land, including property being destroyed.
Dispute Settlement Centre of Victoria (DSCV)	Government-funded provider of free dispute settlement services to the Victorian community.
Diversity jurisdiction	The authority to exercise judicial power to resolve disputes between residents of different states.
Encroachment	When a tree (or parts of a tree) crosses over boundary lines and enters adjoining land.
Harm	A term used in the report to describe an impact on the health or safety of a person, including injury or death.
Informal dispute resolution	Negotiating an outcome outside court or tribunal proceedings. It encompasses legal methods such as **mediation**, and interpersonal methods such as neighbours talking to each other to resolve a dispute.
Jurisdiction	The authority of a court or tribunal to hear cases brought to it.

Local laws	Laws passed by local councils to protect public health, safety and amenity. Tree protection laws are an example of local laws.
Mediation	A method of dispute resolution that involves bringing parties together to discuss a dispute and reach an agreement.
Land and Environment Court of New South Wales (NSWLEC)	In New South Wales, the court that hears neighbourhood tree disputes.
Online dispute resolution (ODR)	A range of technology-assisted methods for resolving disputes.
Planning scheme	A planning scheme is a statutory document which sets out objectives, policies and provisions for the use and development of land.
Queensland Civil and Administrative Tribunal (QCAT)	In Queensland, the tribunal that hears neighbourhood tree disputes.
Resource Management and Planning Appeal Tribunal (RMPAT)	In Tasmania, the tribunal that hears neighbourhood tree disputes.
Responsible authority	Under the *Planning and Environment Act 1987* (Vic), a responsible authority, usually the local council, is the party responsible for the administration and enforcement of a **planning scheme**.
Standing	The right to bring proceedings before a court or tribunal. To have standing in a case a person must be able to show that they have sufficient interest in the case, for example, because of possible effects on themselves, their property or activities.
Statutory scheme	A scheme based on specific legislation passed by Parliament, rather than on the common law (judge-made law).
Tort	A civil wrong, and type of **cause of action**. Nuisance, negligence and trespass to land are types of torts.
Tree owner	The person who owns the land on which the relevant tree is located.
Urban forest	The urban forest refers to trees and other vegetation growing in urban space. Many Victorian councils have policies relating to the protection and preservation of the urban forest.
Victorian Civil and Administrative Tribunal (VCAT)	In Victoria, the tribunal that hears civil and administrative claims.
Victorian Planning Provisions (VPPs)	A set of stardard planning provisions that are incorporated into local **planning schemes**.

Executive summary: neighbourhood tree disputes

1 On 8 June 2017 the Commission initiated an inquiry on ways to provide just, effective and timely methods for resolving neighbourhood tree disputes on private land in Victoria.

2 The Commission's key recommendation is to introduce a Neighbourhood Tree Disputes Act. This recommendation responds to community calls for better guidance from the law about how to resolve these disputes.

The scope of the problem

3 In an increasingly urbanised environment, people's decisions about their land and trees can have a significant effect on their neighbours' homes and lives. The Commission has heard that these disputes are common. Concerns about neighbourhood trees were the third most common enquiry to the Dispute Settlement Centre of Victoria from December 2011 to May 2017.

4 Most disputes relate to overhanging branches, encroaching roots and the presence of large trees, but other issues also exist.

5 Although tree disputes are common, few of them go to court or are resolved with legal assistance because legal action is expensive and outcomes are uncertain. People often contact multiple agencies for assistance and are frustrated when they cannot obtain clear advice about what they can or cannot do to resolve their dispute. As a consequence, tree disputes may remain unresolved. This is problematic because quick resolution is desirable. Tree disputes give rise to impassioned responses because they can be seen to challenge a person's ownership and enjoyment of their land. They can cause significant distress and lead to or amplify poor relations between neighbours. Sometimes they escalate to trespass, criminal damage or other criminal behaviour.

6 While these disputes may appear straightforward, they are often complex. They have an emotional dimension and a range of factors prevent them from being resolved, including:

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

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

The law is complex

8 The current methods for resolving these disputes—from informal negotiation to litigation—are unclear and confusing. 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.

9 Information to help people resolve their disputes is hard to find. Community members must piece together information published by different government and community agencies to work out a possible resolution process.

10 The community does not have a good understanding of which experts can assist them. In particular, there is a lack of understanding about the role and qualifications of arborists.

The law provides limited remedies

11 Legal action in relation to tree disputes in Victoria is currently based on the common law torts of negligence, nuisance and trespass. These torts do not allow much scope to obtain a remedy that will prevent damage or harm from occurring. Affected neighbours may have to wait for the damage or harm to occur before they can take legal action. This is reactive and counter-productive.

12 An affected neighbour who exercises their common law right to abate by pruning to a boundary line cannot recoup any costs from the tree owner. They may be left significantly out of pocket or unable to arrange any tree works because of the costs involved. The legal requirement to return abated vegetation can itself create disputes or make existing problems worse, particularly when neighbours throw vegetation back over the fence.

13 These disputes can be characterised as a competition of rights: the tree owner's right to use and enjoy the land in any lawful manner, and the affected neighbour's right to enjoy their land without unreasonable interference. However, they have another dimension. The need to retain and protect vegetation is increasingly important to our community because it improves the liveability of our urban environments.

14 Some councils receive as many enquiries about the loss of vegetation from a neighbour's property as they do about a neighbour's tree causing damage or harm to the affected neighbour's property. The main remedies are court orders for an injunction or damages. These remedies 'aim to rectify specific personal losses, but do not address the interests of the public at large in the aesthetic, historical, cultural or environmental values associated with trees'.[1]

A new Neighbourhood Tree Disputes Act

15 The Commission recommends the introduction of a Neighbourhood Tree Disputes Act in Victoria, managed by the Victorian Civil and Administrative Tribunal (VCAT).

16 New South Wales, Queensland and Tasmania have enacted legislation to govern the resolution of tree disputes. The legislative schemes in New South Wales and Queensland appear to have had positive outcomes. The Tasmanian scheme only commenced in December 2017. The number of applications handled by the Land and Environment Court of New South Wales (NSWLEC) and the Queensland Civil and Administrative Tribunal (QCAT) each year is relatively low, and the Commission has been advised that matters can be resolved quickly and affordably. These schemes provide a good guide for Victoria.

17 A new Act is the best way to ensure the fast, cheap and effective resolution of these disputes. Community responses overwhelmingly support this option.

1 Margaret Davies and Kynan Rogers, 'Tale of a Tree' (2014) 16 *Flinders Law Journal* 43, 52.

18 The aims of the new 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
- balance competing rights and interests fairly and transparently and use evidence-based decision making
- interact simply with other laws without disrupting established policy wherever possible.

19 Supporting material should be created to help the community understand:

- how the new Act works in practice
- how to progress a matter through VCAT
- what professional assistance is available
- how to manage vegetation to prevent disputes arising.

Key features of the new Act

Cause of action

20 It is recommended that the new Act enable VCAT to make orders:

- to restrain or remedy damage to the affected neighbour's land or property that is caused by a tree, or prevent damage that is likely to occur within the next 12 months
- to 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.

21 The Commission has not considered a compensation scheme for harm suffered. Instead the focus in the new Act is on practical remedies related to tree management.

22 The Commission considers that the torts of trespass, negligence and nuisance should continue to be available in the courts because they can provide unique remedies in broader contexts that may be useful.

23 Interference caused by a tree that amounts to annoyance but does not cause actual property damage or harm should not be actionable under the new Act. Matters such as the dropping of leaf litter that creates a mess in a neighbour's driveway are an ordinary part of community life in urban environments. Similarly, unless an affected neighbour could establish that an overhanging branch was causing damage or harm, the Act would not provide a remedy.

The scope of the Act

24 The Commission's recommendations about the scope of the new Act include:

- 'Tree' should be defined broadly to include Australian flora and introduced trees, and all parts of a tree, as well as dead trees, trees that have been removed and plants that resemble a tree in form and size.
- The Act should apply to trees on residential land and to other designated land zones. The Act should also apply to land that has the substantial character of the zones designated in the Act. The exclusion of some farming and rural land and land that is used for commercial timber plantations is consistent with interstate Acts. The Commission recommends that the breadth of the zoning provisions is revisited when the Act is reviewed and that further consultation occur with farmers and users of agricultural land at that time.

- An affected neighbour's land must adjoin a tree owner's land with a common boundary, or be separated by a thoroughfare or other area specified in the Act.
- If a tree straddles a boundary line, an affected neighbour should be able to bring a claim regardless of how much of the tree is on the affected neighbour's land.
- Legal action may be commenced by an affected neighbour who is the owner of the affected land, or an occupier where the owner has refused to take action. Action can only be brought against the owner of the land with the tree.

25 The Commission recommends that VCAT consider developing an application form based on those used in the NSWLEC and QCAT. The form should ask for extensive information from the parties upfront to help the decision maker determine the suitability of matters for alternative dispute resolution and to narrow the issues in dispute if the matter proceeds to a hearing.

Informal resolution

26 Introducing a new Act and providing clarity in the law will assist the community to resolve their disputes informally outside VCAT. A new Act will also reduce the number of enquiries to the Dispute Settlement Centre of Victoria and help it to resolve those enquiries and mediate disputes.

27 Resolving disputes informally allows neighbours to come up with creative solutions and maximises the chances of preserving neighbourly relations. It is also cheaper than going to court.

28 The Commission makes recommendations to improve awareness about existing informal resolution options such as:

- abatement
- neighbour-led negotiation
- free mediation via the Dispute Settlement Centre of Victoria.

29 The common law remedy of abatement should be modified by the new Act so that pruned tree branches and other material are not required to be returned to the tree owner. The Commission identified that this common law requirement can make disputes worse.

30 Some community responses favoured including responsibilities for tree owners in legislation. The Commission does not support the introduction of non-binding responsibilities for tree owners, or a requirement that parties have attempted to resolve the dispute informally before VCAT will make an order or the matter can proceed to a hearing, as occurs in some states.

31 The Commission provides its preliminary views about including a formal branch removal process in the new Act to address concerns about overhanging branches that do not result in damage or harm to people. This mechanism is included in legislation in Queensland and Tasmania. The Commission suggests that the usefulness of this process be considered when the Act is reviewed. At that time Government should consult with the Queensland and Tasmanian governments, dispute resolution centres and community legal centres about the effectiveness of this mechanism interstate and how it might work in Victoria.

VCAT to determine tree disputes

32 Tree disputes should be adjudicated in VCAT because its processes are most suited to the needs of the community. A VCAT framework will ensure that costs are kept to a minimum. It will be possible to use VCAT's existing alternative dispute resolution programs, as well as its expertise in planning and environment matters and civil claims. VCAT is specifically designed for parties without legal representation and is less formal than a court.

The expertise of decision makers

33 The Commission recommends that Government consider appointing to VCAT expert members with extensive arboricultural experience to hear these disputes on site, as occurs in New South Wales. Alternatively, VCAT should consider the Queensland approach of using Tribunal-appointed independent tree assessors to conduct on-site inspections and provide reports to VCAT, with the cost shared by the parties.

Decision-making principles

34 The new Act should facilitate evidence-based, transparent and consistent decision making. This will require mandatory and comprehensive decision-making principles to help decision makers to balance competing rights and interests fairly and transparently. They will also help people to resolve their own disputes outside a formal VCAT hearing or in mediation.

35 Decision-making principles are a feature of comparable interstate legislation and some local council and planning laws in Victoria. It is recommended that the list of decision-making principles in the Act be comprehensive but also provide VCAT with the discretion to consider additional relevant matters. Principles should include:

- the broader benefits of the tree to the community
- the requirements of other laws
- whether anything other than the tree may have contributed to the damage or harm
- whether the tree existed first in time
- the location and health of the tree
- any steps taken by the affected neighbour or owner to resolve the dispute.

Expert evidence in VCAT

36 VCAT hearings should be informed by arboricultural evidence.

37 The Commission recommends minimum qualification standards for arborists and independent tree assessors who provide evidence to VCAT. Minimum qualification levels will help ensure trees are properly assessed in accordance with industry-approved risk assessment methods and will guide the community when hiring arborists.

38 VCAT should develop a specific Practice Note about the need to demonstrate a causal link, supported by expert evidence, between the tree and the harm (for example, a medical condition) that is the subject of the application.

39 Additional recommendations outline requirements for expert report writing.

Remedies and appeals

40 The Commission recommends that the Act should provide for timely, practical and effective remedies for tree disputes. These will provide guidance to the community about the likely outcomes if a matter proceeds to hearing.

41 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.

42 While existing appeal mechanisms in VCAT are appropriate, the new Act should allow the parties to apply to VCAT to vary or revoke the original order where new circumstances are not accommodated in the original order. Trees are dynamic, living organisms and the facts relating to disputes can change over time. However, such applications should be limited to one per year to prevent vexatious applications and provide certainty to the parties.

43 The new Act should include a penalty for failure to comply with an order. To facilitate the

practical resolution of a dispute, where an order is not complied with, the Commission recommends that a party be able to apply to VCAT for permission to enter the tree owner's land and carry out the works themselves. Reasonable costs incurred as a result should be able to be recouped from the non-complying party as a debt in the relevant court and safeguards should apply for entry to the neighbour's land.

Interaction with other laws

44 In the interests of adopting a straightforward, accessible and timely statutory scheme, the Commission wishes to avoid the involvement of multiple decision makers and multiple decision-making frameworks. To achieve this, orders made under the new Act should supersede some requirements under other laws, subject to safeguards.

45 These safeguards will ensure that VCAT can consider information that would have been considered under the other law. Other responsible authorities will be invited to participate in the hearing process. Additional safeguards are recommended for particular laws.

The need to obtain a planning permit to carry out works on a tree

46 The Commission recommends that the existing permit exemptions in the Victoria Planning Provisions under the *Planning and Environment Act 1987* (Vic) be expanded to include orders under the new Act. This would mean an Order under the new Act would have effect despite any requirement to obtain a permit to remove, prune or destroy vegetation under overlay requirements or native vegetation provisions. If the requirements of the new Act were satisfied a party would not need to obtain a permit under these planning provisions before applying to VCAT for a remedy. Recommended safeguards aim to ensure minimal interruption to established policies.

Local laws

47 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 root protection zone.

48 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. Fulfilling this requirement would be impractical and place an unreasonable burden on applicants.

49 An order under the new Act should override local laws. Safeguards should extend to giving significant weight in the decision-making process to local laws and policies already in place.

The Heritage Act

50 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 only allow 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.

51 The Commission recommends amending the Heritage Act to provide that it is subject to any order made pursuant to the new Act where the tree has been assessed as posing an imminent danger to life or property. Because heritage-listed trees are important to Victoria, the Commission recommends interfering with existing laws only in emergencies. VCAT would need to consider the factors Heritage Victoria would have addressed in a permit decision, and any replanting requirements to maintain the heritage value of the landscape.

The Aboriginal Heritage Act

52 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 are best left to Registered Aboriginal Parties or Aboriginal Victoria.

The Fences Act

53 The Magistrates' Court has jurisdiction to decide matters under the *Fences Act 1968* (Vic). The Commission recommends that 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 in this situation for orders to be made about the tree and the fence at the same time by the same decision maker. The Commission recommends amending the Fences Act to provide VCAT with this jurisdiction.

The Catchment and Land Protection Act

54 The *Catchment and Land Protection Act 1994* (Vic) places obligations on land owners to manage listed weeds. Directions can be issued under this Act to land owners to take measures to control or eradicate weeds.

55 The new Act should apply to recognised weeds that meet the definition of 'tree' in the Act and where the problem caused by the weed fits within the ambit of the proposed Act. To do otherwise would prevent a number of tree disputes from being resolved. VCAT should consider any past actions taken by the landowner under this Act when determining the scope of orders.

Other Acts and laws

56 This report provides the Commission's views about the interaction of the new Act with other existing planning mechanisms and laws. Further consultation is required to determine the extent to which some of these laws might interact with the new Act.

New owners of land

57 The new Act should clearly outline the rights and obligations of new land owners about trees that have been or are the subject of a formal tree dispute. This will give the tree dispute finality, and the parties certainty, about how to manage the tree. It will also avoid duplication of legal proceedings. The new 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
- state that only immediate new owners may benefit from orders
- avoid adding extra steps or complexity to the sale of land process.

Future review

58 The new Act should be reviewed after five years of operation to determine if it is achieving its objectives. The Commission identifies some particular matters for consideration by Government when the Act is reviewed.

59 The Commission's preliminary views on some matters beyond the scope of this inquiry are provided at the conclusion of this report, as well as other issues that should be considered by the Government in designing the new Act, for example online dispute resolution.

Recommendations

Chapter 4

1 A new Act should be introduced to govern the process for resolving disputes between neighbours about trees on private land in Victoria. The new Act could be titled the Neighbourhood Tree Disputes Act.

Chapter 5

2 The Act should define 'tree' to mean:

(a) any woody perennial plant

(b) any plant resembling a tree in form and size

(c) vines, cacti, palms, bamboo

(d) any other plant prescribed by Regulations.

3 'Tree' should also include:

(a) all parts of the tree, whether joined to the main structure or separate

(b) a tree that has been partially or wholly removed

(c) a dead tree.

4 The Act should apply to trees on privately owned land that is:

(a) within a zone designated residential, commercial, industrial, green wedge, rural living and rural conservation under a Victorian planning scheme or a zone that has the substantial character of one of these zones, or

(b) within a special purpose zone designated as capital city, docklands, activity centre, priority development, comprehensive development and urban growth, or

(c) prescribed in regulations.

5 The Act should not apply to land that is zoned farming, rural activity, special use, urban floodway or port or to land that is used for commercial timber plantation.

6 The Act should apply only where an affected neighbour's land adjoins the tree owner's land.

7 The Act should define 'adjoin' to mean land that shares a common boundary, or would share a common boundary were it not separated by:

(a) a public road

(b) a pedestrian path

(c) a laneway

(d) a bridge

(e) a culvert or

(f) other similar thoroughfare prescribed in Regulations.

8 If a tree subject to the dispute straddles boundary lines the Act should:

(a) allow the affected neighbour to bring an application irrespective of the proportions of the tree on each parcel of land, and

(b) provide the Victorian Civil and Administrative Tribunal with a discretion to consider the proportions of the tree on each party's land in making orders.

9 A determination about the proportions of the tree owned by the respective parties should be made by measuring the location of the base of the trunk at ground level on each parcel of land.

10 A person may apply to the Victorian Civil and Administrative Tribunal for an order under the Act if they are:

(a) the owner of the land affected by a tree (affected neighbour), or

(b) an occupier of land affected by a tree if the owner of land has refused to commence proceedings.

11 The Act should allow an application to be brought against the owner of the land on which the tree is situated (the tree owner).

12 An applicant may apply to the Victorian Civil and Administrative Tribunal for an order under the Act to:

(a) restrain or remedy damage to the affected neighbour's land or property that is caused by a tree

(b) prevent damage to the affected neighbour's land or property that is caused by a tree that is likely to occur within the next 12 months

(c) address existing harm to anyone on the affected neighbour's land that is caused by a tree

(d) prevent harm to any person on the affected neighbour's land that is caused by a tree that is likely to occur within the next 12 months.

13 The affected neighbour should be required to notify affected parties of an application and the remedies sought within 21 days of lodging the application.

14 'Affected parties' should be defined in the Act to mean:

(a) the tree owner/s

(b) any relevant authority that would otherwise be required to issue consent in relation to any works to the tree

(c) any other person that the applicant thinks will be affected by the order.

15 The Act should state that the Victorian Civil and Administrative Tribunal may waive these notice requirements where the tree poses an imminent risk of causing damage or harm or where it is appropriate in the circumstances to do so.

16 The Victorian Civil and Administrative Tribunal should consider developing a detailed application form that is modelled on the application forms for initiating a tree dispute in the Land and Environment Court of New South Wales and the Queensland Civil and Administrative Tribunal. Additional information should be sought in the application form about:

(a) the species of the tree and whether it is a recognised weed

(b) the steps the parties may have already taken to resolve their dispute

(c) how the decision-making principles in the Act are addressed

(d) the zone of the land the tree is situated on and any applicable planning scheme, overlay or other requirement affecting the management of the tree that the applicant is aware of under the *Planning and Environment Act 1987* (Vic) or any other Act or law

(e) whether any remedies are sought under the *Fences Act 1968* (Vic) to rectify damage to a fence caused by a tree or to prevent damage or harm from a tree that forms part of a fence

(f) any assessments or quotes that may have already been obtained from experts

(g) whether the applicant is the owner or occupier of the land. If the applicant is an occupier of land, evidence that the owner has refused to make an application

(h) whether any party has entered into a contract for the sale of land to ensure that the Victorian Civil and Administrative Tribunal is aware of all relevant parties to the dispute.

(i) the names of other parties and information about proportional ownership if a tree trunk straddles a boundary.

Chapter 6

17 The Act should state that the affected neighbour and tree owner are encouraged to resolve their dispute informally but that the affected neighbour may apply to the Victorian Civil and Administrative Tribunal to resolve the dispute.

18 The Act should include a non-exhaustive list of examples of informal resolution approaches including:

(a) communicating with the other party to notify them of the issues (including providing a quotation or arborist's assessment) and negotiate with them

(b) exercising the right to abate

(c) engaging in alternative dispute resolution, such as mediation through the Dispute Settlement Centre of Victoria.

19 The Act should modify the common law right to abate to the extent that abated tree parts such as branches, roots, fruit and other material are not required to be returned to the tree owner unless the neighbours have agreed otherwise.

Chapter 7

20 The Victorian Civil and Administrative Tribunal should have original but not exclusive jurisdiction to determine tree disputes under the new Act.

21 Any Government consideration of diversity jurisdiction issues that apply to the Victorian Civil and Administrative Tribunal should also include consideration of the new Act.

22 The Victorian Civil and Administrative Tribunal should consider extending the Fast Track Mediation and Hearing Program administered by the Dispute Settlement Centre of Victoria in VCAT to suitable tree disputes.

23 Government should consider appointing members with arboricultural expertise to the Victorian Civil and Administrative Tribunal to hear tree dispute matters. Alternatively, in order to obtain expert opinions on arboriculture matters and to obtain the complete context of the dispute, the Victorian Civil and Administrative Tribunal should consider adopting the Queensland Civil and Administrative Tribunal approach of using independent tree assessors throughout Victoria.

24 The Victorian Civil and Administrative Tribunal should conduct on-site final hearings or on-site inspections for all tree disputes.

Chapter 8

25 The Act should state that before determining an application the Victorian Civil and Administrative Tribunal must consider the following matters to the extent that they are relevant to an application:

(a) the location of the tree in relation to the boundary of the land and any structures or premises

(b) the condition of the tree in respect of its health and structural integrity

(c) whether works to the tree would require any consent or authorisation under other Acts or laws and, if so, whether the consent or authorisation has been obtained

(d) the provisions of the planning scheme which apply to the land under the *Planning and Environment Act 1987* (Vic) including relevant zones and overlays and the provisions of other relevant Acts or laws that apply to the land or tree

(e) the impact any pruning, including the impact of maintaining the tree at a particular height, width or shape, would have on the tree

(f) any contribution the tree makes to:

i. the amenity of land on which it is situated, including its contribution to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke

ii. the local ecosystem and biodiversity

iii. the natural landscape and scenic value of the land

(g) whether the tree has any historical, cultural, social or scientific value. This includes a tree that is part of Aboriginal cultural heritage under the *Aboriginal Heritage Act 2006* (Vic) or is a registered tree or is situated in a Victorian heritage place under the *Heritage Act 2017* (Vic).

(h) any impact the tree has on soil stability, the water table or other natural features of the land or locality

(i) anything, other than the tree, that has contributed, or is contributing, to any harm or damage or likelihood of harm or damage, including:

i. any act or omission by the applicant and the impact of any other trees owned by the applicant

ii. any steps taken by the applicant or the owner of the land on which the tree is situated to prevent or rectify damage

(j) whether the tree and any risk, obstruction or interference associated with the tree existed before the affected neighbour began to occupy the land affected by the tree

(k) whether the tree is a recognised weed

(l) such other matters as the decision-making body considers relevant in the circumstances of the case.

26 The Act should require that arborists who provide evidence to the Victorian Civil and Administrative Tribunal hold a relevant arboricultural qualification of minimum Australian Qualifications Framework (AQF) Level 5 or equivalent and have at least two years practical experience.

27 The Victorian Civil and Administrative Tribunal should direct experts in tree dispute matters to comply with clause 11 of Practice Note PNVCAT2: Expert Evidence, 1 October 2014 with the following additional requirements:

(a) a requirement that the on-site assessment has been undertaken during the three months leading up to the hearing

(b) a detailed description of the assessment methodology relied upon, including the date of the tree inspection and any limitations of the assessment

(c) a record of the expert's observation of the tree, providing an assessment of the categories for the tree's health, condition, form and structure

(d) a photograph supporting observations and highlighting points of interest

(e) details of the local planning scheme overlays and local laws applying to the tree

(f) information about whether the tree is remnant, indigenous, native, exotic or weed species

(g) information about the retention value of the tree based on the objectives of the local planning scheme or the local law.

28 The Victorian Civil and Administrative Tribunal should develop a Practice Note about the requirement for a causal link between the tree and any harm, such as a medical condition, that is the subject of an application.

Chapter 9

29 The Act should provide the decision maker with broad discretion to make such orders as it considers appropriate, including:

(a) requiring the taking of specified action

(b) enabling entry to land for the purposes of carrying out an order or to obtain a quote for carrying out the tree works

(c) requiring the payment of the costs of tree works

(d) requiring the payment of compensation for property damage

(e) requiring a replacement tree to be planted in a specified location and to be maintained to mature growth if a tree is ordered to be removed, or

(f) requiring ongoing maintenance for a specified time period.

30 The Act should require that work that is carried out pursuant to orders complies with the relevant Australian Standards and undertaken by a suitably qualified arborist as determined by the Victorian Civil and Administrative Tribunal.

31 The Act should require the Victorian Civil and Administrative Tribunal to provide a copy of any orders made to any relevant authority who would otherwise be required to authorise or consent to works on the tree.

32 Where new circumstances are not accommodated in the original order, the Act should allow the tree owner or affected neighbour or immediate successors in title to apply to the Victorian Civil and Administrative Tribunal to vary or revoke the original order.

33 The Victorian Civil and Administrative Tribunal's powers in determining the application to vary or revoke the order should be stated in the Act as the power to:

(a) affirm the original order

(b) vary the original order by altering the terms of the order or by substituting any other order that the Victorian Civil and Administrative Tribunal may make under the new Act

(c) revoke an existing order.

34 The applicant should provide notice in writing of the application to vary or revoke the original order to the original parties to the dispute as well as any other affected parties that were given notice of the original application or any successors in title.

35 The Act should only provide for one application to vary or revoke the order per year.

36 The Act should include a penalty, to be determined by Government, for the failure to comply with an order.

37 If an order has not been complied with by the required time, the Act should provide that a party may apply to the Victorian Civil and Administrative Tribunal to seek permission to enter the tree owner's land and carry out the works specified in the order themselves. Reasonable costs incurred as a result of carrying out the order should be able to be recouped from the non-complying party as a debt in the relevant court.

38 The right of the affected neighbour to enter a tree owner's land should be subject to the requirement that:

(a) reasonable notice is given to the owner of land or occupier whose land is to be accessed by the applicant

(b) access only occurs at a reasonable time during the day

(c) any other requirements that the Victorian Civil and Administrative Tribunal considers are appropriate, for example, that relevant insurance is obtained by the applicant.

Chapter 10

39 The Commission recommends exemptions in the Victoria Planning Provisions be expanded to enable an order made under the Act to have effect despite any requirement to obtain a permit in a Victorian Planning Scheme to remove, lop or destroy vegetation under a:

(a) Significant Landscape Overlay

(b) Environmental Significance Overlay

(c) Vegetation Protection Overlay

(d) Heritage Overlay

(e) Native Vegetation Particular Provision.

40 Where an exemption referred to in Recommendation 39 applies, the following safeguards should apply:

(a) the relevant responsible authority must be notified of the application and invited to participate in hearings

(b) the Victorian Civil and Administrative Tribunal must consider the factors that the responsible authority would have been required to consider in determining a matter under the *Planning and Environment Act 1987* (Vic) such as:

i. the objectives of planning in Victoria

ii. the provisions of the relevant planning scheme that apply to the land the subject of the application, including decision-making guidelines in planning schemes

iii. information provided by the responsible authority.

41 Orders under the Act should have effect regardless of requirements for consent or authorisation under local tree protection laws made under the *Local Government Act 1989* (Vic).

42 Where Recommendation 41 applies, the following safeguards should apply:

(a) the Victorian Civil and Administrative Tribunal must afford the relevant council tree protection laws significant but not determinative weight in the decision-making process

(b) the Tribunal should invite council to appear at a tree dispute hearing or to provide a written submission.

43 Section 86 of the *Heritage Act 2017* (Vic) should be amended to provide that the operation of the Heritage Act is subject to any order under the new Act where the Victorian Civil and Administrative Tribunal determines that a registered tree or a tree situated in a heritage place poses an imminent danger to life or property.

44 Where Recommendation 43 applies, the following safeguards should apply:

(a) Heritage Victoria must be notified of the application and be invited to participate in the hearing

(b) the Victorian Civil and Administrative Tribunal should consider the factors that Heritage Victoria would have been required to take into account pursuant to the *Heritage Act 2017* (Vic) and any information provided by Heritage Victoria.

45 Where a registered tree under the *Heritage Act 2017* (Vic) or a tree in a heritage-listed place is ordered to be removed by the Victorian Civil and Administrative Tribunal under the Act, the Tribunal should have regard to any replanting requirements that Heritage Victoria may consider necessary to maintain the heritage value of the landscape.

46 Section 30C of the *Fences Act 1968* (Vic) should be amended to provide the Victorian Civil and Administrative Tribunal with jurisdiction to make orders under the Fences Act where a tree:

(a) has caused, is causing, or is likely in the next 12 months to cause damage to a dividing fence, or

(b) forms part of the fence that has caused, is causing, or is likely in the next 12 months to cause damage to property or harm to any person.

47 The Act should apply to recognised weeds provided that the weed is a 'tree' and has caused, is causing or is likely to cause damage to property or land or harm to people in the next 12 months.

Chapter 11

48 The Act should state that new owners of land should be bound by and benefit from the outcome of legal action.

49 The Act should state that new owners are bound to the extent the original owner has not completed the order or has an ongoing obligation to carry out the Order.

50 Only immediate new owners may benefit from orders made in the original owner's favour.

51 The Act should state that the date from which new owners will be bound and will benefit from the outcome of legal action is the date of settlement.

52 Any timeframes stipulated in the orders should re-commence on the date of settlement.

53 The Act should state that purchasers should be notified of any legal action commenced or underway at the time of the sale, or orders made under the Act. The Act should further state that copies of the application or order must be provided with a Section 32 Vendor Statement.

54 The Due Diligence Checklist under Division 2A of the *Sale of Land Act 1962* (Vic) should be amended by Consumer Affairs Victoria to include information about the effect on new owners of legal action and orders made under the proposed Act.

55 The *Sale of Land Act 1962* (Vic) should be amended to include a provision under Section 32 that requires disclosure of legal action under the proposed Act at the time of sale, or if legal action has concluded, disclosure of incomplete or ongoing orders. The *Sale of Land Act 1962* (Vic) should also stipulate that copies of the application and order are to be provided.

56 If a party to a tree dispute enters into a contract of sale of land while legal action under the Act is underway, the Act should require that party to notify the Victorian Civil and Administrative Tribunal about the sale as soon as possible after the contract of sale has been fully executed.

Chapter 12

57 A website should be established by the Department of Justice and Community Safety which would provide:

(a) guidance on how to negotiate with your neighbour, including a sample standard letter that affected neighbours can use to communicate with the tree owner about a problem tree

(b) information about informal dispute resolution mechanisms

(c) detailed information on alternative dispute resolution and a link to the Dispute Settlement Centre of Victoria website

(d) guidance on engaging appropriately qualified arborists

(e) a step-by-step overview of the Act

(f) information on how to commence proceedings

(g) guidance about how to seek information about other laws that may apply from government authorities and local councils.

58 The Victorian Civil and Administrative Tribunal should provide supporting information for parties about the operation of the Act and Tribunal processes. Resources could include:

(a) a detailed information guide, similar in format to the guide developed by the Magistrates' Court for fencing disputes

(b) information about key decisions made under the Act

(c) an annotated version of the Act outlining how the Tribunal has interpreted particular provisions and highlighting key cases

(d) a link to the Dispute Settlement Centre of Victoria website

(e) key Practice Notes relevant to tree disputes, for example, about the provision of expert evidence and alternative dispute resolution.

59 The services of the Dispute Settlement Centre of Victoria should be promoted more broadly. Community engagement workshops could be conducted for the arboricultural industry and other interested organisations and professional bodies.

60 Local councils should continue to provide resources to the community relevant to tree disputes. These resources could include:

(a) tree planting guidelines suited to local areas

(b) fact sheets on the application of local tree protection laws

(c) information about engaging appropriately qualified arborists.

61 The arboricultural industry should provide information to the community about how people can identify and engage appropriately qualified arborists.

Chapter 13

62 The Minister should review the Act after a period of five years from the date of commencement to determine whether the policy objectives of the Act remain valid and whether the legislation remains appropriate for securing those objectives. A report on the outcome of the review should be tabled in each House of Parliament within 12 months after the end of the review.

63 Matters that should be examined as part of the review include:

(a) the effectiveness of zoning provisions in the Act

(b) the effectiveness of the definition of adjoining land in the Act

(c) if there is a need for the Act to be expanded to include a formal branch removal notice process

(d) if there is a need to expand the scope of the Act to trees blocking access to sunlight and views (including high hedges).

1

Introduction to neighbourhood tree disputes

2 Introduction

2 Origins of the project

3 The Commission's process

4 Structure of the report

1. Introduction to neighbourhood tree disputes

Introduction

1.1 This report arises from the Victorian Law Reform Commission's community law reform project on neighbourhood tree disputes. It follows public consultation on the issues and a consultation paper published in December 2017.

1.2 Section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) states that one of the Commission's functions is to examine and make recommendations to the Attorney-General on issues that are of general community concern but are relatively minor. The term 'relatively minor' means limited in size and scope and not requiring the significant deployment of Commission resources.

1.3 The impetus for this work often comes from community suggestions about how to improve Victorian law. In undertaking community law reform projects, the Commission aims to provide workable solutions to gaps or inadequacies in the law so that reform delivers real benefits to the community.

1.4 The Commission's priority for this review has been the effective and efficient resolution of disputes between neighbours about trees on private land ('tree disputes').

Key reform

1.5 The Commission recommends the introduction of a dedicated Act to govern the resolution of neighbourhood tree disputes in Victoria. The Commission recommends that the new Act be administered by the Victorian Civil and Administrative Tribunal (VCAT).

Origins of the project

1.6 This project responds to enquiries and suggestions from the community.[1] The Commission was told that it is common for tree disputes to arise about encroaching roots, overhanging branches, leaf litter and concerns about trees causing damage to property or harm to people. Neighbourhood tree disputes can create significant disharmony between neighbours and can be difficult to resolve. Recouping costs associated with tree works was also raised as a difficult issue.

1.7 The Dispute Settlement Centre of Victoria (DSCV) offers a free statewide dispute resolution service for neighbourhood disputes in Victoria that includes mediation. Concerns about neighbourhood trees were the third most common enquiry to DSCV from December 2011 to May 2017.[2] DSCV suggested that the community found the existing common law remedies hard to access and confusing.[3]

1 The Commission received five enquiries on this issue from 2010–2016.
2 Information provided by the Dispute Settlement Centre of Victoria (DSCV) as part of a data request from the Commission, August 2017 and clarification of data provided in May 2019. This is discussed in Ch 2.
3 Information provided by DSCV as part of a data request from the Commission, August 2017.

1.8 Given the volume and frequency of neighbourhood tree disputes, the Commission determined that a review of the current law governing the resolution of these disputes was timely.

1.9 In June 2017 the Commission initiated the Neighbourhood Tree Disputes inquiry. To confine the project within the parameters of a community law reform project, the terms of reference exclude consideration of disputes about trees on public land or disputes about trees that block sunlight and views.

1.10 This inquiry remains larger in scope than most community law reform projects. This is because even a small neighbourhood tree dispute can present a range of complex and multifaceted law reform issues.

1.11 The terms of reference for the inquiry are on page xii.

The Commission's process

1.12 The Commission Chair, the Hon. Philip Cummins AM established a Division which he chaired. The Division members were Liana Buchanan, Dr Ian Hardingham QC, Professor Bernadette McSherry, Alison O'Brien PSM, and Gemma Varley PSM.

1.13 The Chair died in February 2019. Bruce Gardner PSM has chaired the final stages of this inquiry.

1.14 The Commission has been greatly assisted by community contributions in consultations and in submissions.

Submissions

1.15 In December 2017 a consultation paper was published identifying the current law and outlining common types of tree disputes. It put forward a range of options for reform. The consultation paper invited members of the community who had been affected by the law or had a view about what the law should be to make a submission.

1.16 Thirty-eight submissions were received, the majority of which are available on the Commission's website. A list of all stakeholders who made submissions is at Appendix A. Submissions were received from a broad cross-section of interested parties including arborists, academics, legal practitioners, private home owners, local councils, industry bodies and associations, and the Magistrates' Court of Victoria.[4]

1.17 Confidential submissions have not been published on the Commission's website. These confidential submissions have informed the Commission's thinking. However, in accordance with the Commission's submission policy, they have not been referred to in this report unless permission has been sought from the author. Where this has occurred, no identifying information has been provided in citations.

Consultations

1.18 In the course of this inquiry, the Commission undertook 16 formal consultations with individuals and groups who have particular experience or knowledge of tree disputes.

1.19 Consultations were undertaken in inner metropolitan and outer Melbourne. Responses were also received from regional Victoria. Commission staff spoke with members of the public, arborists, four local councils, an academic, and representatives from government agencies and departments. Consultation meetings were also held with VCAT, the Land and Environment Court of New South Wales (NSWLEC) and the Queensland Civil and Administrative Tribunal (QCAT).

4 The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Commission. The Commission's Submissions' Policy is available on its website: Victorian Law Reform Commission, *Submissions Policy* (Web Page, 5 March 2019) <https://www.lawreform.vic.gov.au/about-us/policies/submissions-policy>.

1.20 A list of individuals and organisations the Commission consulted with is at Appendix B.

Survey

1.21 An online survey was conducted with members of the community, particularly those who might not have had the time to make a formal submission. The survey contained 15 questions about people's experiences of trying to resolve tree disputes with their neighbours and how to improve the law to help them to do this better. The survey received 124 responses. The Commission has treated those submissions anonymously for the purposes of this report. See Appendix C for the survey.

Interstate reviews and tree dispute Acts

1.22 Reviews by other law reform bodies and interstate government agencies were of great assistance to the Commission.[5] Following these reviews, New South Wales, Queensland and Tasmania introduced legislation to govern the resolution of tree disputes:

- the *Trees (Disputes Between Neighbours) Act 2006* (NSW)
- the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)
- the *Neighbourhood Disputes About Plants Act 2017* (Tas).

1.23 The Acts have modernised and simplified the law to better assist the community in these states. Subsequent statutory reviews on the effectiveness of the new Acts in New South Wales and Queensland have also been of assistance.[6] These reviews and reforms are discussed in more detail in Chapter 3.

1.24 While it is helpful and appropriate to review and consider approaches to tree disputes in other jurisdictions, these reforms must be considered in their legislative, financial and social contexts. They have been a helpful guide for the Commission where suited to local Victorian circumstances.

Structure of the report

1.25 This report is divided into 13 chapters.

1.26 **Chapter 2** considers the prevalence of neighbourhood tree disputes in Victoria. It examines the common features of neighbourhood tree disputes as well as the impact they have on neighbours. It concludes by exploring some of the factors that contribute to these disputes.

1.27 **Chapter 3** describes the current law that applies to the resolution of these disputes and identifies some of its limitations.

1.28 **Chapter 4** considers the need for change in more detail. It briefly examines dispute resolution pathways that have been introduced in other jurisdictions. Community responses to the preliminary reform ideas presented in the consultation paper are also examined. It concludes by recommending the introduction of a new Act in Victoria to regulate neighbourhood tree disputes and identifying the public policy principles that should underpin it.

5 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations* (Report No 88, 1998); Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations: Trees* (Discussion Paper, July 2008); Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Report No 21, January 2016).

6 Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009); Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015).

1.29 **Chapter 5** considers the scope of the new Act. It explores what types of vegetation and land should come within its scope. It also considers the types of conduct that will be actionable, who can bring an application and who should be notified of an application that is made.

1.30 **Chapter 6** examines the importance of informal resolution of tree disputes and how to improve and facilitate this.

1.31 **Chapter 7** explores the recommendation that VCAT should adjudicate disputes under the new Act. It examines the way dedicated tree dispute Acts operate interstate and identifies the type of jurisdiction that should be granted to VCAT. It also considers VCAT's processes for managing those disputes.

1.32 **Chapter 8** considers the decision-making principles to be included in the new Act to guide VCAT decision makers and the community about the application of the law. It also examines the role of experts in the decision-making process.

1.33 **Chapter 9** explores the types of orders that should be available under the new Act and how orders should be enforced and appealed.

1.34 **Chapter 10** looks at the complex issue of how a new Act should interact with existing laws and regulations that already protect trees or limit action in relation to trees on private land in Victoria.

1.35 **Chapter 11** recommends steps to better notify purchasers of land and new owners about the existence of VCAT applications or orders made under the new Act.

1.36 **Chapter 12** contains recommendations for providing the community with clear and helpful information about how to resolve tree disputes. It also explores possible ways to prevent these disputes from arising.

1.37 **Chapter 13** concludes this report and suggests other issues that should be considered by the Victorian Government in designing a new Act, for example the suitability of online dispute resolution for tree disputes. Preliminary views on some matters beyond the scope of the inquiry are also provided. The report concludes with the recommendation that the operation of the new Act should be reviewed after five years to determine whether the Act is achieving its objectives. The Commission identifies some matters for Government consideration when the Act is reviewed.

2

The scope of the neighbourhood tree dispute problem

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2. The scope of the neighbourhood tree dispute problem

Introduction

2.1 This chapter examines the scope of the neighbourhood tree dispute problem and identifies the frequency of tree disputes in Victoria. It then explores the common types of tree disputes that occur and the impact they have on neighbours.

2.2 The potential for these disputes to seriously damage neighbour relations makes it important for them to be resolved quickly and effectively. Identifying some of the underlying causes of disputes has helped the Commission to develop its reform recommendations and guide policy development for the new Act. These underlying factors are discussed at the end of the chapter.

Prevalence of tree disputes

2.3 Determining the frequency and number of tree disputes in the community is difficult. Disputes are not commonly litigated in court. However, data provided by the Dispute Settlement Centre of Victoria (DSCV) and anecdotal information from local councils, government bodies, arborists and lawyers indicate that a significant number of tree disputes occur in Victoria.[1]

2.4 Disputes do not appear to be limited to particular locations or types of property interest. The Commission received responses from landowners, tenants, businesses and other organisations in metropolitan, regional and rural areas about their tree disputes. Tree disputes were reported between neighbours who occupy their property only periodically, such as in the case of a holiday home,[2] and where a large tree sits on a common boundary that is shared by multiple properties.[3]

Tree disputes in the courts

2.5 Few tree disputes are litigated in the courts. According to DSCV data, 'matters that proceed to Court are usually much more serious, and typically involve some degree of property destruction or damage'.[4]

1 Submissions 7 (Ben Kenyon), 21 (Pointon Partners Lawyers), 25 (City of Boorondara), 30 (Law Institute of Victoria), 31 (Barwon Community Legal Service); Consultations 3 (HVP Plantations), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip), 13 (Aboriginal Victoria), 16 (Heritage Victoria); Survey Respondents 43, 79, 103; Information provided by the Dispute Settlement Centre of Victoria (DSCV) as part of a data request from the Commission, August 2017 and clarification of data provided in May 2019.
2 Submission 8 (Victoria Thieberger); Consultation 7 (Dispute Settlement Centre of Victoria).
3 Submissions 8 (Victoria Thieberger), 38 (L. Barry Wollmer).
4 Information provided by DSCV as part of a data request from the Commission, August 2017.

2.6 The infrequent litigation of less serious matters appears to be largely because taking legal action is too expensive and outcomes are uncertain.[5] Tree disputes are not typically handled by community legal centres or covered by Victoria Legal Aid grants for legal assistance.[6] The low rates of litigation are discussed further in Chapter 3.

2.7 If legal action is commenced, it generally occurs in the Magistrates' Court of Victoria, which has jurisdiction over small civil claims up to the value of $100,000.[7] However, the number of tree disputes filed and determined by the Magistrates' Court is unknown because the court does not report these decisions and does not distinguish between the causes of action, for example nuisance.

2.8 The Victorian Civil and Administrative Tribunal also hears cases about problems caused by trees as part of its review jurisdiction under the Planning and Environment Act 1987 (Vic).[8]

2.9 The Commission is aware of only six reported cases from higher courts[9] within Victoria.[10] The older case of *Barton v Chhibber*[11] is the only reported case heard by the Supreme Court of Victoria. A neighbourhood dispute about vegetation has been held to be 'the heart of the matter' in another Victorian Supreme Court case pertaining to conditions of planning permits.[12] The majority of reported cases from higher courts involving tree disputes were initiated in the Magistrates' Court, and later transferred to the County Court.[13]

Volume of tree enquiries received by the Dispute Settlement Centre of Victoria

2.10 Tree disputes that are not litigated are likely to go unrecorded unless the parties have contacted DSCV. DSCV is part of the Victorian Department of Justice and Community Safety and provides free dispute resolution services across 14 metropolitan and regional locations in Victoria.[14]

2.11 Data from DSCV indicates that enquiries relating to trees[15] were the third most common enquiry to DSCV over the 5.5-year period from December 2011 to May 2017. In that time 18,727 of 109,039 DSCV community enquiries related to trees.[16] This represents an average of 17.2 per cent of DSCV's total workload over that period or approximately 3,400 enquiries per year. The rate remains relatively constant over that time.[17] The highest percentage of tree-related enquiries (19.2 per cent) occurred in 2012, with the lowest (15.7 per cent) recorded in 2014.[18]

2.12 DSCV provided a breakdown of cases received by season, highlighting an increase in enquiries in the spring and summer months. DSCV attributes this to springtime vegetation growth and people spending more time outdoors.[19]

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5 Submissions 21 (Pointon Partners Lawyers), 31 (Barwon Community Legal Service); Survey Respondents 6, 53, 118.

6 Barwon Community Legal Service noted that community legal centres may not have the resources to take matters to court and that Victoria Legal Aid does not assist with tree disputes: Submission 31. Applicable means testing may disqualify an affected neighbour, depending on their income and assets: Victoria Legal Aid, '12—Means Test', *VLA Handbook for Lawyers* (Web Page, 28 September 2018) <https://handbook.vla.vic.gov.au/handbook/12-means-test>.

7 *Magistrates' Court Act 1989* (Vic) ss 3 (definition of 'jurisdictional limit'), 100. The jurisdiction of the Magistrates' Court of Victoria is explored in more detail in Ch 7.

8 See, eg, *Anzic v Bayside CC* [2016] VCAT 815, where the tree owner and neighbours wanted a tree protected under a Vegetation Protection Order removed due to fears of damage/harm. See also Clay Lucas, 'Appalling Display of Incompetence: Council Lashed in Stinging VCAT Ruling', *The Age* (online, 23 May 2016) <https://www.theage.com.au/national/victoria/appalling-display-of-incompetence-council-lashed-in-stinging-vcat-ruling-20160522-gp10o5.html>.

9 This includes the County and Supreme Courts of Victoria. For more information on Victorian courts and tribunals, see Court Services Victoria, *Victorian Courts and Tribunals* (Web Page, 2019) <https://www.courts.vic.gov.au/court-system/victorian-courts-and-tribunals>.

10 *City of Richmond v Scantelbury* [1991] 2 VR 38; *Hiss v Galea* [2012] VCC 710; *Marshall v Berndt* [2011] VCC 384; *Owners Corporation SP020030 v Keyt* [2016] VCC 1656; *Pearson v Greater Shepparton CC* [2017] VCC 468; *Traian v Ware* [1957] VR 200.

11 (1988) Aust Torts Reports 80-185

12 See, eg, *Manderson v Wright* [2016] VSC 677 [42] which concerned a neighbourhood dispute about whether the removal of native vegetation was permitted pursuant to a restrictive covenant and neighbourhood design plan.

13 See, eg, *Hiss v Galea* [2012] VCC 710 [1]; *Marshall v Berndt* [2011] VCC 384 [14(c)].

14 See generally Dispute Settlement Centre of Victoria, *About Us* (Web Page, 4 January 2019) <https://www.disputes.vic.gov.au/about-us>.

15 Cases are assigned one main issue type upon intake with DSCV. Many enquiries involve multiple issues: these statistics reflect enquiries that were categorised on intake as relating to 'trees', 'shrubs' or 'creepers'.

16 Information provided by DSCV as part of a data request from the Commission, August 2017.

17 Ibid.

18 Ibid.

19 Information provided by DSCV as part of a data request from the Commission, August 2017 and November 2018 and clarification of data provided in May 2019.

2.13 DSCV reported anecdotally that tree-related enquiries most commonly involve overhanging branches and encroaching tree roots that cause damage to property as well as hedging that might obstruct the owners' view. A further quantitative breakdown of specific tree-related issues affecting neighbours who contact DSCV is not available.[20] DSCV data also suggests that it received more enquiries in the relevant period from metropolitan areas than regional areas.[21]

2.14 ENSPEC, an arboricultural consulting firm, noted some limitations in the data reported in the consultation paper on the prevalence of tree disputes in the community:

> What is not provided in [the DSCV] data is the number of [tree disputes] that were trivial matters, such as falling leaves. It is reasonable to expect that most trivial complaints would not go beyond an initial enquiry. The DSCV statistics provided suggest that few of these may actually be cases of genuine or substantial harm as only 5.3% of cases are successfully resolved with DSCV assistance. A better analysis of the available data, or better data, may provide a more accurate picture of the scope of the problem that actually requires an avenue of resolution provided through reform of the law…. This begs the question of whether there is actually a significant issue, or just a high level of unreasonable expectation or confusion in the community?[22]

2.15 Further consideration of the data from DSCV suggests that the number of matters that progressed to mediation or reached assisted settlement from December 2011 to May 2017 is much smaller than the number of tree enquiries DSCV originally received. Only 5.3% of the enquiries resulted in a dispute resolution outcome -whether through mediation, or where DSCV facilitated an outcome for parties directly, or provided advice to enable parties to resolve their matter. This differs from the average dispute resolution outcome rate for other matters which is much higher at 15-16%. This information indicates that tree enquiries are less likely than other matters to progress to a dispute resolution outcome.[23]

2.16 As ENSPEC suggests this may be because not all of these original enquiries amounted to disputes about 'genuine or substantial harm' and perhaps some enquiries were from people who were merely seeking information. DSCV points to a wide range of factors to explain the lower resolution rates for tree disputes that includes unclear rights and obligations, minimal scope for negotiation and considerable barriers to resolving through Court. Another factor identified is low awareness in the community about rights and obligations. It suggests that 'many DSCV customers contact the centre to purely enquire about their rights and obligations with regard to tree issues. At the time of contact, there may not be a dispute or it may be too early in the process for DSCV to facilitate a resolution'.[24] DSCV's dispute resolution process is discussed in Chapter 3. Several stages are identified before a matter is assessed as suitable for mediation—clarifying issues in dispute, answering questions and discussing options.

2.17 While acknowledging that DSCV refers a smaller number of matters to mediation than it receives as enquiries, the Commission remains of the view that the level of enquiries to DSCV (an average of approximately 3400 per year over the relevant period) and the proportion of DSCV's workload that this represents, being 17.2%, are significant.[25] Further, In the 2017–18 financial year DSCV reported over 26,000 unique page views for its online content relating specifically to trees.[26]

20 Information provided by DSCV as part of a data request from the Commission, August 2017 and November 2018. DSCV also reports that enquiries also commonly relate to the obstruction of a view by a hedge. The obstruction of sunlight and views is beyond the scope of this inquiry.
21 Information provided by DSCV as part of a data request from the Commission, August 2017 and November 2018.
22 Submission 18 (ENSPEC).
23 Information provided by DSCV as part of a data request from the Commission, August 2017.
24 Ibid.
25 Ibid.
26 Information provided by DSCV as part of a data request from the Commission, April 2019. DSCV expects this number to rise in the future as these webpages continue to be externally linked and are more easily found in internet searches. Information provided by DSCV via email as part of a data request from the Commission, November 2018.

Community responses about the frequency of tree disputes

2.18 Submissions and consultations also suggested a high incidence of tree disputes in the community. The Law Institute of Victoria stated that tree disputes 'occur with relative frequency'[27] and Barwon Community Legal Service reported that between April 2017 and March 2018 it provided legal advice to eight clients with tree disputes.[28] Arborists suggested that they come across tree disputes frequently during the course of their work.[29]

2.19 This accords with information provided by the Land and Environment Court of New South Wales (NSWLEC) which estimated that in New South Wales the tree disputes that proceed through to the Court represent only a small proportion of those occurring in the community.[30]

2.20 Many people in Victoria contact their local council, community legal centre or an arborist for assistance with a tree dispute.[31] Victorian councils do not typically keep formal records of the number of enquiries relating to tree disputes, which they view as private, civil matters outside the role of local councils. Local councils typically refer such enquiries to DSCV.[32]

2.21 However, some local councils were able to provide estimates on the number of enquiries they receive. The number varies depending on the degree of vegetation in local council areas, the location of the council and record-keeping practices. The City of Boroondara reported that it receives 'multiple daily enquiries' from residents asking for help with tree disputes.[33] Nillumbik Shire Council reported that it receives approximately two enquiries a week.[34] The City of Port Phillip estimated that it receives approximately 20 enquiries a year.[35] Baw Baw Shire Council reported that its front desk staff receive enquiries about tree disputes 'from time to time'.[36]

2.22 HVP Plantations is a private timber plantation business that shares boundaries with rural and residential neighbours. It becomes involved in approximately 10 tree disputes a year, which it resolves informally.[37]

2.23 Aboriginal Victoria suggested that it receives 6 to 10 enquiries a week from individuals wanting to know whether a particular tree is protected under the Aboriginal Heritage Act 2006 (Vic) and how this might affect proposed development works on nearby land.[38] Heritage Victoria also reported that it receives a small number of enquiries about disputes between neighbours concerning trees of heritage value.[39]

2.24 The Commission is of the view that the data from DSCV suggests that issues about trees do arise frequently in the community (whether or not they become disputes) and that more clarity in the law and a clearer dispute resolution process would be useful. This data is supported by community responses. The Commission is of the view that reforms may not only reduce the large number of enquiries to DSCV, but also better assist DSCV to resolve them.

27 Submission 30 (Law Institute of Victoria).
28 Submission 31 (Barwon Community Legal Service).
29 Submissions 7 (Ben Kenyon), 27 (Name withheld); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
30 Consultation 11 (Land and Environment Court of New South Wales).
31 Submissions 1 (Ian Collier), 4 (Name withheld), 8 (Victoria Thieberger), 17 (Name withheld), 25 (City of Boorondara), 31 (Barwon Community Legal Service), 34 (Allan Day), 36 (Monique Onezime); Consultations 1 (Aldo Taranto), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo).
32 Consultations 7 (Dispute Settlement Centre of Victoria), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council); 12 (City of Port Phillip).
33 Submission 25 (City of Boroondara).
34 Consultation 9 (Nillumbik Shire Council).
35 Consultation 12 (City of Port Phillip).
36 Consultation 10 (Baw Baw Shire Council).
37 Consultation 3 (HVP Plantations).
38 Consultation 13 (Aboriginal Victoria).
39 Consultation 16 (Heritage Victoria).

Types of tree disputes

2.25 The consultation paper identified that encroachment of branches or tree roots are the most common cause of tree-related problems in cases brought before a court. This likely reflects the seriousness of the damage, which would justify the expense and time involved in taking court action.[40]

2.26 Case law suggests that overhanging branches can affect neighbouring properties by taking up space or dropping leaf litter, and by causing damage to property by exerting pressure on or falling onto structures.[41] Encroaching roots may cause damage to structures and foundations, as well as to other plants, and may pose a safety hazard.[42] Trees may also cause harm to neighbours by affecting their health or causing injuries, including by triggering allergies, causing injury from falling branches or trees, or creating trip hazards from structures compromised by root growth.[43]

2.27 The most common tree disputes referred to in community responses were about:

- overhanging branches[44]
- encroaching roots[45] or
- the presence of large trees[46] or the proximity of trees to boundaries between properties.[47]

2.28 Community responses also reveal disputes about:

- increased bushfire risk[48]
- economic loss[49]
- neighbours objecting to tree works conducted by neighbouring tree owners[50]
- tree works undertaken without the tree owner's consent or that harm the tree[51]
- particular issues unique to rural settings.[52]

2.29 A smaller number of people identified circumstances involving dead trees[53], the spread of weeds[54] or trees hosting pests[55] as other conditions causing tree disputes.

40 See generally *City of Richmond v Scantelbury* [1991] 2 VR 38; *Yang v Scerri* [2007] NSWLEC 592; *Hiss v Galea* [2012] VCC 710; *Owners Corporation SP020030 v Keyt* [2016] VCC 1656; *Rogerson v Dean* [2017] NSWLEC 1209.
41 See, eg, *Wilson v Farah* [2017] NSWLEC 1006; *Yang v Scerri* [2007] NSWLEC 592.
42 John Roberts, Nick Jackson and Mark Smith, *Tree Roots in the Built Environment* (Arboricultural Association, UK, 2005) 369.
43 See, eg, *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 [8]; *Leonardi v Watson & Harloe* [2015] QCATA 192; *Huggett v Burrowes* [2015] NSWLEC 1057; *Rogerson v Dean* [2017] NSWLEC 1209; *Tuft v Piddington* [2008] NSWLEC 1249.
44 Submissions 5 (Name withheld), 9 (Dr Karen Smith), 19 (Anne Richter), 31 (Barwon Community Legal Service), 36 (Monique Onezime); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council); information provided by DSCV as part of a data request from the Commission, November 2018. In addition, 75.38% of survey respondents reported overhanging branches as the main issue in their tree dispute: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018). The Queensland Civil and Administrative Tribunal (QCAT) also identified that disputes over overhanging branches are the most common type of dispute for which people take legal action in QCAT. In 2018, approximately 52 out of a total of 205 tree disputes concerned overhanging branches. A further 33 applications included overhanging branches as one of the reasons for the application: Consultation 15 (Queensland Civil and Administrative Tribunal).
45 Submissions 1 (Ian Collier), 17 (Name withheld), 22 (Name withheld), 30 (Law Institute of Victoria); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon), 10 (Baw Baw Shire Council), 12 (City of Port Phillip); information provided by DSCV as part of a data request from the Commission, November 2018. In addition, 53.85% of survey respondents reported encroaching tree roots as the main issue in their tree dispute: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).
46 Submissions 1 (Ian Collier), 22 (Name withheld), 24 (Name withheld), 36 (Monique Onezime).
47 Submissions 1 (Ian Collier), 6 (Name withheld); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council).
48 Submissions 5 (Name withheld), 6 (Name withheld), 13 (Mandy Collins), 19 (Name withheld), 22 (Name withheld); Consultation 10 (Baw Baw Shire Council).
49 Submissions 22 (Name withheld), 28 (HVP Plantations); Survey Respondent 99.
50 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).
51 Submission 17 (Name withheld); Consultation 7 (Dispute Settlement Centre of Victoria).
52 Submissions 13 (Mandy Collins), 28 (HVP Plantations); Consultation 10 (Baw Baw Shire Council).
53 Submission 19 (Name withheld); Consultation 14 (Robert Mineo). People may perceive a dead tree as an even greater risk of damage or harm. One community member explained that their neighbour's tree is 'dry and dead and presents an even greater fire danger': Submission 19 (Name withheld).
54 Submission 30 (Law Institute of Victoria); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018); Survey Respondent 99.
55 Submission 4 (Name withheld).

Damage to property and dropping of leaf litter

2.30 The most common complaint spoken about to the Commission was damage to property,[56] followed closely by tree disputes over the dropping of leaf litter.[57]

2.31 Damage to a dividing fence was the most common example of damage to property.[58] Other types of damage to property, attributed commonly to encroaching roots,[59] included damage to building foundations,[60] paving,[61] driveways,[62] stormwater facilities, polyvinyl chloride (PVC) pipes,[63] substrate (in the form of heaving)[64] and landscaping (for example, grass and soil).[65]

2.32 Concerns about leaf litter included problems with leaves, nuts, fruit, twigs or small branches, depending on the species of tree.[66] Community members affected by leaf litter reported that it resulted in the blocking of roof gutters[67] (most common), the littering of driveways, open spaces and pools,[68] and led to noise, for example, from the dropping of gumnuts or berries onto hard surfaces.[69]

Harm to people

2.33 A smaller number of people cited harm (or injury) to people as a reason for tree disputes, particularly due to concerns about living near overhanging branches, encroaching roots and large trees.[70] HVP Plantations described these types of disputes as about 'life and limb issues'.[71] Some specifically expressed concern about the risk of harm to children playing in backyards,[72] the triggering of allergies due to pollen[73] and loss of life.[74] The City of Boroondara receives approximately six claims relating to pollen allergies each year.[75]

2.34 One submission noted 'an insurance company may be able to restore/rebuild a building damaged by a tree, but it cannot restore a broken body or human life'.[76]

2.35 The City of Boroondara advised that it had received reports from neighbours experiencing 'psychological distress' due to the fear and stress of living near a tree they think may drop or fall.[77] A survey respondent reported that they had been involved with tree disputes involving 'psychological harm' caused by the 'assumed risk of tree failure'.[78]

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56 Submissions 1 (Ian Collier), 22 (Name withheld), 27 (Name withheld), 30 (Law Institute of Victoria); Consultations 1 (Aldo Taranto), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 9 (Nillumbik Shire Council), 8 (City of Boroondara); In addition, 50.77% of survey respondents reported damage to property as the main issue in their tree dispute: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018). QCAT also identified that tree disputes over damage to property are the second-most common type of dispute for which people take legal action in QCAT: Consultation 15 (Queensland Civil and Administrative Tribunal).

57 Submissions 1 (Ian Collier), 25 (City of Boorondara), 27 (Name withheld), 36 (Monique Onezime); Consultations 6 (Ben Kenyon), 10 (Baw Baw Shire Council). In addition, 49.23% of survey respondents reported leaf litter as the main issue in their tree dispute: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).

58 Submissions 1 (Ian Collier), 5 (Name withheld), 28 (HVP Plantations); Consultations 3 (HVP Plantations), 8 (City of Boroondara), 10 (Baw Baw Shire Council); Survey Respondent 53.

59 Submissions 30 (Law Institute of Victoria), 31 (Barwon Community Legal Service); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).

60 Consultation 8 (City of Boroondara).

61 Ibid.

62 Consultation 6 (Ben Kenyon).

63 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 8 (City of Boroondara).

64 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).

65 Submission 1 (Ian Collier); Survey Respondent 99.

66 Submissions 1 (Ian Collier), 5 (Name withheld), 9 (Dr Karen Smith), 27 (Name withheld); Consultation 6 (Ben Kenyon).

67 Submissions 1 (Ian Collier), 5 (Name withheld), 27 (Name withheld), 36 (Monique Onezime); Consultation 9 (Nillumbik Shire Council).

68 Submission 27 (Name withheld); Information provided by a community member to the Commission, 1 March 2018.

69 Information provided by a community member to the Commission, 1 March 2018; Survey Respondent 72.

70 Submissions 5 (Name withheld), 6 (Name withheld), 9 (Dr Karen Smith), 19 (Name withheld), 22 (Name withheld), 24 (Name withheld), 36 (Monique Onezime); Consultations 3 (HVP Plantations), 6 (Ben Kenyon), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).

71 Consultation 3 (HVP Plantations).

72 Consultations 3 (HVP Plantations), 9 (Nillumbik Shire Council).

73 Submission 9 (Dr Karen Smith); Consultations 6 (Ben Kenyon), 8 (City of Boroondara).

74 Submissions 24 (Name withheld), 38 (L. Barry Wollmer).

75 Consultation 8 (City of Boroondara).

76 Submission 38 (L. Barry Wollmer).

77 Consultation 8 (City of Boroondara).

78 Survey Respondent 108.

2.36 Some people reported that the mere presence of trees in some circumstances, without any actual or tangible adverse consequence, was the cause of their dispute.[79] For example, the presence of large trees[80] resulted in heightened fear or anticipation of falling trees or branches,[81] especially in windy conditions.[82] Neighbours described concerns about living near trees that were 16 metres to 50 metres high.[83] One affected neighbour stated, 'The tree that really frightens me is a big 40 meter single tree 'trunk' which doesn't have boughs and is entirely inside [the tree owner's] boundary but leaning towards my house. I feel very nervous seeing it bending around in strong winds'.[84] Another community member noted, 'I consider that I am in danger of a huge tree or part thereof, failing on my house and seriously injuring, maiming or killing someone on my property'.[85] Large dead trees were also described as posing a greater risk of eventually falling.[86]

Bushfire risk

2.37 Some responses also identified that tree disputes can occur about the bushfire risk posed by trees.[87] One person suggested that they live in a country town with a designated high bushfire risk and that their property's Bushfire Attack Level (BAL) rating,[88] as assessed by the County Fire Authority, was high because of vegetation on neighbouring land. The community member suggested that the high cost of removing the vegetation contributed to the dispute being left unresolved. However, it was noted that this cost 'would be miniscule' compared to the potential loss of property if a bushfire occurred.[89]

Economic loss

2.38 One submission suggested that trees on neighbouring land could contaminate their land or potentially lead to economic loss, for example in the form of loss of business.[90] Another submission was concerned about the devaluation of their property due to the perceived or real risk posed by a neighbour's tree.[91] HVP Plantations raised the issue of the economic cost of tree maintenance along newly subdivided boundaries for rural landowners.[92] The costs associated with abating trees was also noted.[93] One survey respondent described the effect of neighbouring trees on their business:

> Use of our headland will be affected…Trees are expected to reach final height of around 12–15m and will negatively affect our viticultural business. Needles of this species (pine radiata) is expected to spoil the soil quality, which again will impact our [business] with expected long term loss of fruit quality and quantity.[94]

Objecting to tree works conducted by the tree owner

2.39 Not all tree disputes focus on how a tree is adversely affecting neighbouring property.[95] Some tree disputes may occur when a neighbour wants to retain surrounding vegetation and objects to the pruning or removal of a tree by its owner.[96]

79 Submissions 9 (Dr Karen Smith), 22 (Name withheld), 24 (Name withheld), 27 (Name withheld), 30 (Law Institute of Victoria), 36 (Monique Onezime); Consultations 1 (Aldo Taranto), 3 (HVP Plantations), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).
80 Submissions 24 (Name withheld), 27 (Name withheld), 38 (L. Barry Wollmer).
81 Submissions 30 (Law Institute of Victoria), 36 (Monique Onezime); Consultations 1 (Aldo Taranto), 3 (HVP Plantations), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).
82 Submissions 3 (HVP Plantations), 9 (Dr Karen Smith), 22 (Name withheld), 24 (Name withheld).
83 Submissions 1 (Ian Collier), 22 (Name withheld), 24 (Name withheld), 34 (Allan Day); Survey Respondent 93.
84 Submission 24 (Name withheld).
85 Submission 38 (L. Barry Wollmer).
86 Submission 19 (Name withheld); Consultation 14 (Robert Mineo).
87 Submissions 5 (Name withheld), 6 (Name withheld), 13 (Mandy Collins), 19 (Name withheld), 22 (Name withheld); Consultation 10 (Baw Baw Shire Council).
88 A Bushfire Attack Level (BAL) is a way of measuring a building's ability to withstand bushfire attack: Department of Environment, Land, Water and Planning (Vic), 'Minimum Construction Standard', *Building in Bushfire Prone Areas* (Web Page, 4 April 2019) <https://www.planning.vic.gov.au/policy-and-strategy/bushfire-protection/building-in-bushfire-prone-areas>.
89 Submission 13 (Mandy Collins).
90 Confidential submission.
91 Submission 22 (Name withheld).
92 Submission 28 (HVP Plantations).
93 Submission 19 (Name withheld), 36 (Monique Onezime)
94 Survey Respondent 99.
95 Submissions 17 (Name withheld), 31 (Barwon Community Legal Service).
96 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).

2.40 The Commission observes that trees on private land are usually privately owned, but the benefits of living in a treed environment are shared. Neighbours may enjoy the increased shade, cooling properties, biodiversity and aesthetic value of a neighbour's tree.[97] Baw Baw Shire Council suggested that its residents are generally environmentally conscious and prefer to retain as much vegetation as possible.[98] It reported that many of the enquiries it receives are from concerned residents wanting to know whether or not a neighbouring tree owner is permitted to cut or remove a tree, especially where the resident believes the tree is a significant tree protected under the local council's planning scheme, or forms part of an endorsed landscape plan contained in a planning permit.[99]

2.41 Nillumbik Shire Council stated that approximately half of the enquiries about tree disputes are from neighbours who are concerned about trees being removed on neighbouring property.[100] The Council noted that sometimes residents make early enquiries before they become involved in a tree dispute to ascertain rights and responsibilities about a neighbouring tree and any applicable planning controls or exemptions.[101]

Tree works undertaken without consent or that harm the tree

2.42 Another type of tree dispute may occur where an affected neighbour decides to take matters into their own hands and trim or cut down a tree in excess of their right to abate[102] and without the permission or consent of the tree owner.[103] This may involve trespassing on the tree owner's land.[104] Abatement is discussed in Chapter 3.

2.43 Sometimes a tree itself may be affected by activities carried out on neighbouring land. One person, also a tree owner, described a situation where their neighbour began excavation along the boundary fence which included cutting back at least 15 substantial roots of their tree, estimated to be over 100 years old. The tree was located two metres from the boundary and the submitter believes this activity seriously affected the health of their tree.[105]

2.44 In some situations, if a tree dispute remains unresolved, people have resorted to illegal action such as poisoning their neighbour's tree.[106] In one case, reported in the media, a couple were convicted and fined for criminal damage in the Geelong Magistrates' Court after they pleaded guilty to poisoning more than 40 cypress trees on neighbouring properties.[107] The Geelong Advertiser reported that the couple were alleged to have poisoned the trees following longstanding disputes over the trees which they claimed had caused root damage to their land and property.[108]

97 That trees have a quantifiable economic benefit is increasingly well recognised. See, eg, the discussion in Greg M Moore, 'The Importance and Value of Urban Forests as Climate Changes' (2012) 129(5) *The Victorian Naturalist* 167.

98 For example, Baw Baw Shire Council informed the Commission that their local community strongly support large, old trees and have created the Drouin Ficifolia Festival to celebrate some of them: Consultation 10 (Baw Baw Shire Council). The community interest group, Friends of Drouin's Trees, also operates in Baw Baw Shire and works to conserve and raise awareness about significant trees and vegetated spaces in Drouin. The group has also published a booklet that 'aims to showcase the incredible wealth of Drouin's remnant and planted trees': Friends of Drouin's Trees, *Drouin Tree Walks* (Booklet, 2018) 1.

99 Consultation 10 (Baw Baw Shire Council).

100 Consultation 9 (Nillumbik Shire Council).

101 Ibid.

102 Abatement is a 'self-help' remedy developed under the common law for any type of private nuisance. In the context of tree disputes, it allows neighbours to take matters into their own hands and abate the interference caused by the tree up to boundary lines without entering the tree owner's land: see *Lemmon v Webb* [1895] AC 1; *Young v Wheeler* [1987] Aust Torts Reports 80–126, 68,970.

103 Consultation 7 (Dispute Settlement Centre of Victoria).

104 See, eg, Order of Magistrate J Lesser (Magistrates' Court of Victoria, H13012408, 14 February 2018) referred to in Khaleda Rahman, 'Every Neighbour's Worst Nightmare: Family Comes Home to Find Beloved Trees Destroyed by Chainsaw Wielding Man', *Daily Mail Australia* (online,11 May 2017) <https://www.dailymail.co.uk/news/article-4494582/Family-returns-home-backyard-trees-CHOPPED-down.html>.

105 Submission 17 (Name withheld).

106 Consultation 6 (Ben Kenyon).

107 Order of Magistrate M P Coghlan (Magistrates' Court of Victoria, F13605089, 19 January 2016).

108 Karen Matthews, 'Geelong Court—Couple Pleads Guilty to Poisoning Neighbours' Trees', *Geelong Advertiser* (online, 20 January 2016) <www.geelongadvertiser.com.au/news/crime-court/geelong-court-lovely-banks-couple-pleads-guilty-to-poisoning-neighbours-trees/news-story/e65a9b00bdf98c5f7938c4e88ce2d2ba>.

Tree disputes in rural settings

2.45 HVP Plantations told the Commission that in the rural context, the escape of livestock following damage to a fence caused by a tree can be a concern as well as the cross-pollination of plant species.[109] HVP also identified that concerns about trees arise where 'treed land adjoin habitation' and there is a 'risk that trees will fall across people or buildings'.[110] Others identified that concerns can arise over the bushfire risk posed by vegetation on neighbouring land in country areas.[111]

Other types of tree disputes

2.46 The Law Institute of Victoria (LIV) noted the role of conservation covenants in tree disputes. Conservation covenants are voluntary agreements entered into by landowners to protect vegetation on their land (see Chapter 10). These agreements bind all future owners and prevent development that will interfere with the protected vegetation.[112] The LIV explained:

> [W]here farming and conservation interact, each landowner may be concerned that the neighbouring operations will create obstacles for their individual goals as landowners: a farmer may be concerned by the spread of weeds, or an increase in native fauna such as kangaroos, as a result of the conservation covenant, whereas the covenantor might be concerned with chemical spray drift, soil disturbance and noise, caused by farming operations.[113]

2.47 Arborists and local councils reported that tree disputes can also arise in the development context when, for example, a developer may be attempting to remove trees without a permit or damaging trees on neighbouring land.[114] The trend of 'moonscaping' in developments to remove all existing vegetation on a plot to make way for built structures was also noted.[115]

2.48 Tree disputes have also been known to occur over the removal of or damage to Aboriginal scarred trees or other culturally significant vegetation.[116]

2.49 Tree disputes can be multifaceted and may involve a combination of factors described above. As one community member described:

> My neighbour's tree branches overhang the boundary fence and intrude into my yard. The trees are pushing the fence and a section of fence has become loose. The trees pose a fire risk as they are only 1.5 metres away from my house. The tree branches reach the roof gutters of my house and fill the gutters with leaves and branches.[117]

109 Consultation 3 (HVP Plantations).
110 Submission 28 (HVP Plantations).
111 Submission 13 (Mandy Collins); Consultation 10 (Baw Baw Shire Council).
112 Submission 30 (Law Institute of Victoria); see, eg, Department of the Environment and Energy (Cth), *Conservation Covenants* (Web Page) <http://www.environment.gov.au/biodiversity/conservation/covenants>.
113 Submission 30 (Law Institute of Victoria).
114 Consultation 6 (Ben Kenyon), Submission 12 (City of Port Phillip).
115 Consultation 6 (Ben Kenyon), Submission 12 (Dr Gregory Moore OAM).
116 Consultation 13 (Aboriginal Victoria). Scarred trees have had their bark removed for various purposes by Aboriginal people. These trees are protected at law: Aboriginal Heritage Act 2006 (Vic) s 4, Pt 3; see also Victorian Government, *'Aboriginal Scarred Trees'*, *Aboriginal Victoria* (Brochure, June 2008) <https://w.www.vic.gov.au/aboriginalvictoria/heritage/aboriginal-cultural-heritage-of-victoria/aboriginal-places-objects-and-land-management.html>. Scarred trees are discussed in more detail in Ch 10; recently there has been a dispute about the planned removal of trees culturally significant to the Djab Wurrung people in western Victoria for highway upgrades: see Madeleine Hayman-Reber, 'Djab Wurrung Protestors Continue Their Fight for Sacred Trees', *NITV* (online, 23 March 2019) <https://www.sbs.com.au/nitv/article/2019/03/23/djab-wurrung-protesters-continue-their-fight-sacred-trees>.
117 Submission 5 (Name withheld).

Impact of tree disputes on neighbours

2.50 The following negative impacts of tree disputes were raised in responses to the consultation paper:

- the breakdown of neighbour relations and cessation of all communication[118]
- incurring significant costs and being out-of-pocket[119]
- being unable to pay for the costs of repairs or maintenance[120]
- having to sell the affected property and move away[121]
- economic loss (especially in regional areas where land is farmed or used commercially)[122]
- feeling frustrated and distressed because of involvement in a protracted dispute [123]
- being anxious or fearful about a tree falling and causing damage or harm, especially during turbulent weather[124]
- having to call the police or being charged with a criminal offence (for example, assault) resulting from an escalated tree dispute.[125]

2.51 The Tasmania Law Reform Institute identifies that these disputes can have 'consequences for the wider community through their potential to create civic discord and lead to instances where laws are ignored or purposely broken'.[126]

2.52 The stress and anxiety that can be caused by tree disputes is compounded by the frustration people experience when they attempt to resolve these disputes. Confusion can arise about rights and responsibilities, potentially exacerbating existing tensions and prolonging disputes.

Breakdown of neighbour relations

2.53 Like other types of neighbourhood dispute, tree disputes can severely affect once-amicable neighbour relationships or may be the final straw in a pre-existing conflict.[127] They can create considerable stress and anxiety and can significantly impair people's experience of living in their homes.[128] The LIV explained that tree disputes 'often affect an individual's right to quiet enjoyment of their land, which can have a significant impact on their livelihood.'[129]

2.54 The proximity of one's neighbours can lead to more frequent reminders about interference and interactions with them, and the feeling of having one's sense of ownership challenged, and so tree disputes can escalate quickly with serious consequences.[130]

118 Submissions 6 (Name withheld), 17 (Name withheld); Consultation 1 (Aldo Taranto).
119 Submissions 1 (Ian Collier), 19 (Name withheld).
120 Submissions 24 (Name withheld), 31 (Barwon Community Legal Service); Survey Respondent 6.
121 Consultation 1 (Aldo Taranto); Survey Respondent 61.
122 Survey Respondent 99.
123 Submission 22 (Name withheld).
124 Submissions 22 (Name withheld), 24 (Name withheld), 36 (Monique Onezime); Survey Respondent 108.
125 Submissions 24 (Name withheld); Survey Respondent 44.
126 Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Report No 21, January 2016) 8.
127 Victoria Legal Aid, *Disputes With Neighbours* (Web Page, 25 March 2019) <www.legalaid.vic.gov.au/find-legal-answers/disputes-with-neighbours>; Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Report No 21, January 2016) 8.
128 Submissions 6 (Name withheld); 17 (Name withheld); 22 (Name withheld), 24 (Name withheld), 36 (Monique Onezime); Survey Respondents 44, 61, 108; Lynda Cheshire and Robin Fitzgerald, 'From Private Nuisance to Criminal Behaviour: Neighbour Problems and Neighbourhood Context in an Australian City' (2015) 30(3) *Housing Studies* 100, 101; Mediation SA, *Preventing Conflicts in the Modern Neighbourhood: Tips on Being a Good Neighbour* (Guide, 2015) 61.
129 Submission 30 (Law Institute of Victoria).
130 Submissions 9 (Dr Karen Smith), 24 (Name withheld); Consultation 12 (City of Port Phillip); Survey Respondent 44.

2.55 Some community members who had experienced a tree dispute described having a poor relationship with their neighbour as a result.[131] This ranged from a relationship becoming 'strained',[132] or being verbally 'abuse[d] over the fence',[133] through to police intervention.[134]

2.56 Tree disputes can also lead to applications for a personal safety intervention order.[135] In Miles v Barca[136] Justice Byrne of the Supreme Court held:

> Although there have been pre-existing differences, even feuds, between the neighbours, the incident which provoked this proceeding concerned a manna gum tree which grows on the Miles property close to the Barca boundary.[137]

Significant costs

2.57 In some cases, the cost of repairing damaged property, or of tree works or engaging an arborist may be quite substantial. These costs may not be able to be recouped from the tree owner. For example, one person stated that it would cost over $2000 to have overhanging branches cut up to the boundary line.[138]

2.58 An arborist recounted a tree dispute concerning the roots of a tree that had grown into and under a neighbouring property. This had destroyed storm water facilities, which led to heaving of substrate and caused the corner of the building to drop. PVC pipes were also broken. The total cost of the damage was estimated to be over $60,000.[139]

2.59 Some people noted that they simply could not pay for the cost of tree works or the cost of repairs.[140]

Emotional toll of tree disputes

2.60 Some community members described the emotional toll of being involved in a tree dispute. They reported feelings of frustration and distress, especially with protracted disputes that cannot be resolved.[141]

2.61 Some people also reported feeling anxious or fearful about occupying their homes, or yards especially during turbulent weather or bushfire season.[142]

Greater impact on vulnerable people

2.62 Some people in the community can face greater challenges when trying to resolve tree disputes. Barwon Community Legal Service (BCLS) noted that the eight clients who sought its legal assistance with a tree dispute between April 2017 and March 2018 were 'largely the most vulnerable in our community being elderly or suffering from mental illness' and that all of these clients 'identified their income level as low with the majority receiving their only income from Centrelink'.[143]

2.63 Arborist Robert Mineo suggested that some older people may become more frequently involved in tree disputes because it is more difficult for them to maintain and manage problem trees.[144] Financial incapacity to engage an arborist to assess a tree or prune overhanging branches was also noted in a submission.[145]

131 Submissions 6 (Name withheld), 17 (Name withheld); Consultation 1 (Aldo Taranto).
132 Submission 22 (Name withheld).
133 Submission 6 (Name withheld).
134 Submissions 24 (Name withheld); Survey Respondent 44.
135 See, eg, *Miles v Barca* (2003) VSC 376; Victoria Legal Aid, *Disputes With Neighbours* (Web Page, 25 March 2019) <www.legalaid.vic.gov.au/find-legal-answers/disputes-with-neighbours>. A personal safety intervention order is an order made by a magistrate to protect a person from physical or mental harm caused by someone who is not a family member.
136 (2003) VSC 376 [3].
137 *Miles v Barca* (2003) VSC 376 [3].
138 Survey Respondent 72.
139 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
140 Submissions 24 (Name withheld), 31 (Barwon Community Legal Service); Survey Respondent 6.
141 Submissions 22 (Name withheld), 36 (Monique Onezime).
142 Submissions 22 (Name withheld), 24 (Name withheld), 36 (Monique Onezime); Survey respondent 108.
143 Submission 31 (Barwon Community Legal Service).
144 Consultation 14 (Robert Mineo).
145 Submission 6 (Name withheld).

2.64 BCLS gave an example of a client who is 'elderly so cannot cut and return the branches herself nor can she afford to spend her aged pension on hiring someone [to do so]'.[146]

2.65 One person stated, 'I am now left with gutters and downpipes full of leaves and debris which is a constant, expensive and losing battle for a 70-year-old to maintain'.[147]

2.66 Another stated:

> Neighbours trees hang over [the] fence and close to my roof, I'm a pensioner and can't cut them myself and can't afford to have them cut constantly … I can't do it physically. It's dangerous I could get hurt and … the financial burden is too much.[148]

2.67 DSCV explained that 'Older people and pensioners are often left feeling disempowered. They do not have support, language skills, money or confidence to take legal action. They may also be intimidated by mediation.' Accordingly, 'DSCV takes steps that participation occurs with adequate support to address any power imbalance, interpreter services to combat language issues and referrals to legal services or financial counsellors as required'.[149]

Factors contributing to tree disputes

2.68 In exploring community responses to the consultation paper, the Commission has identified factors that contribute to tree disputes. All of these factors can prolong and heighten disputes.

Breakdown in communication

2.69 Almost all available community resources about tree disputes stress the importance of communicating respectfully with neighbours in recognition of the fact that communication can quickly descend into conflict.[150]

2.70 Many affected neighbours reported that when they approached the tree owner, they were ignored or, in some cases, met with hostility.[151] A lack of clarity in the law means that there is no motivation for a neighbour to engage in conversations or be reasonably expected to manage their tree in a certain way. It was also stated that pre-existing conflict between neighbours can cause or exacerbate tree disputes.[152]

Lack of knowledge about trees

Lack of understanding about the biology of trees

2.71 Many arborists noted that a lack of knowledge about trees contributed to the occurrence of tree disputes. Many community members are unaware of how trees live and grow, and how they interact with built structures in urban environments.[153] This lack of knowledge leads to negative perceptions within the community about living near trees, described by arborists as generally 'misplaced'[154] or 'dramatically inflated'.[155]

146 Submission 31 (Barwon Community Legal Service).
147 Submission 1 (Ian Collier).
148 Submission 6 (Name withheld).
149 Consultation 7 (Dispute Settlement Centre of Victoria) and clarification of data information provided in May 2019.
150 See, eg, Victoria Law Foundation, '*Neighbours, the Law and You: Your Guide to Neighbourhood Laws in Victoria*', *Victoria Legal Aid* (Brochure, March 2015) 4 <https://www.victorialawfoundation.org.au/publication/neighbours-the-law-and-you/read>; Peter Cotter, 'Neighbour Disputes' in Naomi Saligari (ed), *The Law Handbook 2019: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 41st ed, 2019) 539–40.
151 Submissions 6 (Name withheld), 36 (Monique Onezime), 38 (L. Barry Wollmer); Consultation 1 (Aldo Taranto); Survey Respondents 60, 99.
152 Consultation 11 (Land and Environment Court of New South Wales).
153 Submissions 9 (Dr Karen Smith), 12 (Dr Gregory Moore OAM), 18 (ENSPEC), 25 (City of Boorondara); Consultations 2 (Dr Gregory Moore OAM), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
154 Consultation 2 (Dr Gregory Moore OAM).
155 Consultation 6 (Ben Kenyon).

2.72 Dr Gregory Moore OAM stated that 'we don't understand our own flora'. He explained that most people do not know that, for example, once the canopy of an oak tree has fully formed, it remains that way, with no dramatic changes. Similarly, eucalypts are misunderstood—these trees repeatedly shoot up and 'die back' as part of their natural growth cycle, not because they are dying. Dr Moore also stated that many people attribute summer limb drop[156] to certain species of trees, even though there is no arboricultural data or evidence to suggest some species of tree are more prone to this than others.[157]

2.73 Arborists at VTIO ArborCamp agreed that 'education is a big issue' and that a lack of education and knowledge fuels tree disputes. Many of these arborists suggested that they play a significant role in educating the public on how trees grow. It was identified that better education about the biology of trees, tree management and the importance of the urban forest could alleviate neighbours' concerns about trees. The Commission was told that most people do not realise that properly managing a tree is a long-term task, sometimes with no quick fix.[158]

Incorrect assumptions about the causes of problems

2.74 ENSPEC, an arboricultural consulting firm, told the Commission that healthy trees pose no greater risk than built structures in urban and residential settings. However, it is common for people to fear the dropping of overhanging branches or the falling of entire trees, especially in storms, more than the failure of other structures on or near their property. ENSPEC further explained:

> Management of unreasonable risk is appropriate; however, the elimination of all risk from any cause, including trees, is not practical. The very small risk of physical harm to persons that the total population of trees represent is outweighed by the benefits that the trees provide. Overall risk from trees is extremely low.[159]

2.75 Many arborists suggest that it is common for people to believe that trees pose a risk or are at fault without any evidence. The perception about the tree often does not accord with tree biology or arboriculture.160 Arborist Ben Kenyon noted that many engineers and plumbers wrongly attribute structural or plumbing damage to neighbouring trees, thus fuelling people's misplaced perceptions and disputes.[161]

2.76 A further issue can arise where, despite an arborist's assessment that a tree poses no risk of damage or harm, people insist on pruning or cutting off overhanging branches thereby damaging the health of a tree and creating an increased risk. Dr Moore explained that pruning a branch results in changes to the dynamic forces of a tree, which means it may shed a branch elsewhere. This risk may increase if a neighbour or a tree lopper without arboricultural expertise cuts or prunes encroaching tree parts indiscriminately.[162]

2.77 Damage attributed to a tree's root system was identified by arborists as the most common example of community perceptions and arboricultural evidence being at odds. Arborist Dr Karen Smith noted:

> There are also many deeply held beliefs about trees that bear no rigorous scrutiny when our understanding of tree biology and arboriculture is used to examine them. This is especially so regarding tree roots.[163]

156 The falling of a branch from an otherwise healthy tree is commonly known as 'sudden limb failure' or 'summer branch drop': Richard W Harris, 'Summer Branch Drop' (1983) 9(4) *Journal of Arboriculture,* 111–13; *Huggett v Burrowes* [2015] NSWLEC 1057 [12].
157 Consultation 2 (Dr Gregory Moore OAM).
158 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
159 Submission 18 (ENSPEC).
160 Submissions 7 (Ben Kenyon), 9 (Dr Karen Smith), 12 (Dr Gregory Moore OAM), 18 (ENSPEC); Consultations 2 (Dr Gregory Moore OAM), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon), 8 (City of Boroondara).
161 Consultation 6 (Ben Kenyon).
162 Consultation 2 (Dr Gregory Moore OAM).
163 Submission 9 (Dr Karen Smith).

2.78 Many people believe that their neighbour's tree roots are causing problems with their foundations, dwellings and plumbing. However, the Commission was told by arborists that property damage is a 'multi-factorial issue' with arboricultural assessments often showing that damage is caused by poorly installed or ageing infrastructure or pipes that have cracked due to poor quality, rather than the entry of roots. Mr Kenyon observed that root damage can be easy to prove or disprove by cutting into the ground or using other root detection techniques.[164]

2.79 The Commission was told that tree roots do not, contrary to popular perceptions, exert enough pressure to crack pipes or damage 'properly installed infrastructure' such as, for example, a concrete slab. It is also rare for tree roots to crack concrete footings unless they grow in a very specific upwards direction.[165] Roots also tend to grow in the shallow layers of soil.[166]

2.80 Dr Smith further described the complexities that arise in assessing property damage from tree roots:

> It was never possible to attribute all the damage to the tree, once data such as moisture at footing depth, footing information, age of the house and construction information have been taken into consideration. Once real data was collected and examined the complainants came to understand that the tree was not the sole cause of the damage. Property damage was never attributed to any more than 20% of the cost of repairs. In many cases collecting data on soil moisture at footing depth would eliminate the tree altogether. This soil moisture data often showed that cracked pipes, failed Victorian footings or damaged down pipes were the cause of damage. If the footings were damp where damage had occurred it was often leaking pipes or failed storm water that had caused footings to slump.[167]

2.81 Early management techniques, such as proper tree placement on properties and early formative pruning, can be used to prevent tree disputes from arising in the first place.[168] However, it was acknowledged that without widespread community awareness about arboriculture and tree management, community members cannot be expected to always be proactive in the management of trees on their land.[169]

2.82 Dr Moore also explained that the insurance industry can also fuel people's perceived risk of trees. Dr Moore described advertisements from a well-known insurance company that offered to charge people lower premiums if they had no trees on their land. He also suggested that stories in the media about trees falling in storms can exacerbate people's existing misperceptions of trees when they are buying or living on vegetated land.[170]

Problems obtaining expert assistance

2.83 An arborist is a qualified professional trained in cultivating, caring for, and maintaining trees.[171] Arborists are best placed to assess the health and condition of trees and any possible impact or interference they will have on built structures. Private arborists reported that they are frequently contacted by people for help with a tree dispute.[172]

164 Consultation 6 (Ben Kenyon).
165 Consultation 2 (Dr Gregory Moore OAM).
166 Submission 12 (Dr Gregory Moore OAM).
167 Submission 9 (Dr Karen Smith).
168 Submission 12 (Dr Gregory Moore OAM); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
169 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
170 Consultation 2 (Dr Gregory Moore OAM).
171 See Aboriculture Australia, *Australian Qualification Framework (AQF) and Australian Training Programs* (Web Page) <http://arboriculture.org.au/Qualification>.
172 Submission 9 (Dr Karen Smith); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).

2.84 Ben Kenyon stated that developers and town planners did not routinely rely on arborist reports 20 years ago. Mr Kenyon noted, however, that there is greater awareness about and importance placed on arboriculture by the general community now, particularly as people become more environmentally conscious. Mr Kenyon explained that this change is also reflected in current local laws and local council policies that seek to protect and maintain the urban forest.[173]

Role of arborists

2.85 Arborists use a range of tools or assessment methods to determine whether or not a tree is the cause of damage to property or whether or not a tree will fall or drop branches. Dr Moore explained that a properly qualified arborist will be able to tell whether or not a tree has or will shed a major limb simply by looking at it. Arborists may also employ manual techniques, such as an air knife or ground-penetrating radar, to detect the presence of roots.[174]

2.86 A number of arborists agreed that the most common approach when they are involved in an issue involving a dispute with a neighbour, is to explain to their client the option to abate up to the boundary line.[175] They may even advise the client about the importance of abating a tree in accordance with any relevant Australian Standards,[176] although one arborist acknowledged that this may be unclear and vague advice to give community members.[177] On the other hand, some arborists reported that when it comes to the legal dimensions of a tree dispute, they may simply tell their clients to seek legal advice.[178]

2.87 Some arborists may simply perform an assessment of the tree or complete the requested tree works, while others may provide additional advice about how to resolve the tree dispute or perform an improvised dispute resolution role involving both neighbours.[179]

2.88 One arborist stated that they offer to do a tree amenity evaluation to quantify the tree's value; without a quantifiable amount, it can be hard for an arborist to explain what the neighbour will lose if they remove or prune a tree.[180]

Not following advice and not understanding qualifications

2.89 People do not always rely on expert assistance or advice.[181] Where they do, the Commission has been told that the community is unlikely to give much weight to whether or not an arborist is suitably qualified to carry out tree works or assessments.[182]

2.90 Community members do not have a good understanding about the different qualifications and roles of arborists[183] and information on what level of qualification is advisable for particular tree works may not be easy for the community to find.[184] For example, people may not know the difference between a 'tree lopper' and a highly qualified arborist skilled in the assessment and management of trees.[185] A tree lopper may

173 Consultation 6 (Ben Kenyon); see, eg, *Tree Protection Local Law No.22 2016* (Frankston City Council); City of Greater Bendigo, *Urban Tree Management Policy* (16 August 2017) 4; see also *City of Melbourne, Urban Forest Strategy—Making a Great City Greener 2012–2032* (Report, 2012); City of Stonnington, *Urban Forest Strategy 2017–2022* (Report, June 2017) 4.
174 Submission 12 (Dr Gregory Moore OAM).
175 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 14 (Robert Mineo).
176 See, eg, Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007).
177 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
178 Ibid.
179 Ibid.
180 Ibid.
181 Submission 18 (ENSPEC); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
182 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
183 Submission 18 (ENSPEC); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018). This is discussed in more detail in Chapter 12.
184 Despite the framework of qualifications, the arboricultural industry is unregulated, which has led to instances of underqualified people carrying out work and performing low-quality assessments. For this reason, Arboriculture Australia, the national peak body for arborists, has introduced a voluntary industry licence to promote quality of practice: Arboriculture Australia, *Australian Arborist Industry Licence* (Information Brochure, version 04, 2017) <http://arboriculture.org.au/License>
185 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018); 9 (Nillumbik Shire Council), 14 (Robert Mineo).

be more willing to simply remove a tree or indiscriminately cut away branches. On the other hand, a qualified arborist can assess the health of the tree and help people come up with ways to manage any nuisance or risk.[186]

2.91 Most arborists are qualified in accordance with the Australian Qualifications Framework (AQF).[187] An AQF Level 3 arborist would hold a Certificate III in arboriculture and have the skills and knowledge to work as an arboricultural tradesperson and provide basic tree care and management. An AQF Level 5 arborist would hold a diploma and be able to work independently as a consultant or in a supervisory role.

2.92 Arboricultural organisations and local councils commonly advise that arborists of minimum AQF Level 3 should be engaged for tree works, such as pruning or lopping.[188] However, if the tree's health and associated risks need to be assessed, then engaging an arborist with minimum AQF Level 5 qualifications is necessary because these are more complex assessments that 'require a high level of training, knowledge and experience'.[189]

Obtaining advice too late

2.93 Sometimes arborists advise that talking to tree owners and affected neighbours about the history of the tree, amenity value, recreational benefits and environmental benefits (for example, hosting birdlife) may help to dispel misplaced perceptions. However, arborists noted that they tend to be engaged too late and it is harder to quell people's often misplaced fears about their trees because their views become more and more entrenched and the dispute continues to escalate.[190] In addition, neighbours usually have not taken any steps to resolve the dispute before an arborist is called. Some arborists reported that their appointments with neighbours are usually in the form of 'whispered conversations' or 'secret meetings'.[191]

Different expectations about living near trees

2.94 People hold different expectations about living near trees and this itself can be a cause of dispute.

2.95 The Commission was told that some people, who may not be physically or financially able to clear their property of leaf litter or prune a tree, may be less tolerant of trees and more likely to become involved in a dispute.[192]

2.96 On the other hand, others may greatly value trees and may seek out leafy and highly vegetated areas to live in. HVP Plantations noted that many of its residential neighbours choose to live near its plantations due to the vegetated green space it provides.[193] Some local councils with a high level of vegetation and green space also noted that many of their residents choose to live in their areas to be near trees.[194]

186 Consultations 2 (Dr Gregory Moore OAM), 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
187 The Australian Qualifications Framework (AQF) is the agreed policy of Commonwealth, state and territory Ministers for regulating qualifications in the Australian education and training system: Australian Qualifications Framework, *What is the AQF?* (Web Page) <www.aqf.edu.au/what-is-the-aqf>.
188 Consultation 8 (City of Boroondara); see also Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007).
189 See, eg, City of Kingston, *Arboricultural Reporting Guidelines for Planning and Developments* (25 June 2013) 1 <https://www.kingston.vic.gov.au/Property-and-Development/Planning/Planning-Useful-Forms-and-Links>; see also City of Boroondara, *Arboricultural Report Writing Guide: Guide for the Preparation of Preliminary Arboricultural Reports, Arboricultural Impact Assessments, Root Investigation/ Mapping Reports, Tree Management and Protection Plans and Transplant Method Statements* (Guidelines, June 2017) 3; Consultations 11 (Land and Environment Court of New South Wales); 12 (City of Port Phillip).
190 Consultations 2 (Dr Gregory Moore OAM), 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
191 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
192 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 14 (Robert Mineo).
193 Consultation 3 (HVP Plantations).
194 Consultations 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).

2.97 Nillumbik Shire Council stated that the Nillumbik community can be divided with respect to the value placed on vegetation—those who want to maintain vegetation and enjoy living in a green wedge[195] versus those who are risk-averse and want vegetation removed to reduce the risk of bushfire or for other reasons.[196] Baw Baw Shire Council also stated that its community can be divided about the value placed on vegetation.[197]

The Commission's conclusion

2.98 Tree disputes in the Victorian community are common. They are driven by factors such as a lack of knowledge about trees, a breakdown in communication between neighbours, different expectations about living near trees, as well people's different circumstances and a failure to obtain timely professional advice.

2.99 The most common types of tree dispute involve overhanging branches, encroaching roots and concerns about the risks posed by large trees. Tree disputes can encompass a wide range of issues. They can have a negative impact on people's relationships with their neighbours, may cause them to incur significant costs which are hard to recover, and can take an emotional toll. The nature of tree disputes makes quick resolution desirable. The next chapter considers the limitations of the current law in assisting people to resolve their disputes and the underlying reasons for reform.

195 See *Planning and Environment Act 1987* (Vic) s 46AC. Non-urban areas of metropolitan Melbourne that lie outside the Urban Growth Boundary are known as green wedges: Department of Environment Water Land and Planning, *What are Green Wedges* (Web Page, 5 April 2019) <https://www.planning.vic.gov.au/policy-and-strategy/green-wedges>.
196 Consultation 9 (Nillumbik Shire Council).
197 Consultation 10 (Baw Baw Shire Council).

3

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3. Current tree dispute law in Victoria

Introduction

3.1 This chapter examines the limitations with the way the law currently assists people to resolve their tree disputes. Community responses on this issue are also canvassed.

3.2 Depending on the circumstances of the dispute and the resources available, neighbours can currently take a number of steps to attempt to resolve their tree dispute:

- making an insurance claim
- abatement/'self-help'
- neighbour-led informal resolution
- alternative dispute resolution, or
- court proceedings.

3.3 A detailed discussion of these steps appears in the consultation paper and they are briefly discussed below. Navigating these steps can be confusing as it is difficult to find definitive statements of rights and responsibilities. Inadequacies in the law create confusion, compound community frustrations and prolong disputes.

3.4 The Commission concludes that there is currently no clear, accessible process for resolving tree disputes.

Insurance claims

3.5 One of the first steps an affected neighbour may take when a tree on neighbouring land damages their property is to contact their insurance company.

3.6 Household insurance may cover damage caused by trees. These policies generally cover 'the cost of rebuilding or repairing your home' when damage occurs in circumstances that are out of the policy holder's control, including natural disasters and storms.[1] However, the scope of the cover differs from one insurer to another.[2] Common general exclusions for damage caused by trees include damage caused by tree roots.[3]

3.7 Generally speaking, a householder's insurance will only cover damage to their property. Where a tree falls across boundary lines and damages a neighbour's property, the likely course of action is for the affected neighbour to claim on their own insurance.[4]

1 Australian Securities and Investments Commission (ASIC), 'MoneySmart', *Home Insurance* (Web Page, 19 December 2018) <https://www.moneysmart.gov.au/insurance/home-insurance>.

2 ASIC encourages consumers to carefully examine each provider's Product Disclosure Statement (PDS) before purchasing and relying on their insurance coverage: Australian Securities and Investments Commission (ASIC), 'MoneySmart', *Home Insurance* (Web Page, 19 December 2018) <www.moneysmart.gov.au/insurance/homeinsurance>.

3 See, eg, AAMI, *Home Building Insurance Product Disclosure Statement* (1 October 2013) 39; RACV, *Home Insurance Product Disclosure Statement and Policy Booklet* (29 September 2017) 63.

4 For a landowner to be found liable, generally they will need to be aware that the tree is near the boundary and in a dangerous condition or belongs to a species which is known to drop branches: see Financial Rights Legal Centre, *If a Tree Falls in a Storm Who Pays for its Removal?* (Factsheet, 2018) <https://insurancelaw.org.au/factsheets/>.

3.8 Where the tree owner can be shown to be at fault (for example, they had knowledge of the poor condition of the tree), the affected neighbour's insurance company may seek to recover from the tree owner's insurance company.[5]

3.9 Insurance cannot, however, prevent damage. An insurance claim is only possible once damage or harm (injury) has occurred. An insurance provider cannot enforce pre-emptive measures such as trimming, pruning or removing a tree to prevent damage.

Abatement/'self-help'

3.10 Abatement is a 'self-help' remedy developed under the common law for any type of private nuisance. In the context of tree disputes, it allows neighbours to take matters into their own hands and abate the interference caused by the tree up to boundary lines without entering the tree owner's land.[6] For example, an affected neighbour may prune overhanging branches up to boundary lines or may install a root barrier.

3.11 The common law allows:

> this private and summary method of doing one's self justice … because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy and cannot wait for the slow progress of the ordinary forms of law.[7]

3.12 This remedy is currently advised and encouraged where appropriate by community resources.[8] It is useful in situations where a part of a tree has encroached over boundary lines but has not caused the level of interference—unreasonable interference—needed to establish nuisance or has not yet caused actual physical damage. The use of abatement may also prevent damage from arising.[9]

3.13 Any encroaching branches or roots that are removed remain the property of the tree owner, and must be returned, in order to avoid liability for the separate common law tort of conversion.[10] An affected neighbour does not need to give notice to the tree owner to abate up to the boundary line,[11] particularly where 'there is immediate danger to life or health so as to render it unsafe to wait'.[12]

3.14 An affected neighbour must abate cautiously to avoid damage and ensure that they do not trespass or act negligently.[13] If a tree is damaged by the actions of an affected neighbour, they can be found liable for criminal damage.[14]

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5 See Financial Rights Legal Centre, *If a Tree Falls in a Storm Who Pays for its Removal?* (Factsheet, 2018) <https://insurancelaw.org.au/factsheets/>.

6 *Lemmon v Webb* [1895] AC 1; *Young v Wheeler* [1987] Aus Torts Reports 80–126, 68,970.

7 William Blackstone, *Commentaries on the Laws of England, Book III* (Cadell and Davies, 15th ed, 1809) 6.

8 See, eg, Dispute Settlement Centre of Victoria, *Trees* (Web Page, 24 April 2019) <https://www.disputes.vic.gov.au/information-and-advice/trees-0>; Victoria Law Foundation, *'Neighbours, the Law and You: Your Guide to Neighbourhood Laws in Victoria*', *Victoria Legal Aid (*Brochure, March 2015) <https://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/neighbours-law-and-you>; Peter Cotter, 'Neighbour Disputes' in Naomi Saligari (ed), *The Law Handbook 2019: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 41st ed, 2019) 543–4. But note that the use of abatement more generally to remedy other types of private nuisances 'tends to be discouraged save in relation to minor annoyances …': Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), Fleming's The Law of Torts (Lawbook Co., 10th ed, 2011) 487 [21.280].

9 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.7.3].

10 *Robson v Leischke* (2008) 72 NSWLR 98 [57] citing *Mills v Brooker* [1919] 1 KB 555, 558.

11 *Lemmon v Webb* [1894] AC 1.

12 *Traian v Ware* [1957] VR 200, 207.

13 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co.,10th ed, 2011) 487 [21.280]. However existing case law which states abatement must be carried out 'reasonably' or 'only as far as is necessary' or that the person is 'bound to use due care and skill to avoid causing damage' may not provide a conclusive answer as to whether abatement must be carried out cautiously to avoid damage in the specific context of overhanging branches or encroaching roots: Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.220]–[3.233].

14 See eg, *Crimes Act 1958* (Vic) s 197.

3.15 The costs of abatement cannot generally be recouped.[15] Abatement may be limited in circumstances where the tree is protected under a planning scheme or other law.[16]

3.16 Abatement by entering the tree owner's property may only be justified in rare circumstances where 'there is an immediate danger to life or health so as to render it unsafe to wait'.[17] It is considered prudent to notify the property owner before entering their land.[18] Abating in this way also means that the affected neighbour will lose their right to claim damages for the nuisance, because of 'the degree of self-help and potential damage to the other party involved in going on to the land of the other party, and interfering with it'.[19]

Neighbour-led resolution

3.17 Neighbours may seek to resolve problems relating to trees informally, without the involvement of lawyers or formal dispute resolution.

3.18 Some government and community organisations have published useful resources aimed at helping neighbours resolve their tree dispute. These include the Dispute Settlement Centre of Victoria (DSCV), the Victoria Law Foundation and Fitzroy Legal Service's Law Handbook.[20] Local council websites and customer service centres often provide a range of information and links, with significant variation in detail between councils.[21]

3.19 Most emphasise resolving disputes informally wherever possible. These resources are guides only, providing general information, not legal advice.

3.20 Common themes contained in these information sources include:

- approaching neighbours calmly and respectfully
- explaining concerns clearly and openly
- considering the neighbours' point of view
- workshopping possible solutions
- seeking professional advice and quotations where necessary, so each party can negotiate from an informed position
- the desirability of reaching a solution, as neighbourhood disputes can easily escalate and have detrimental effects on both parties' living situations.

3.21 Other points of contact for information include Arboriculture Australia, the Victorian Tree Industry Organisation, individual community legal centres, the Federation of Community Legal Centres, Victoria Legal Aid, the Law Institute of Victoria (LIV) and private lawyers.

3.22 DSCV also provides conflict coaching and dispute resolution advice over the phone, including options, strategies and negotiation techniques to help people resolve their disputes between themselves.[22]

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15 *Young v Wheeler* [1987] Aus Torts Reportss 80–126, 68,972; *City of Richmond v Scantelbury of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 where it is stated that the affected neighbour has a duty to mitigate damages and, where abatement is carried out to do so, then cost is recoverable. Hodgson J quotes Jenkins LJ in *Davey v Harrow Corporation* [1958] 1 QB 60 [487]: 'Is there any duty to mitigate? Can a person who sees encroaching roots on his land build a house and wait for it to fall down?' and continues that, in his view, an affected neighbour 'does, nevertheless, have the usual obligation to mitigate damages; and accordingly, he has the obligation to take reasonable steps to keep these damages to a minimum, and has the corresponding right to claim from the adjoining owner the expenses associated with these reasonable steps'. See also Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 525 [21.280].

16 For example, where a tree is protected under an overlay within a local council planning scheme. This is discussed further in Chapter 10.

17 *Traian v Ware* [1957] VR 200, 207. See also Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.7.3].

18 *Traian v Ware* [1957] VR 200, 207.

19 *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478, 487. Hodgson J continues: 'However, I do not think that the law attached such a consequence to the taking of steps on one's own land, such as the cutting back of tree branches or tree roots.'

20 Dispute Settlement Centre of Victoria, *Trees* (Web Page, 24 April 2019) <https://www.disputes.vic.gov.au/information-and-advice/trees-0>; Victoria Law Foundation, '*Neighbours, the Law and You: Your Guide to Neighbourhood Laws in Victoria*', *Victoria Legal Aid* (Brochure, March 2015) <https://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/neighbours-law-and-you>; Peter Cotter, 'Neighbour Disputes' in Naomi Saligari (ed), *The Law Handbook 2019: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 41st ed, 2019) 543–4.

21 See, eg, City of Boroondara, *Neighbouring Trees* (Web Page, 2019) <https://www.boroondara.vic.gov.au/waste-environment/trees-and-naturestrips/neighbouring-trees>.

22 Dispute Settlement Centre of Victoria, *Dispute Advice* (Web Page, 4 April 2019) <https://www.disputes.vic.gov.au/about-us/dispute-advice-0>.

3.23 Neighbours may also contact an arborist to obtain quotes for tree works or to assess the health of the tree. If informal resolution is ineffective, neighbours may elect to engage in alternative dispute resolution or take legal action by going to court.

Alternative dispute resolution

3.24 Alternative dispute resolution (ADR) refers to a decision-making process other than judicial determination (by a court or tribunal), in which an impartial person helps parties resolve their dispute. There are many forms of ADR, ranging from the facilitative and exploratory (mediation), active and advisory (conciliation), through to processes that decide the result (arbitration).[23]

3.25 There are many private ADR practitioners who may be engaged by people in dispute. One way community members can seek out private mediators is through the LIV's Mediators Directory, which provides details of approved legal practitioners qualified to conduct mediations.[24]

3.26 DSCV offers a free mediation service to the community to assist with a range of disputes including tree disputes.[25]

The role of the Dispute Settlement Centre of Victoria

3.27 DSCV is funded by Government to provide a front-line resolution service offering:

- information and education to help people understand their rights and responsibilities regarding an issue or dispute
- options for further advice and resources to help people resolve the dispute themselves
- a range of dispute resolution services to assist parties.[26]

3.28 DSCV provides a range of dispute resolution services, depending on the nature of the dispute. They include:

- targeted advice
- conflict coaching
- shuttle negotiation
- telephone mediation
- abbreviated mediation with a sole mediator
- a half-day mediation with two mediators.[27]

3.29 People involved in a tree dispute most commonly make contact with DSCV:

- to obtain the help of an impartial third party to make a decision about the dispute or compel a neighbour to take certain action
- to seek information about the law or confirm how the law may apply to their dispute
- to obtain assistance with tree maintenance issues due to age/health (for example, cleaning leaf litter from gutters)
- when there is pre-existing neighbour conflict and the tree dispute is the final straw, or
- when they have exhausted all other steps leading up to mediation or legal action.[28]

23 Peter Butt (ed), *Butterworth's Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'alternative dispute resolution'.
24 Law Institute of Victoria, *Mediators* (Online Database) <https://www.liv.asn.au/mediators>.
25 See Dispute Settlement Centre of Victoria, *Mediation* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/about-us/mediation-0>.
26 See generally, Dispute Settlement Centre of Victoria, *About Us* (Web Page, 4 January 2019) <https://www.disputes.vic.gov.au/about-us>.
27 Information provided by the Dispute Settle Centre of Victoria (DSCV) as part of a data request from the Commission, November 2018 and clarification of data provided in May 2019.
28 Consultation 7 (Dispute Settlement Centre of Victoria).

3.30 When a person first contacts DSCV, they speak to a Dispute Assessment Officer (DAO) who provides general support and advice on dispute resolution, including:

- listening to the client's concerns
- helping to clarify the issues
- answering questions
- providing techniques and strategies for resolving the dispute
- referring clients to other specialist services where needed.[29]

3.31 DSCV informs clients that tree disputes are governed by the common law and that it cannot provide legal advice. DSCV focuses on reshaping the conversation and discussing dispute resolution options rather than legal options.[30]

3.32 With the client's consent, a DAO may also contact the other party to the dispute.[31] Where the other party agrees to participate, the DAO will work to identify the issues in the dispute, suggest options to parties and try to resolve the matter separately with each party over the phone. If this fails, the dispute may be referred to accredited mediators within DSCV.[32]

3.33 If a dispute is assessed as suitable for mediation,[33] it can be scheduled quickly (generally within two weeks of referral) and held at a location suitable to the parties. Mediation is voluntary and proceedings are confidential. The mediator will invite the parties to share their views, explain what has led to the dispute, and how they propose to resolve the issue. Parties may be in the same room, or in separate rooms, with a mediator acting as an intermediary.[34]

3.34 A mediation if successful results in a written agreement. Agreements reached in DSCV mediations are not legally binding.[35] Parties are informed by DSCV that with both parties consent they can present their agreement to a lawyer to render the good faith agreement legally binding.[36]

Court-referred alternative dispute resolution

3.35 The courts may also employ court-ordered ADR processes (with or without the consent of the parties) to help parties resolve their disputes without a formal hearing.[37] For example, the Civil Claims Program in the Magistrates' Court allows the Court to refer certain matters to DSCV for compulsory mediation.[38] After successful mediation it communicates the outcome back to the court or tribunal. The mediated agreements generally take the form of consent orders, terms of settlement, or the filing of a notice of discontinuance from court or tribunal proceedings.[39]

29 Information provided by DSCV as part of a data request from the Commission, August 2017 and clarification of data provided in May 2019.
30 Consultation 7 (Dispute Settlement Centre of Victoria).
31 DSCV explains that it 'will send a letter with a Department of Justice & Community Safety letterhead requesting that the person call the centre to discuss the issue further': Dispute Settlement Centre of Victoria, *DSCV FAQs* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/information-and-advice/dscv-faqs>.
32 Information provided by DSCV as part of a data request from the Commission, November 2018 and clarification of data provided in May 2019.
33 Considerations include: whether both parties genuinely want to resolve the dispute; whether the parties are able to understand and participate in the mediation process; the level of vulnerability of either party, e.g. mental health issues; whether either party has expressed fear of the other party, or has been harmed or threatened with violence by the other party; any previous failed attempts at mediation; whether the issue is substantial enough to mediate: Dispute Settlement Centre of Victoria, *Mediation* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/about-us/mediation-0>.
34 Information provided by DSCV as part of a data request from the Commission, November 2018.
35 Parties are informed by DSCV that their written mediation agreements may be drawn up into a formal written contract by an external legal practitioner: information provided by DSCV as part of a data request from the Commission, 16 October 2017.
36 Information provided by DSCV in May 2019.
37 See, eg, *Magistrates' Court Act 1989* (Vic) s 108; *County Court Act 1958* (Vic) s 47A; *Supreme Court Act 1986* (Vic) s 24A.
38 This is only available for some Magistrates' Courts and is limited to civil claims under $40,000: Dispute Settlement Centre of Victoria, *Civil Claims Program* (Web Page, 24 April 2019) <https://www.disputes.vic.gov.au/about-us/civil-claims-program>. Further information about the jurisdiction and processes of the courts, including Alternative Dispute Resolution (ADR) programs, is provided in Ch 6.
39 See generally Magistrates' Court of Victoria, *Mediation* (Web Page, 14 January 2019) https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/mediation; Dispute Settlement Centre of Victoria, *Civil Claims Program* (Web Page, 22 May 2019) <https://www.disputes.vic.gov.au/about-us/civil-claims-program>.

3.36 DSCV has also recently partnered with the Victorian Civil and Administrative Tribunal (VCAT) to administer Fast Track Mediation and Hearing (FTMH)[40] at VCAT. FTMH aims to resolve disputes at VCAT as quickly as possible through mediation or to progress to a hearing on the same day if required.[41]

Court proceedings

3.37 Parties in a tree dispute may also initiate legal proceedings in court. As described in Chapter 2, this does not occur often.

3.38 The resolution of tree disputes in Victoria is currently based on the law of torts, which has largely been developed through judge-made case law (the 'common law').[42] There is no legislation specific to the process for resolving private tree disputes between neighbours in Victoria.

3.39 A tort is a 'civil wrong' that confers civil liability on the wrongdoer.[43] Torts cover a variety of acts or omissions that infringe on a person's 'fundamental liberties, such as personal liberty, and fundamental rights, such as property rights, and provide protection from interferences'.[44]

3.40 If one party decides to take their dispute to court, it will usually be heard in the Magistrates' Court of Victoria.[45] Some cases involving large claims will be heard in the County Court of Victoria,[46] or, in cases involving very large or complex claims, in the Supreme Court of Victoria.[47]

3.41 In order to bring a tree dispute to court, neighbours will usually have to rely on one or more of the torts of nuisance, negligence and trespass.[48] Each of these torts is outlined briefly in Table 1 below.[49]

Table 1: Overview of relevant torts

Tort	Circumstances that give rise to the tort
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

40 The Dispute Settlement Centre of Victoria refers to this program as the 'Civil Mediation at VCAT Program': Dispute Settlement Centre of Victoria, *Civil Mediation at VCAT Program* (Web Page, 7 June 2019) <https://www.disputes.vic.gov.au/about-us/civil-mediation-at-vcat-program>. See also Victorian Civil and Administrative Tribunal, *Annual Report 2017–2018* (Report, 2018) 25.

41 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).

42 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [1.4]. Unlike statute law, common law rules are not set out in a single document but are contained in the judgments of a range of courts and tribunals: Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'case law' and 'common law'. However, in recent times, certain torts have undergone law reform—'Despite their common law origins, most tort actions are subject to some statutory variation of the common law principles by state and territory legislation. Numerous statutes limit actions or defences, provide limitation periods, cap or exclude awards of damages, and provide for survival of actions': Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report No 129, 2015) [16.23], n 38. This is particularly true of negligence, which has been given a statutory framework in the respective civil liability statutes of each state and territory: see, eg, *Wrongs Act 1958* (Vic) Pt X, but note that statutory amendments do not override or affect common law principles associated with negligence unless otherwise stated: *Wrongs Act 1958* (Vic) s 47.

43 Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'tort'.

44 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report No 129, 2015) [16.21].

45 The Magistrates' Court has jurisdiction to hear civil matters where claims for works or damages are no more than $100,000: *Magistrates' Court Act 1989* (Vic) ss 3(1) (definition of 'jurisdictional limit'), 100(1)(a)–(b).

46 'The Court has jurisdiction to hear and determine all applications, clams, disputes and civil proceedings regardless of the type of relief sought or the subject-matter as are not by this or any other act excluded from its jurisdiction': *County Court Act 1958* (Vic) s 37. The civil jurisdiction of the County Court imposes no monetary cap on the amount of damages it can award: see County Court of Victoria, *Court Divisions* (Web Page, 2019) <https://www.countycourt.vic.gov.au/learn-about-court/court-divisions>.

47 See, eg, the Major Torts List which is 'designed to facilitate and expedite the passage of significant tortious claims to trial': Supreme Court of Victoria, *Practice Note SC CL 4: Major Torts List,* 1 October 2018 <https://www.supremecourt.vic.gov.au/law-and-practice/specialist-areas-of-law/major-torts-list>.

48 See, eg, *Robson v Leischke* (2008) 72 NSWLR 98 [36]; Submission 16 (Magistrates' Court of Victoria).

49 But only to the extent each is relevant to resolving tree disputes. The tort of negligence, for example, is an extremely complex and technical area of law which will not be discussed in its entirety in this report.

Nuisance

3.42 The tort (civil wrong) of nuisance can be classified as a public nuisance, or a private nuisance.[50] Neighbours in tree disputes will rely on private nuisance (nuisance).[51]

3.43 In legal terms, a nuisance relates to an act or omission that causes substantial and unreasonable interference with the affected neighbour's land or their enjoyment of land.[52] It is 'a tort directed against the plaintiff's enjoyment of their rights over the land'[53] and is inextricably linked to a person's proprietary interests over the land they occupy.

3.44 In the context of tree disputes, nuisance can cover situations where a tree encroaches on neighbouring land,[54] causes physical damage to neighbouring land, or interferes with the comfortable and convenient enjoyment' of a person's land.[55]

3.45 Nuisance claims in tree disputes are often a balancing exercise between the tree owner's right to enjoy and use their land in any lawful manner that they see fit, and the affected neighbour's right to use and enjoy their land without unreasonable interference.[56]

3.46 In order for an affected neighbour to take legal action for unreasonable interference with the use and enjoyment of their land, they must be in actual and exclusive possession of the land.[57]

3.47 Unreasonable interference with the use and enjoyment of land has been described as occurring when substantial and unreasonable 'annoyance, or discomfort' is caused.[58] This is judged against the common law standard of a 'reasonable user', which requires that any minor or trifling interference will be considered part of the ordinary neighbourly exchange of 'give and take, live and let live'.[59]

3.48 Barker et al explain this as follows:

> when people live in close proximity to one another they have to be prepared, to some extent, to allow others to do things that annoy them at times when they would prefer to be left in peace and quiet if they, in turn, want to be able to behave in a way that might annoy their neighbours and at a time when their neighbours would prefer they did not.[60]

3.49 Therefore, liability will only be imposed 'where the harm or risk to one is greater than [what] one ought to be required to bear under the circumstances'.[61] In making this determination the court will balance a number of factors:

- the character of the neighbourhood in which the interference occurs

50 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 185.
51 Unless the context indicates otherwise, all references to 'nuisance' should be taken to refer to the tort of private nuisance.
52 LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Private and Public Nuisance' [415-605]; see, eg, *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 896–7.
53 *Robson v Leischke* (2008) 72 NSWLR 98 [91] citing *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 902–03.
54 See, eg, LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Private Nuisance' [415-630].
55 *Robson v Leischke* (2008) 72 NSWLR 98 [54] citing *Thompson-Schwab v Costaki* [1956] 1 All ER 652, 653; *Mendez v Palazzi* (1976) 68 DLR (3d) 582, 589; and *Owners of Strata Plan No 13218 v Woollahra Municipal Council* (2002) 121 LGERA 117, 135. It is generally accepted that interference resulting in personal injury has been absorbed by the law of negligence: see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 where the High Court of Australia absorbed the rule in *Rylands v Fletcher* (1866) LR 1 Ex 265 into the tort of negligence. Barker et al elaborate that claims for damages for past personal injury or damage to property framed as nuisance are likely to be treated by a court as a claim in negligence: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 216.
56 LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Private Nuisance' [415-620] citing *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, 151.
57 This means freehold owners in possession of land, or tenants or licensees with exclusive possession. See Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.4]; *Robson v Leischke* (2008) 72 NSWLR 98 [91].
58 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.80].
59 *Bamford v Turnley* (1862) 122 ER 27, 32–3.
60 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.2.2].
61 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 499 n 98 citing American Law Institute, *Restatement* (Second) of the Law of Torts 2d (1965) § 822. In other words, 'there must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty habits of living but according to plain and sober notions among ordinary people': Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487, 500 citing *Walter v Selfe* (1851) 4 De G & Sm 315; 64 ER 849, 851.

- the extent of the interference
- the sensitivity of the affected neighbour
- whether an intention to harm exists.[62]

3.50 Importantly, there is no need to prove that actual physical damage has resulted from a nuisance where the dispute concerns comfort and amenities.[63] However, mere encroachment of overhanging branches is unlikely to constitute nuisance unless some sort of 'special damage' is proven to have been 'suffered by the neighbour as a result of the encroachment'.[64]

3.51 Where actual physical damage has resulted, such as a crack in concrete foundations, or damage to a dwelling, then the presence of damage makes the interference unreasonable.[65] Because damage can be objectively assessed, the relative weight of factors such as the characteristics of the neighbourhood, the extent of the interference, sensitivity and improper motive are not as relevant.[66]

Liability

3.52 Under a common law action in nuisance, anyone who created the nuisance can be found liable. That is, there is no need for the defendant to have any interest in the land.[67] This means that private nuisances can be created not only by landowners and tenants, but also by independent contractors undertaking work on the land.[68] However, generally speaking, 'most private nuisances are created by private landowners'.[69]

3.53 The tree owner must be at 'fault' for a nuisance claim.[70] This will depend on whether the tree owner has created, adopted or continued the nuisance.[71] A tree owner can 'create' a nuisance by 'deliberately or recklessly'[72] using their land in a way that will cause harm to their neighbour, or where they knew or ought to have known that the nuisance was reasonably foreseeable.[73]

3.54 A tree owner might create a nuisance to their neighbour's land by carrying out works to their own tree, for example 'by taking action which adversely affects the health of their tree or its structural stability' such as by 'allowing a tree to become unsafe or unsound so that it or parts of it, fall onto the neighbour's land'.[74]

3.55 A tree owner may also be considered liable where a third party (including a tenant) creates a nuisance if they authorised them to carry out activities that would naturally and necessarily result in nuisance.[75]

62 See Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.90]–[21.110].
63 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.2].
64 *Robson v Leischke* (2008) 72 NSWLR 98 [56] citing *Asman v MacLurcan* (1985) 3 BPR 9592, 9594. For examples of cases where overhanging branches have been held to constitute nuisance, see *Robson v Leischke* (2008) 72 NSWLR 98, [59].
65 *St Helen's Smelting Co v Tipping* (1865) 11 ER 1483; *Kraemers v Attorney-General* (Tas) [1966] Tas SR 113, 122–3; *Corbett v Pallas* (1995) LGERA 312.
66 Thomson Reuters, *The Laws of Australia* (at 28 April 2016) 33 Torts, '7 Nuisance' [33.7.250]; cf Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012): 'Liability in private nuisance for damage caused by overhanging branches or the encroachment of tree roots depends on proof of negligence' [5.1.8.2].
67 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.5]; see also LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Strict Liability of Creator' [415-715].
68 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.5].
69 Ibid.
70 *Robson v Leischke* (2008) 72 NSWLR 98 [44]–[45]. Preston CJ also notes that 'Fault generally involves foreseeability': [45].
71 LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Liability' [415-710]; see also *Robson v Leischke* (2008) 72 NSWLR 98 [47]–[50].
72 This 'covers all those cases of obvious or "patent" nuisances': *Robson v Leischke* (2008) 72 NSWLR 98 [48] citing A M Jones & M A Dugdale (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th ed, 2006) 1184 [20–39].
73 *Robson v Leischke* (2008) 72 NSWLR 98 [48] citing A M Jones & M A Dugdale (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 19th ed, 2006) 1184 [20–39].
74 *Robson v Leischke* (2008) 72 NSWLR 98 [69]
75 Thomson Reuters, *The Laws of Australia* (at 28 April 2016) 33 Torts, '7 Nuisance' [33.7.540]. See also *De Jager v Payneham & Magill Lodges Hall Inc* (1984) 36 SASR 498, 501.

3.56 A tree owner will have 'adopted' the nuisance caused by the tree where they make use of it, such as by using it for privacy or noise reduction.[76] A tree owner will be considered to have 'continued' the nuisance where they fail to stop the nuisance being caused by the tree within a reasonable time.[77]

3.57 A tree owner will be liable where they knew or ought to have known of the nuisance and did not take reasonable steps to mitigate or end the foreseeable interference.[78] The court will weigh the likely cost and inconvenience of mitigating or removing the interference against any damage or discomfort that the affected neighbour may experience.[79]

Defences

3.58 Where a nuisance can be shown, a tree owner may not be liable if they have a legal defence. Some common defences are:

- The tree owner had statutory authority for their action—where an action is authorised by an Act and the nuisance is an inevitable consequence, it is not unlawful.[80]
- The nuisance was consented to—a tree owner may rely on the express or implied consent of an affected neighbour as a defence. For example, if a tree that is causing a nuisance is maintained for an agreed common benefit, such as providing shade, then the affected neighbour may forego any right against the tree owner because of the agreement reached.[81]
- The affected neighbour contributed to the problem—the tree owner's liability may be reduced where the affected neighbour is found to have acted without reasonable care for their own property, contributing to the resulting damage for which they seek relief.[82]

Remedies

3.59 A person must commence legal action within the time limits set out in the Limitations of Actions Act 1958 (Vic). In the case of nuisance, an affected neighbour must generally bring legal action for nuisance within six years of the date the nuisance occurred.[83]

3.60 There are three remedies available for nuisance: abatement, injunction and damages.[84] Abatement is often exercised before an affected neighbour pursues an action for nuisance in court. Where the affected neighbour takes the matter to court, they may seek an injunction or damages.

76 Joel Silver, *Nuisance by Tree—Who's the Guilty Tree?* (Paper, Owen Dixon Chambers, 18 May 2015) [46]. However, Silver explains: 'For trees, it is more probable that a defendant will have "continued" a nuisance than "adopted" it, simply because fewer factual situations permit the nuisance caused by trees to be adopted.': [40].
77 See, eg, *City of Richmond v Scantelbury* [1991] 2 VR 38, 41; *Robson v Leischke* (2008) 72 NSWLR 98 [49].
78 See, eg, *City of Richmond v Scantelbury* [1991] 2 VR 38, 45; *Robson v Leischke* (2008) 72 NSWLR 98 [52]–[53].
79 *City of Richmond v Scantelbury* [1991] 2 VR 38, 47.
80 This is because it is presumed that Parliament, in authorising activities capable of causing nuisance, has already balanced within the statute 'the rights of individuals against the benefit to the public of certain nuisance-creating activities': Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) [21.220]. See also *Fullarton v North Melbourne Electric Tramway & Lighting Co Ltd* (1916) 21 CLR 181.
81 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.240].
82 A finding of contribution does not, however, fully defeat a nuisance claim: *Wrongs Act 1958* (Vic) s 26. See also *Stockwell v State of Victoria* [2001] VSC 497 [624]–[627].
83 *Limitations of Actions Act 1958* (Vic) s 5(1)(a).
84 Thomson Reuters, *The Laws of Australia* (at 28 April 2016) 33 Torts, '7 Nuisance' [33.7.820].

3.61 An injunction is a court order restraining the tree owner from performing or continuing the interference.[85] It is the main remedy awarded to an affected neighbour in an action for nuisance.[86] It is most suited to types of interference which are recurrent and infringe on the affected neighbour's right to use and enjoy their land, as opposed to those causing damage to property.[87]

3.62 An injunction may be granted to prevent future nuisance even though the nuisance does not exist at the time the injunction is sought.[88] The threshold for this type of injunction is high and requires 'proof that the apprehended damage … is imminent or likely to occur in the near future and … that the damage [will be] very substantial or almost irreparable'.[89]

3.63 A court may also make an award of damages to an affected neighbour, which is monetary compensation for any material loss or damage that has already occurred as a reasonably foreseeable consequence of the nuisance.[90] Damages may be sought for material loss or damage to land, possessions, or for the loss of profits which would have otherwise been earned from use of the land.[91] Damages can be awarded alone or in combination with an injunction.[92]

Negligence

3.64 A tree owner may be negligent where they fail to exercise reasonable care in relation to their tree.[93] Negligence occurs where the tree owner breaches the duty of care they owe to the affected neighbour, causing the affected neighbour to suffer a reasonably foreseeable harm.[94]

3.65 Negligence is largely based on the common law but it has also undergone statutory reform in the Wrongs Act 1958 (Vic).[95] Common law principles and elements relating to negligence are now restated in, clarified by or altered by statute.[96]

3.66 In order to establish negligence, the affected neighbour must prove all of the following:[97]

- that the tree owner owed them a duty of care—this duty of care is fulfilled by adhering to a standard of care that a 'reasonable person of ordinary prudence' would adhere to in order to avoid 'unreasonable risk or danger to others'.[98] It is well established that neighbours owe each other this duty of care.[99]

85 An injunction may be prohibitive, in that it orders the tree owner to stop certain actions; or mandatory, in that it orders the tree owner to carry out a certain act. An injunction must clearly identify how it is to be complied with: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.7.1].

86 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012). [5.1.7.1].

87 Ibid [5.1.7.2].

88 LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Injunctions' [415-850]. Known as a *quia timet* (Latin) injunction, meaning 'because he or she fears': Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'quia timet'.

89 *Robson v Leischke* (2008) 72 NSWLR 98 [58], [67]. An affected neighbour may also seek an injunction before the hearing (an interlocutory injunction), but only if there is a 'serious question to be tried' and if it is appropriate on 'the balance of convenience' to restrain the tree owner in such a way before the hearing: *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 [19].

90 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.260]; *Overseas Tankship (UK) Ltd v The Miller Steamship Co* (The Wagon Mound No. 2) [1967] 1 AC 617. Damages are particularly suitable for tree disputes where an injunction would be ineffective, such as when the dispute concerns interferences causing damage to property.

91 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 487 [21.260]. See also *Robson v Leischke* (2008) 72 NSWLR 98 [216]; *Hunter v Canary Wharf Ltd* [1997] AC 655, 706. However, where interference is caused without materially damaging the property, damages cannot be awarded for a decrease in the value of the affected neighbour's property. This is because damages for nuisance seek to provide relief for infringement of the right to use and enjoy the land. Thus, damages compensate for the plaintiff's subjective experience of past discomfort or inconvenience: Thomson Reuters, *The Laws of Australia* (at 1 June 2016) 33 Torts, '7 Nuisance' [33.7.880]. Equitable damages (cf common law damages), instead of an injunction for future nuisance (quia timet injunction), may be awarded in rare circumstances: Thomson Reuters, *The Laws of Australia* (at 1 June 2016) 33 Torts, '7 Nuisance' [33.7.890].

92 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.7.2].

93 *Wrongs Act 1958* (Vic) s 43 (definition of 'negligence').

94 Prue Vines, 'Negligence: Introduction' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 119, 122; see also *Robson v Leischke* (2008) 72 NSWLR 98 [93].

95 See, eg, *Wrongs Act 1958* (Vic) Pt X.

96 But note that statutory amendments do not override or affect common law principles associated with negligence: *Wrongs Act 1958* (Vic) s 47.

97 Prue Vines, 'Negligence: Introduction' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 119, 122.

98 Barbara McDonald, 'Standard of Care' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 123, 123.

99 *Robson v Leischke* (2008) 72 NSWLR 98 [96]; see also the seminal case of *Donoghue v Stevenson* [1932] AC 562, 580; *Stockwell v State of Victoria* [2001] VSC 497 [392] in which Gillard J states: 'authorities in the past have established that in certain circumstances, an occupier of property owes a duty of care to an adjoining land owner to avoid damage, resulting from something moving onto an adjoining property by reason of some action or inaction on the first property'.

- that the tree owner breached that duty—a person may breach a duty of care through a positive act or omission that falls short of the standard of care, unless they have taken precautions to safeguard against foreseeable risks that are 'not insignificant'.[100]
- that the affected neighbour suffered harm—section 43 of the *Wrongs Act 1958* (Vic) defines harm broadly as 'any kind of harm', which includes personal injury or death; and damage to property and economic loss.[101]
- that the harm was caused by the breach (causation) and that it was not too remote. To determine causation, the court will use a two-step approach that involves determining first, factual causation[102] and second, the scope of liability.[103] Factual causation obliges the court to ask whether the affected neighbour would still have suffered their loss but for the negligence of the tree owner.[104] If factual causation is established, the court must then consider the scope of liability. This involves a determination about 'whether or not to attribute the harm suffered to the negligence act for the purposes of deciding who, if anyone, is liable to pay compensation'. This test 'involves policy considerations and is value laden, and hence takes account of social, moral and economic factors'.[105]

3.67 To determine whether the harm suffered was not too remote, the court will consider whether the harm is a reasonably foreseeable consequence of the negligent conduct.[106] There must have been a real (not far-fetched) risk that the negligent conduct would cause the type of harm in question.[107]

3.68 In tree disputes where damage to property is concerned, negligence is often submitted as an alternative cause of action to nuisance.[108] Where personal injury is alleged in a tree dispute, it is more likely that negligence will be exclusively relied on.[109]

Defences

3.69 There are four defences available against claims of negligence. These are:

- Voluntary assumption of risk—a negligence claim may be defeated where the tree owner can prove that the affected neighbour fully understood the extent of the risk

100 *Wrongs Act 1958* (Vic) s 48; Thomson Reuters, *The Laws of Australia* (at 1 June 2016) 33 Torts, '2 Negligence' [33.2.1510]. The double negative, 'not insignificant', is a statutory formulation based on the common law: see *Wrongs Act 1958* (Vic) s 48(1)(b) and *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 in which Mason J states that 'not insignificant' risks are those that are 'not far-fetched or fanciful'. See also *Wrongs Act 1958* (Vic) s 48(3)(a). The foreseeability of risks and whether or not a person has adequately taken precautions against them will depend on balancing factors such as the probability of the risk occurring, the severity of the harm if it does, the cost and difficulty of taking precautions against the risk and the social utility of the conduct that creates the risk: *Wrongs Act 1958* (Vic) s 48(2). The balancing of these factors will depend on the particular facts of each case: *Vairy v Wyong Shire Council* (2005) 223 CLR 422 [40] (McHugh J). The balancing of these factors is commonly referred to in law as 'the calculus of negligence': Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [8.3]. Courts have also developed principles to infer negligent conduct where, for example, evidence may be circumstantial: see generally Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) Ch 8.7.

101 Damage to property includes damage caused to anything on the land, including chattels or possessions. Personal injury refers to physical bodily injury—cf mental harm, which is a separate category of harm: see *Wrongs Act 1958* (Vic) Part XI and Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) Ch 9.4. Economic loss is an 'injury to person or property resulting in immediate or subsequent detriment to a person's income or wealth': Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'economic loss'.

102 *Wrongs Act 1958* (Vic) s 51(1)(a): that the negligence was a necessary condition of the occurrence of the harm.

103 *Wrongs Act 1958* (Vic) s 51(1)(b): that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused.

104 This is known as the 'but for test': Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [10.2.1]. If complex circumstances exist, where, for eg, the harm cannot readily be attributed to the tree owner's negligent conduct, then the court may apply common law principles to make a determination. These principles relate to, for example, where there are alternative, multiple or hypothetical causes, or intervening causes that break the chain of causation (novus actus interveniens): see generally Margaret Beazley, 'Damage' in in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) [9.70], [9.190]; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [10.3.2]. See also *Wrongs Act 1958* (Vic) s 51(2) which states: 'In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.'

105 Mirko Bagaric and Sharon Erbacher, 'Causation in Negligence: From Anti-jurisprudence to Principle – Individual Responsibility as the Cornerstone for Attribution of Liability' (2011) 18 *Journal of Law and Medicine* 759, 768.

106 *Overseas Tankship (UK) v Morts Dock & Engineering Co Ltd* (Wagon Mound No. 1) [1961] AC 388.

107 *Overseas Tankship (UK) v Morts Dock & Engineering Co Ltd* (Wagon Mound No. 1) [1961] AC 388; *Overseas Tankship (UK) Ltd v The Miller Steamship Co* (Wagon Mound No. 2) [1967] AC 617, 643. The exact extent of the harm does not have be foreseeable: see, eg, 'the "thin skull" rule' and 'extent of harm' in Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [10.3.4.1]–[10.3.4.2].

108 See, eg, *Marshall v Berndt* [2011] VCC 384 [234]; *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 [13].

109 *Robson v Leischke* (2008) 72 NSWLR 98; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 653.

and freely chose to accept or ignore it, thus voluntarily assuming the risk.[110] Where the risk is obvious, the court will presume the affected neighbour was aware of the risk.[111]

- Statutory defences—some defences are included in the Wrongs Act 1958 (Vic). These include the statutory defences relating to 'good Samaritans' and volunteers.[112]
- Illegality—the fact that a person was engaged in an illegal activity at the time they suffered harm does not necessarily provide an automatic defence for the negligent party.[113] A duty of care may still be owed to a person engaged in an illegal activity in certain circumstances.[114] The court may take into consideration whether or not the person bringing the claim was engaged in illegal activity and reduce an award of damages to reflect this engagement.[115]
- Contributory negligence—where the affected neighbour fails to take reasonable care for their own safety, and this failure contributes to their injury, the court may find contributory negligence.[116]

Remedies

3.70 Negligence claims must be brought before a court within three years of the harm being discoverable (that is, it is known about or could be identified), or within 12 years of the date the negligent act occurred, whichever occurs first.[117] For negligence resulting in damage to property, a person must bring legal action within six years of the date the negligent act occurred.[118]

3.71 The main remedy for negligence is financial compensation (damages). The *Wrongs Act 1958* (Vic) sets out various thresholds of harm and caps for monetary amounts that must be applied when awarding damages.[119] Damages are most appropriate to remedy past, one-off losses such as personal injury, or damage to property. An injunction is usually ineffective in these situations, as the risk of these events and losses recurring is likely to be low.[120] For example, where an old, decaying tree falls and causes damage to property or injury to a person on neighbouring land, it is unlikely that this event will recur.[121]

110 This defence is also known by the Latin maxim *volenti non fit injuria:* Thomson Reuters, *The Laws of Australia* (at 1 June 2016) 33 Torts, '9 Defences' [33.9.880] citing R P Balkin and J L R Davis, *Law of Torts* (Lexis Nexis/Butterworths, 5th ed, 2013) [10.27], the second edition of which is cited in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 (Kirby J); see also *Monie v Commonwealth* [2007] NSWCA 230 [75]–[76] (Campbell JA); *Wrongs Act 1958* (Vic) ss 53–54. Whether or not the affected neighbour understood the extent of the risk is a subjective assessment based on their actual knowledge: Thomson Reuters, *The Laws of Australia* (at 1 June 2016) 33 Torts, '9 Defences' [33.9.910]; *The Insurance Commissioner (Qld) v Joyce* (1948) 77 CLR 39.

111 Unless the affected neighbour can prove, in turn, on the balance of probabilities that they were in fact not aware of the risk. An 'obvious risk' is a risk that would have been obvious to a reasonable person in the position. This includes 'risks that are patent or a matter of common knowledge'. Furthermore, a risk can be obvious even if it 'has a low probability of occurring' and 'is not prominent, conspicuous or physically observable'. A risk will not be obvious if the risk is created because a person has failed to properly 'operate, maintain, replace, prepare or care for' an item or 'living thing' unless 'the failure itself is an obvious risk': see generally *Wrongs Act 1958* (Vic) s 53.

112 A 'good Samaritan', acting in good faith and without financial reward, can rely on s 31B of the *Wrongs Act 1958* (Vic) to relieve themselves of liability. Section 37 provides a similar defence for volunteers engaged in community work; liability is conferred onto the community organisation for which they volunteer although exceptions may apply: see *Wrongs Act 1958* (Vic) s 38; see generally *Wrongs Act 1958* (Vic) Pts VIA, IX.

113 Thomson Reuters, *The Laws of Australia* (at 27 May 2016) 33 Torts, '9 Defences' [33.9.980].

114 To establish illegality as a defence a relationship must exist between the criminal act and the act of negligence. A common example given is that of a burglar who suffers a motor vehicle collision on a highway on their way to a professional engagement. The harm suffered by the burglar is independent of the crime: Thomson Reuters, *The Laws of Australia* (at 27 May 2016) 33 Torts, '9 Defences' [33.9.990].

115 *Wrongs Act 1958* (Vic) s 14G; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 624; James Goudkamp, 'Defences to Negligence' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011), 317, [12.440].

116 James Goudkamp, 'Defences to Negligence' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011), 317, [12.30]; see also *Wrongs Act 1958* (Vic) s 62. However, unlike contributory negligence in a nuisance claim, liability for negligence can also be fully defeated by contributory negligence if the court thinks it just and equitable to do so: *Wrongs Act 1958* (Vic) s 63.

117 *Limitations of Actions Act 1958* (Vic) s 27D.

118 Ibid s 5(1)(a).

119 For example, 'in Victoria the threshold for non-economic loss requires the plaintiff to have suffered a "significant injury". Significant injury is defined in s 28LF of the *Wrongs Act 1958* (Vic) and depends on assessment of the degree of impairment, according to a procedure laid down, by an approved medical practitioner or a medical panel.': Loane Skene and Harold Luntz, 'Effects of Tort Law Reform on Medical Liability' (2005) 79 *Australian Law Journal* 345–63, 358–9; see also *Wrongs Act 1958* (Vic) parts VA, VB, VBAA and VBA.

120 Stephen Sugarman, 'Damages' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 261 [10.10].

121 See, eg, *Timbs v Shoalhaven City Council* (2004) 132 LGERA 397, but note that the subject tree was on council land.

Trespass

3.72 Trespass to land[122] (trespass) is unauthorised entry onto land.[123] Legal action can be taken against the person entering without authority.[124]

3.73 In the context of tree disputes, trespass may be claimed by the tree owner for unpermitted entry to land by the affected neighbour in two situations. First, where the affected neighbour abates (cuts back overhanging vegetation) beyond their boundary line from their own land and onto the tree owner's land.[125] Secondly, where the affected neighbour physically enters the tree owner's land without permission.

3.74 Land relates not only to 'the surface of any ground, soil or earth but also any buildings or structures that might be affixed to it … both things growing on the surface (such as trees and grass) and minerals under the surface'.[126]

3.75 Every unpermitted entry onto land, no matter how minor, is considered a trespass,[127] even if the trespass does not cause any material damage.[128]

3.76 The owner of land affected must be in actual, exclusive possession of the land to bring an action for trespass.[129] The trespasser must intend the trespass; that is, they 'deliberately and wilfully' interfered with the tree owner's exclusive possession.[130]

3.77 The most obvious form of trespass is entering land without permission. Trespass may also occur when, for example, objects are placed over boundary lines and left on the land.[131] As Justice Bollen explained in the South Australian case of *Gazzard v Hutchesson*,[132] trespass can be found without entry onto another's land when an affected neighbour uses a stepladder to lean over a boundary line and cut their neighbour's roses. The trespass will continue for as long as the intrusion remains.[133]

3.78 The encroachment of roots or branches over boundary lines, however, will not constitute trespass because it is unintended.[134] An action in nuisance would be better suited to these situations.[135]

Defences

3.79 An affected neighbour may rely on the following defences against trespass:[136]

- Necessity—a belief that the trespass was reasonably necessary to preserve life or protect property from real and imminent harm.[137]

122 A number of forms of trespass exist, including to land, property and to the person. For the purposes of this report, and unless the context indicates otherwise, all references to 'trespass' should be considered to mean 'trespass to land'.
123 See generally *Plenty v Dillon* (1991) 171 CLR 635; see also LexisNexis, *Halsbury's Laws of Australia* (at 21 March 2018) [415 Tort], '2 Torts Derived from Trespass' [415-480].
124 See LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Unjustified Entry' [415-480] citing *Entick v Carrington* (1765) 19 St. Tr. 1030; 95 ER 807; *Dumont v Miller* (1873) 4 AJR 152; *Plenty v Dillon* (1991) 171 CLR 635 at 639; see also *Summary Offences Act 1966* (Vic) s 9(1)(e).
125 See, eg, *Gazzard v Hutchesson* (1995) Aust Torts Reports 81–337, 62,360.
126 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.1].
127 *Plenty v Dillon* (1991) 171 CLR 635, 639 citing *Lord Camden LCJ in Entick v Carrington* (1765) 19 St. Tr. 1030; 95 ER 807.
128 *Plenty v Dillon* (1991) 171 CLR 635, 645, 654–55; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.2].
129 Where a property is being rented, only a tenant with exclusive possession can bring an action for trespass. A licensee (someone with permission to be on the land but without a tenancy agreement) may also be able to sue third parties for trespass in certain circumstances: *New South Wales v Ibbett* (2006) 229 CLR 638 [29]; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.2].
130 The affected neighbour may also be deemed to have intended trespass where they are reckless as to the consequences or negligent: see LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Unjustified Entry' [415-480]; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.2].
131 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.5.3].
132 (1995) Aust Torts Reports 81–337, 62,360.
133 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.5.3].
134 See, eg, *Lemmon v Webb* [1894] 3 Ch 1, 24 affirmed on other grounds in *Lemmon v Webb* [1895] AC 1 cited in *Robson v Leischke* (2008) 72 NSWLR 98 [40].
135 Ibid.
136 Re-entry onto land and lawful authority are also defences to trespass to land but are not discussed here.
137 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.4.1]. The situation believed by the affected neighbour to compel them to act to preserve life and property must be 'an urgent situation of imminent peril' that 'existed actually, and not merely in the belief of the [affected neighbour]': *Southwark London Borough Council v Williams* (1971) 1 Ch 734, 746; *Cope v Sharpe* (No 2) [1912] 1 KB 496, 508.

- Consent—an affected neighbour will not be liable for trespass where they had consent to act in the way that they did.[138]

3.80 Mistake which results in trespass, however reasonable, will not be a defence.[139]

Remedies

3.81 A person must bring legal action within six years of the date the trespass occurred.[140]

3.82 A tree owner may seek an injunction or damages as a remedy for trespass. An injunction may be sought to restrain a person from continuing to trespass.[141]

3.83 Damages may be sought even if the trespass does not cause any material damage to the land or property on the land.[142] This is because:

> the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of [their] land.[143]

3.84 Where no damage results, the tree owner may be awarded a small (nominal) amount of damages.[144]

3.85 Exemplary or aggravated damages may be awarded where significant disrespect is shown for the tree owner's rights—for example, by cutting down a neighbour's tree when they are absent from their land, without informing them or allowing them a chance to have their say about what should happen to their tree—and the court considers that punishment is warranted.[145]

Other laws affecting tree management

3.86 In Victoria, the management and removal of trees on private land can be affected by other legislation. These laws may stipulate in what circumstances and in accordance with what process works may be carried out on specified trees or on specified private land in Victoria.

3.87 Private tree disputes may intersect with the following legislation:

- *the Planning and Environment Act 1987* (Vic)
- local laws made pursuant to the *Local Government Act 1989* (Vic)
- the *Heritage Act 2017* (Vic)
- the *Aboriginal Heritage Act 2006 (*Vic)
- the *Fences Act 1968* (Vic)
- the *Catchment and Land Protection Act 1994* (Vic)
- the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

138 Consent can be express or implied. Common examples of implied consent are entering a driveway and knocking on a neighbour's door to speak to them: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.4.2].
139 Thomson Reuters, *The Laws of Australia* (at 1 June 2016) 33 Torts, '8 Trespass and Intentional Torts' [33.8.330], [33.8.470].
140 *Limitation of Actions Act 1958* (Vic) s 5(1)(a).
141 For example, this may occur when a person remains on the land after entry and refuses to leave, places objects on the land and refuses to remove them, or builds a wall on the land: Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.2.5.3].
142 Ibid [4.5.1].
143 *Plenty v Dillon* (1991) 171 CLR 635, 655.
144 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.5.1].
145 *Gazzard v Hutchesson* (1995) Aust Torts Reports 81–337, 62,360: 'contumelious disrespect for the rights of the enjoyment by the [tree owner]'; see also Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.5.1].

3.88 Other Acts also relate to the management of vegetation for fire prevention; to minimise interference with powerlines; and to protect public health and wellbeing, and the environment.[146] See Chapter 10.

Community responses—the current law

3.89 Only a small number of people reporting a tree dispute to the Commission stated that they had been able to resolve it.[147]

3.90 The most common ways that neighbours tried to resolve their tree dispute were by exercising the self-help right to abatement or by attempting neighbour-led dispute resolution.[148] A smaller number of people reported that they contacted DSCV for varying degrees of assistance.[149]

3.91 The three main reasons given by community members for why neighbours may not be successful in resolving their tree dispute were:

- a lack of clarity about the law and information sources
- an inadequate balance between the rights of the tree owner and the affected neighbour
- the limited avenues of recourse available.

Lack of clarity

3.92 Many community responses identified that the law lacks clarity, particularly in terms of making it easy for neighbours to apply legal rules to their tree dispute.[150]

3.93 The Commission has been told that the available common law causes of action are hard to navigate and are complex, and the rights of neighbours at common law are unclear.[151] This means that neighbours are unable to point to any clear legal duty to encourage the resolution of a dispute or even encourage their neighbour to engage with them early on. This is exacerbated when the neighbour is uncooperative or hostile.[152]

3.94 The Law Institute of Victoria stated:

> Disputes about trees are governed by the common law torts of negligence and nuisance, which are inherently complex. Parties may view the current law as complex, and may not have a clear understanding of their rights and duties under the common law.[153]

3.95 DSCV suggested that there are a range of reasons for the lower rates of dispute resolution outcomes for tree matters. Some of those relate to a lack of clarity in the law. It suggested that many people who contact the centre incorrectly expect a local council or government agency to enforce an outcome that is inconsistent with case law.[154] Other reasons relate to unclear rights and obligations. DSCV suggested that:

> [DSCV staff find it] difficult to explain exactly what customers can and can't do without going to Court to have a Magistrate decide. For instance, for a customer whose property

146 *Country Fire Authority Act 1958* (Vic); *Metropolitan Fire Brigades Act 1958* (Vic); *Electrical Safety Act 1998* (Vic); *Flora and Fauna Guarantee Act 1988* (Vic); *Public Health and Wellbeing Act 2008* (Vic); *Road Management Act 2004* (Vic); *Rail Management Act 1996* (Vic); *Victorian Conservation Trust Act 1972* (Vic); *Conservation, Forests and Lands Act 1987* (Vic).
147 Only 22.86% of survey respondents reported that they were able to resolve their tree dispute successfully: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018). However, the Commission acknowledges that people who have been unsuccessful in resolving their tree dispute are more likely to contribute to this inquiry.
148 Submissions 1 (Ian Collier), 5 (Name withheld), 6 (Name withheld), 19 (Name withheld), 22 (Name withheld), 36 (Monique Onezime); 38 (L. Barry Wollmer); Consultation 1 (Aldo Taranto). 51.67% of survey respondents reported that they trimmed back the tree/plant to the boundary line to remedy the issue (abatement): Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).
149 Submissions 5 (Name withheld), 6 (Name withheld), 23 (Name withheld), 38 (L. Barry Wollmer); Survey Respondents 60, 82, 117.
150 Submissions 7 (Ben Kenyon), 9 (Dr Karen Smith), 25 (City of Boorondara), 28 (HVP Plantations), 30 (Law Institute of Victoria), 34 (Allan Day); Consultations 3 (HVP Plantations), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon); Survey Respondents 3, 43, 57, 82, 88.
151 Submission 30 (Law Institute of Victoria); Consultation 3 (HVP Plantations); Survey Respondent 117.
152 Submissions 6 (Name withheld), 36 (Monique Onezime), 38 (L. Barry Wollmer); Consultation 1 (Aldo Taranto); Survey Respondent 60.
153 Submission 30 (Law Institute of Victoria).
154 Information provided by DSCV as part of a data request from the Commission, August 2017.

> is threatened or damaged by tree roots, it is difficult to actually do anything from a practical stand-point; they can cut the roots back to the fenceline, but this will almost certainly result in damage to the tree, which could in turn destabilise it and leave them liable for property damage.[155]

3.96 Whilst it is not a function of DSCV to provide legal advice to its clients, DSCV also observes that many tree issues that people decide to contact DSCV about 'would not meet the standard for private nuisance'. It suggested that for these low level dispute matters there is no clear pathway for resolution and without this 'clients may become disillusioned and withdraw from contact with external agencies'.[156]

3.97 HVP Plantations stated that it is difficult to know how to interpret and apply the current law to a tree dispute without a determination by a court.[157] It observed that the common law with respect to tree disputes has not been as extensively developed as other matters that involve nuisance, negligence or trespass.

3.98 HVP Plantations further noted available case law focuses mainly on urban trees in close settings, which cannot be easily applied to rural settings:

> the current state of the law can only be estimated by extrapolation from cases that have considered boundary trees in urban settings. These cases tend not to provide a useful consideration of the issues in a rural setting.[158]

3.99 Arborist Ben Kenyon further identified that the law lacks additional clarity in situations where neighbours experience allergies due to neighbouring trees.[159]

Other laws add complexity

3.100 It was also identified that the additional layers of planning, local laws and other statutes add complexity and confusion to the resolution of these disputes.[160] Arborist Dr Karen Smith stated that even if the law was considered to be satisfactory, it may be confusing to navigate because 'there are so many different laws relevant to tree disputes, and also different codes of practices. And they are all in different places.'[161]

3.101 As one survey respondent noted, 'It is not always obvious to neighbours when a tree enjoys "extra" protective status, such as heritage status as deemed by council or other such bodies.'[162] It was further suggested:

> It is not easy to understand the 'rights' of both parties. Also the law or laws governing this area are spread over what seems to be a number of acts … understanding the implications of such laws then becomes quite cumbersome.[163]

Existing remedies are limited in value

3.102 An overwhelming majority of responses suggested that people had not been successful in resolving their tree dispute regardless of what form of informal resolution they attempted.[164] Despite this, the majority of people reported that they did not take legal action, even after exhausting all other options.[165]

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155 Information provided by DSCV as part of a data request from the Commission, August 2017.
156 Ibid.
157 Consultation 3 (HVP Plantations).
158 Submission 28 (HVP Plantations).
159 Consultation 6 (Ben Kenyon).
160 Submission 9 (Dr Karen Smith); Survey Respondents 3, 19, 57, 83, 88, 110.
161 Submission 9 (Dr Karen Smith).
162 Survey Respondent 57.
163 Ibid.
164 Submissions 1 (Ian Collier), 5 (Name withheld), 6 (Name withheld), 19 (Name withheld), 22 (Name withheld), 36 (Monique Onezime), 38 (L. Barry Wollmer); Consultation 1 (Aldo Taranto). Only 22.86% of survey respondents reported that they were able to successfully resolve the dispute themselves: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).
165 Submissions 2 (Name withheld), 5 (Name withheld), 6 (Name withheld), 19 (Name withheld), 38 (L. Barry Wollmer); Consultation 1 (Aldo Taranto). 93.62% of survey respondents reported that they did not take legal action: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).

3.103 Some stated that they had only achieved partial resolution,[166] such as when a tree owner agreed to remove the tree but refused to pay the cost of repairs. Others explained that although their tree dispute had been resolved, this had not occurred because of existing law and process. Instead, the dispute had ended because they moved away and were no longer affected or the risk they perceived (for example, a falling branch or tree) had eventuated, ending the immediate tension.[167]

3.104 A large number of responses reported that existing remedies were limited in their application and often inaccessible.[168] For example, one submission noted in relation to insurance that 'not everybody has insurance cover' and some people, for example pensioners, 'are unable to afford insurance'…'I am a pensioner and while I can manage to scrape together enough to pay an insurance premium, I cannot possibly afford the risky business of mounting a legal case'.[169]

Abatement is sometimes impractical or inappropriate

3.105 The legal requirement to return abated branches to the tree owner was identified as a confusing and unfair aspect of the law.[170] For example, one person expressed frustration that their neighbours had 'dumped the pruned branches' onto their land 'without notice or prior discussion'.[171] Some suggested that this requirement in and of itself may have the potential to cause or exacerbate a dispute with their neighbour about who is responsible for disposing of the branches.[172]

3.106 Some submissions raised concerns that the affected neighbour is entirely responsible for abating. As a result they may incur a substantial debt (for example, arborist's fees) with no physical assistance or monetary contribution required at law from the tree owner.[173] This may be particularly problematic for people who cannot physically or financially afford to carry out or arrange tree works.[174]

3.107 Another criticism is that abatement is not always practical such as where the encroaching tree is very large or where overhanging branches are many metres above the ground, possibly requiring a cherry picker.[175] Similarly, abatement may be inappropriate to use in confined spaces and narrow side streets.[176]

3.108 The cutting of encroaching roots or pruning of overhanging branches may also require the expertise of an arborist, which can be a significant cost that the affected neighbour may be unable to fund and has no right to recoup from the tree owner.[177]

3.109 Some arborists noted that when they are engaged by an affected neighbour to perform an assessment of a neighbouring tree, they are often unable to complete a thorough assessment because they are prevented from viewing the tree from all angles without permission to enter the tree owner's land.[178]

166 30% of survey respondents reported that they achieved a partial resolution: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).
167 Consultation 1 (Aldo Taranto); Survey Respondents 17, 31, 61, 74, 106.
168 Submissions 2 (Name withheld), 4 (Name withheld), 5 (Name withheld), 6 (Name withheld), 9 (Dr Karen Smith), 21 (Pointon Partner Lawyers), 22 (Name withheld), 23 (Name withheld), 24 (Name withheld), 27 (Name withheld), 30 (Law Institute of Victoria), 31 (Barwon Community Legal Service), 34 (Allan Day), 36 (Monique Onezime), 38 (L. Barry Wollmer); Consultations 1 (Aldo Taranto), 3 (HVP Plantations), 4 (Participants in facilitated discussion at VTIO ArborCamp2018); Survey Respondent 99.
169 Submission 38 (L. Barry Wollmer).
170 Submission 7 (Ben Kenyon); Survey Respondents 44, 95, 96, 103.
171 Survey Respondent 95.
172 Submission 10 (Professor Phillip Hamilton); Survey Respondents 7, 44.
173 Submissions 19 (Name withheld), 36 (Monique Onezime).
174 Submissions 6 (Name withheld), 31 (Barwon Community Legal Service), 36 (Monique Onezime); Consultations 7 (Dispute Settlement Centre of Victoria), 14 (Robert Mineo); Survey Respondents 6, 82, 114.
175 Submission 19 (Name withheld); Survey Respondents 24, 114.
176 Submission 23 (Name withheld).
177 Submission 24 (Name withheld).
178 Consultations 1 (Aldo Taranto), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 14 (Robert Mineo).

Disconnect with arboricultural standards

3.110 Some arborists also identified that the common law governing the resolution of tree disputes is sometimes at odds with arboricultural science and the professional standards that arborists are trained to follow.[179]

3.111 Dr Gregory Moore OAM noted:

> Matters that arise can be many and varied and the system that deals with disputes seems to be very complex and often appears to display a lack of knowledge of the biology and arboriculture of urban trees.[180]

3.112 An example commonly provided by arborists was the misalignment between the common law right to abate and the two main Australian Standards that arborists are trained to follow when pruning branches and cutting roots.[181] These two standards are the *AS 4373-2007—Pruning of Amenity Trees* and the *AS 4970-2009—Protection of Trees on Development Sites*.

3.113 An arborist applying *AS 4373-2007—Pruning of Amenity Trees* (the Australian Standard) may determine that, in order to maintain the tree's health and structural integrity, the branches should be pruned to the trunk of the tree, which could be located across boundary lines. If done without the consent of the tree owner, this would likely constitute a trespass.[182]

3.114 Alternatively, an arborist may determine that applying the Australian Standard would require that overhanging branches should only be lightly pruned to maintain the health and structural integrity of the tree. Some arborists reported that clients may prefer their arborist to perform tree works up to the boundary line regardless of what the Australian Standard may dictate in their situation.[183] Dr Gregory Moore OAM also stated that some arborists with less training and experience may be more likely to agree to their client's wishes.[184]

3.115 Arborists reported feeling concerned about the legal repercussions of causing damage to a tree by not following the Australian Standard and expressed confusion about balancing their obligations in this regard.[185]

Limitations of alternative dispute resolution

3.116 Data provided by DSCV and responses from the community suggest that mediation will not always be effective in tree disputes. From December 2011 to May 2017 DSCV reports that in 11.3 per cent of tree-related enquiries, it invited parties to participate in mediation. However, mediation was only conducted in 1.2 per cent of these matters. DSCV suggests that 5.3 per cent of tree related enquiries resulted in a dispute resolution outcome – either through mediation or where DSCV facilitated an outcome for parties directly, or provided advice to enable parties to resolve their matter. DSCV has advised that this rate differs from the average dispute resolution outcome rate for other matters which is much higher at 15–16 per cent. This information indicates that tree enquiries are less likely than other matters to progress to a dispute resolution outcome.[186]

3.117 Ben Kenyon also noted that '[m]ost situations rarely end with mediation' and that if they remain unresolved then the disputes are likely to 'head straight through to court'.[187]

179 Submission 7 (Ben Kenyon); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
180 Submission 12 (Dr Gregory Moore OAM).
181 Submission 7 (Ben Kenyon); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
182 Submission 23 (Name withheld).
183 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
184 Consultation 2 (Dr Gregory Moore OAM).
185 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
186 Information provided by DSCV as part of a data request from the Commission, August 2017.
187 Submission 7 (Ben Kenyon).

3.118 Mediation is a voluntary process. Nearly all community members who told the Commission that they contacted DSCV for help with their tree dispute reported that mediation could not be arranged because the other party was unresponsive or unwilling.[188] One person explained:

> I was hoping to initiate mediation through the [Dispute Settlement Centre of Victoria], so I provided them with my neighbours' details (name and address). The Centre sent correspondence to my neighbour, but my neighbour refused to attend and therefore we did not have a meeting to negotiate an outcome. The [Dispute Settlement Centre of Victoria] told me that attendance is purely on a voluntary basis and they could not force my neighbour to attend if [they] didn't want.[189]

3.119 A further limitation may arise when a neighbour seeking to mediate cannot locate the tree owner or obtain their contact details. This can happen where a holiday home is occupied only periodically.[190]

3.120 The Law Institute of Victoria noted that even if neighbours participate in mediation and agree on a form of resolution, the outcomes or agreements reached may not be easily enforceable if the neighbour later changes their mind or otherwise fails to comply with the agreement.[191]

3.121 Private mediation is also available for neighbours willing to participate in this process but the cost of private mediation may be prohibitive for many community members. One person suggested that the total cost of using private mediation to resolve their tree dispute was almost $10,000 for one day, and that this excluded the cost of preparation. The mediation session did not result in a successful outcome because the other party was unwilling to come to an agreement.[192]

3.122 DSCV has suggested that the low resolution rates for tree disputes can be attributed to factors, including:

- low awareness in the community of rights/obligations
- incorrect assumptions or expectations at point of contact
- lack of a defined process for resolving disputes
- unclear rights and obligations
- more frequent low-level disputes
- minimal scope for negotiation
- considerable barriers to resolving the dispute through court.[193]

3.123 DSCV observed that, unlike fencing disputes involving shared property, in a tree dispute the primary cost associated with a tree typically falls to one party.[194] In tree disputes 'neighbours are not explicitly required to negotiate by legislation or case law and thus many self-select out of the DSCV mediation process.' [195]

188 Submissions 5 (Name withheld), 6 (Name withheld), 38 (L. Barry Wollmer); Consultation 7 (Dispute Settlement Centre of Victoria); Survey Respondents 60, 82, 104, 117.
189 Submission 5 (Name withheld).
190 Consultation 7 (Dispute Settlement Centre of Victoria).
191 Submission 30 (Law Institute of Victoria).
192 Submission 17 (Name withheld).
193 Information provided by DSCV as part of a data request from the Commission, August 2017.
194 Ibid.
195 Ibid.

Litigation is difficult and costly

3.124 Nearly all people involved in tree disputes who made submissions or consulted with the Commission reported that they had not taken legal action.[196] Over 90 per cent of survey respondents also indicated that they had not taken legal action.[197] Only one person had commenced legal action and taken their matter to court regarding damage caused to a tree that they owned.[198] This person stated that 'after substantial costs were incurred and multiple delay tactics by the neighbours, an agreement was negotiated, largely in relation to the damaged fence'. They had received legal advice that 'no action could be taken in relation to the damage caused to the tree because it had not been killed'.[199]

3.125 Community responses suggest that legal action is very rarely pursued for a number of reasons, the most significant of which is the prohibitive cost.[200] Pointon Partners explained:

> Occasionally, matters do proceed to litigation in either the Magistrates' Court or sometimes the County Court. However, in my experience a great number of matters are abandoned, unresolved, because parties do not have the resources to proceed to Court.[201]

3.126 Pointon Partners suggested that 'Simple matters can cost in the order of $30,000 to bring to trial. More complicated matters can, and do, cost in excess of $100,000.' Costs may be incurred during the course of obtaining legal advice, paying court filing fees and the additional cost of retaining legal counsel in higher courts.[202] These costs were described as 'a significant impediment to parties wishing to litigate'.[203] One person suggested that, as a pensioner, he could not afford to go to court and stated that 'most pensioners cannot'.[204]

3.127 Community Legal Centres, which offer free legal assistance to community members, may be limited in the legal assistance they can provide for tree dispute matters. As Barwon Community Legal Service noted:

> Refusal to participate or unsuccessful mediation with neighbours, in the current legal framework leaves clients with only one option, initiating Court proceedings. Our service does not have capacity to assist clients taking these matters to Court. As a result, our service is left to refer clients to potentially expensive litigation lawyers to engage in a lengthy Court action for nuisance while the health of their trees continues to deteriorate or further damage is caused to adjoining fences or other structures.[205]

3.128 The LIV also noted that the 'time consuming nature of litigation may discourage parties from seeking formal resolution'.[206] DSCV noted that Magistrates' Court action is not generally considered by parties because 'the process takes a long time and can be costly, particularly in relation to the amounts that are typically in dispute. As such many clients simply "give up" and decide not to bother taking the matter further.' [207]

3.129 Some people reported that another reason why they did not pursue legal action was because they did not want to put further strain on their relationship with their neighbour.[208]

196 Submissions 6 (Name withheld), 11 (Name withheld), 13 (Mandy Collins), 19 (Name withheld), 23 (Name withheld), 33 (Annette Neville), 36 (Monique Onezime), 38 (L. Barry Wollmer); Consultation 1 (Aldo Taranto).
197 Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018).
198 Submission 17 (Name withheld).
199 Ibid.
200 Submissions 6 (Name withheld), 21 (Pointon Partners Lawyers), 30 (Law Institute of Victoria), 38 (L. Barry Wollmer); information provided by DSCV as part of a data request from the Commission, August 2017.
201 Submission 21 (Pointon Partners Lawyers).
202 Submissions 21 (Pointon Partners Lawyers), 30 (Law Institute of Victoria).
203 Submission 21 (Pointon Partners Lawyers).
204 Submission 38 (L. Barry Wollmer).
205 Submission 31 (Barwon Community Legal Service).
206 Submission 30 (Law Institute of Victoria).
207 Information provided by DSCV as part of a data request from the Commission, August 2017.
208 Submission 22 (Name withheld); Survey Respondent 123.

3.130 It was also lamented that the option of taking legal action is only available after damage or harm has occurred.[209] Where an affected neighbour is fearful or anxious about a large tree falling on their house, they may not be able to prove nuisance or negligence without any actual interference or damage having occurred.[210] In this sense, the law was described as reactionary.[211] One person stated:

> The laws are not very responsive to immediate or significant hazards. The system requires a lengthy and tedious process to get results at the affected person's expense both financially/emotionally.[212]

3.131 The City of Boroondara stated in summary, 'The current regime in Victoria is complicated, costly and overly legalistic.'[213]

Low awareness and lack of information

3.132 Community members may not know where to find the law, how to interpret it and who to ask for assistance.[214] DSCV observed that many people contact the centre 'purely to enquire about their rights and obligations with regards to tree issues'. It observed that there is a low level of awareness in the community about rights and obligations. [215]

3.133 Community responses suggest that people seeking information and assistance with their tree dispute are often referred to multiple agencies and find not getting clear advice frustrating. [216] People sometimes find themselves caught in a cycle of referrals.[217]

3.134 Responses lamented a lack of a central resource. Arborist Dr Karen Smith stated that:

> [there] needs to be a centralised place for people to go for information regarding trees and the law before they get into disputes … As well as a place to access information about their rights[218]

3.135 Most people approach their local council for information about what to do in a tree dispute.[219] People often mistakenly believe their local council will be able to help with their tree dispute because councils manage vegetation through local laws or planning schemes or because they handle other types of nuisance or public health and safety complaints.[220]

3.136 The Commission undertook consultations with some local councils. All confirmed that they view tree disputes as private matters between residents and will not generally become involved with these types of dispute unless the tree is regulated pursuant to a local law or planning scheme. [221] Councils generally encourage people to resolve their dispute informally by communicating with their neighbours or refer them to the free mediation services provided by DSCV.[222]

3.137 Local councils may also take additional, ad hoc steps to help residents resolve their tree dispute. For example, Baw Baw Shire Council stated that it may examine an arborist's report regarding certain claims and if the interference is substantial, it might try to assist or support the resident by informing them about the current health of the tree or its

209 Submission 22 (Name withheld).
210 Ibid.
211 Submission 31 (Barwon Community Legal Service).
212 Submission 4 (Name withheld).
213 Submission 25 (City of Boorondara).
214 Submissions 9 (Dr Karen Smith), 28 (HVP Plantations), 30 (Law Institute of Victoria), 34 (Allan Day); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
215 Information provided by DSCV as part of a data request from the Commission, August 2017.
216 Submissions 31 (Barwon Community Legal Service), 34 (Allan Day); Consultation 1 (Aldo Taranto). Most of Barwon Community Legal Service's clients had contacted their local council before seeking assistance from the Legal Service: Submission 31 (Barwon Community Legal Service).
217 Information provided by a community member to the Commission, 1 March 2018.
218 Submission 9 (Dr Karen Smith).
219 Submissions 4 (Name withheld), 8 (Victoria Thieberger), 17 (Name withheld), 25 (City of Boorondara), 31 (Barwon Community Legal Service), 34 (Allan Day), 36 (Monique Onezime); Consultations 1 (Aldo Taranto), 7 (Dispute Settlement Centre of Victoria), 10 (Baw Baw Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo), 9 (Nillumbik Shire Council); Survey Respondents 76; 114.
220 Consultation 8 (City of Boroondara).
221 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
222 Consultations 7 (Dispute Settlement Centre of Victoria), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).

environmental and amenity benefits. It may also suggest other ways to resolve the matter (for example, moving a sandpit instead of removing the branch that overhangs it).[223]

3.138 The City of Port Phillip also stated that it may advise residents to seek independent arboricultural advice. Port Phillip stated it may become more involved in a tree dispute where damage is caused by a third party to a resident's tree (for example, a plumber who may be damaging the roots of a tree).[224]

3.139 DSCV reported that in some instances, they may need to refer clients back to the referring local council when it is discovered that the tree subject to the dispute is protected by a local law or planning scheme.[225] Moreover, although DSCV reported that it received referrals from private arborists from time to time, an overwhelming majority of private arborists at ArborCamp2018 advised they had not heard of DSCV.[226]

3.140 People seeking information and assistance may also contact private arborists[227] and community legal centres.[228] A small number of people also reported that they contacted real estate agents[229] or property managers[230] (in the case of tenants) or water utility companies (in the case of roots blocking drains and sewerage),[231] insurance companies,[232] and even the Environmental Protection Agency.[233] These people reported that they were advised that they could not be assisted with this type of dispute or were referred elsewhere. People also contacted private lawyers for legal advice but this was less common, most likely due to expense.[234]

3.141 One affected neighbour recounted their experience of trying to get help with their tree dispute and being referred to a number of organisations. This person was concerned about overhanging gum trees and the noise of gumnuts falling on their garage roof. They contacted the local council first. The local council advised them that it could not help and referred them to DSCV. DSCV advised that the tree owner would need to participate in mediation voluntarily, which the affected neighbour determined was not practicable because of a hostile relationship. The affected neighbour also contacted the Environmental Protection Agency (EPA). The EPA advised them that noise complaints fell within the remit of local council and referred them back to their local council. The local council reiterated that it was unable to assist with private tree disputes and referred the person to DSCV a second time.[235]

The balance of competing rights

Few responsibilities for tree owners

3.142 Many people viewed the law as 'unfair' or 'one-sided'[236] because they perceive an inadequate balance between the right of a tree owner to use and enjoy their land in any lawful manner and the affected neighbour's right to use and enjoy their land without unreasonable interference.[237]

223 Consultation 10 (Baw Baw Shire Council).
224 Consultation 12 (City of Port Phillip).
225 Consultation 7 (Dispute Settlement Centre of Victoria).
226 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018). Approximately 35–40 arborists from all around Victoria were present during this consultation. The majority were private contractors.
227 Consultations 2 (Dr Gregory Moore OAM), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
228 Submissions 31 (Barwon Community Legal Service), 34 (Allan Day); Consultation 1 (Aldo Taranto).
229 Survey Respondents 20, 113.
230 Survey Respondent 95.
231 Survey Respondent 114
232 Submission 34 (Allan Day).
233 Information provided by a community member to the Commission, 1 March 2018.
234 Submissions 17 (Name withheld), 21 (Pointon Partners Lawyers).
235 Information provided by a community member to the Commission,1 March 2018.
236 Submissions 6 (Name withheld), 34 (Allan Day); Survey Respondent 72.
237 Submissions 5 (Name withheld), 6 (Name withheld), 34 (Allan Day), 36 (Monique Onezime); Survey Respondents 18, 72, 93, 99, 106, 111, 112, 114.

3.143 A common theme in community responses was that even though the tree is the property of the owner of the land on which is grows, the affected neighbour is left with the responsibility of managing the growth and effects of that tree as it encroaches over the fence.[238]

3.144 Many affected neighbours were concerned that the law appears to favour the tree owner because it does not put any obligations on the owner to maintain their tree. In doing so, it appears to allow the owner to ignore or refuse even reasonable requests or genuine efforts to resolve the dispute by their neighbour.[239] In addition, concern was expressed that an affected neighbour cannot recoup any costs associated with abatement, such as the cost of engaging an arborist to prune branches.[240]

3.145 Community responses noted:

> Your tree, your responsibility. [241]

> The law currently allows me to cut back overhanging tree branches and return them to my neighbour. This is an expensive ongoing issue that is hard work for me as I do not hire professional companies to do the job for me. I undertake the work to try and reduce the cost … I do not own the trees therefore why should I have to take responsibility to maintain them. Trees grow and spread, it should be the owner's responsibility to maintain them.[242]

> … [the law is] totally in favour of the person who owns the tree and they are the ones causing the trouble it is very unfair, I have done nothing to cause the situation but its left all to me to deal with the situation, as the laws are ridiculous. The current laws are not fair it should be the person who owns the tree or is in their property to take care of them when they are impeding onto someone else's property. … [T]he system as it is does not work at all and treats the [affected neighbour] as though they are the ones at fault and leaves it up to them which is unfair, people have illnesses and financial hardships they should not be expected to clear their neighbours trees.[243]

> The current law is very unfair. It is one-sided It will cost over $2,000 dollars to have it cut back to the fence line which won't even resolve the issues. It is their tree it should be their responsibility to keep it within their property. We would not be able to build a 4 story property on any part of our land but they can have a tree that high and also with branches and roots coming onto our property and we have no say about it.[244]

> It is hard to comprehend that we have no rights other than requesting empathy from the neighbour who unfortunately shows no willingness to remove the trees that will have foreseeable negative impact on our agricultural business … It is bordering on ridiculousness that currently the affected neighbour has to carry the costs for someone else's encroaching trees and even return the branches to the neighbour![245]

> There are no real sanctions—the rights of tree owners are paramount and the rights of those who suffer from neighbour's trees are almost non-existent. The onus and huge cost of removing overhanging branches and unwanted roots is on the victim, and not the tree owning perpetrator.[246]

238 Submissions 6 (Name withheld), 24 (Name withheld), 34 (Allan Day).
239 Submissions 5 (Name withheld), 17 (Name withheld), 22 (Name withheld), 33 (Annette Neville), 34 (Allan Day); Consultation 1 (Aldo Taranto); Survey Respondent 60.
240 Submissions 5 (Name withheld), 6 (Name withheld), 19 (Name withheld), 23 (Name withheld).
241 Submission 38 (L. Barry Wollmer).
242 Submission 5 (Name withheld).
243 Submission 6 (Name withheld).
244 Survey Respondent 72.
245 Survey Respondent 99.
246 Submission 19 (Name withheld).

The benefits of trees

3.146 In Chapter 2 the Commission identified that the community is becoming increasingly aware of the importance of vegetation and the need to retain it. Disputes also arise in the community about the removal of vegetation from neighbouring land. In some local government areas it was suggested that these enquiries equate to half of the enquiries received about trees on private land.[247]

3.147 One arborist also expressed the view that it was unfair that new owners have full authority over any tree on their land, especially where the tree is decades-or centuries-old and could be considered to be a community asset.[248]

3.148 ENSPEC noted that 'any reform needs to provide a balance between genuine harm, or risk thereof, and the unreasonable expectations of some in the community, such as often occurs with complaints about falling leaves, or the propensity to attribute causation to trees without proof for phenomena [such as] soil subsidence and blocked pipes'.[249]

3.149 In addition and as outlined above, the main remedies for tree disputes are court orders for an injunction and/or damages. These tortious remedies 'aim to rectify specific personal losses, but do not address the interests of the public at large in the aesthetic, historical, cultural or environmental values associated with trees'.[250] This may be considered at odds with an increasing awareness about and emphasis on the importance of vegetation, the need to retain the urban forest and to improve the liveability of urban spaces.

Rural and urban contexts

3.150 HVP Plantations identified that common law principles in nuisance and negligence are not easily applied to tree issues in rural areas where there may be many trees on extensive boundaries. It was suggested that it is difficult in practice for rural landowners to inspect trees to protect neighbours from harm in the context of negligence: 'Regular inspection of such trees is mostly impractical and a tree which is "defective" is also likely to be a tree with significant habitat value which is valued by the community.'[251]

3.151 HVP also identified that nuisance arising from damage to property by falling trees or branches is almost inevitable in rural areas. Abating large and numerous trees to address this issue would 'not be a desirable outcome'. It was suggested that 'most people would prefer that the objective of total safety from falling trees and branches be compromised to maintain the environmental and amenity value of trees in the landscape'.[252] A distinction was drawn where there is a threat of harm to people caused by a particular tree and action is therefore required.[253]

The Commission's conclusion

3.152 The Commission is of the view that there is currently no clear process that the community can easily follow to resolve tree disputes. It is hard to find definitive legal statements about the rights of parties to disputes and navigating the current law is difficult. There is also a lack of centrally available community information about how to resolve these disputes.

3.153 Court proceedings are prohibitively expensive and remedies provide only limited recourse. Some remedies are reactive only and do not allow much scope for a person to take action to prevent damage or harm, while others do not take into account the broader benefits that trees provide to the community. Some remedies are outdated and can further inflame disputes—for example, the requirement to return abated branches to the tree owner.

247 Consultations 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
248 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
249 Submission 18 (ENSPEC).
250 Margaret Davies and Kynan Rogers, 'Tale of a Tree' (2014) 16 *Flinders Law Journal* 43, 52.
251 Submission 28 (HVP Plantations).
252 Ibid.
253 Ibid.

4

The need for a new Act to resolve neighbourhood tree disputes

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4. The need for a new Act to resolve neighbourhood tree disputes

Introduction

4.1 Chapter 3 examined some limitations with how the current law helps people to resolve tree disputes. This chapter explores the need for change in more detail. It briefly considers the interstate Acts that have been introduced to resolve tree disputes, and community responses to the possible direction of reforms in Victoria. It recommends the introduction of a Neighbourhood Tree Disputes Act in Victoria and identifies the policy themes that should underpin this new Act.

Approaches to tree disputes in other jurisdictions

4.2 Some Australian jurisdictions have enacted legislative regimes to govern the resolution of tree disputes while others have retained the common law.

4.3 In the Australian Capital Territory, the Northern Territory, South Australia and Western Australia, tree disputes are governed by common law, as in Victoria. The overall process in each of these states and territories is similar to the Victorian process discussed in Chapter 3.

4.4 As in Victoria, each of the states and territories has its own provider of free mediation services.[1] Tree disputes are heard in courts or tribunals:

- In South Australia and Western Australia, smaller claims are heard in magistrates' courts.[2]
- In the Northern Territory, smaller claims can be heard in the Northern Territory Civil and Administrative Tribunal or the Local Court.[3]
- In the Australian Capital Territory, an affected neighbour can bring legal action for nuisance in the ACT Civil and Administrative Tribunal instead of going to court, provided their claim is for $25,000 or less.[4] Claims exceeding this amount must be brought in the ACT Magistrates Court.[5]

1 These include the Conflict Resolution Service in the ACT (Conflict Resolution Centre, *Resolving Conflict in Canberra* (Web Page) <www.crs.org.au/>); the Community Justice Centre (NT), *Resolving Disputes without Going to Court* (Web Page, 2019) <https://nt.gov.au/law/processes/resolving-disputes-without-going-to-court>); the Uniting Communities Mediation Service in South Australia (Uniting Communities, *Mediation* (Web Page, 2019) <www.unitingcommunities.org/services/financial-legal-services/mediation-services/>), and the Citizens Advice Bureau in Western Australia (Citizens Advice Bureau (WA), *Mediation Service* (Web Page, 2019) <http://www.cabwa.com.au/mediation-service>).

2 Individual jurisdictional limits of each state and territory's courts may require larger claims to be brought in higher courts.

3 The Northern Territory Civil and Administrative Tribunal has original jurisdiction to hear claims made pursuant to the *Small Claims Act 2016* (NT). A 'small claim' is $25 000 or less: *Small Claims Act 2016* (NT) s 6. Section 13A of the Local Court Act 2015 confers limited concurrent jurisdiction on the Local Court in relation to these claims.

4 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 18(2)(a).

5 The jurisdictional limit of the ACT Magistrates Court is $250,000: *Magistrates Court Act 1930* (ACT) s 257.

Tree dispute Acts in other states

4.5 Specific Acts have been introduced in New South Wales, Queensland and Tasmania to help neighbours on private land resolve their tree disputes.[6] The key features of these Acts are discussed throughout this report.

4.6 These Acts were introduced following reviews by law reform bodies and government agencies[7] that recommended new legislation to provide a 'simple, inexpensive and accessible process for resolving tree disputes'.[8]

4.7 These Acts identify:

- the rights and responsibilities of parties
- the specific causes of action that can be relied upon to bring legal action
- the decision-making principles that will guide the decision maker
- the types of orders that can be made.

4.8 Cases under the interstate Acts are heard in either in a tribunal or in a specialised court, which each focusing on quick, cheap and efficient dispute resolution.[9] In New South Wales, cases are heard by specialist Commissioners with arboricultural experience and hearings are generally conducted on site.[10] In Queensland the Queensland Civil and Administrative Tribunal (QCAT) is assisted by Tribunal appointed independent tree assessors who provide expert advice to the Tribunal.[11]

4.9 In addition to legal action through a court or tribunal, the Queensland and Tasmanian Acts introduce formal procedures that help people resolve their disputes out of court.[12]

4.10 Both NSW and Queensland handle a relatively low number of applications each year. The Land and Environment Court of New South Wales (NSWLEC) has heard approximately 1000 cases since the NSW scheme commenced. It now hears 120 to 156 cases per year.[13] Approximately 200 tree dispute applications are filed in QCAT each year.[14] The Tasmanian Act came into operation in December 2017, with 13 applications filed in 2018 and three filed as at the end of April 2019.[15]

4.11 The introduction of these Acts appears to have had positive outcomes. Reviews of the Acts have found that the policy objectives of simplicity, affordability and accessibility have been met by the procedure established in New South Wales; [16] and that the Queensland scheme provides effective resolution of tree disputes.[17]

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6 See generally, *Trees (Disputes Between Neighbours) Act 2006* (NSW); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld); *Neighbourhood Disputes About Plants Act 2017* (Tas).

7 For Queensland see Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2, 9; Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations: Trees* (Discussion Paper, July 2008); Department of Justice and Attorney-General (Qld), *Review of Neighbourly Relations: Resolving Neighbourhood Disputes* (Discussion Paper, July 2008); Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) 1; For Tasmania see Tasmania, Parliamentary Debates, Legislative Council, 22 June 2017, 1 (Leonie Hiscuitt); Tasmanian Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Report No 21, January 2016) 35 (Recommendation 3); For New South Wales see New South Wales Law Reform Commission, *Neighbour and Neighbour Relations* (Report No 88, 1998).

8 For New South Wales see Law Reform Commission, *Neighbour and Neighbour Relations* (Report No 88, 1998) [Recommendation 5]. As Commissioner Fakes explains, the *Trees (Disputes Between Neighbours) Act 2006* (NSW) 'was enacted to provide a relatively simple means of dealing with disputes between neighbours as a result of trees...These are civil matters that prior to the [statutory scheme] would have required someone to take an action in nuisance or negligence … an expensive and time consuming process, and a process more limited in scope than that of the current [statutory scheme]': *Ghazal v Vella* (No.2) [2011] NSWLEC 1340.

9 Tree disputes are heard in the Land and Environment Court of NSW, the Queensland Civil and Administrative Tribunal and the Resource Management and Planning Appeal Tribunal.

10 Land and Environment Court of New South Wales, *Practice Note Class 2: Tree Disputes*, 1 December 2018 [23], [42].

11 Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 7 of 2013: Arrangements for Applications for Orders to Resolve Other Issues About Trees,* 3 April 2014 [5]-[7].

12 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) pt 4; *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 20-21. These parts of the Acts provide for a formal branch removal notice process. This process is discussed in Ch 6.

13 Consultation 11 (Land and Environment Court of New South Wales).

14 Consultation 15 (Queensland Civil and Administrative Tribunal).

15 Information provided by the Resource Management and Planning Appeal Tribunal to the Commission, April 2019. The data provided dates to 26 April 2019.

16 Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 10, 15-16.

17 Consultation 15 (Queensland Civil and Administrative Tribunal).

4.12 These schemes provide a good guide for a legislative regime in Victoria.

International jurisdictions

4.13 Some international jurisdictions have also developed laws and processes to help neighbours to resolve their tree disputes. They include New Zealand, Singapore, Canada and the United States. Some of these international schemes have informed the development of recommendations in this report.

Community responses—options for reform

4.14 In the consultation paper, the Commission sought community responses on three main options for reform:

- Option 1: Retain the existing system but with specific improvements
- Option 2: Introduce a new statutory scheme (an Act) for resolving tree disputes in Victoria
- Option 3: Alternative options for reform.

4.15 Community responses overwhelmingly supported the introduction of a new Act in Victoria.

Option 1: Retain the existing system

4.16 Only a small number of people considered the current law and process in Victoria satisfactory.[18] Most community members who addressed this question suggested that the current law is not satisfactory.[19] One submission noted:

> the existing system should not be retained … Anything that resolves or unifies the multitude of legal considerations surrounding tree dispute laws and processes that we have at present should be a great improvement.[20]

4.17 Another commented, 'the law in Victoria relating to tree disputes is totally unsatisfactory … in reality [it] offers no protection to persons and property that may be impacted and or inconvenienced by a neighbour's tree.'[21]

4.18 Some community members provided suggestions for specific improvements:

- modifications to abatement[22]
- accessible and centralised information about available options and rights and best practice for pruning (for example, information about the relevant Australian Standards)[23]
- compelling tree owners to manage or remedy trees in specific situations (such as where the tree hosts pests or is diseased, or where an affected neighbour makes specific requests for works) with enforcement by local council[24]

18 Only 15.31 per cent of survey responses to Question 12 'Do you think the current law and process for resolving tree disputes in Victoria is satisfactory as it is?' said 'yes': Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018); Submissions 9 (Dr Karen Smith) 'I think they probably are. However, there are so many different laws relevant to tree disputes, and also different codes of practices. And they are all in different places'; 21 (Pointon Partners Lawyers) 'The law is satisfactory, however the process for resolving neighbourhood tree disputes is simply not available to those who cannot afford to go to Court. Therefore, the enactment of an Expert Tribunal to resolve simple dispute between neighbours relating to tree would make justice accessible to all Victorians'.

19 Submissions 2 (Name withheld), 4 (Name withheld), 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 11 (Name withheld), 13 (Mandy Collins), 17 (Name withheld), 19 (Name withheld), 22 (Name withheld), 23 (Name withheld), 24 (Name withheld), 25 (City of Boroondara), 27 (Name withheld), 30 (Law Institute of Victoria), 31 (Barwon Community Legal Service), 33 (Annette Neville), 34 (Allan Day), 36 (Monique Onezime), 38 (L. Barry Wollmer); Consultations 3 (HVP Plantations), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).

20 Confidential submission.

21 Submission 38 (L. Barry Wollmer).

22 Submission 23 (Name withheld).

23 Submissions 7 (Ben Kenyon), 9 (Dr Karen Smith), 11 (Name withheld), 23 (Name withheld). See, eg, Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007).

24 Submission 4 (Name withheld).

- preventing people from planting trees close to common boundaries, and giving affected neighbours an automatic right to cut down trees to the height of the dividing fence[25]
- compelling an unwilling party to participate in mediation.[26]

Option 2: Introduce a new tree disputes Act

4.19 The majority of community members supported the adoption of a specific statutory scheme in Victoria and noted it would be a significant improvement.[27]

4.20 One community member stated 'there should be a single, clear Act that sets out neighbours' rights and duties, and explains where to go for information and support'.[28] Arborist Dr Karen Smith stated 'It would seem that this has merit since self-help and mediation is not proving satisfactory to many.'[29] Another community member pointed out that:

> A statutory scheme for resolving tree disputes has the primary function of providing a level of certainty for disputants who are seeking the resolution of a seemingly intractable conflict by way [of] accessible legislation and adjudication.[30]

4.21 Many community members viewed the scheme in New South Wales favourably and considered a similar Victorian statutory scheme appropriate[31]:

> Other states in Australia have much more rigorous laws and also specialised courts to deal with these problems … We need a new act of parliament. Other states have useful legislation, why not Victoria?[32]

4.22 As one survey respondent succinctly explained: 'The law requires immediate reform. It is currently unfair. The NSW tree law is a good example to use for reforming the laws in relation to trees in Victoria.'[33]

4.23 Dr Gregory Moore OAM stated that the statutory schemes in New South Wales, Queensland and Tasmania appear to be sensible.[34]

4.24 QCAT reported that the Queensland scheme appears to be working well to resolve tree disputes.[35] Acting Commissioner David Galwey of the NSWLEC and a tree disputes consultant working in both New South Wales and Victoria submitted that the New South Wales scheme provides a good example of effective legislation for resolving tree disputes.[36]

4.25 Some commented that a clear statutory scheme, such as the *Fences Act 1968* (Vic) for fence disputes, should be replicated for tree disputes.[37]

4.26 Although no one objected to the idea of a new Act, there were reservations about the potential for any new scheme to lead to an increase in disputes and have a greater impact on vegetation.[38]

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25 Submission 33 (Annette Neville).
26 Submission 10 (Professor Phillip Hamilton); Survey respondents 72, 117.
27 Submissions 2 (Name withheld), 4 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 11 (Name withheld), 13 (Mandy Collins), 19 (Name withheld), 20 (Name withheld), 23 (Name withheld), 25 (City of Boorondara), 27 (Name withheld), 28 (HVP Plantations), 31 (Barwon Community Legal Service), 33 (Annette Neville); Consultations 1 (Aldo Taranto), 3 (HVP Plantations).
28 Consultation 1 (Aldo Taranto).
29 Submission 9 (Dr Karen Smith).
30 Submission 20 (Name withheld).
31 Submissions 7 (Ben Kenyon), 9 (Dr Karen Smith), 20 (Name withheld), 31 (Barwon Community Legal Service); Consultation 1 (Aldo Taranto).
32 Submission 19 (Name withheld).
33 Survey respondent 99.
34 Consultation 2 (Dr Gregory Moore OAM).
35 Consultation 15 (Queensland Civil and Administrative Tribunal).
36 Submissions 20 (Name withheld), 29 (David Galwey).
37 See, eg, Consultation 3 (HVP Plantations).
38 Submissions 18 (ENSPEC), 28 (HVP Plantations); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).

4.27 An arborist expressed concern that a statutory scheme will increase the removal of trees, thus reducing the urban forest and benefits to the community.[39] ENSPEC, an arboricultural consulting firm, supported reforms to clarify and simplify the resolution of tree disputes but noted:

> we harbour some strong reservations about the form this might take and the potential for an increase in disputes as a result … Is the current number of enquiries unexpected or unreasonable given the millions of trees in our community?
>
> Could the number of enquiries/disputes be reduced through public education about reasonable expectations of living in a community?
>
> Would providing an easily accessible system actually increase the overall workload in the system and burden on the community by facilitating more unreasonable 'disputes' going further than an enquiry to DSCV [Dispute Settlement Centre of Victoria]?[40]

4.28 HVP Plantations cautioned against placing unreasonable burdens on rural landowners to manage trees. It submitted that 'there is a case for statutory intervention to provide guidance to rural landowners in treed environments, and to draw a contemporary compromise between the benefits and risks that trees bring to neighbours'.[41]

Option 3: Alternative options

4.29 The community was also asked to submit proposals for alternative options for reform. Some of these ideas are discussed in Chapter 13 because they are beyond the scope of this Community Law Reform Inquiry.

4.30 Dr Gregory Moore OAM suggested establishing an office of the State Arborist. This person would have significant arboricultural experience and would provide independent and impartial advice in disputes. Parties could pay a fee which would fund the office.[42]

4.31 Some responses proposed a role for local councils to inspect trees, put tree owners on notice, and fine those who do not comply.[43]

The Commission's conclusions—options for reform

4.32 Tree issues arise frequently in the community (whether or not they become disputes handled by DSCV) and those issues would usefully be ameliorated by more clarity in the law.

4.33 For most people, the current law and process are unclear and provide limited recourse. Because courts are inaccessible to most people, the community must rely on the informal dispute resolution framework. Without clear guidance from the law, this approach has limitations.

The limitations of only focusing on informal resolution

4.34 Informal neighbour-led negotiation may not be possible when a tree owner ignores an affected neighbour's concerns or refuses to negotiate. There is currently little incentive for a tree owner to negotiate with an affected neighbour because the law is hard to identify and there is no clear resolution framework.

39 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
40 Submission 18 (ENSPEC).
41 Submission 28 (HVP Plantations).
42 Consultation 2 (Dr Gregory Moore OAM).
43 Submissions 5 (Name withheld), 6 (Name withheld).

4.35 It may be inadvisable to approach a tree owner where the relationship between neighbours is acrimonious. The close proximity of neighbours increases the chances of conflict. Tree disputes can escalate into trespass, vandalism or criminal matters.[44]

4.36 Abatement is a 'self-help' remedy and so does not require any contribution or cooperation from the tree owner, but it may be of limited use for affected neighbours who are physically or financially unable to do it. Abatement may not be practicable in situations involving large trees or confined spaces. Further, the requirement at law to return abated branches to the tree owner was identified as unfair and could make things worse.

4.37 Mediation via DSCV is voluntary, so if one party refuses to participate an affected neighbour is left without any recourse. Moreover, any agreement reached is not legally binding and the affected neighbour has no right of enforcement unless the agreement is converted into a formal written contract by an external legal practitioner.[45] These limits were also recognised in the context of fence disputes by the Parliamentary Law Reform Committee during its 1998 review *of the Fences Act 1968 (Vic*).[46]

4.38 Mediation will not be appropriate if either party has expressed fear of the other or has been harmed or threatened with violence by the other party.[47]

4.39 The Commission agrees with the conclusions of the Tasmania Law Reform Institute's 2016 review, *Problem Trees and Hedges: Access to Sunlight and Views*. The review recognised that the current Victorian system for resolving tree disputes is focused on alternative dispute resolution (ADR).[48] It concluded:

> The Institute is not persuaded that ADR should be used as a stand-alone alternative to other, more formal processes in the resolution of neighbour disputes about trees or hedges. This is due to potential difficulties with compelling a neighbour to participate in ADR processes—particularly where there is a level of animosity between neighbours that would make voluntary attendance or compliance unrealistic or undesirable—and the (potentially) non-binding nature of agreements reached through ADR, making the enforcement of agreements unworkable in some cases. Further, if ADR fails to resolve the dispute recourse would be to the common law, a situation that is unlikely to provide a satisfactory resolution to the dispute.[49]

4.40 The Tasmanian review recommended that the Victorian model not be implemented in Tasmania.[50]

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44 See, eg, *Miles v Barca* (2003) VSC 376; Gregory Moore, 'Acts of Arborial Violence: Tree Vandals Deprive Us All', *The Conversation* (online, 2 June 2015, <http://theconversation.com/acts-of-arborial-violence-tree-vandals-deprive-us-all-41342>; Lynda Cheshire and Robin Fitzgerald, 'From Private Nuisance to Criminal Behaviour: Neighbour Problems and Neighbourhood Context in an Australian City' (2015) 30(3) *Housing Studies* 100, 101, 115–6; Victoria Legal Aid, *Disputes With Neighbours* (Web Page, 25 March 2019) <www.legalaid.vic.gov.au/find-legal-answers/disputes-with-neighbours>.

45 DSCV staff do not have any investigative or enforcement powers. Accordingly, DSCV does not provide any location/site assessment services and they cannot tell the person you are in dispute with to do anything: Dispute Settlement Centre of Victoria, DSCV FAQS (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/information-and-advice/dscv-faqs>. Parties are informed by DSCV that their written mediation agreements may be drawn up into a formal written contract by an external legal practitioner: Information provided by the Dispute Settlement Centre of Victoria to the Commission, 16 October 2017.

46 Law Reform Committee, Parliament of Victoria, *Review of the Fences Act 1968* (Report, 1998) [2.17]–[2.20].

47 DSCV considers a number of factors when determining whether a matter is appropriate for mediation. Considerations include: whether both parties genuinely want to resolve the dispute; whether the parties are able to understand and participate in the mediation process; the level of vulnerability of either party (eg, mental health issues); whether either party has expressed fear of the other party, or has been harmed or threatened with violence by the other party; any previous failed attempts at mediation; whether the issue is substantial enough to mediate: Dispute Settlement Centre of Victoria, *Mediation* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/about-us/mediation-0>.

48 Tasmania Law Reform Institute, *Problem Trees and Hedge: Access to Sunlight and Views* (Report No 21, 2016) [5.3.1].

49 Ibid [5.3.8].

50 Ibid 35, Recommendation 3.

The limitations of going to court

4.41 High costs mean that many people do not take matters to court. Even if neighbours choose to pursue legal action, the outcomes can be difficult to predict. Common law rules in nuisance, negligence and trespass are often complex and it is difficult to identify clear statements of rights and responsibilities for tree owners and affected neighbours. The torts and their remedies do not address all the unique circumstances and issues involved in tree disputes, and the wider benefits and importance of trees do not have to be considered. It is also difficult to obtain a pre-emptive remedy.

4.42 The Commission agrees generally with the comments in interstate reviews on the complexity and limitations of the common law. The New South Wales Law Reform Commission's 1998 review, *Neighbour and Neighbour Relations* found that:

> The law of nuisance is only likely to provide a remedy where a tree actually causes physical damage. Common law nuisance rights in relation to the less tangible impact of trees on the enjoyment of property are so unclear and uncertain that few people are likely to pursue them in a court. People are also unlikely to be able to resolve a dispute between themselves on the basis of such laws ... The common law of nuisance is of very little use to a neighbour trying to prevent a tree from causing damage. This means that a minor dispute that could be resolved by the inexpensive removal of a small tree is likely to become a major dispute in which property damage has occurred and will continue to occur unless huge amounts are spent to remove what has become a very large tree.[51]

4.43 The Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010 (which became the Queensland Act) explain that 'the application of the common law of nuisance to a neighbourhood dispute about trees did not provide a realistic solution for neighbours'.[52]

A new Tree Disputes Act is needed

4.44 The Commission recommends that a new Act is introduced to govern the resolution of tree disputes between neighbours on private land in Victoria. This approach received considerable support from the community.

4.45 A new Act is needed because amending existing laws would not address all the elements that arise in tree disputes. A standalone Act would be easier for the community to find, navigate and understand.

4.46 Certain aspects of the current legal process should be retained to allow neighbours different options. The existing pathways of abatement, neighbour-led negotiation and mediation via DSCV may successfully resolve some tree disputes.

4.47 The Commission supports retaining these options and encouraging neighbours to use them as a first step. Specific suggestions for improving them are outlined in subsequent chapters.[53] This is consistent with other Australian and international jurisdictions that have enacted legislation for tree disputes but have also encouraged the options of negotiation, mediation and abatement. See Chapter 6.

4.48 Neighbours who wish to take legal action should not have to rely on the common law tort of nuisance for tree disputes that fall within the scope of the new Act. Instead, neighbours should be able to bring a claim within the new Act. Retaining the common law right to nuisance may be helpful for matters that would fall outside the new Act—for example, a claimant who wishes to bring an application alleging interference, which is excluded from the ambit of the new Act (see Chapter 5). Neither the Tasmanian nor

51 New South Wales Law Reform Commission, *Neighbour and Neighbour Relations* (Report No 88, 1998) [2.20]-[2.21].
52 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld), 1–2.
53 Possible modifications to abatement, and the remedies of neighbour-led informal negotiation and mediation are discussed in Chapter 6. Possible community resources for better information about the law and processes are discussed in Chapter 12.

Queensland Acts limit the operation of the common law rights to nuisance,[54] although they do modify the right to abatement (see Chapter 6).

4.49 Also, negligence and trespass offer unique and relevant remedies in certain circumstances (for example, personal injury or trespass to land). The new Act should not limit a neighbour's ability to sue for negligence or trespass occurring as a result of a tree dispute. This is consistent with the New South Wales Act, where neighbours may still wish to bring an action for negligence or trespass at common law.[55] The Tasmanian and Queensland Acts do not limit the right to negligence or trespass.

4.50 The Commission acknowledges concerns expressed by ENSPEC that a new Act could increase the level of disputation in the community or result in more 'unreasonable disputes going further than an enquiry to DSCV'.[56] Others expressed concern that a new Act may lead to increased vegetation removal.[57]

4.51 The Commission's recommendations, including mandatory decision-making principles and a requirement for expert evidence, aim to ensure that the matters initiated in VCAT are disputes of real substance and that a range of different considerations are balanced transparently in the decision-making process.

4.52 The Commission is encouraged by the positive findings of the statutory reviews of the tree dispute Acts in New South Wales and Queensland,[58] and by its own discussions in the course of this review.[59] The Commission also understands that the statutory scheme for resolving fence disputes under the *Fences Act 1968* (Vic) is working well and providing clarity about rights and dispute resolution.

4.53 Rather than tackle current inadequacies in the law solely through education and community resources,[60] these resources should complement the introduction of a new Act. Supporting material should explain in an accessible way how the new Act works and provide information about the broader tools available to help the community resolve their disputes and manage vegetation better.

Other reform ideas

4.54 Proposals for a resolution and enforcement process through local councils[61] are not supported because this is contrary to the primary role of local councils. An independent review body, such as an office of a State Arborist,[62] a review panel or a process through approved expert contractors, could provide neighbours with an independent decision about the tree and how best to manage it.[63] However, an existing decision-making forum within the legal system would respond better to the civil and arboricultural elements of a tree dispute.

54 See generally *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2017* (Tas). In contrast the *Trees (Disputes Between Neighbours) Act 2006* (NSW) does limit the right to nuisance: s 5.
55 See, eg, *Robson v Leischke* (2008) 72 NSWLR 98 [218]–[219].
56 Submission 18 (ENSPEC).
57 Submission 28 (HVP Plantations); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
58 Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (Report, 2009) 3; Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015). The recently introduced Tasmanian scheme has not yet undergone any form of review.
59 Consultations 11 (Land and Environment Court of New South Wales); 15 (Queensland Civil and Administrative Tribunal).
60 See Submission 18 (ENSPEC).
61 Submissions 5 (Name withheld), 6 (Name withheld).
62 Consultation 2 (Dr Gregory Moore OAM).
63 Confidential submission.

Recommendation

1 A new Act should be introduced to govern the process for resolving disputes between neighbours about trees on private land in Victoria. The new Act could be titled the Neighbourhood Tree Disputes Act.

Policy themes that should underpin the new Act

4.56 The Commission has identified policy themes to underpin the new Act. The new tree disputes Act should:

- provide a clear dispute resolution pathway that encourages people to resolve their 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 to resolve their own disputes
- provide practical and effective remedies
- balance competing rights and interests fairly and transparently
- use evidence-based decision making
- interact simply with other laws.

4.57 The new Act should also be accessible and supported by information that is clear and easy to find. These policy themes are discussed in the following paragraphs.

Provide a clear dispute resolution pathway

4.58 It is important that neighbours try to work out ways of solving tree problems between themselves to preserve their ongoing relationship.

4.59 The new Act should clearly define the circumstances in which a case can be brought and the range of the orders available. It should encourage people to resolve disputes informally and provide greater certainty for those who take legal action.

Resolve disputes efficiently and inexpensively

4.60 Not all disputes can be resolved informally. Where disputes proceed to formal adjudication, they should be resolved in an inexpensive, accessible and transparent way to provide the best chance of preserving future relations. The Commission considers that tree disputes would be most appropriately adjudicated in VCAT for the following reasons:

- Application costs are kept to a minimum in VCAT proceedings and parties generally bear their own costs.
- The use of alternative dispute resolution (ADR) is encouraged and VCAT has established ADR programs.
- Tribunal decision makers have relevant experience in planning, environmental and small civil claims matters.
- The Tribunal has considerable flexibility in how it conducts hearings. It is designed for parties without legal representation and is less formal than a court.

4.61 Tree disputes are essentially small party–party disputes and so are well suited to Tribunal resolution. They are generally between two neighbours and often involve factual interpretation rather than complex legal interpretation. They can often be solved with practical and relatively low-cost solutions.

4.62 The Commission is impressed by the success of the NSW scheme. While the NSWLEC is a superior court, it manages tree disputes in much the same way as a tribunal—quickly, efficiently and flexibly. Many of the key features of the NSW scheme could be adapted to work well in the tribunal system in Victoria. See Chapter 7.

Establish clear decision-making principles

4.63 The new Act should establish clear decision-making principles to guide the community about what factors may be considered by VCAT if a matter progresses to a Tribunal hearing. These principles will guide the community about how the Act will apply and help the community to resolve disputes themselves.

Provide practical and effective remedies

4.64 There is a need for clear practical solutions to tree problems to be incorporated in the new laws. The Act should provide VCAT with a wide discretion to make a range of orders to remedy, restrain or prevent or address damage to property or injury to a person. See Chapter 5.

4.65 The requirements of the common law remedy of abatement may sometimes make disputes worse. For example, tree owners voiced concerns about vegetation being dumped back over the fence after abatement, and affected neighbours expressed concern about having to carry out tree maintenance work that was not of their making.[64]

4.66 There is a need to modernise the law to reflect the realities of urban life today. Abatement should be modified so that an affected neighbour is no longer required to return tree branches. This remedy would also be enhanced by improved awareness of and access to qualified, trained arborists. See Chapters 8 and 12.

4.67 Arborists have noted a disconnect between the common law and the Australian standards that arborists are trained to follow.[65] In Chapter 9 the Commission recommends that works conducted pursuant to orders comply with the relevant Australian standards.

4.68 Expert arboricultural input into the process will help VCAT provide remedies that are robust and practical. There should be scope to vary or revoke orders where necessary. See Chapter 9.

Balance competing rights and interests

The risk of damage or injury

4.69 Primary importance should be given to identifying any risks posed by the tree in an accurate and timely way. This principle was echoed in a number of submissions and consultations.[66] The new Act should aim to prevent harm and damage caused by trees. The new Act should recognise that trees are dynamic living organisms and should enable VCAT to make swift decisions.

The importance of trees to the community

4.70 Protecting and encouraging more vegetation in our urban spaces is increasingly important to our community. Viewing tree disputes strictly as party–party disputes overlooks some of the broader considerations. These include:

- the historical, cultural, social or scientific value of trees

64 Submissions 5 (Name withheld), 19 (Name withheld), 34 (Allan Day), 36 (Monique Onezime); Survey respondents 44, 72, 95, 99, 103.

65 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon); see, eg, Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007) [4]. The objective of the standard is to 'provide arborists, tree workers, government departments, property owners, and contractors with a guide defining uniform tree pruning procedures and practices in order to minimize the adverse or negative impact of pruning on trees'.

66 Submissions 9 (Dr Karen Smith), 19 (Name withheld), 22 (Name withheld), 24 (Name Withheld), 38 (L. Barry Wollmer); Consultations 3 (HVP Plantations), 10 (Baw Baw Shire Council).

- the contribution trees make to local ecosystems and biodiversity
- the way they contribute to the natural landscape and local amenity.

4.71 Trees are increasingly viewed as community assets.[67] One community member commented that 'maintaining canopy tree cover in the urban settings is now critically urgent'.[68] Councils are increasingly recognising the value of trees in urban forest policies, tree management plans and exceptional tree registers.[69]

4.72 The new Act should seek to balance the tension between property owners' rights and the benefits to the community of living in a leafy environment. This should be done on a case-by-case basis through nonexhaustive decision-making criteria in the new Act that recognise the broader intrinsic benefits of trees (for example, that trees provide shade and natural cooling).[70]

4.73 More minor interference such as leaf litter and the dropping of fruit should not be actionable. Such issues should be an assumed natural consequence of living in neighbourhoods with trees. This is the approach taken by various local councils[71] and the approach interstate.[72] Tree disputes relating to minor interference should be resolved informally and should only require remedial action via a formal dispute resolution pathway if they meet the damage or harm requirements under the new Act. See Chapter 5.

Use expert decision makers and expert evidence

4.74 VCAT hearings should be informed by arboricultural evidence that explains whether the tree is the real cause of the damage or harm. The Commission recommends the use of members with arboricultural experience to adjudicate tree dispute hearings at VCAT. This is the approach taken by the NSWLEC. Alternatively, an arboricultural expert qualified to at least AQF Level 5 or equivalent should be appointed by VCAT as a joint expert, with the cost of that shared equally by the parties. This is the approach taken by QCAT. The Commission also recommends the use of on-site hearings or onsite inspections by Tribunal members to check the parties' concerns and positions in the context of the physical realities of the tree.

4.75 Arborists who provide evidence to VCAT should meet minimum qualification standards. Minimum qualification standards will help to ensure that trees are properly assessed in accordance with industry approved risk assessment methods. Additional recommendations outline requirements for report writing. Formal evidentiary requirements will reduce the likelihood of people bringing claims that are trivial or without merit to the Tribunal and ensure that remedies are robust and practical. See Chapters 7 and 8.

Interact simply with other laws

4.76 Many existing Acts, local laws and policies regulate trees on private land and could intersect with the new Act. These laws and regulations are complex and varied. Decisions made pursuant to some of these laws are subject to review in VCAT. The operation of these laws increases confusion and adds to the difficulties people experience trying to resolve their tree disputes.

67 Submissions 18 (ENSPEC), 19 (Name withheld), 25 (City of Boroondara), 28 (HVP Plantations), 29 (David Galwey); Consultations 2 (Dr Gregory Moore), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon), 8 (City of Boroondara), 10 (Baw Baw Shire Council), 11 (Land and Environment Court of New South Wales), 14 (Robert Mineo); Survey respondents 2, 13; 115.

68 Submission 37 (Ian Hundley).

69 See, eg, City of Greater Bendigo, *Urban Tree Management Policy* (16 August 2017) 4; *City of Melbourne, Urban Forest Strategy—Making a Great City Greener 2012-2032* (Report, 2012); City of Stonnington, *Urban Forest Strategy* 2017–2022 (June 2017) 4; City of Ballarat, 'Exceptional Tree Register', *Tree Management* (Web Page, 2019) <http://www.ballarat.vic.gov.au/city/parks-and-outdoors/tree-management>; South Gippsland Shire Council, *Tree Management Plan 2017* (26 July 2017) 4. The importance of retaining urban tree canopy has been recognised by the establishment of the inaugural Australian School of Urban Forestry at the University of Melbourne in partnership with the City of Melbourne, dedicated to understanding and protecting urban forests: see City of Melbourne, *Australia's First Urban Forestry School Announced* (Web Page, 6 September 2018) <https://www.melbourne.vic.gov.au/news-and-media/pages/australias-first-urban-forestry-school-announced.aspx>. This issue is discussed in Ch 13.

70 Consultation 2 (Dr Gregory Moore OAM).

71 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip); See also City of Greater Bendigo, *Urban Tree Management Policy* (16 August 2017) 7.

72 See, eg, *Barker v Kryiakides* [2007] NSWLEC 292; Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) cl 61.

4.77 Adding to the complex web of vegetation management legislation in Victoria is not desirable. The new Act should not restrict or alter the operation of existing laws and established policies in areas of law outside tree disputes. However, the Commission seeks to ensure that people visit VCAT only once to resolve their tree dispute. Where necessary, it recommends that the new Act constrain some existing laws in limited circumstances and with appropriate safeguards.

Notify purchasers and new owners of land about existing disputes or Orders

4.78 The Commission identifies a need for potential purchasers and new landowners to be put on notice of obligations that may apply to them under the new Act if they purchase land. This is needed to provide certainty about the resolution of a dispute and to prevent tree disputes arising in the future.

Provide accessible laws, information and support

4.79 The language and structure of the new Act needs to be clear and simple to ensure it is widely accessible to the community.

4.80 Extensive, accessible community information should also be provided about:

- how the Act works in practice and what to expect if a matter proceeds to hearing
- agencies and experts that can help parties resolve their disputes
- how to manage vegetation better.

4.81 Resources should be developed to improve the community's understanding of trees, for example their rate of growth, and how to best manage issues with trees on neighbouring land. See Chapter 12.

Resolve disputes with professional assistance

4.82 A failure to obtain expert assistance at the appropriate time may mean that incorrect assumptions about the causes of damage or harm are not addressed and advice about practical solutions is not obtained. The timely use of expert assistance would resolve both informal and formal disputes more efficiently and effectively. See Chapter 12.

DSCV mediation

4.83 DSCV provides helpful dispute resolution services and information to all Victorian's free of charge. These services are provided throughout Victoria including in regional areas. The Commission anticipates that clearer law will further assist DSCV to respond to community enquiries and help it to resolve disputes. The Commission has learnt that the services offered by DSCV are not widely known to some councils,[73] arborists or community members.[74] It will therefore be important that the free mediation services of DSCV are promoted, particularly among arborists. See Chapter 6.

Appropriately qualified arborists (tree professionals)

4.84 The community has a poor understanding of the role and qualifications of arborists. Minimum qualification requirements for expert evidence could also act as a reference point for people wishing to obtain their own arboricultural advice independently of VCAT. It is also important for community information to provide guidance on when and how to engage appropriately qualified arborists. See Chapter 8.

73 Consultation 7 (Dispute Settlement Centre of Victoria).
74 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).

5

Applying the new Act to neighbourhood tree disputes

66 Introduction

66 Trees, land and proximity

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5. Applying the new Act to neighbourhood tree disputes

Introduction

5.1 This chapter explains how the new Act should be applied to tree disputes.

5.2 The consultation paper asked the community a series of questions about these matters. This chapter examines the community's responses. It then describes key features of the statutory schemes to resolve tree disputes in New South Wales, Queensland and Tasmania.[1] The Commission's recommendations about what should be included in the new Act in Victoria are explained. The key features to be addressed by the new Act are:

- Trees, land and proximity
- Who can be a party to a tree dispute
- What problems are within the scope of the new Act
- Who should be notified of an action
- Application requirements.

Trees, land and proximity

Definition of 'tree'

5.3 The consultation paper invited community responses on the types of tree (or vegetation) that should be included in the new Act.

5.4 The word 'tree' in this report denotes all vegetation that may cause a dispute between neighbours. Disputes can arise over a wide variety of vegetation, including trees, grasses, bushes, creepers and vines, and even dead trees.[2]

5.5 The Macquarie Dictionary defines a tree as 'a perennial plant having a permanent woody, self-supporting main stem or trunk, usually growing to a considerable height, and usually developing branches at some distance from the ground'.[3] It defines 'vegetation' as 'plants collectively; the plant life of a particular region considered as a whole'.[4]

5.6 There are very few definitions of 'tree' in Victorian legislation. Some existing definitions are:

- The *Forests Act 1958* (Vic) provides that a 'tree or trees' includes 'trees shrubs bushes seedlings saplings and reshoots whether alive or dead'.[5]

1 See generally, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld); *Trees (Disputes Between Neighbours) Act 2006* (NSW); *Neighbourhood Disputes About Plants Act 2017* (Tas).
2 See, eg, Submissions 17 (Name Withheld), 19 (Name Withheld), 34 (Allan Day).
3 Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 'tree'.
4 Ibid 'vegetation'.
5 *Forests Act 1958* (Vic) s 3 (definition of 'tree' or 'trees').

- The *Country Fire Authority Act 1958* (Vic) defines 'scrub or vegetation' to include 'trees bushes plants and undergrowth of all kinds and sizes whether living or dead and whether standing or not standing, and also includes any part of any such trees bushes plants or undergrowth whether severed or not severed'.[6]

5.7 At the local government level, trees are defined in different ways. The Melbourne City Council's definition includes 'the trunk, branches, canopy and root system of [a] tree'.[7] Nillumbik Shire Council defines a tree as a 'long lived woody perennial plant greater than (or usually greater than) 3 metres in height with one or relatively few main stems or trunks'.[8]

Other jurisdictions—definition of 'tree'

5.8 New South Wales and Queensland have similar definitions in their tree dispute Acts. The NSW Act defines a tree as 'any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations'.[9] Additional problematic vegetation has since been prescribed in regulation.

5.9 Bamboo, technically a type of grass,[10] was originally excluded from the definition of 'tree' under the NSW Act but since 2007 has been prescribed under the NSW Regulations.[11]

5.10 Vines[12] were also originally excluded from the definition of 'tree' in the NSW Act.[13] However, following statutory review of the Act by the New South Wales Government in 2009, it was decided that vines can cause damage to, for example, 'the paintwork on the outside of a house, or caus[e] water damage by blocking a downpipe or drain', or pose 'a risk of personal injury'.[14] The review concluded that there was no reason why disputes relating to vines should have to be resolved by 'the more complicated procedure in nuisance'[15] and recommended that vines be declared a prescribed plant under the NSW Regulations.[16] The NSW Regulations now prescribe 'any type of vine'.[17]

5.11 The Queensland Act defines a tree as 'any woody perennial plant' or 'any plant resembling a tree in form and size' such as 'bamboo, banana plant, palm and cactus'.[18] A tree also includes a bare trunk, a stump rooted in the land and a dead tree.[19]

5.12 In its statutory review of the Queensland Act, the Queensland Law Reform Commission (QLRC) found that 'tree' is currently 'widely and clearly' defined. However, the QLRC recommended that the definition should be amended to include 'root or the roots of any living or dead tree' because roots are an integral part of the tree and can cause disputes. This recommendation has not been implemented.[20]

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6 *Country Fire Authority Act 1958* (Vic) s 3 (definition of 'scrub' or 'vegetation').
7 *Activities Local Law 2009 (*Melbourne City Council) cl 1.11 (Definitions).
8 Nillumbik Shire Council, *Nillumbik Tree Management Guidelines* (September 2015) 7 <https://www.nillumbik.vic.gov.au/Council/Council-publications/Strategies-policies-and-legislation>.
9 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3(1).
10 See, eg, *Robson v Leischke* (2008) 72 NSWLR 98 [137].
11 See *Trees (Disputes Between Neighbours) Regulation 2014* (NSW) r 4.
12 A vine can also be referred to as a creeper or climber. It is defined as 'any of various plants, especially the grapevine, having long flexible stems that creep along the ground or climb by clinging to a support by means of tendrils, leafstalks etc.: Patrick Hanks, *Collins Dictionary of the English Language* (Collins, 2001).
13 For example, in *Buckingham v Ryder* [2007] NSWLEC 458 a dispute between neighbours over a pink trumpet vine was dismissed because it was determined that vines generally do not meet the definition of a 'tree' under the Act because vines do not display the self-supporting characteristics of trees and instead require a surface to grow along [28]—[32].
14 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 19.
15 Ibid.
16 Ibid Recommendation 3.
17 *Trees (Disputes Between Neighbours) Regulation 2014* (NSW) r 4.
18 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45(1).
19 Ibid s 45(2).
20 See generally, Ibid s 45.

5.13 In the Tasmanian Act, the term 'plant' is preferred over 'tree'. A plant is defined as 'any plant or part of a plant'[21] and includes:

- a tree
- a hedge or group of plants
- fruits, seeds, leaves or flowers, of a plant
- a bare trunk
- a stump rooted in the land
- any root of a plant
- a dead plant.[22]

Community responses—definition of 'tree'

5.14 The Commission was told that it is important to provide a clear definition of 'tree' in any new Act.[23]

5.15 Most community members were in favour of broadly defining 'tree' under a new Act so that it includes any vegetation.[24] Some people pointed to existing definitions of trees as suitable starting points—for example, definitions commonly found in general dictionaries,[25] the *Australian Standard AS 4373-2007—Pruning of Amenity Trees,*[26] or arboricultural and gardening textbooks such as *The Oxford Companion to Australian Gardens.*[27]

5.16 The Victorian Civil and Administrative Tribunal (VCAT) preferred 'vegetation' to 'tree' because it is broader.[28] A tree disputes consultant in New South Wales stated that defining 'tree' too broadly may be confusing and add complexity.[29]

5.17 A small number of people preferred a narrower definition.[30] One submission stated that only significant trees should be included, such as those considered 'culturally, historically, botanically'[31] significant. Another stated that the new Act should cover trees that exceed the height of dividing fences on common boundaries.[32]

5.18 Some community members stated that noxious weeds should be excluded from the ambit of a new Act.[33] However, most community members believed that the new Act should not discriminate between species and should include any type of vegetation, including those classified as a weed.[34] One person stated that vegetation that forms part of 'farm forestry' should also be excluded.[35]

Vegetation that is known to cause disputes

5.19 Many cautioned that commonly recognised definitions of 'tree' may exclude other types of vegetation known to cause tree disputes.[36]

21 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 4(1).
22 Ibid s 4(2).
23 Submission 20 (Name withheld); Consultation 10 (Baw Baw Shire Council); Submission 20 (Name withheld).
24 Submissions 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 21 (Pointon Partners Lawyers), 23 (Name withheld), 38 (L. Barry Wollmer); Consultations 10 (Baw Baw Shire Council),14 (Robert Mineo), 8 (City of Boroondara), 12 (City of Port Phillip).
25 Consultation 14 (Robert Mineo).
26 Submission 9 (Dr Karen Smith). This Australian Standard defines a tree as a 'Long lived woody perennial plant greater than (or usually greater than) 3 m in height with one or relatively few main stems or trunks': Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007) [3.45].
27 Submission 12 (Dr Gregory Moore OAM); See Richard Aitken and Michael Looker (eds), *The Oxford Companion to Australian Gardens* (Oxford University Press, 2002) 602.
28 Consultation 5 (Victorian Civil and Administrative Tribunal).
29 Submission 20 (Name withheld).
30 Submissions 2 (Name withheld), 5 (Name withheld).
31 Submission 2 (Name withheld).
32 Submission 33 (Annette Neville).
33 Submissions 2 (Name withheld), 27 (Name withheld).
34 Submissions 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 23 (Name withheld), 21 (Pointon Partners Lawyers); Consultations 8 (City of Boroondara), 10 (Baw Baw Shire Council), 14 (Robert Mineo). Noxious weeds are discussed in Ch 10.
35 Confidential submission.
36 Submissions 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton), 11 (Name withheld), 12 (Dr Gregory Moore OAM); Consultations 2 (Dr Gregory Moore OAM), 9 (Nillumbik Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo).

5.20 Arborist Robert Mineo, explained that bamboo, a type of grass, and palms, a type of grasstree, would not meet the typical definition of 'tree' but could affect neighbouring land.[37] The City of Port Phillip stated that palms should be covered by a new Act because they can give rise to problems.[38] Nillumbik Shire Council stated that cootamundra wattle, pine trees and Burgen are all examples of vegetation that can be problematic. [39]

5.21 A tree disputes consultant in New South Wales explained:

> Plants, woody vines, palms and bamboo all have the potential to cause damage to property and feature in a range of cases heard by the Land and Environment Court of New South Wales. The inclusion of this vegetation may add an extra layer of complexity to the scheme, however, it will benefit those disputants who are dealing with tree disputes arising from woody vines, palms, bamboo or 'plants'.[40]

5.22 Dr Gregory Moore OAM added that the common dictionary term 'woody', used to describe secondary growth that is characteristic of trees, excludes palms, cycads, tree ferns and grass trees.[41] Dr Moore noted that most people would consider these types of vegetation to be trees even though they are technically categorised as pachycauls.[42] He stated: 'Given this wide public perception, it might be wise to include pachycauls in legislation'.[43]

5.23 Dr Moore also noted that common definitions referring to a single stem or trunk do not take into account multi-stemmed types of tree species unique to Australia, such as mallee,[44] eucalypts and acacias. Dr Moore suggested that a more suitable description can be found in the Oxford Companion to Australian Gardening, which describes trees as 'long-lived woody perennial plants greater than three metres in height, with one or relatively few stems or trunks'.[45]

5.24 One submission stated that shrubs that are large can cause disputes and so should be included.[46] Professor Phillip Hamilton suggested that height may be a relevant descriptor under a new Act to allow for vegetation that is not technically classified as a tree (for example, vines or plants used in hedges) but that can grow to a significant size.[47]

5.25 Baw Baw Shire Council observed that ideas about what constitutes significant size may be subjective—for example, trees considered large in metropolitan areas may be considered small in regional areas that have more vegetated space.[48]

5.26 Overall, most community members who favoured a broad approach suggested that the new Act should include shrubs, hedges, vines, cacti, palms and bamboo in addition to trees.[49]

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37 Consultation 14 (Robert Mineo).
38 Consultation 12 (City of Port Phillip); *Local Law No.1* (Community Amenity) 2013 (City of Port Phillip) defines a significant tree or palm as 'a tree or palm on private land: with a trunk circumference of 150 centimetres or greater measured 1 metre from its base; or a multi-stemmed tree on private land where the circumference of its exterior stems equals or is or greater than 1.5 metres when measured 1 metre from its bases; or if the tree has been removed a trunk circumference or at 150 centimetres or greater measured at its base': cl 6.
39 Consultation 9 (Nillumbik Shire Council).
40 Submission 20 (Name withheld).
41 Submission 12 (Dr Gregory Moore OAM).
42 A pachycaul is a succulent plant with capacity for secondary growth. Pachycauls 'display a strongly swollen woody stem with often highly reduced branches: Howard Griffiths and Jamie Males, 'Succulent Plants' (11 September 2017) 27(17) *Current Biology* 894.
43 Submission 12 (Dr Gregory Moore OAM).
44 Instead of just a single trunk, mallees have many stems that rise from a large bulbous woody structure called a lignotuber, or mallee root: Australian National Botanic Gardens, Australian Government, *Mallee Plant—Surviving Harsh Conditions* (Information Resource, 2004) 2.
45 Submission 12 (Dr Gregory Moore OAM); See Richard Aitken and Michael Looker (eds), *The Oxford Companion to Australian Gardens* (Oxford University Press, 2002) 602.
46 Confidential submission.
47 Submission 10 (Professor Phillip Hamilton).
48 Consultation 10 (Baw Baw Shire Council).
49 Submissions 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton), 11 (Name withheld); Consultations 9 (Nillumbik Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo).

Dead trees, parts of trees and roots

5.27 Arborist Dr Karen Smith stated that dead trees should be included, as well as 'fruit, seeds, pollen, leaves and flowers of a plant … Roots should be included, as should suckers.'[50]

5.28 A tree disputes consultant in New South Wales stated that the new Act should include a tree that has been wholly removed by the time legal action has commenced.[51] Before the tree was removed it may have damaged neighbouring property, and the affected neighbour may seek to be reimbursed for the cost of repairs from the tree owner.

5.29 The Land and Environment Court of New South Wales (NSWLEC) stated that the broad definition of 'tree' under the NSW Act, with the option to add further species through accompanying Regulations, has been working well. The NSWLEC also explained that the broad definition implies the inclusion of tree roots and dead trees.[52]

5.30 A tree disputes consultant in New South Wales noted the usefulness of the phrase 'any plant resembling a tree in form and size'. They considered this 'a helpful, yet non-specific definition' which allows a small amount of interpretation and flexibility.[53]

The Commission's conclusions—definition of 'tree'

5.31 It is important for reasons of clarity to define the type of vegetation covered in the new statutory scheme as broadly as possible so that it is fair and inclusive. However, too broad a definition may lack clarity and require too much interpretation.

5.32 The word 'tree' rather than 'vegetation' is preferred because it is more specific and excludes smaller, short-lived types of vegetation that are unlikely to significantly impact people's property or safety, or result in significant environmental or cultural loss.

5.33 Existing definitions of 'tree' in legislation and other instruments are typically a synthesis of common meanings found in general dictionaries and technical literature.

5.34 The Commission notes the comments of the NSWLEC and the QLRC that the New South Wales and Queensland schemes are adequate and working well to capture most genuine disputes. The Commission supports a similar approach for the new Act in Victoria.

5.35 'Tree' should be defined by its common meaning of a 'woody perennial plant'. Height or age (for example, 'long-lived') descriptors are not recommended because these characteristics vary throughout existing definitions and literature. Whether a tree is considered large or old is also subjective and will vary too greatly depending on the vegetation that is commonly found in the area. Any height or age requirements may unfairly exclude people from seeking legal relief. Additionally, the vitality of a tree should not matter because trees that are dying or dead may still impact on people's land and safety. These trees may also hold important cultural, heritage and environmental value.

5.36 'Tree' should explicitly include vines, cacti, palms and bamboo. The term 'pachycaul' is not widely understood by the community and a more suitable approach would be to list further particular species in regulations for clarity.

5.37 For reasons of fairness and flexibility, any other vegetation that 'resembles a tree in form and size'[54] should be included. This takes into account mallee trees that do not meet any technical requirements of a singular tree trunk, certain species of shrubs known to grow quite large, and also allows the decision maker discretion. This would also encompass a 'pachycaul'.

50 Submission 9 (Dr Karen Smith).
51 Submission 20 (Name withheld).
52 Consultation 11 (Land and Environment Court of New South Wales); *The Trees (Disputes Between Neighbours) Act 2006* (NSW) will also apply to a tree that is removed following damage or injury that gave rise to an application if the tree was situated wholly or principally on the land immediately before the damage or injury occurred: s 4(4).
53 Submission 20 (Name withheld).
54 See, eg, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45(1)(b).

5.38 Hedges should not be included, as this represents a style of planting, rather than a species of vegetation.[55] Any plants or vegetation in the form of a hedge will be included irrespective of how they are styled if they meet the definition.

5.39 In addition, vegetation classified as a noxious weed should be captured under the new Act if it otherwise meets the definition of 'tree' for example, 'any plant that resembles a tree in form and size'.

5.40 The definition of 'tree' should include all parts of a tree, whether joined to a main structure or separate. This would include roots and bare trunks. In addition, trees that have been partially or wholly removed should be included. An affected neighbour may still wish to seek orders for payment of the cost of repairs to their property even if the tree has been wholly removed.

5.41 Finally, there should be scope to include any other specific vegetation in the definition of tree by way of Regulations accompanying the new Act.

Recommendations

2 The Act should define 'tree' to mean:

- (a) any woody perennial plant
- (b) any plant resembling a tree in form and size
- (c) vines, cacti, palms, bamboo
- (d) any other plant prescribed by Regulations.

3 'Tree' should also include:

- (a) all parts of the tree, whether joined to the main structure or separate
- (b) a tree that has been partially or wholly removed
- (c) a dead tree.

To which land should the Act apply?

5.42 When considering which types of land should fall within the scope of the new Act, the Commission sought to strike a balance between providing a remedy to affected neighbours and ensuring that the application of the Act is not overly broad or burdensome to owners or occupiers of land.

5.43 The consultation paper asked the community whether the new Act should be limited to land in particular zones.

55 A hedge can be defined as 'a row of bushes or small trees planted close together, especially when forming a fence or boundary: Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 690.

Standard Victorian zones

5.44 Land in Victoria is zoned to outline the purpose of land use and any permitted or prohibited developments. There are six categories:

- public
- residential
- commercial
- industrial
- rural
- special purpose.[56]

5.45 The Commission is not considering disputes about trees located on public land, for example street trees, trees in parks and trees on regulatory easements held by a council or service authority, as these are excluded from the terms of this inquiry.[57] Public land is also excluded from the operation of interstate Acts.[58]

Residential zones

5.46 Tree disputes are reportedly more common in residential zones than other land use zones.[59] There are six residential zones that permit residential use to varying degrees in cities and towns, including small rural townships.[60]

Commercial zones

5.47 There are three commercial zones. Residential land uses are limited in a commercial zone and must not undermine the zone's primary focus on employment and economic development.[61]

Industrial zones

5.48 There are three industrial zones. Accommodation is generally prohibited in these zones to provide for and promote manufacturing, storage and distribution of goods and associated uses.[62] One industrial zone acts as a buffer between the first two types of industrial zone and local communities, 'which allows for industries and associated uses compatible with the nearby community'.[63]

Rural zones

5.49 Rural zones[64] include six distinct categories:

- The Farming Zone is the most common rural zone and is strongly focused on protecting and promoting farming and agriculture.[65]
- Two types of Green Wedge Zones protect and conserve green wedge land (Green Wedge and Green Wedge A).[66] There are 12 designated green wedges in non-

56 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 30-37 <http://planningschemes.dpcd.vic.gov.au/schemes/vpps>.
57 These include the Public Park and Recreation Zone; the Public Conservation and Resource Zone and the Road Zone.
58 This is discussed in chapter 13.
59 Consultations 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
60 These include the Low Density Residential Zone; the Mixed Use Zone; the Township Zone; the Residential Growth Zone; the General Residential Zone; and the Neighbourhood Residential Zone: See Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 32.03-32.05, 32.07-32.09; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 27-29.
61 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 34.
62 Ibid cl 33.
63 Ibid cl 33.03; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 28.
64 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.
65 Ibid cl 35.07; Agriculture Victoria, *Rural Zones Explained* (Web Page, 8 May 2017) <http://agriculture.vic.gov.au/agriculture/farm-management/business-management/planning-applications-in-rural-areas/rural-zones-explained>; Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 42: Applying the Rural Zones,* June 2015 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.
66 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.04-05.

urban areas forming a ring around metropolitan Melbourne.[67] These areas of land are recognised and protected for a variety of purposes, including agricultural, environmental, historic, landscape or recreational values, or mineral and stone resources.[68] Green wedge zones can be used to support rural living. One of the purposes a Green Wedge A Zone is to 'recognise and protect the amenity of existing rural living areas'.[69]

- The Rural Activity Zone provides for the use of land for agriculture, such as the primary production of plant or animal produce, and for uses of land and development compatible with agricultural uses.[70] While a dwelling may be used for accommodation purposes, this use must be compatible with agriculture and the environmental and landscape characteristics of the area.[71]
- The Rural Conservation Zone protects and enhances the natural resources and biodiversity of the area and imposes limits on other uses of land, such as residential dwellings.[72] One of its purposes is to provide for agricultural uses of land compatible with the conservation of the environment and the landscape values of the area.[73] The zone allows land to be used for a dwelling provided the lot is at least two hectares in size.[74] A permit is required to use dwellings on land lots smaller than two hectares.
- The Rural Living Zone provides for residential uses of land in rural areas. Although agricultural activities are permitted within the zone, emphasis is given to the protection of residential amenity.[75]

Special purpose zones

5.50 Special Purpose Zones include nine distinct categories. The Special Use Zone is essentially a catch-all zone if no other zoning is appropriate.[76] It can also be considered where the site adjoins more than one zone and the new use of land is not known.[77]

5.51 The Capital City Zone, Docklands Zone, Activity Centre Zone, Priority Development Zone, and the Comprehensive Development Zone all permit residential land use within urban areas.[78] The purpose of the Urban Growth Zone is to manage the transition of nonurban land into urban land, with a significant portion of this land to be rezoned for residential use.[79]

67 *Planning and Environment Act 1987* (Vic) s 46AC; Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 62: Green Wedge Planning Provisions,* June 2015 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>; Department of Environment, Land, Water and Planning (Vic), *Green Wedges* (Web Page, 2018) <https://www.planning.vic.gov.au/policy-and-strategy/green-wedges>. The landscape ranges from the Mornington Peninsula coastline, to the open basalt plains of the west, to the highly scenic countryside of the Yarra Valley.

68 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 62: Green Wedge Planning Provisions,* June 2015 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.

69 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.04-2, 35.05, 35.05-2; Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 42: Applying the Rural Zones,* June 2015 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>; see, eg, City of Boroondara, *Boroondara Planning Scheme* (21 February 2019) cl 11.01; Nillumbik Shire Council, *Nillumbik Planning Scheme* (30 May 2019) cl 22.03.

70 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.08; see also, Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 29.

71 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 42: Applying the Rural Zones*, June 2015, 4 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.

72 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.06; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 29.

73 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.06.

74 Ibid cl 35.03-1.

75 Ibid cl 35.03; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 29.

76 Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 29.

77 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 3: Applying the Special Use Zone,* May 2017 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.

78 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System Guide* (Guide, 28 May 2015) <www.planning.vic.gov.au/guide-home/using-victorias-planning-system>. The Commission notes that recent planning scheme amendments have prevented future use of the priority development zone: see, eg, Department of Environment, Land, Water and Planning (Vic), *Amendment VC148—Planning Advisory Note 72* (July 2018) 10 <https://www.planning.vic.gov.au/schemes-and-amendments/Amendment-VC148-reforms>.

79 Department of Environment, Land, Water and Planning (Vic), *Overarching Report—Residential Zones State Of Play* (Report, 29 January 2016) <https://www.planning.vic.gov.au/panels-and-committees/previous-panels-and-committees/managing-residential-development-advisory-committee/residential-zones-state-of-play-reports>.

5.52 The Urban Floodway Zone applies to urban land where the primary function of the land is to carry or store floodwater.[80] Land use is restricted to uses such as recreation or agriculture.[81] The Port Zone covers Victoria's commercial trading ports and provides for shipping, road and railway access. It provides for the use and development of commercial trading ports within Victoria pursuant to the *Port Management Act 1995* (Vic).[82]

Other jurisdictions—to which land should the Act apply?

New South Wales

5.53 The application of the NSW Act was initially restricted to urban areas only.[83] Upon review, it was expanded to include land zoned as rural–residential.[84] Rural–residential land had been initially excluded because of concerns that the NSW Act might interfere with existing legislation, for example, laws relating to land clearing and native vegetation.[85] This meant that a person with a tree dispute in a rural–residential area was not able to seek a remedy under the NSW Act.

5.54 The NSW Department of Justice and Attorney General concluded that extending the NSW Act to rural–residential zones would overlap, but not interfere, with the *Native Vegetation Act 2003* (NSW).[86] The Native Vegetation Act contained various exceptions relating to the clearance of vegetation to remove or reduce personal injury or damage to property, which was the problem that the NSW Act sought to address.[87] Amendment of the NSW Act followed.

5.55 At present, the NSW Act applies to land zoned residential, rural–residential, village, township, industrial or business.[88] In addition, land outside the listed zones may fall within the ambit of the NSW Act if the zone has the substantial character of one of the listed zones.[89] The NSW Act does not appear to apply to land that is used for primary production purposes, for example extensive agricultural uses, or land use that is permitted under the *Forestry Act 2012* (NSW).[90]

5.56 The NSWLEC informed the Commission that most tree disputes originate from residential zones, with few applications being made beyond this zone.[91]

Queensland

5.57 Similarly, the Queensland Act applies to urban areas and rural–residential land.[92] The Act does not apply to trees situated on rural land or to land that is more than four hectares.[93] The Act also does not apply to trees planted or maintained for commercial purposes.[94]

80 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) <www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.
81 Melbourne Water, *Overlays Explained* (Web Page, 26 September 2017) <https://www.melbournewater.com.au/planning-and-building/flooding-information-and-advice/overlays-explained>.
82 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 37.09.
83 Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (Report, 2009) 40. This included land zoned as residential, township or industrial.
84 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1)(a).
85 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 40.
86 The *Native Vegetation Act 2003* (NSW) was repealed on 25 August 2017. Current legislation governing the clearing of native vegetation is the *Local Land Services Act 2013* and the *Biodiversity Conservation Act 2016*: Office of Environment and Heritage (NSW), *Native Vegetation Act 2003* (Web Page, 17 August 2018) <https://www.environment.nsw.gov.au/vegetation/nvact.htm>.
87 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 40. There are various exemptions built into the Act and therefore the Acts would overlap but not interfere with each other.
88 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1)(a).
89 Ibid; see, eg, *Aaron v Haynes* [2007] NSWLEC 294.
90 This includes plantations on an area of Crown-timber land (other than a flora reserve), or an area of land owned by the Corporation, on which the predominant number of trees forming, or expected to form, the canopy are trees that have been planted (whether by sowing seed or otherwise): (a) for the purpose of timber production: *Forestry Act 2012* (NSW) s 4; See *Standard Instrument—Principle Local Environmental 2006* (NSW).
91 Consultation 11 (Land and Environment Court of New South Wales).
92 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3).
93 Ibid s 42(3).
94 Ibid s 42(4)(a).

5.58 In its review of the operation of the Queensland Act, the QLRC recommended the inclusion of land greater than four hectares in size to address the inequity of a neighbour on a smaller lot of land not being able to take action against a neighbour on a larger lot but the neighbour on a larger lot being able to commence action against the neighbour on the smaller lot.[95] This recommendation has not been implemented at the time of writing.

Tasmania

5.59 The Tasmanian Law Reform Institute (TLRI) recommended that a new Tasmanian Act apply to all land zones, 'but that the zoning of the land on which the tree or hedge is situated be a factor that must be considered by the decision-maker'.[96] This was in line with community feedback which supported no restriction on the application of a new Act to particular zones.[97]

5.60 The Tasmanian Act excludes council-owned or managed land, rail network land, reserves and certain forestry land.[98] Plants that are planted or maintained for a purpose that is necessary or desirable for the management or operation of a farm are also excluded, as are plants that are planted or maintained to be sold.[99] The Tasmanian Government indicated it did not want the Act to interfere with the rights of primary producers. It noted that 'the statutory scheme should not impose an unreasonable burden on people who are trying to make a living'.[100] The Second Reading Speech for the Tasmanian Bill explains:

> these excluded categories are more likely to capture large parcels of land that are located in rural or remote locations—the land is often unoccupied, or it may have high conservation value or serve some other kind of public purpose or be of benefit to the broader community.[101]

Community responses—to which land should the Act apply?

5.61 More than half of those who responded to the issue of land zoning were in favour of the new Act applying to all types of land use within Victoria.[102]

5.62 Arborist Dr Karen Smith explained that the application of the new Act should not be limited to particular zones because many urban dwellings can be located next to public, agricultural, industrial and commercial land.[103]

5.63 Consultations with local councils revealed that most tree disputes between neighbours occur in urban and residential areas.[104] Nillumbik Shire Council reported that most complaints about trees on private land are from residents living in urban areas.[105] It was suggested that this is because people on smaller parcels of land live in closer proximity to one another.[106] One community member noted that 'a large proportion of all trees on private residential properties are located close to property boundaries. This is a fruitful, and growing, source of disputation between neighbours'.[107]

95 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) 70-71.
96 Tasmania Law Reform Institute, *Problem Trees and Hedge: Access to Sunlight and Views* (Report No 21, 2016) 56, recommendation 12.
97 Ibid 56.
98 *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 5, 9.
99 Ibid s 5.
100 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 3 (Rene Hidding); Neighbourhood Disputes About Plants Bill 2017 (Tas).
101 Ibid
102 Submissions 2 (Name withheld), 4 (Name withheld), 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 19 (Name Withheld), 20 (Name withheld), 21 (Pointon Partners Lawyers), 27 (Name withheld); Consultations 3 (HVP Plantations), 14 (Robert Mineo).
103 Submission 9 (Dr Karen Smith).
104 Consultations 8 (City of Boroondara); 9 (Nillumbik Shire Council); 10 (Baw Baw Shire Council); 12 (City of Port Phillip).
105 Consultation 9 (Nillumbik Shire Council).
106 Ibid.
107 Submission 37 (Ian Hundley).

5.64 From December 2011 to May 2017 DSCV received 18,727 tree-related enquiries from the community.[108] Of these, 13,301 (71 per cent) were from metropolitan areas within Victoria,[109] while 3000 were located in regional Victoria (16 per cent).[110]

5.65 While these figures indicate that the vast majority of tree-related enquiries arise in metropolitan areas, there are many tree disputes in regional Victoria. The Commission was told that in regional Victoria tree disputes most often occur in population centres such as towns rather than rural areas. In these locations the subject matter of the disputes is often similar to metropolitan tree disputes.[111] Baw Baw Shire Council proposed that zoning under a new Act should be limited to residential zones or areas that resemble residential areas.[112]

5.66 One submission described a dispute in a rural agricultural area concerning a line of trees planted close to a shared fence.[113] This submission suggested that the trees on the neighbouring property had the potential to cause damage or harm to the boundary fence and to crops through contamination. The submission expressed frustration at the limited resolution options available for tree disputes in rural areas.[114]

5.67 HVP Plantations have suggested that tree disputes 'occur state-wide and are not limited to suburban areas' and that it has been involved in disputes with both residential and farming neighbours. HVP Plantations told the Commission that it is involved in approximately 10 tree disputes a year in rural areas. [115]

5.68 Owners or occupiers of rural land may also be concerned about the risk of a bushfire posed by vegetation on neighbouring land.[116]

The Commission's conclusions—to which land should the Act apply?

5.69 The new Act should apply to land zones in urban areas or to land that provides for residential living (including some rural areas), while giving discretion to the decision-making body to consider land that has the substantial character of one of these zones. A new Act would therefore apply to:

- the six residential zones
- the three commercial zones
- the three industrial zones
- the two green wedge zones (as they support rural living and are located on the urban fringe)
- the rural living zone
- the rural conservation zone
- special purpose zones excluding the special use zone, the urban floodway zone and the port zone
- any other land prescribed in regulation

5.70 The Commission has recommended including all commercial and industrial zones as this is the approach taken by all interstate statutory schemes. Some of these zones are likely to interface with residential uses of land, and so it is more straightforward to include them all rather than omit certain categories of commercial and industrial land uses.

108 Information provided by DSCV as part of a data request from the Commission, August 2017 and clarification of data provided in May 2019.
109 DSCV data categorises metropolitan disputes as originating in the CBD, North (metro), South East (metro) and the West (metro): Information provided by DSCV as part of a data request from the Commission, August 2017.
110 Information provided by DSCV as part of a data request from the Commission, August 2017 and November 2018 and clarification of data provided in May 2019. For the purposes of DSCV data regional Victoria includes: Barwon, Gippsland, Grampians, Hume and Loddon Mallee.
111 Consultation 10 (Baw Baw Shire Council).
112 Ibid.
113 Survey respondent 99.
114 Ibid.
115 Consultation 3 (HVP Plantations).
116 Consultation 10 (Baw Baw Shire Council).

5.71 The new Act will also apply to land that has the substantial character of one of the zones designated in the Act. This is the approach in NSW. For example, in exercising its discretion in relation to land that may have the substantial character of a residential zone the NSWLEC has considered the 'settlement pattern in the vicinity of the two properties involved' and the 'streetscape of the road in which they are located' to determine that the zoning was analogous to a residential zone.[117]

5.72 Land that is used for commercial timber plantations should also be excluded from the ambit of the new Act.[118] This is consistent with interstate Acts[119] and recognises the unique nature and needs of these commercial operations as identified by HVP Plantations in its submission.[120] The Commission notes that plantations must be managed according to various statutory requirements, including the Code of Practice for Timber Production 2014.[121] Government may also determine that other types of land should be excluded from the ambit of the Act as occurs interstate.[122]

5.73 There was considerable support for including all zones in a new Act. The Commission acknowledges that tree disputes can arise on land that is primarily used for farming and agricultural production.[123] The application of the new Act will extend to land in most zones in Victoria. However, it will not extend to the farming and rural activity zones. These types of zones are also excluded in the interstate Acts.[124] The recommended approach provides a remedy for many intractable neighbourhood tree disputes, while not interfering with land primarily used for farming and agricultural purposes.

5.74 The Commission acknowledges HVP Plantations' suggestion that that there is a 'case for statutory intervention to provide guidance to rural landowners in treed environments, and to draw a contemporary compromise between the benefits and the risks that trees bring to neighbours'.[125] The Commission accepts that tree disputes in rural settings often involve different considerations and it is important that the new Act reflect this. The decision-making principles recommended in Chapter 8 will help VCAT to balance competing rights and interests fairly and transparently. Those principles require VCAT to consider a broad range of matters including the broader benefits of trees and the relevant zoning and the related purpose of the land. These principles will also help people to resolve their own disputes outside a formal VCAT hearing or in mediation.

Exclusion of Farming and Rural Activity Zones

5.75 While amenity and property damage may prove problematic for neighbours close to each other in urban areas, land predominantly used for farming and agricultural purposes tends to raise different kinds of issues. Land holders in rural areas may 'want trees on their farms to shelter farm stock and crops; control soil erosion and dryland salinity; enhance their property values; and, if at all possible, generate alternative sources of income'.[126] Baw Baw Shire Council noted that:

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117 In this case the Court held 'we are satisfied that the zoning, although not using the word residential, is, in fact, a zone of a residential character and thus, in that regard, the Court does have jurisdiction to deal with this application': see *Aaron v Haynes* [2007] NSWLEC 294 [10]-[11].

118 For, eg, land that is held under a licence issued pursuant to the *Victorian Plantations Corporation Act 1993* (Vic).

119 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (*Qld) s 42(4)(a); *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 5(3)(a), 9(i),(j).

120 Submission 28 (HVP Plantations).

121 The Code is made by the Minister for Environment and Climate Change under Part 5 of the *Conservation Forests and Lands Act 1987* (Vic). The Code applies to the planning and conducting of all commercial timber production and timber harvesting operations on both public and private land in Victoria.

122 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(4)(a); *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 5(3)(a), 9(i),(j).

123 Confidential submission, Submission 28 (HVP Plantations).

124 These Acts are often broader in their exclusions than is contemplated for the Victorian Act.

125 Submission 28 (HVP Plantations).

126 Otway Agroforestry Network, *Agroforestry: Multi-Purpose Tree Growing* (Web Page) <http://www.oan.org.au/>. The Otway Agroforestry Network (OAN) is a not-for-profit community organisation consisting of over 200 local farming families. The Network is aimed at exploring 'how growing trees can make farming more environmentally sustainable and economically rewarding'. The Network does this through advocacy, education and information-sharing through its network of members: Otway Agroforestry Network, Who are OAN? (Web Page) <http://www.oan.org.au/Main.asp?_=About%20Us>.

> Farmers have different motivations to urban land users. A person in a metropolitan area may have great concern over the removal of a 500 year old red gum. For a farmer those concerns may be overridden by practical considerations and the need to use the land for agricultural purposes.[127]

5.76 The purpose of the Farming Zone is to ensure that non-agricultural uses, particularly dwellings, do not adversely affect the use of land for agriculture.[128] The Farming Zone is the most flexible zone in terms of agricultural uses and many agricultural uses do not require a permit.[129] This zone is explicitly focused on preserving productive agricultural land and 'farming uses are encouraged to establish and expand with as little restriction as possible'.[130] Agriculture Victoria provides tips to would-be purchasers of rural land on its website, and advises:

> There are not many formal requirements for farmers to minimise the normal impacts arising from the legitimate agricultural enterprises they may run, and there are few requirements for them to formally notify you of what they intend to do … Living together in rural Victoria comes down to having reasonable expectations of how the land in your neighbourhood is used, and exercising a little give and take.[131]

5.77 Similarly, the main feature of the Rural Activity Zone is the 'flexibility that it provides for farming and other land uses to co-exist'.[132] The growth of farming practices is supported but a wide range of non-farming commercial and retail uses are also encouraged.[133] The Department of Environment, Land, Water and Planning advises:

> The zone should not be mistaken for a quasi-rural residential zone. Housing is only one of a number of uses that may be considered in the zone, and, in some circumstances, it may be incompatible with the particular mix of uses that the planning authority is seeking to achieve.[134]

5.78 Vegetation can serve a wide range of purposes in rural areas. For example, fallen timber and ground litter provide hiding, basking and nesting places, and a source of food for animals and birds.[135] Agriculture Victoria notes that fallen timber 'can provide important stepping stones for safe passage of wildlife across the landscape' and 'messy branches touching the ground are important avenues of access for animals such as goannas and snakes'.[136] Moreover, single paddock trees provide shade and shelter for domestic stock and valuable habitats for insects, birds and bats. Agriculture Victoria state that 'the loss of paddock trees can soon result in the loss of these endangered species'.[137]

5.79 Existing legislative provisions that protect vegetation on private land in rural areas do not always extend to rural activity and farming zones, in order to facilitate agricultural production. The Native Vegetation Particular Provisions do not extend to some land uses in the rural activity and farming zones.[138]

127 Consultation 10 (Baw Baw Shire Council).
128 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 35.07.
129 Ibid cl 35.071.
130 Department of Environment, Water, Land and Planning (Vic), *Planning Practice Note No 42: Applying the Rural Zones* (Practice Document, June 2015) 6 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.
131 Agriculture Victoria, *Tips Before Purchasing Rural Land* (Web Page, 3 August 2017) <http://agriculture.vic.gov.au/agriculture/farm-management/business-management/new-landholders/tips-before-purchasing-rural-land>. Agriculture Victoria is a government entity supported by the Department of Jobs, Precincts and Regions. Its website states that it has 'been created to give greater visibility to the agriculture activities of the department, giving a clear identity to agricultural services and initiatives with the department': Agriculture Victoria, *About Us* (Web Page, 23 January 2019) <http://agriculture.vic.gov.au/about-us>.
132 Department of Environment, Water, Land and Planning (Vic), *Planning Practice Note No 42: Applying the Rural Zones,* June 2015, 7 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.
133 Ibid.
134 Ibid.
135 Agriculture Victoria, *Property Management and the Environment* (Web Page, 3 August 2017) <http://agriculture.vic.gov.au/agriculture/farm-management/business-management/new-landholders/property-management-and-the-environment>.
136 Ibid.
137 Ibid.
138 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 52.17-7 'Table of exemptions'.

5.80 HVP Plantations is Victoria's largest plantation owner. It owns native bushland, forest and managed plantations, operating as a 'tree farmer' that grows and harvests trees for sale to timber customers.[139] HVP Plantations noted differences between urban and rural parcels of land. In the urban environment:

> The number of trees managed by any one landowner is generally few, and a landowner may reasonably be expected to keep an eye on the state of the trees in their garden, but in a rural environment, large numbers of trees over significant lengths of boundary can be involved. Regular inspection of such trees is mostly impractical, and a tree which is "defective" is also likely to be a tree with significant habitat value which is valued by the community.[140]

5.81 HVP Plantations has 240,000 hectares of land and around 920 kilometres of direct boundaries to other private land holders.[141] In some cases a farmer may also have multiple neighbours where subdivision has occurred on a neighbouring property.[142] HVP noted that 'it is unjust if a neighbour can subdivide their land and make a large sum of money from so doing, but in so doing impose a significant and ongoing cost of tree inspection and management on their neighbour'.[143] It suggested that sometimes neighbours may be notified of the hazards of neighbouring trees through Section 173 Agreements (discussed in Chapter 10) but this does not occur often.[144]

5.82 HVP suggested that it resolves tree disputes informally and internally because the common law cannot be easily applied in the rural setting.[145] Baw Baw Shire also reported anecdotally that farmers tend to resolve disputes about vegetation informally with each other, rather than going through processes they see as too burdensome or bureaucratic.[146] Agriculture Victoria provides case studies of how alternative dispute resolution has assisted parties living in rural Victoria to come to agreement.[147]

5.83 The exclusion of farming and rural activity zones means that the Act will not apply to a dispute involving neighbours on farming land or to a dispute between a tree owner on farming land and an affected neighbour on adjoining residential land. In these situations, the affected neighbour would need to establish that the land has the substantial character of one of the listed zones or is prescribed in regulation to obtain a remedy in VCAT.

5.84 The recommendation to exclude certain zones from the application of the Act should be revisited when it has been operating for five years, to find out whether the exclusion has detrimentally affected many people with genuine disputes who have no other simple way of resolving them. Because unique considerations arise in relation to the management of trees on rural-agricultural land it would be sensible to first ascertain how well the Act helps resolve disputes in rural zones that the Commission recommends fall within the scope of the Act, for example, the rural conservation zone. This approach of adding zones after a period of operation has also occurred in NSW.[148]

139 Consultation 3 (HVP Plantations).
140 Submission 28 (HVP Plantations).
141 Ibid.
142 Consultation 3 (HVP Plantations).
143 Submission 28 (HVP Plantations).
144 Consultation 3 (HVP Plantations).
145 Ibid. This was discussed in Ch 3.
146 Consultation 10 (Baw Baw Shire Council).
147 Agriculture Victoria, *Resolving Disputes* (Web Page, 8 May 2017) <http://agriculture.vic.gov.au/agriculture/farm-management/business-management/new-landholders/resolving-disputes>.
148 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 'Recommendation 10(a)'; see *Trees Disputes Between Neighbours Act 2006* (NSW) s 4(1)(a).

Review of the Act

5.85 At review, regulation could specify that the Act apply to additional zones. Alternatively, regulation could also exclude some zones if it was determined that the application of the Act as initially implemented was too broad and hindered the purpose of any of those zones. At review Government should consult with farming and agricultural users of land to obtain specific input from rural communities about the application of the Act.[149]

5.86 Review could also determine if any other types of land should be excluded from the ambit of the Act.

5.87 This review recommendation is discussed further in Chapter 13.

Recommendations

4 The Act should apply to trees on privately owned land that is:

(a) within a zone designated residential, commercial, industrial, green wedge, rural living and rural conservation under a Victorian planning scheme or a zone that has the substantial character of one of these zones, or

(b) within a special purpose zone designated as capital city, docklands, activity centre, priority development, comprehensive development and urban growth, or

(c) prescribed in regulations.

5 The Act should not apply to land that is zoned farming, rural activity, special use, urban floodway or port or to land that is used for commercial timber plantation.

Proximity to affected neighbour's land

5.88 The consultation paper asked whether there should be a requirement in the new Act for the affected neighbour's land to adjoin the land on which the tree is situated (for example, to share a common boundary) and, if so, how the relevant degree of proximity should be defined.

Other jurisdictions—proximity of the tree

5.89 In New South Wales the tree subject to legal action under the Act must be on 'adjoining land'.[150] This is not defined under the NSW Act. However, case law has determined this to mean properties that abut each other as well as those that are not touching, for example where they are separated by land but there is a 'relevant connection'.[151]

5.90 A relevant connection will exist if the tree is capable of causing damage to the other property or harming people on it.[152] The NSWLEC also gave the example of a common corner post that was held to provide a relevant connection indicating that the neighbours' land was adjoining under the NSW Act.[153] The NSWLEC has found that properties with

149 The Commission sought responses from rural and regional areas. A consultation was conducted with HVP Plantations and Baw Baw Shire Council. Several submissions and survey responses were received from rural and regional areas: Submissions 8 (Victoria Thieberger), 13 (Mandy Collins), 28 (HVP Plantations), 31 (Barwon Community Legal Service), 34 (Allan Day); Survey respondent 99.
150 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 7.
151 *Robson v Leischke* (2008) 72 NSWLR 98 [157]; Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 8.
152 Ibid.
153 Consultation 11 (Land and Environment Court of New South Wales); see, eg, *Cavalier v Young* [2011] NSWLEC 1080 [7].

intervening 'gaps' are 'adjoining' for the purposes of the New South Wales Act where those gaps comprise uninhabited land such as roadways, laneways and battle-axe driveways.[154]

5.91 In Queensland an affected neighbour's land must adjoin the land on which the tree is situated, or would adjoin the land if it were not separated by a road.[155] This has been interpreted narrowly and requires proof of physical connection between neighbouring lands.[156]

5.92 In Tasmania an affected neighbour's land does not need to adjoin the land on which the tree is situated.[157] Instead, an affected neighbour's land needs to be within 25 metres of the base of the neighbouring tree's trunk or where the stem of a tree connects to a root system.[158] The Tasmanian Act's broader approach 'recognises that in some cases tree roots can extend horizontally to a distance of up to 25 metres'.[159]

Community responses—proximity of the tree

5.93 Community responses were mixed. Some people favoured limiting legal action to neighbours with adjoining parcels of land (for example, with shared common boundaries)[160] while others favoured a broader approach where the tree and the affected neighbour's land need not be adjoining at all, or were connected in some other way.[161]

Trees can impact at considerable distance from the trunk

5.94 The Commission was told that a tree's roots can extend far beyond its canopy, which can cause them to have an impact on properties several doors down from where the tree is situated.[162]

5.95 The NSWLEC stated that where the issue arises of non-adjoining neighbours being affected by a tree, it may occur in inner urban areas with small properties. The most likely scenario would be a large canopy that overhangs multiple narrow properties. This issue has arisen only once in the NSWLEC and similar issues have not been presented in relation to roots.[163]

5.96 Some submissions cautioned that the usefulness of a broad approach such as Tasmania's may be limited.[164] It may be difficult to determine which tree the roots originate from if there are multiple trees in the area, without extensive investigation such as lab testing, root radar reports or hydro excavation reports.[165] Another submission suggested that the impact is likely to be less severe the greater distance it is away from the tree and more easily resolved through abatement (for example, by cutting away roots) with no significant impact on the tree's health or structural integrity.[166]

5.97 The NSWLEC suggested that problems may arise where multiple properties are affected by encroaching roots. It may be difficult to determine the best place to sever roots when they travel across multiple properties. For example, where each property's sewer connects to a common main, and an application is made over roots entering old pipes on one property, this may require intervention that involves cutting into new, re-sleeved pipes of other properties and excavating unaffected land.[167]

154 Information provided by NSWLEC to the Commission, 4 December 2018.
155 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(b)(i)-(ii).
156 Consultation 15 (Queensland Civil and Administrative Tribunal).
157 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(4).
158 Ibid s 7(6).
159 Parliament of Tasmania, *Parliamentary Debates*, Legislative Council, 22 June 2017, 5 (Leonie Hiscuitt).
160 Submissions 2 (Name withheld), 6 (Name withheld), 11 (Name withheld), 33 (Annette Neville); Consultation 8 (City of Boroondara).
161 Submissions 6 (Name withheld), 10 (Professor Phillip Hamilton), 21 (Pointon Partners Lawyers), 23 (Name withheld); 27 (Name withheld), 38 (L. Barry Wollmer); Consultation 14 (Robert Mineo).
162 Submissions 12 (Dr Gregory Moore OAM), 29 (David Galwey); Consultation 14 (Robert Mineo).
163 Information provided by NSWLEC to the Commission, 4 December 2018.
164 Consultation 14 (Robert Mineo).
165 Consultation 14 (Robert Mineo).
166 Confidential submission.
167 Information provided by NSWLEC to the Commission, 4 December 2018.

5.98 The City of Boroondara favoured limiting legal action to neighbours with adjoining land. It considered that the Tasmanian approach may be too broad and that it would be hard to ascertain the direct impact of the tree. There may be situations where a tree may affect neighbouring land without physically encroaching on it in any way, such as in the context of soil hydrology, where a tree may remove water from neighbouring soil, which can compromise the foundations of a dwelling. In these situations, it would become increasingly difficult to prove the alleged impact of a tree at greater distances, particularly in leafy areas where it is difficult or impossible to identify which tree is the source of the problem.[168]

5.99 The NSWLEC cautioned that a 25-metre rule may raise procedural issues. It would increase the number of interested parties and properties likely to be affected by any orders made. The NSWLEC noted that intervening landowners may need to be made parties to the application where their land is affected in terms of amenity or access to their land is required to carry out works.[169] It suggested that although well intentioned, selecting a meterage as the jurisdictional test for proximity was arbitrary and insufficient to cover all contexts—for example, a tree 40 metres tall may impact beyond 25 metres.[170]

A broader approach

5.100 Some of those in favour of a broader approach suggested that the only relevant threshold should be whether a person's use and enjoyment of their land is being affected by a tree in the neighbourhood.[171] Others stated that whether or not sufficient proximity exists between the tree and the affected neighbour's land should be determined by the local council in the area.[172] Pointon Partners stated that the determination of whether or not sufficient proximity exists is a task best left to the relevant decision-making body.[173]

5.101 An arborist stated:

> It may be a very unlikely situation where a non-neighbour is an affected party but they should not be excluded because their property does not share a boundary with the property on which the tree is located.[174]

Tree Protection Zone

5.102 Some people suggested that the focus should be on the tree's own Tree Protection Zone (TPZ) as outlined in the *Australian Standard AS 4970-2009—Protection of Trees on Development Sites* rather than distances between lands.[175] The suggestion was that a person who owns land within a tree protection zone should be entitled to bring an action under the new Act.

5.103 A tree's TPZ denotes the area of roots and canopy to be isolated and protected from construction disturbances to maintain the health and stability of the tree.[176] A TPZ is often used by local councils to protect vegetation during development.[177]

5.104 Arborist Ben Kenyon explained that 'any disputed issue within the TPZ could have a significant impact on the health, structure and useful life of a tree', thus warranting legal intervention, but that parts of the tree outside the TPZ that are causing the neighbour issues can be dealt with directly by the neighbour without affecting the tree.[178] Another submission explained that any tree parts, such as branches or roots, that are affecting

168 Consultation 8 (City of Boroondara).
169 Information provided by the NSWLEC via telephone to the Commission, 4 December 2018.
170 Consultation 11 (Land and Environment Court of New South Wales).
171 Submission 23 (Name withheld), 38 (L Barry Wollmer).
172 Submissions 4 (Name withheld), 6 (Name withheld).
173 Submission 21 (Pointon Partners Lawyers).
174 Submission 27 (Name withheld).
175 See, eg, Submission 7 (Ben Kenyon); See Standards Australia, *Protection of Trees on Development Sites* (AS 4970-2009) (Sydney, NSW: Standards Australia, 2009).
176 See, eg, Standards Australia, *Protection of Trees on Development Sites* (AS 4970-2009) (Sydney, NSW: Standards Australia, 2009) [1.4.7].
177 See, eg, City of Port Phillip, *Tree Protection Fact Sheet* (February 2019) <http://www.portphillip.vic.gov.au/tree_maintenance.htm>.
178 Submission 7 (Ben Kenyon).

neighbouring land but are outside the tree's TPZ should be considered 'a natural risk of living near trees'.[179]

The Commission's conclusions—proximity to affected neighbour's land

Neighbours' land should be adjoining

5.105 Allowing any person in the neighbourhood to take legal action against a tree owner would be too broad. It would go beyond the goal of resolving tree disputes between neighbours and reach into the broader community. Disputes about trees that affect the neighbourhood more broadly may be better dealt with through local laws, public health and safety laws, or public nuisance.[180]

5.106 As the new Act aims to provide for the resolution of tree disputes between neighbours, a certain degree of proximity between neighbouring lands is necessary and sensible. The Commission is of the view that a proximity requirement of adjoining land will be easier for the community to understand and apply than a broader causal link or specified meterage that might require a land survey to accurately measure distances. It will also help to eliminate frivolous or vexatious claims.

5.107 The most straightforward degree of proximity is adjoining parcels of land that share a common boundary. For these purposes a tree may be recognised as being on adjoining land even where there are multiple properties and the relevant boundary between the tree owner's property and the affected neighbour's land is short or is a point of convergence of multiple properties.

5.108 To prevent people from being arbitrarily and unfairly excluded from the scheme due to neighbouring public infrastructure or landscapes the Commission proposes that the affected neighbour's land should be deemed to adjoin the tree owner's land where it is separated by a:

- public road
- pedestrian path
- laneway
- bridge, or
- culvert.

5.109 This approach reflects the Queensland Act and cases determined under the NSW Act.

5.110 The Commission's conclusion is influenced by arguments put forward by some arborists. Generally, the further away a tree is from an affected neighbour's land, the less significant the impact will be on the land or occupants.

5.111 A number of other practical obstacles will make it harder for neighbours at greater distances to mount a successful case, and so cases are less likely to be brought. These obstacles include the jurisdictional requirements under the proposed Act; the need for claims to be supported by expert evidence from qualified arborists; and the difficulty of identifying the subject tree in leafy areas.

179 Confidential submission.

180 A public nuisance is an unlawful act, the effect of which is to endanger the life, health, property, morals, or comfort of the public: *R v Clifford* [1980] 1 NSWLR 314: Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004).

5.112 The recommended definition of adjoining land may leave some neighbours without recourse even if they can prove, for example, that a very tall tree of compromised health would affect a non-adjoining neighbour's land if it were to fall or drop a large branch.[181] In this situation, the affected neighbour's only options may be to commence legal action for nuisance and seek a *quia timet*[182] injunction or pursue an action for negligence if damage or harm has already occurred.[183]

5.113 If the tree has caused damage to multiple properties on adjoining land, then separate applications for each affected property would be required. This is consistent with the approach in New South Wales.[184]

Irregular blocks and public easements

5.114 Some neighbouring land may be diagonally offset or separated by very short distances of public land, including where there is an easement.[185] It would be unfair to exclude these neighbours from the scope of the new Act if they were genuinely affected by a neighbouring tree.

5.115 Non-standard issues relating to the threshold of 'adjoining' arise very rarely. The NSWLEC has heard approximately 1000 tree disputes since the commencement of the NSW Act, and in only a few cases have unusual issues arisen about the relevant connection test.[186]

5.116 Further consultation with councils and Land Use Victoria[187] may be prudent to ascertain if there are many irregular parcels of land where this is likely to be a significant issue in Victoria. If necessary, the definition of adjoining land could be expanded when the Act is reviewed (discussed in Chapter 13). Such an expansion could take in neighbours who do not share a common boundary but are separated by no more than two metres of public land, or separated by an easement on public land. This distance allows some flexibility while being narrow enough to capture only immediate neighbours.

Private easements should be excluded

5.117 Tree disputes concerning private easements or easements in gross[188] on private land should not be included in the new Act, even if the easement adjoins the land of the affected neighbour or tree owner. Disputes about trees that interfere with an easement (both private and in gross) to the detriment of the dominant owner or local authority should be resolved in the usual ways easement disputes are resolved (for example, abatement or legal action in nuisance). This reflects the current approach in New South Wales and the conclusions of the Queensland Law Reform Commission.[189]

181 This has occurred interstate. See, eg: *Dive v Lin* [2017] NSWLEC 1348 in which an affected neighbour's application about a Sydney blue gum, which had previously dropped branches and caused damage, was dismissed by the Court because his land was 'separated … by another residential allotment' and was, more specifically, 'two properties to the east' of the tree owner's land. The affected neighbour's application was therefore beyond the jurisdiction of the Court, and the potentially hazardous nature of the tree could not be considered through that application. This decision was upheld on appeal in *Dive v Lin* [2017] NSWLEC 153; see also *Bell v Griffiths* [2013] QCAT 655.

182 Latin meaning 'because he or she fears': Peter Butt (ed) *Butterworths' Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) *'quia timet'*.

183 The *Public Health and Wellbeing Act 2008* (Vic) also applies to nuisances which are dangerous to health or offensive. It is therefore possible for a tree to form a nuisance and therefore for this Act to be used in the management of tree disputes on private land. This Act is discussed in Ch 10. Common law actions in nuisance and negligence are discussed in Ch 3.

184 Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 8.

185 An Easement is a property right to make a limited use of land by someone other than an owner. It cannot give exclusive possession and must be for the benefit of other land (Dominant land). An Easement in Gross is an easement for the benefit of the holder of the easement (usually a service provider) which is not attached to dominant land. It is not recognised at common law and can exist only under legislation: Victorian Law Reform Commission, *Easements and Covenants* (Final Report No 22, 2010) 6.

186 Information provided by the NSWLEC to the Commission, 4 December 2018.

187 Land Use Victoria is the Victorian Government's key agency for land administration and property information: Department of Environment, Land, Water and Planning (Vic), *Property and Land Titles* (Web Page, 2019) <https://www.propertyandlandtitles.vic.gov.au/home>.

188 An Easement is a property right to make a limited use of land by someone other than an owner. It cannot give exclusive possession, and must be for the benefit of other land (Dominant land). An Easement in Gross is an easement for the benefit of the holder of the easement (usually a service provider) which is not attached to dominant land. It is not recognised at common law and can exist only under legislation: Victorian Law Reform Commission, *Easements and Covenants* (Final Report No 22, 2010) 6.

189 See, eg, *McCormack v Spencer* [2008] NSWLEC 1285; *Liu v Morris* [2012] NSWLEC 1345, as cited in the Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 11; see also Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) 93-94.

5.118 Although the Commission appreciates the intent of Tasmania's broader approach to proximity, it considers that it would not provide a significant benefit to neighbours involved in tree disputes.

Recommendations

6 The Act should apply only where an affected neighbour's land adjoins the tree owner's land.

7 The Act should define 'adjoin' to mean land that shares a common boundary, or would share a common boundary were it not separated by:

(a) a public road

(b) a pedestrian path

(c) a laneway

(d) a bridge

(e) a culvert or

(f) other similar thoroughfare prescribed in Regulations.

Trees on boundaries

5.119 The consultation paper asked how trees on boundaries (or trees only partially on one parcel of land) should be dealt with under a statutory scheme.

5.120 Ownership of a tree on private land is usually determined by reference to the location of its trunk.[190] A tree is considered a 'fixture' on the land—a tangible item of personal property that is attached to and forms part of the land.[191]

5.121 Vegetation that forms a 'hedge or similar vegetative barrier' in the form of a dividing fence is covered by the *Fences Act 1968* (Vic).[192] Under the Fences Act, neighbours must contribute to the erection or repair of a fence in equal proportions.[193]

5.122 The Commission is unaware of any cases determined under the common law or any Victorian legislation that set out how liability is to be determined when a tree that is not part of a fence straddles the boundary of two or more properties.[194]

Other jurisdictions—trees on boundaries

5.123 Under the NSW Act an affected neighbour must establish that the tree affecting them is 'wholly or principally' situated on their neighbour's land.[195] The location of the base of the trunk at ground level is used to determine where the tree is situated. The canopy and root system are not a relevant consideration. Where a tree straddles a boundary, the tree will be considered to be 'principally' on a person's land if at least 50 per cent or more of the trunk at ground level is on their side of the boundary.[196]

190 See *Robson v Leischke* (2008) 72 NSWLR 98 [151] citing *Holder v Coates* (1827) M. & M. 112; 173 ER 1099, 1100; *Lemmon v Webb* [1895] AC 1.

191 Margaret Davies and Kynan Rogers, 'Tale of a Tree' (2014) 16 *Flinders Law Journal* 43; *Permanent Trustee Australia v Shand* (1992) 27 NSWLR 426; *Clos Farming Estates v Easton* (2002) 11 BPR 20, 605. By contrast, a tree that becomes severed from the land is considered a chattel, as it can be moved.

192 *Fences Act 1968* (Vic) s 3 (definition of 'fence').

193 Ibid s 7(1)-(2).

194 Cf. cases concerning dwellings and sheds straddling boundary lines. These are called 'building encroachments'. In Victoria, building encroachments are resolved on the basis of trespass or adverse possession: Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Final Report No 20, 2010) 54.

195 Submission 20 (Name withheld); *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 43(3); Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 5.

196 See, eg, *Drolz v Sinclair* [2008] NSWLEC 34; *Brown v Weaver* [2007] NSWLEC 738.

5.124 Where a dividing fence does not correctly reflect legal boundary lines or where the location of the base of the trunk is unclear, the NSWLEC may require a land survey to be undertaken.[197] A survey or any other investigation for determining the position of the trunk usually occurs during the early stages of the hearing process, such as at the time of lodgement in the Court's registry or at a preliminary hearing.[198] The survey must accurately show the configuration of the base of the tree and its location with respect to the boundary.[199]

5.125 A tree disputes consultant in New South Wales explained that using the location of the trunk at ground level 'gives a level of certainty to disputants, requiring upfront research (if self-represented) and preparation, before undertaking Court action'.[200]

5.126 The NSWLEC may make orders reflecting the proportions of the straddle tree on each parcel of land. For example, in the case of *Dallas v Watson,*[201] a survey found that two-thirds of the straddle tree was situated on the respondent's land. As a result, the respondent was ordered to pay two-thirds of the total cost of tree removal.[202]

5.127 If the location of the tree remains unclear and cannot be established by the affected neighbour, such as where the tree has already been removed, then the matter may be dismissed because the tree has not been proven to be 'principally' on the tree owner's land.[203]

5.128 Under the Queensland Act, the base of the trunk must be 'wholly or mainly' on neighbouring land.[204] It does not matter if the tree has been removed by the time the application is heard. It is enough for the tree to have once been wholly or mainly on the land. QCAT has not determined any cases concerning ambiguity about whether or not a straddle tree is 'mainly' on a tree owner's land.[205]

5.129 In Tasmania, a tree is 'situated on land' if the base of the trunk, or the place at which the stem of the plant connects with the roots of the plant, is in whole or in part on the land.[206] For the purposes of bringing an action under the Tasmanian Act, the tree will be treated as if it lies wholly on the neighbouring land even if it straddles the boundary of adjoining properties. That is, either neighbour, although both are technically tree owners, can issue proceedings if the tree is affecting them in the ways covered by the Tasmanian Act. In determining the extent to which the tree is affecting a neighbour, the proportion of the tree situated on each area of land will be taken into account.[207] The Resource Management and Planning Appeal Tribunal (RMPAT) has discretion to make orders against both owners as if they were joint owners or either owner.[208]

International jurisdictions—trees on boundaries

5.130 The consultation paper detailed the approaches to trees that straddle boundaries in some Canadian provinces and the United States. Laws in these countries take a more collective approach to the ownership of straddle trees by requiring the cost of works to straddle trees to be shared and permission obtained from all owners before works can start.

5.131 In Ontario, Canada, under the *Forestry Act,* 'Every tree whose trunk is growing on the boundary between adjoining lands is the common property of the owners of the adjoining lands' irrespective of who planted the tree.[209] Any action taken in relation to the

197 Submission 20 (Name withheld); Consultation 11 (Land and Environment Court of New South Wales).
198 Submission 20 (Name withheld); Consultation 11 (Land and Environment Court of New South Wales); See also Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 5.
199 Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 5.
200 Submission 20 (Name withheld).
201 [2009] NSWLEC 1056.
202 *Dallas v Watson* [2009] NSWLEC 1056 [25].
203 See, eg, *Drolz v Sinclair* [2008] NSWLEC 34.
204 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 47.
205 Consultation 15 (Queensland Civil and Administrative Tribunal).
206 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 4.
207 Ibid s 8(1)(a)-(b).
208 Ibid s 8(2).
209 *Forestry Act*, RSO 1990, c F26, s 10(2); *Hartley v Cunningham* (2013) ONSC 2929 (17 May 2013) (Ontario Superior Court of Justice).

straddle tree without the consent of neighbours will amount to an offence.[210] A 'trunk' has been interpreted by the Ontario Superior Court of Justice to mean 'the entire trunk from its point of growth away from its roots up to its top where it branches out to limbs and foliage'.[211] All owners of boundary trees are liable for the costs of maintenance or works. The extent of each owner's liability will depend on the facts of the case.[212]

5.132 In Saskatchewan, Canada, 'a straddle tree planted with the agreement of adjoining owners is owned in common and each has a proprietary interest in the whole of the tree that may be protected by registration of a caveat. Where it is not determinable which owner planted the tree, ownership in common will not be implied.'[213] In such a case, the tree remains the property of the owner of the land on which the tree was planted even when the trunk, roots and branches extend into neighbouring property.[214]

5.133 In some states of the United States, where a tree stands on the boundary line with its trunk on both properties, the neighbours own the tree as tenants in common if an 'intention, acquiescence, or agreement'[215] as to its joint ownership can be demonstrated.[216] While neighbours may abate up to boundary lines in the usual manner, any significant work that crosses boundary lines or is concerned with the removal of the tree must be done with the agreement of the owners.[217]

Community responses—trees on boundaries

5.134 Community responses fell into three distinct categories: proportional ownership, shared ownership in equal parts and other suggestions.

5.135 One person related their unresolved dispute about a straddle tree. This person was unable to remove the tree as they wished because the neighbour would not allow them to access their land to carry out the works.[218]

Proportional ownership

5.136 Most responses preferred proportional ownership—that is, the neighbour with the greater portion of the tree on their property should be deemed to own the tree and be fully responsible for it.[219] A range of methods were put forward for assessing ownership. As one arborist explained:

> A system of determining the extent of ownership should apply. Does this look solely at the location of the centre of the trunk, the extent of the trunk on each parcel of land, the extent of canopy over each parcel and/or the extent of root system in each parcel? How does one define ownership of a tree? Is proportional liability a reasonable application for attributing liability?[220]

5.137 One person suggested that in ambiguous circumstances, such as where the tree straddles boundaries in equal proportions, the tree should be deemed to be owned by the neighbour whose property is significantly affected by the tree.[221]

5.138 Arborist Ben Kenyon stated that the neighbour with the majority of the tree's Tree Protection Zone (TPZ) on their land should be deemed to own the tree.[222]

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210 *Forestry Act*, RSO 1990, c F26, s 10(3)
211 *Hartley v Cunningham* (2013) ONSC 2929 [14]. Upheld by the Court of Appeal for Ontario: *Hartley v. Cunningham* (2013) ONCA 759 [3]–[4]
212 *Jessica Laciak v City of Toronto* (2014) ONSC 1206 [22].
213 *Koenig v Goebel* [1998] 6 WWR 56 (Court of Queen's Bench for Saskatchewan).
214 Ibid.
215 See, eg, *Holmberg v Bergin,* 172 NW 2d 739 (Minn, 1969).
216 Clark Boardman Callaghan, *Nichols Cyclopedia of Legal Forms Annotated,* vol 1 (at November 2016) 6.4 Joint ownership of trees on dividing line, 'Chapter 6 Adjoining or Abutting Owners'.
217 See, eg, Cal Civil Code § 833-834; Illinois Legal Aid Online, *Who Owns the Tree on Both My and My Neighbour's Property?* (Web Page, 2019) <www.illinoislegalaid.org/legal-information/who-owns-tree-both-my-and-my-neighbors-property>.
218 Consultation 1 (Aldo Taranto).
219 Submissions 4 (Name withheld), 7 (Ben Kenyon), 12 (Dr Gregory Moore OAM).
220 Submission 27 (Name withheld).
221 Submission 4 (Name withheld).
222 Submission 7 (Ben Kenyon).

Shared ownership

5.139 A smaller number of people suggested that neighbours should be considered to jointly own a straddle tree in proportion to the cross-sectional area of the trunk at ground level[223] or in proportion to the buttress roots[224] on each property.[225]

5.140 One submission endorsed the Ontario approach to straddle trees where the tree is jointly owned by neighbours who need to consent to any proposed works or actions.[226] Dr Gregory Moore OAM stated:

> I have seen [joint ownership] work very well when both parties have a joint sense of ownership and responsibility—in a sense it forces people to work together to achieve a mutually agreed outcome.[227]

5.141 Some people also stated that straddle trees should be jointly owned in equal shares regardless of the actual portions of the tree on each property.[228]

Other suggestions

5.142 Some submissions suggested that ownership of a boundary tree should be determined by an arborist[229] or the local council.[230]

5.143 Some arborists cautioned against determining ownership based on who planted the tree or on which property the tree originated, because determining the origin of the tree can be a difficult task with possibly inconclusive outcomes.[231]

5.144 Arborist Dr Karen Smith noted that the type of tree may be relevant in any assessments of location along boundary lines, such as whether there is an 'individual tree, suckers, or vines or bamboo'.[232]

The Commission's conclusions—trees on boundaries

5.145 It should not be necessary to identify a single majority-owner of a tree that straddles a boundary for the purposes of commencing legal action. Any neighbour affected by a straddle tree should have the benefit of seeking relief as long as the matter meets the other proposed jurisdictional requirements in the new Act.[233] This is a similar approach to the Tasmanian Act.

5.146 The Commission is mindful of not excluding parties from being able to use the proposed scheme. The NSWLEC noted that 'principally situated' has been interpreted to mean where the trunk at ground level is equal to or greater than 50 per cent. If this test is not at ground level then it can be difficult to determine the portions of the trunk on each property, especially where the tree is leaning.[234]

5.147 The Commission observes that either owner of a straddle tree may need to take legal action including, for example, a person who may own 60 per cent of the tree. The owner of 60 per cent of the tree may need to remove or prune a major branch on their neighbour's side in order to maintain the structural integrity of the tree but would be prohibited from doing so without their neighbour's consent. In this situation, it would be unfair to exclude parties from seeking legal relief.

223 Submission 12 (Dr Gregory Moore OAM).
224 Buttress roots are roots that support the trunk of a tree, providing mechanical stability. These roots can extend above the ground and sometimes many metres up the tree: Peter Thomas, *Trees: Their Natural History* (Cambridge University Press, 2000) 108.
225 Confidential submission.
226 Confidential submission.
227 Submission 12 (Dr Gregory Moore OAM).
228 Submissions 10 (Professor Phillip Hamilton), 19 (Name withheld).
229 Submission 23 (Name withheld).
230 Submission 4 (Name withheld).
231 See, eg, submission 12 (Dr Gregory Moore OAM).
232 Submission 9 (Dr Karen Smith).
233 For example, that the tree is in a zone included under the proposed Act and the tree is affecting the neighbour in ways that are captured under the proposed causes of action.
234 Consultation 11 (Land and Environment Court of New South Wales).

5.148 In addition, it would be unfair to hold neighbours who share a straddle tree automatically liable in equal portions for work specified in orders. This is the approach in the *Fences Act 1968* (Vic) for neighbours who share a dividing fence. Trees are more complex and dynamic structures than fences. Accordingly, joint responsibility in equal shares without regard for actual portions of the tree may be unfair and may unreasonably burden the person who has a smaller portion of the tree on their land.

5.149 A fairer approach would be for the decision maker to consider the proportions of ownership together with any other relevant factors when making orders. For example, if an order specified tree works totalling $1000, the neighbour with 60 per cent of the tree on their land would be liable to contribute $600; the neighbour with 40 per cent, $400. If the tree is located on properties in equal proportions, the costs would be shared equally.

5.150 Proportional ownership of the tree should be assessed by reference to the proportions of ownership of the base of the trunk (or stem) at ground level. This reflects the approach in New South Wales, Tasmania and Queensland and also mirrors the common law approach which determines ownership based on the location of the trunk of a tree.[235] It is easier to determine the base of the trunk at ground level than the TPZ, root system or canopy, which may be difficult to identify without engaging an arborist. Similarly, any method of determining proportions based on the origin of the tree is likely to be too difficult. [236]

5.151 Where the boundary lines or proportions are ambiguous due to the nature of the tree or the location of the boundary, the Tribunal could direct parties to have their land surveyed by a licensed surveyor or the tree assessed by an arborist. If this did not provide conclusive results, a sensible approach would be to apportion liability equally.

5.152 Where a tree straddles the boundary of more than two properties, an affected neighbour should name all owners in the application and provide evidence about proportional ownership by reference to the tree trunk. It will then be a matter for the Tribunal to consider who orders should be made against and the proportion of liability.[237]

Recommendations

8 If a tree subject to the dispute straddles boundary lines the Act should:

(a) allow the affected neighbour to bring an application irrespective of the proportions of the tree on each parcel of land, and

(b) provide the Victorian Civil and Administrative Tribunal with a discretion to consider the proportions of the tree on each party's land in making orders.

9 A determination about the proportions of the tree owned by the respective parties should be made by measuring the location of the base of the trunk at ground level on each parcel of land.

235 *Robson v Leischke* (2008) 72 NSWLR 98 [151] citing *Holder v Coates* (1827) M. & M. 112; 173 ER 1099, 1100; *Lemmon v Webb* [1894] AC 1.
236 Consultation 11 (Land and Environment Court of New South Wales).
237 This approach is contained in the *Neighbourhood Disputes About Plants Act 2017* (Tas) s 8(2).

Parties to a tree dispute

5.153 The next part of this chapter examines the legal concepts of standing and liability in the new Act. The question of which neighbours can make an application (that is, who has 'standing') and who can be held liable is usually determined based on the person's relationship to the land that is the subject of the dispute.[238]

Who can commence an action?

5.154 The consultation paper asked who should be able to commence legal action if a new Act was introduced.

5.155 In order to have standing to bring an action in nuisance at common law, the affected neighbour must be in possession of the land affected by the tree. Standing extends to an owner, tenant or licensee with exclusive possession of the land.[239]

5.156 When fencing disputes occur between neighbours, the *Fences Act 1968* (Vic) provides that only an owner of land may take action to resolve disputes about fences located on the common boundary of adjoining land.[240] Long-term tenants with five or more years remaining on their lease may be liable to contribute to the costs of fencing disputes.[241]

Other jurisdictions—who can commence an action

5.157 In *Robson v Leischke*[242] the NSWLEC held that applications in New South Wales are firstly limited to an owner of adjoining land and, by extension, the occupier of adjoining land.[243] An occupier must be in physical possession of the land. If the affected property has multiple owners, any one of the owners can apply.[244] If multiple properties are affected by the subject tree, the NSWLEC requires separate applications from the owner or occupier of each affected property.[245]

5.158 Queensland takes a slightly different approach. QCAT will only accept an application by an occupier of land if the registered owner of the land has refused to make the application.[246] QCAT also requires separate applications if multiple properties are affected by the subject tree. Joint liability will apply if the land on which the tree is situated has multiple owners.[247] It is rare for occupiers of land to make an application to the Tribunal. However, this may arise where a landlord is overseas or cannot be located.[248]

5.159 The Tasmanian Act operates in a similar way to the Queensland Act. While an owner or occupier of land can apply for an order under the Tasmanian Act, a person who is not an owner of the land can only apply if:

- the person has, in writing to the owner, requested the owner of the land to make an application, and
- the owner has refused to comply with the request within 42 days.[249]

238 See, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd (*1981) 149 CLR 27.
239 LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Title to Sue' [415-640]; See also *Stockwell v State of Victoria* [2001] VSC 497 [241]. Mere licensees or occupiers do not have title to sue in private nuisance, unless there are particular circumstances which alter that status.
240 *Fences Act 1968* (Vic) s 4. This includes the owner's corporation if the land is common property.
241 Ibid s 10. This allows the owner to give the tenant a fencing notice and for the tenant to contribute 50 per cent of the cost the owner is liable to pay (if the tenant has an unexpired lease of 5 or more years but less than 10 years) and 100 per cent of the cost the owner is liable to pay (if the tenant has an unexpired lease of 10 or more years). This does not apply to retail leases or residential tenancies.
242 (2008) 72 NSWLR 98.
243 (2008) 72 NSWLR 98 [158]-[160]; see *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 3(1), 7.
244 See, eg, *Treeves v Hedge* [2010] NSWLEC 1344.
245 See, eg, *Po & Dossan v Warham* [2008] NSWLEC 1238.
246 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (QLD) s 62(2).
247 Ibid s 53.
248 Consultation 15 (Queensland Civil and Administrative Tribunal).
249 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 23(4).

Community responses—who can commence an action

5.160 Community responses overwhelmingly supported any person affected by the tree being able to commence legal proceedings under a new Act.[250] Some submissions suggested that standing should not depend on demonstrating a certain interest in land.[251] As discussed, only owners of land can take legal action to resolve fencing disputes.

The Commission's conclusions—who can commence an action

5.161 Owners of land affected by a tree on neighbouring land should be able to commence legal proceedings under a new Act to resolve their disputes.

5.162 It would also be appropriate to enable occupiers of land to take legal action where the occupier has asked the owner to commence legal proceedings but the owner has refused to act. This accords with most community responses and reflects the approach in Queensland and Tasmania.

5.163 This approach puts landowners on notice of the dispute. Ultimately, it is in the interests of the landowner to be involved in proceedings because they may end up responsible for any costs.[252] In normal leasing arrangements landlords are responsible for major tree pruning, cutting back overhanging branches (such as those near powerlines) and maintaining fire breaks.[253] Tenants are generally responsible for garden maintenance such as mowing lawns, weeding and minor pruning.[254] Therefore, it is likely to be landowners who assume responsibility for carrying out orders under the new Act.

5.164 By allowing occupiers to take action in the absence of the owner, there is a greater chance that unsafe trees and branches may be addressed before they cause damage or harm.

Recommendation

10 A person may apply to the Victorian Civil and Administrative Tribunal for an order under the Act if they are:

(a) the owner of the land affected by a tree (affected neighbour), or

(b) an occupier of land affected by a tree if the owner of land has refused to commence proceedings.

Who can be found liable?

5.165 The consultation paper asked the related question of who should be found liable for harm or damage caused by trees under a new Act.

5.166 Under a common law action in nuisance, anyone who created the nuisance can be found liable. There is no need for the defendant to have any interest in the land.[255] Generally speaking, however, 'most private nuisances are created by private landowners'.[256] To that

250 Submissions 5 (Name withheld), 7 (Ben Kenyon), 10 (Professor Phillip Hamilton), 23 (Name withheld), 27 (Name withheld).
251 Submissions 20 (Name withheld), 23 (Name withheld).
252 See, eg, Victorian Civil and Administrative Tribunal, *Submission to the Department of Justice and Community Safety, Residential Tenancies Act Review* 4 <https://engage.vic.gov.au/fairersaferhousing>. The Tribunal interprets the tenant's duty to keep the rented premises in a 'reasonably clean condition' to include any obligation by the tenant to mow the lawn and maintain garden beds so that they are neat. The Tribunal interprets the landlord's duty to maintain the premises in good repair to include cleaning gutters and pruning larger trees.
253 Ibid.
254 Ibid.
255 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.5]; See also *LexisNexis, Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Strict Liability of Creator' [415-715].
256 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.5].

end, a tree owner will be found liable for an action in nuisance under common law where they:

- created the nuisance
- permitted the nuisance to arise by failing to exercise reasonable care
- continued or adopted the nuisance, or
- negligently failed to remedy or abate the nuisance.[257]

5.167 Under a common law action in negligence, liability may be imposed on owners or occupiers of neighbouring properties because the common law 'imposes a duty of care on each neighbour in relation to the other neighbour.'[258] Liability will attach to neighbouring owners or occupiers of land in negligence where they failed to exercise reasonable care in relation to their tree, resulting in harm or loss to a neighbour.[259]

5.168 For legal action arising out of fencing disputes, both owners are liable to contribute in equal proportions.[260] In some circumstances, long-term tenants (excluding residential tenants) may have to contribute to the costs. This applies to tenants with at least five years remaining on their lease.[261] This is to ensure 'that the fence to be constructed will meet the needs of present usage' and this extends to being sufficient for the purposes of both occupiers.[262] It also covers situations in which the tenant wishes to have a fence installed that costs more than one which the landlord is required to contribute under the Fences Act.[263] Residential tenants are excluded because the 'erection or replacement of a fence is an improvement to the land and should not be distinguished from other improvements for which a landlord is generally responsible'.[264]

Other jurisdictions—who can be found liable?

5.169 Under the NSW Act, owners or occupiers of land on which the subject tree is located can be found liable.[265]

5.170 In Queensland, liability attaches to a 'tree-keeper' (tree owner). This accords with the responsibilities placed on a tree-keeper to remove branches that overhang a neighbour's land and to ensure trees on their land do not cause injury or damage or interfere with a person's use and enjoyment of land.[266] A tree-keeper is generally defined as the registered owner of land or a lessee or licensee of Crown land under the *Land Act 1994* (Qld).[267] The Queensland Act is careful not to extend liability to residential tenants.[268] It provides for joint liability where there are multiple owners of land.[269]

257 LexisNexis, *Halsbury's The Laws of Australia* (at 21 March 2018) 415 Tort, 'Liability' [415-710]; See also *Robson v Leischke* (2008) 72 NSWLR 98 [47]-[50].
258 See, eg, *Robson v Leischke* (2008) 72 NSWLR 98 [96] citing *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 432 [27], 443 [63].
259 See, eg, Prue Vines, 'Negligence: Introduction' in Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) 119, 122; See also, *Wrongs Act 1958* (Vic) s 43: 'Negligence means failure to exercise reasonable care'.
260 *Fences Act 1968* (Vic) s 7.
261 Ibid s 10.
262 Law Reform Committee, Parliament of Victoria, *Review of the Fences Act 1968* (Report, 1998) 45.
263 Ibid 46.
264 Ibid 48; see also *Fences Act 1968* (Vic) s 10(4)(a). A tenant under a retail premises lease to which the *Retail Leases Act 2003* applies is also excluded.
265 *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 3(1), 7.
266 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (QLD) s 52.
267 Ibid s 48. This also includes the grantee for an occupation permit or a stock grazing permit under the *Forestry Act 1959* (Qld); the grantee for a stock grazing permit under the *Nature Conservation Act 1992* (Qld); the body corporate for the community title scheme under the *Body Corporate and Community Management Act 1997* (Qld); the body corporate for the plan under the *Building Units and Group Titles Act 1980* (Qld) ; and the trustee of the reserve, other than a reserve for community purposes, under the *Land Act 1994* (Qld).
268 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48.
269 Ibid s 53.

5.171 In Tasmania liability attaches to owners of land on which the tree is situated. An owner of land is generally defined to include owners of freehold estates, bodies corporate, life tenants and licensees and lessees of Crown land.[270] The Tasmanian Act also provides for joint liability where there are multiple owners of land.[271] This mirrors the Queensland approach.

5.172 The Tasmanian Act places responsibilities on landowners to remove branches that overhang a neighbour's land and to ensure trees on their land do not cause injury or damage or interfere with a person's use and enjoyment of land.[272] The Second Reading Speech to the Tasmanian Act makes it clear that residential tenants will not have responsibility or liability for plants under the Act.[273]

5.173 All interstate schemes take into account a broad range of considerations before determining remedies. In this way, any acts or omissions by the affected neighbour or the owner of the land on which the tree is situated may affect the outcome of the dispute. The NSW Act requires the NSWLEC to consider:

> anything, other than the tree, that has contributed, or is contributing, to any such injury or damage or likelihood of injury or damage, including:
>
> > any act or omission by the applicant and the impact of any other trees (including trees owned by the applicant); and
> >
> > 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.[274]

5.174 In several cases the NSWLEC has ordered the affected neighbour rather than the owner to pay the cost of removing a dying tree likely to cause future damage.[275] In these cases the Court determined that the tree had been poisoned by the affected neighbour and that this action led to the tree being classified as dangerous.[276] See Chapter 8 for a discussion of decision-making principles in the new Act.

Community responses—who can be found liable?

5.175 Many responses strongly supported liability attaching to owners of the land on which the tree is situated.[277] One submission stated, 'Putting the onus on tree owners supports the concept of prevention, which is always the very best option, especially when we are talking about potential threats to people's lives.'[278]

5.176 One submission noted that mere ownership of the land on which the tree is located should not by itself provide enough justification for liability to be imposed.[279] Rather, it was suggested that an element of negligence should also be required.[280]

5.177 Arborist Dr Karen Smith stated that 'a tenant should not bear responsibility for tree damage'.[281]

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270 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 3.
271 Ibid s 11.
272 Ibid s 10.
273 Tasmania, *Parliamentary Debates*, House of Assembly, 4 April 2017, 3 (Rene Hidding); Neighbourhood Disputes About Plants Bill 2017 (Tas).
274 This is considered in more detail in Ch 8.
275 See, eg, *Horn v Latter* [2007] NSWLEC 744; *Joaquim v Adamson* [2009] NSWLEC 1312; *Joaquim v Adamson (No 2)* [2009] NSWLEC 1367.
276 See, eg, *Horn v Latter* [2007] NSWLEC 744.
277 Submissions 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton), 19 (Name withheld), 22 (Name withheld), 23 (Name withheld), 28 (HVP Plantations).
278 Submission 22 (Name withheld).
279 Submission 27 (Name withheld).
280 Ibid.
281 Submission 9 (Dr Karen Smith).

The Commission's conclusions—who can be found liable?

5.178 Liability should attach to the owner of land on which the tree is situated (the tree owner). This should apply to an owner's corporation if the land is common property. Joint liability should apply to multiple owners of land. An owner of land could be defined in the new Act as it is in the *Fences Act 1968* (Vic) with respect to private interests in land, as:

- the Registered Proprietor of the fee simple in the land under the *Transfer of Land Act* 1958 (Vic) (not in an identified folio), or a person empowered under an Act to execute a transfer of the land, or
- an owner of land in an identified folio under the *Transfer of Land Act* 1958 (Vic), or
- a person who has an estate in fee simple in the land (except a mortgagee), or who is empowered to convey an estate in fee simple in the land, or
- the owner's corporation if the land is common property.

5.179 The Commission notes that liability under the NSW Act may extend to occupiers of land,[282] but in accordance with submissions and consultations, the Commission considers that liability should be limited to the owner of the land.

5.180 While some long-term tenants may be found liable to contribute to the costs of fencing works under the Fences Act,[283] the Commission does not consider that this is appropriate for the new Act. The rationale for interventions and the outcomes sought for fencing and tree disputes are different. Action may still be taken against a tenant in nuisance at common law. See Chapter 3.

5.181 Liability should not extend to residential tenants. This is consistent with the approach under the Fences Act. The interests of a landowner in relation to a tree are different to those of a tenant or occupier of land. Moreover, trees can add significant value to land.[284] Further, landlords (owners) are generally responsible for vegetation maintenance pursuant to lease arrangements and will therefore be responsible for the costs associated with orders made under the new Act.[285] It would be unreasonable for liability to attach to a tenant who may not have planted the tree and may only be at the premises for a short time. The interstate statutory schemes in Queensland and Tasmania do not extend liability to residential tenants.

5.182 The Commission is comfortable with the new Act diverging from the approach to liability at common law in negligence and nuisance. At common law it would be necessary to demonstrate that the owner of land created, adopted or continued a nuisance, or was negligent for failing to exercise reasonable care.[286] Different considerations will apply under the new Act. The focus of the new Act is primarily about preventing future damage and harm. It recognises that trees are dynamic, living organisms and the risks they may pose to individuals on adjoining land will not necessary arise from acts or omissions of the landowner.

282 The term 'owner of land' is defined to also include "the occupier of the land": s 3(1) of the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

283 *Fences Act 1968* (Vic) s 10.

284 See, eg, Gregory Moore, 'Economic Value of Trees', *Sustainable Gardening Australia* (Web Page) <https://www.sgaonline.org.au/economic-value-of-trees/>; see also Kelsey Munro, 'Houses on Leafier Streets In Three Sydney Suburbs Worth $50,000 More: Analysis' *The Sydney Morning Herald* (online, 27 April 2017) <https://www.smh.com.au/national/nsw/houses-on-leafier-streets-in-three-sydney-suburbs-worth-50000-more-analysis-20170427-gvtkex.html>; Ram Pandit et al 'The Effect of Street Trees on Property Value in Perth, Western Australia' (2013) 110 *Landscape and Urban Planning* 134-142.

285 See, eg, Victorian Civil and Administrative Tribunal, *Submission to the Department of Justice and Community Safety, Residential Tenancies Act Review* 2 <https://engage.vic.gov.au/fairersaferhousing>. The Tribunal interprets the tenant's duty to keep the rented premises in a 'reasonably clean condition' to include any obligation by the tenant to mow the lawn and maintain garden beds so that they are neat. The Tribunal interprets the landlord's duty to maintain the premises in good repair to include cleaning gutters and pruning larger trees.

286 Paula Giliker, 'Nuisance' in Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Lawbook Co., 10th ed, 2011) [21.160]; Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [5.1.5]; *Wrongs Act 1958* (Vic) s 43.

5.183 However, in determining the extent of liability, VCAT will be guided by the decision-making principles recommended in Chapter 8, which include consideration of acts or omissions by the affected neighbour or anything, other than the tree, that has contributed, or is contributing, to any harm or damage or likelihood of harm or damage.

Recommendation

11 The Act should allow an application to be brought against the owner of the land on which the tree is situated (the tree owner).

What problems are within the scope of the new Act?

5.184 The consultation paper sought responses about the types of tree problem that should be addressed by the new Act. In particular, two main issues that are a cause of common problems were considered:

- damage or interference
- harm (or injury).

5.185 Damage claims relate to property on neighbouring land (such as a house, a garden shed or a car) or also the land itself (such as a garden). Sometimes damage caused by the tree may be preceded by some level of ongoing interference, which in turn causes annoyance or discomfort to the affected neighbour but does not amount to property damage.

5.186 Harm in this report refers to harm to people—causing injury or otherwise affecting their health or safety. Under the NSW, Queensland and Tasmanian Acts, harm is called 'injury'.[287] Future harm is harm that is expected to occur.

5.187 The Commission has not considered a compensation scheme for harm suffered (also referred to as 'personal injury'). The remedies available under the new Act focus on practical remedies related to tree management.

Other jurisdictions—problems within scope

New South Wales

5.188 The NSWLEC 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 to which the Act applies that is situated on adjoining land.[288]

5.189 In New South Wales any sort of damage, regardless of degree, can be claimed. However, minor or insignificant damage is not covered by the Act.[289] Actual damage or physical damage to the land or other structures on the land is actionable as well as to moveable objects located on property.[290] The NSWLEC has determined that garden plants, fences, animals outdoor furniture and motor vehicles are 'property on the land'.[291] 'Property on the land' need not be above ground, as shown by cases concerning sewer pipes.[292] However, 'damage to the surface of the land such as raising a mound of earth or drying

287 *Trees (Disputes Between Neighbours) Act 2006* (NSW) pt 2; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b).
288 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 9.
289 See, eg, *Bailey v Gould* [2011] NSWLEC 1062.
290 *Robson v Leischke* (2008) 72 NSWLR 98 [162–167], [168]–[173].
291 See *Lee v Martin* [2010] NSWLEC 1146 (garden plants); *McHugh v Schmiedte* [2010] NSWLEC 1163 (outdoor furniture); *Russell v Parsons* [2009] NSWLEC 1026 (car); *Robson v Leischke* (2008) 72 NSWLR 98 [162–167].
292 See, *eg, Ding v Phillips* [2008] NSWLEC 1268; *Payn v Allen* [2010] NSWLEC 1315.

the soil without consequential damage to other property' is not covered.[293] Future damage is considered by the NSWLEC if it is satisfied that it is likely to occur within the next 12 months.[294]

5.190 Annoyance or discomfort caused by a neighbouring tree is not actionable.[295] The dropping of leaves or fruit by urban trees would not ordinarily provide the basis for court intervention.[296] This reasoning is the subject of a 'tree dispute principle' that is used by the Court to guide its decision making. These are discussed in more detail in Chapter 8. Although tree dispute principles are not legally binding, the NSWLEC informed the Commission that the Court 'has not felt the need to depart from existing tree dispute principles'.[297]

5.191 Injury is not defined in the NSW Act but case law suggests that injury encompasses allergic reactions or other medical conditions.[298] Applicants are required to provide properly qualified medical or scientific evidence of a link between the injury and the trees subject to the application.[299] For example, 'medical or arboricultural evidence and any supporting medical or peer-reviewed literature' that supports their claim that the tree is the cause of the injury.[300]

5.192 Claims can be brought to prevent future harm that is likely to occur within 12 months.[301] The NSWLEC has made it clear that it will not entertain claims for compensation for personal injury.[302]

Queensland and Tasmania

5.193 In Queensland, QCAT has jurisdiction to make orders in relation to a tree to prevent serious injury to any person or to remedy, restrain or prevent:

- serious damage to the neighbour's land or any property on the neighbour's land, or
- substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.[303]

5.194 An example of 'substantial, ongoing and unreasonable interference' may include a build-up of leaves blocking the gutter or spoiling the tank water for drinking purposes.[304] Another might be where leaf litter is so continuous and extensive it causes an internal roof leak.[305] However, in most cases leaf litter is unlikely to satisfy the interference threshold. The Explanatory Notes to the Queensland Act state that leaf litter is generally considered 'to be expected in urban or suburban areas with trees' and it is reasonable to expect that residents 'will perform some level of regular maintenance, including cleaning gutters and leaf litter'.[306]

293 *Robson v Leischke* (2008) 72 NSWLR 98 [166]; *Ardagh v Ellston* [2012] NSWLEC 1235 [41]–[42].
294 See *Yang v Scerri* [2007] NSWLEC 592.
295 *Robson v Leischke* (2008) 72 NSWLR 98.
296 *Barker v Kyriakides* [2007] NSWLEC 292, [20].
297 Consultation 11 (Land and Environment Court of New South Wales).
298 See, *eg, Tuft v Piddington* [2008] NSWLEC 1249.
299 Land and Environment Court of New South Wales, *Practice Note: Class 2 Tree Applications*, 1 December 2018, [15].
300 Ibid, [15] sch B; Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 10. Without this evidence, injury as a consequence of the tree concerned will not be successfully made out. See, eg, *Hurditch v Staines* [2008] NSWLEC 1351; *Oakey v Owners Corporation Strata Plan 5723* [2009] NSWLEC 1108; *Turner v O'Donnell* [2009] NSWLEC 1349.
301 *Yang v Scerri* [2007] NSWLEC 592.
302 *Konn v Wisbey* [2007] NSWLEC 799. In this case the applicant sought compensation for 'damages for personal stress' and the NSWLEC held that 'the jurisdiction of the Court to make orders does not encompass orders for damage to people but merely encompasses orders for damage to property. The Court therefore is not able to consider this element of the applicant's claim' at [3].
303 *Neighbourhood Disputes (Dividing Fences and Trees) Act* (Qld) s 66.
304 Consultation 15 (Queensland Civil and Administrative Tribunal); Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) cl 61.
305 Consultation 15 (Queensland Civil and Administrative Tribunal); see also *Cacopardo v Woolcock* [2017] QCAT 214 (roots); *Belcher v Sullivan* [2013] QCATA 304 (roots); *Hewitt v Brisbane CC* [2018] QCAT 282 (litter).
306 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) 156; see also *Thomsen v White* [2012] QCAT 381.

5.195 The Queensland Law Reform Commission considered whether QCAT's jurisdiction should be broadened 'to include a power to make an order to cut or remove any overhanging branch …'.[307] However the QLRC concluded that it was 'concerned that such a reform might significantly increase QCAT's workload by the addition of less serious cases'.[308] The QLRC further notes that 'In many cases, overhanging branch issues are addressed by neighbours by informal agreement or by a neighbour exercising the right of abatement'.[309]

5.196 Future damage is actionable if QCAT is satisfied the damage is likely to occur within 12 months. Under the Queensland Act injury to persons must be serious, such as a severe allergic reaction.[310] Serious injury must be likely within 12 months.

5.197 The Tasmanian Act generally mirrors the Queensland approach by providing RMPAT with jurisdiction to make orders in relation to land affected by a plant. This means that it can make orders if a plant has caused, is causing, or is likely within the next 12 months to cause:

- serious injury to a person on the affected land[311] or
- serious damage to the affected land or any property on the affected land or
- substantial, ongoing and unreasonable interference with the use and enjoyment by a person of the affected land.[312]

5.198 Unlike the Queensland Act, the Tasmanian Act also includes a specific power for RMPAT to make an order where branches of a plant overhang affected land.[313] This is unique to the Tasmanian scheme and no orders under this provision have been made by the Tribunal.

Community responses—problems within scope

Damage

5.199 Responses were sought from the community about the degree of damage (the seriousness of damage) and the kind of damage (that is, to land or property) that should be covered by a new Act; and whether future damage should be actionable.

5.200 Some submissions suggested placing a monetary value on the amount of damage that should give rise to an action.[314] One suggested that damage amounting to over $4000 should be sufficient to bring an action.[315] Another thought damage greater than $500 should be actionable.[316]

5.201 Most responses indicated that damage should be both observable and proven.[317] For example, one respondent suggested 'visible damage that can be proven and seen, and has altered from the original condition'.[318] Arborist Robert Mineo stated that 'any damage under a new scheme would have to be serious or significant'.[319]

5.202 Most submissions considered that both damage to the land itself, and to property on the land, for example a motor vehicle, should be actionable.[320]

307 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) [3.455]–[3.456].
308 Ibid.
309 Ibid [3.354].
310 *Leonardi v Watson* [2015] QCATA 192.
311 The orders RMPAT may make in relation to serious injury are to 'prevent, or reduce the likelihood of, serious injury being caused to a person by a plant': *Neighbourhood Disputes About Plants Act 2017* (Tas) s 33(2)(b).
312 Ibid s 7(1)(b).
313 See Ibid ss 7(1)(a), 33(2)(a).
314 See, eg, Submission 4 (Name withheld).
315 Confidential submission.
316 Submission 4 (Name withheld).
317 Submissions 5 (Name withheld), 20 (Name Withheld), 25 (City of Boroondara); Consultation 14 (Robert Mineo).
318 Submission 5 (Name withheld).
319 Consultation 14 (Robert Mineo).
320 Submissions 5 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 19 (Name withheld), 20 (Name withheld), 23 (Name withheld).

5.203 Community feedback generally supported the inclusion of future damage within the scope of a new Act. One submission noted that 'future damage is an important concern and must be included'.[321] Others suggested timeframes and risk assessment methodologies as safeguards.[322] Arborist Dr Karen Smith stated that future damage would be appropriate if assessed within a timeframe of 12 months and 'when assessed according to the Australian Standard for Risk Management'.[323] Dr Smith noted that damage that may be caused at some unknown time would not be sufficient.[324]

5.204 Dr Gregory Moore OAM explained that 'it can be difficult to predict a tree's future'.[325] He identified two risk assessment tools that are used to assess the future risk of trees:

- Tree Risk Assessment Qualification
- Quantified Tree Risk Assessment.[326]

5.205 The City of Boroondara uses an industry-recognised risk assessment methodology and AQF Level 5 arborists who have practical experience in assessing risks posed by trees.[327] Boroondara advised that:

> Any claims relating to future damage or harm need to be based on evidence, not the perceptions of neighbours, and must be assessed by a qualified arborist using an industry recognised risk assessment methodology … risk assessments that extend beyond 12 months can provide inaccurate results that do not accurately represent tree risk and appropriate management options.[328]

5.206 Heritage Victoria suggested that a 12-month time period may be too long for an arborists' assessment.[329] It would be difficult for an arborist to assess risk that far into the future.

5.207 The Commission accepts that it is difficult to assess the likelihood of trees failing in the future. However, the use of expert evidence can assist. Expert evidence will help to prevent unnecessary interference with trees assessed as healthy. Expert evidence is discussed in Chapter 8.

Harm to individuals

5.208 Some community responses suggested that the primary function of the new Act should be to prevent harm caused by trees. Baw Baw Shire Council emphasised that the key issue to be addressed by reform is 'the minimisation of risk to the community'.[330] One submission stated, 'It is my belief that there should be a determined effort to prevent injury and/or death of people and the damage of property.'[331] Another emphatically expressed the view that 'people's safety should always be the priority'.[332] HVP Plantations noted that human health and safety is key.[333]

5.209 There was general agreement that medical evidence should be required where an affected neighbour is seeking a remedy for harm such as the removal of a tree.[334]

321 Submission 38 (L. Barry Wollmer).
322 Submissions 5 (Name withheld), 6 (Name withheld), 9 (Dr Karen Smith), 20 (Name withheld), 21 (Pointon Partners Lawyers); Consultations 1 (Aldo Taranto), 2 (Dr Gregory Moore OAM), 8 (City of Boroondara), 14 (Robert Mineo).
323 Submission 9 (Dr Karen Smith).
324 Ibid.
325 Consultation 2 (Dr Gregory Moore OAM).
326 Ibid; the City of Boroondara informed the Commission that council uses TRAQ when assessing tree risk: Consultation 8 (City of Boroondara). Risk assessment tools are considered in Ch 8.
327 Consultation 8 (City of Boroondara).
328 Ibid.
329 Consultation 16 (Heritage Victoria).
330 Consultation 10 (Baw Baw Shire Council).
331 Submission 38 (L. Barry Wollmer).
332 Submission 24 (Name withheld).
333 Consultation 3 (HVP Plantations)
334 Submissions 7 (Ben Kenyon), 9 (Dr Karen Smith); Consultation 8 (City of Boroondara), 11 (Land and Environment Court of New South Wales), 12 (City of Port Phillip).

5.210 Arborist Dr Karen Smith noted 'whilst special medical conditions do exist, they are rare. So for medical conditions a medical certificate should be provided stating the tree is the cause of the medical condition. Many trees thought to be allergenic are actually not, and claims need to be evidence based.'[335]

5.211 Dr Gregory Moore OAM supported this position, stating that some councils now rely on expert allergy testing rather than a report from a general practitioner.[336] The City of Port Phillip noted that 'if a pollen allergy is cited as the reason for requesting removal of the tree or palm, then this will generally need to be supported by specialist medical evidence'.[337]

5.212 Members of the community felt that harm should include harm to anyone at all, including occupiers and others on the land.[338] One submission noted that 'it will usually be occupiers that are affected'.[339]

5.213 The NSWLEC informed the Commission that 'the Court is able to consider the risk of injury "to any person". This includes not only residents of the affected land, but anyone who is present on the land or visits the land.'[340] In relation to the issue of future harm, on balance, the community was in favour of it being actionable.[341] The City of Port Phillip stated that claims of future harm generally require evidence that the tree is dying or other evidence of decay.[342]

Interference (not causing actual damage)

5.214 In the consultation paper the community was asked 'Should interference (not causing damage) be actionable under a new scheme? If so, what degree of interference?'

5.215 Interference has been described by the NSWLEC as annoyance or discomfort without causing actual damage.[343] This may include the dropping of leaf litter on neighbouring land.[344]

5.216 Community feedback was evenly divided between those who supported the inclusion of interference,[345] and those who did not.[346] Some expressed concern about interference that had the potential to cause damage,[347] others were concerned about 'excessive leaf or bark drop'.[348] A number of submissions reflected some misunderstanding about the question asked and the definition of interference.

5.217 One person supported an action in interference in cases where ongoing maintenance costs may be incurred.[349] Another cautioned against the inclusion of less serious matters:

> Interference (not causing damage) creates a level of complexity that may be difficult to assess … Moreover, making interference actionable may dilute the gravitas of the proposed statutory scheme and burden the Court with undue applications. A statutory scheme should be an effective, last resort for tree disputes or for those neighbours who find themselves within intractable conflict seeking adjudication.[350]

335 Submission 9 (Dr Karen Smith).
336 Consultation 2 (Gregory Moore OAM).
337 Consultation 12 (City of Port Phillip).
338 Submissions 4 (Name withheld), 5 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith);
339 Submission 6 (Name withheld).
340 Consultation 11 (Land and Environment Court of New South Wales).
341 Submissions 4 (Name withheld), 9 (Dr Karen Smith), 21 (Pointon Partners Lawyers), 29 (David Galwey), 27 (Name withheld); Consultations 1 (Aldo Taranto), 2 (Gregory Moore OAM), 8 (City of Boroondara), 12 (City of Port Philip).
342 Consultation 12 (City of Port Phillip).
343 *Robson v Leischke* (2008) 72 NSWLR 98 [168]-[173].
344 See *Barker v Kyriakides* [2007] NSWLEC 292, [20]; *Hendry v Olsson* [2010] NSWLEC 1302.
345 Submissions 4 (Name withheld), 6 (Name withheld), 9 (Dr Karen Smith), 11 (Name withheld), 23 (Name withheld) and Confidential submission.
346 Submissions 2 (Name withheld), 20 (Name withheld), 25 (City of Borondarra), 27 (Name withheld) and two Confidential submissions.
347 Submissions 5 (Name withheld), 6 (Name withheld).
348 Submission 9 (Dr Karen Smith).
349 Submission 11 (Name withheld).
350 Submission 20 (Name withheld).

5.218 Other submissions noted:

- maintenance issues caused by overhanging branches should 'never be grounds on which to bring action';[351]
- 'you should not be able to take someone to court for something frivolous like leaf litter';[352] and
- 'it would be a waste of resources for proceedings to be held that may cause the tree owner to act in a manner the complainant has available to them at the time' (that is, the reasonable action of self-abatement).[353]

5.219 A number of local councils spoke with the Commission about how they respond to enquiries from residents about interference on private land. These councils were all in agreement that interference should not be actionable under a new Act.[354] Councils respond to enquiries by encouraging landowners to maintain the vegetation on their land so it does not unreasonably interfere with adjoining lots of land.[355]

5.220 Nillumbik Shire Council explained that leaf litter (including in a swimming pool) and other normal maintenance issues associated with living in a leafy neighbourhood have not been sufficient to justify the removal of a tree protected under the Nillumbik Planning Scheme and 'should not be actionable under a new scheme'.[356]

5.221 The City of Greater Bendigo adopts the following policy for tree management in the region:

> As trees are living organisms there will be some degree of leaf and other plant litter as these are shed as part of their natural life cycle. It is not unreasonable to expect residents to undertake home maintenance activities as part of having trees in the urban environment.[357]

The Commission's conclusions—problems within scope—damage and harm

5.222 In Chapter 4 it was identified that the primary consideration of the new Act should be the prevention of damage and harm caused by neighbouring trees. People often have different perceptions about the benefits or disadvantages of trees. Some people are annoyed by a minor amount of leaf litter whereas others may choose to move to leafy suburbs to maximise the advantages that they see flowing from a green neighbourhood. The new Act needs to strike a balance between competing rights and interests fairly and transparently. An underlying policy focus is to prevent damage and harm caused by trees and to balance this with their benefits.

Damage

5.223 The new Act should capture damage of any kind and not be limited to damage of a 'significant degree'. This approach is generally supported in the submissions. Requiring damage to be 'serious' or 'significant' may unduly complicate the new Act.

5.224 The Commission supports the various submissions that suggest claims of damage should be supported by expert evidence that demonstrates a causal link between the claimed damage and the tree. This should reduce trivial claims. Expert evidence is considered in Chapter 8.

5.225 In accordance with community views, 'damage' should include damage both to land and to property. Affected neighbours should be able to bring an action for damage to fences and carports for example, as well as damage to the land itself, such as gardens.

351 Confidential submission.
352 Submission 2 (Name withheld),
353 Submission 27 (Name withheld).
354 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
355 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
356 Consultation 9 (Nillumbik Shire Council).
357 City of Greater Bendigo, *Urban Tree Management Policy* (16 August 2017) 7 <https://www.bendigo.vic.gov.au/About/Document-Library/urban-tree-management-policy>. This policy applies to Council trees.

5.226 Future damage should be included as a cause of action but limited to damage that is likely within 12 months. This is consistent with interstate statutory schemes and recommended by practising arborists.[358]

5.227 Because the likelihood of a tree causing future damage is difficult to assess, it is recommended that risk assessments should be undertaken by a suitably qualified arborist (AQF Level 5 or above) with training in industry-recognised risk assessment methods and at least two years of practical experience. See Chapter 8.

Harm to individuals

5.228 The new Act should allow claims to be made to address existing harm and harm that is likely to occur within the next 12 months. This is consistent with community responses that called for the new Act to provide a mechanism to respond to the risk of harm posed by some trees, and is consistent with the approach in interstate Acts.

5.229 Where appropriate, claims of harm should be evidenced by both medical experts and arborists. For example, claims of allergies should be supported by medical testing and not simply a letter from a general practitioner.[359] For claims relating to psychological distress, the NSWLEC approach is appropriate. The NSWLEC does not make orders in relation to the tree where there is no arboricultural basis or evidence to support fears about a tree falling or dropping a branch.[360]

5.230 The potential for future harm should extend to owners and occupiers of the affected land, and could include visitors. This mirrors the interstate approach.[361] The 12-month limit on future harm is in keeping with submissions from arborists who stated that risk assessments that extend beyond 12 months do not accurately represent the risk posed by the tree and appropriate management options.[362]

5.231 The new Act is concerned with the prevention of harm. It is not intended to provide a compensation scheme for personal injury. While the orders recommended in Chapter 9 extend to compensating applicants for damage caused to their property or land, a similar order is not recommended for harm caused to people. This is consistent with interstate schemes. These schemes are also preventative in nature. For example, in *Robson v Leischke*[363] Chief Justice Preston distinguished the causes of action under the NSW Act from breaches of a duty imposed on a person under tort law, explaining that:

> The necessary nexus is between the 'tree' and … likely injury to any person; it is not between some act, or omission to act where there was a duty to act, of the owner or occupier of the land on which the tree is situated … and likely injury to any person.[364]

5.232 The focus is on action that can be taken in relation to the tree to address harm that is occurring and to prevent harm from occurring in the future. Harm that has already been caused may be an evidentiary factor that VCAT will consider in determining the likelihood of future harm and the appropriate remedy.

5.233 A person who commences an action under the new Act to prevent damage or harm is not precluded from bringing an action in negligence under the *Wrongs Act 1958* (Vic).[365] An applicant may still choose to pursue a matter in the Magistrates' Court for nuisance or negligence and seek compensation for personal injury that way if they wish. See Chapter 4.[366]

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358 Submission 9 (Dr Karen Smith); Consultation 8 (City of Boroondara).
359 See, eg, *Turner v O'Donnell* [2009] NSWLEC 1349 [16]-[17]
360 Consultation 11 (Land and Environment Court of New South Wales).
361 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 7 ('any person'); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48 ('a person on the land'); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(1)(b)(i).
362 Submission 9 (Dr Karen Smith); Consultation 8 (City of Boroondara).
363 (2008) 72 NSWLR 98 [181]-[184].
364 *Robson v Leischke* (2008) 72 NSWLR 98 [181].
365 See Pt VB 'Personal Injury Damages'.
366 Where VCAT cannot determine a matter due to the issue of diversity jurisdiction, the applicant may need to pursue action under the new Act in the Supreme Court. VCAT has the power to refer a matter to the Supreme Court. *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 77. Diversity jurisdiction is discussed in Ch 7.

Recommendation

12 An applicant may apply to the Victorian Civil and Administrative Tribunal for an order under the Act to:

(a) restrain or remedy damage to the affected neighbour's land or property that is caused by a tree

(b) prevent damage to the affected neighbour's land or property that is caused by a tree that is likely to occur within the next 12 months

(c) address existing harm to anyone on the affected neighbour's land that is caused by a tree

(d) prevent harm to any person on the affected neighbour's land that is caused by a tree that is likely to occur within the next 12 months.

Interference (not causing actual damage)

5.234 On balance the Commission found the submissions against the inclusion of interference persuasive. A tree that interferes with a neighbours use and enjoyment of their land in the form of annoyance or discomfort should not fall within the scope of the Act. This approach is consistent with the approach in New South Wales. It also reflects the underlying policy position that whilst leaf litter can create mess on neighbouring land and property, it is an ordinary part of community life in urban environments. If the interference is such that it causes damage to the land or property of the affected neighbour, the Act will provide a remedy.

5.235 Whilst the Queensland and Tasmanian Acts extend liability for interference it must be 'substantial, ongoing and unreasonable'. This is similar to the approach to nuisance claims at common law. To meet this threshold interference is likely to involve some sort of property damage or harm. As noted earlier it was not envisaged that the Queensland Act provide a remedy for leaf litter that is an ordinary part of suburban life and that residents can be expected to perform some level of regular associated maintenance.

5.236 The Commission is concerned that the inclusion of interference, may result in trivial or vexatious claims and may discourage neighbours from resolving disputes on a more informal basis. The Nillumbik Shire Council suggested that a new scheme should not provide scope for vindictive neighbours to bring claims without merit against neighbours on adjoining land.[367] Disputes about interference that do not cause damage are more appropriate for alternative forms of dispute resolution. See Chapter 6.

5.237 Excluding interference claims from the Act will mean that an affected neighbour will not be able to obtain a remedy for a tree branch that overhangs the boundary but does not cause damage or pose a risk of harm. In a similar way to leaf litter, an overhanging branch is unlikely to meet the common law requirement for a 'substantial and unreasonable' interference unless some sort of special damage can also be established.[368] The NSWLEC case of *Robson v Leischke*[369] set out examples of cases where overhanging branches have been held to constitute an actionable private nuisance:

- Branches of a yew tree poisoned stock on adjoining land;[370]
- Branches of a tree interfered with the growth of fruit trees on the neighbour's land;[371]

367 Consultation 9 (Nillumbik Shire Council).
368 *Robson v Leischke* (2008) 72 NSWLR 98 [56] citing *Asman v MacLurcan* (1985) 3 BPR 9592, 9594.
369 (2008) 72 NSWLR 98 [59].
370 *Crowhurst v Amersham Burial Board* (1878) 4 ExD 5.
371 *Smith v Giddy* [1904] 2 KB 448, 450-451.

- Branches of trees projected to such an extent over the neighbour's land that they brushed against their house and the leaves blocked the downpipe causing two rooms to be flooded;[372]
- Branches of a row of pine trees overhung the neighbour's property and deposited pine needles and rubbish which poisoned the soil.[373]

5.238 Where an affected neighbour is unable to establish that the overhanging branch is causing damage or posing a risk of harm under the new Act, a remedy may still be available at common law through nuisance.

5.239 Because overhanging branches are a common problem in Victoria, the Commission recommends that Government consider the usefulness of a statutory branch removal process when the Act is reviewed after 5 years of operation. This recommendation is discussed in Chapters 6 and 13.

Who should be notified of an action?

5.240 This part examines who should receive notice of an application under the new Act. Trees on private land may be protected by local laws, planning scheme mechanisms or other laws.[374] This means that councils and other authorities may be affected by VCAT orders under the new Act and may need to be notified. Further, the owner of affected land would need to be notified of any action taken by an occupier of that land in relation to a problem tree.

Other jurisdictions—who should be notified?

5.241 The NSW Act requires an applicant to provide an application and any orders sought at least 21 days before the date of the first hearing to:

- the tree owner
- any relevant authority that would be entitled to appear in proceedings in relation to the tree (council or heritage officers)
- any other person that the applicant has reason to believe will be affected by the order (this may include a person other than the tree owner who might be liable to be ordered to pay compensation or undertake remedial work).[375]

5.242 The NSWLEC may waive the notice requirements if it thinks it appropriate to do so.[376] This has occurred in a number of cases because of the risk of injury if a tree were to fall.[377]

5.243 Queensland mirrors the approach taken in New South Wales by requiring the applicant to give copies of the application to the tree-keeper, the relevant government authority and any other person.[378] This requirement may be waived or varied if QCAT considers it appropriate to do so, for example if the tree poses an imminent threat of serious injury to a person or of damage to the neighbour's land or property.[379]

5.244 Similar notice provisions apply under the Tasmanian Act.[380] The Practice Direction for applications under the Tasmanian Act states that RMPAT will 'also advertise the existence of the application in the Public Notices section of the regional newspaper circulating in the area in question'.[381] In this way, individuals are invited to make an application to join

372 *Rose v Equity Boot Co Ltd* (1913) 32 NZLR 677.
373 *Mandeno v Brown* [1952] NZLR 447; see also *Woodnorth v Holdgate* [1955] NZLR 552, 554-555.
374 See, eg, Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 52.17. The interaction of these existing laws with the new Act is discussed in Ch 10.
375 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 8; See also Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 12.
376 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 8(3).
377 See, eg, Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 13.
378 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (QLD) s 63.
379 Ibid s 63(2).
380 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 24.
381 Resource Management and Planning and Appeal Tribunal, *Practice Direction No 18 – Applications under the Neighbourhood Disputes About Plants Act 2017* (19 November 2018) 18.3.1.

and attend the Preliminary Conference if they believe their interests may be affected by an order related to a plant.[382]

Community responses—who should be notified?

5.245 Pointon Partners commented that all persons affected by the application should be notified, including the local council.[383] This would enable council to provide the decision-making body with any relevant information concerning the tree.

5.246 Baw Baw Shire Council explained that it 'needed to be involved in decision-making where it currently plays a part'.[384] Nillumbik Shire Council informed the Commission that it would be open to having some level of involvement during the hearing process.[385]

5.247 In contrast the City of Boroondara noted that 'any requirement for Council to appear in a tree dispute matter may be problematic, particularly if it is perceived by community members that Council is "taking a side" where both parties are ratepayers'.[386]

The Commission's conclusions—who should be notified?

5.248 An approach similar to the interstate schemes should be taken by requiring an applicant to provide notice of an application and of the remedies sought to people who may be affected by the tree dispute hearing. Notified parties could then decide on their level of involvement in the matter.

5.249 Councils may choose to participate in hearings in a limited way, for example in matters concerning significant trees protected under local laws, but not in hearings that concern other trees on private land within their municipality.

5.250 This requirement should be waived at the discretion of the decision-making body in cases where the tree poses an imminent risk of damage or harm.

5.251 Parties requiring notice would be:

- the tree owner/s
- the owner of the affected land if the action is commenced by an occupier of that land
- any relevant authority who would otherwise be required to provide any authorisation in relation to the carrying out of works on the tree
- any other person that the applicant thinks may be affected by the order, as occurs in the NSWLEC.

5.252 VCAT could also utilise its existing powers to direct that any other person be given notice of the hearing. [387]

5.253 Applications under new laws should not be required to be publicly advertised as occurs in Tasmania. This requirement is unique to the Tasmanian scheme and could add unnecessary complexity to the new Act. Under Victorian planning legislation,[388] public notification of permit applications is generally not required for proposed tree works such as pruning or tree removal of a single tree.[389] The Commission considers that these are the types of order that are most likely to be made under a new Act.

382 Ibid.
383 Submission 21 (Pointon Partners Lawyers).
384 Consultation 10 (Baw Baw Shire Council).
385 Consultation 9 (Nillumbik Shire Council).
386 Consultation 8 (City of Boroondara).
387 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 99.
388 See *Planning and Environment Act 1987* (Vic).
389 The removal, destruction or lopping of one tree generally triggers a fast-track permit assessment process, known as VicSmart. VicSmart applications are exempt from the notice requirements under section 52 of the *Planning and Environment Act 1987* (Vic). This means that they are not required to be publicly advertised. See Department of Environment, Land, Water and Planning (Vic), '*VicSmart – A Simpler Planning Permit Process', Permits and Applications* (Web Page, 20 March 2019) <https://www.planning.vic.gov.au/permits-and-applications/vicsmart>. This is discussed in Ch 10.

Recommendations

13 The affected neighbour should be required to notify affected parties of an application and the remedies sought within 21 days of lodging the application.

14 'Affected parties' should be defined in the Act to mean:

(a) the tree owner/s

(b) any relevant authority that would otherwise be required to issue consent in relation to any works to the tree

(c) any other person that the applicant thinks will be affected by the order.

15 The Act should state that the Victorian Civil and Administrative Tribunal may waive these notice requirements where the tree poses an imminent risk of causing damage or harm or where it is appropriate in the circumstances to do so.

Application requirements

5.254 The application form for tree disputes should elicit information from the parties that is targeted at narrowing the issues in dispute, helping VCAT to determine whether Alternative Dispute Resolution is appropriate and assisting it to resolve the dispute efficiently.

Other jurisdictions—application requirements

5.255 All of the dedicated interstate tree dispute Acts[390] require applicants to provide very detailed information about their dispute in the application form, including:

- the applicant's name, address and contact details
- information about the property on which the tree is located (including the relevant local council, the land use zone of the property, and the name of the property owner/s)
- the orders (or remedies) sought by the applicant
- whether the applicant has made any attempts to resolve the dispute with the respondent
- whether any consent or authorisation from a government authority is required to carry out work on the tree.[391]

5.256 In addition, the NSW and Queensland Acts require applicants to describe:

- whether anything other than the tree has contributed, or is contributing, to the injury or damage
- whether the applicant has taken any steps to prevent or rectify any damage or injury
- whether any trees on the applicant's land may have contributed to the injury or damage.

390 See generally, *Trees (Disputes Between Neighbours) Act 2006* (NSW); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (QLD); *Neighbourhood Disputes About Plants Act 2017* (Tas).

391 See, eg, Land and Environment Court of New South Wales, *Form C: Tree Dispute Application* (Version 3); Land and Environment Court of New South Wales, Form H: Tree Dispute Claim Details (Damage to Property or Injury to a Person) (Version 1) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_how.aspx>; Queensland Civil and Administrative Tribunal, *Form 51: Application for Tree Dispute –Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* <https://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-dispute-application>; Resource Management and Planning Appeal Tribunal, Application under *Neighbourhood Disputes About Plants Act 2017* (Web Page) <https://www.rmpat.tas.gov.au/forms#application>.

5.257 Applicants are also asked to respond broadly to list of decision-making factors the decision maker will take into account before making an order.

New South Wales

5.258 The NSW Act is supported by extensive resources that help applicants to complete application forms and initiate proceedings in the NSWLEC. A step-by-step Plain English guide informs applicants of the requirements and what happens at each stage of the dispute process.[392] See Chapter 12.

5.259 The Court has an eight-page application form[393] that is supported by a 16-page Tree Dispute Claim Details Form.[394] The latter requires the applicant to draw a diagram of their property and the adjoining property where the tree is located showing:

a) the location of the tree that is subject to the application

b) the location of the applicant's dwelling and the location of each part of the dwelling that has been, is being or is likely to be damaged by a tree

c) the location of each place on the applicant's property where the tree is likely to cause injury to a person

d) the boundary between the applicant's property and the property where the tree is located

e) the location of anything, other than the tree that is the subject of the application, that has caused, is causing or is likely to cause damage to the applicant's dwelling

f) the location of anything, other than the tree that is the subject of the application, that has contributed, or is contributing, to the likelihood of injury.

5.260 The applicant is also required to provide the Court with additional information including:

- the species of tree
- a detailed description of the damage the applicant has claimed has occurred, is occurring or is likely or the injury that is likely
- details of statements from other people, such as an arborist or engineer concerning the damage or likelihood of injury
- the amount of compensation claimed for property damage and the basis for this amount
- the basis for seeking an order for rectification works to the applicant's property
- whether the applicant is seeking any orders pursuant to the *Dividing Fences Act 1991* (NSW) concerning any portion of the fence that has not been damaged by the tree.

5.261 The respondent to the application is required to file with the Court any statements, reports, photographs or other documents that the respondent plans to rely on at the hearing. This includes any orders proposed by the respondent as an alternative to or in addition to the orders sought by the applicant. If the respondent wishes to retain the tree, the NSWLEC requests that the reply to the proposed order include 'any solution to prevent the tree causing damage to the applicant's property, including any engineering or construction solution, which would enable the tree to be retained'.[395]

392 Consultation 11 (Land and Environment Court of New South Wales); see Land and Environment Court of New South Wales, *Tree Disputes: Understanding the Law (Fact Sheet)* <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/Treedisputes-helpfulmaterials/treedisputes_helpfulmaterial.aspx#Information_material>.

393 Land and Environment Court of New South Wales, *Form C: Tree Dispute Application* (Version 3) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_how.aspx>.

394 Land and Environment Court of New South Wales, *Form H: Tree Dispute Claim Details* (Damage to Property or Injury to a Person) (Version 1) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_how.aspx>.

395 Land and Environment Court of New South Wales, *Practice Note Class 2: Tree Applications,* 1 December 2018, sch A, cl 10.

Queensland

5.262 In Queensland applicants are required to complete a checklist to assess whether their application falls within QCAT's jurisdiction and to ensure the application has been completed and lodged correctly.[396] The checklist asks whether the tree/s is located in a park owned by the local government or council or on a community reserve. If the answer is yes, the applicant is informed that the tree/s is not within QCAT's jurisdiction and to contact the relevant local council.[397]

5.263 In addition, QCAT requires applicants to provide information about:

- the applicant's connection with the land that is affected by the tree (for example, whether the applicant is an owner or occupier of land)
- if the applicant is an occupier, the details of the owner; whether the applicant has asked the owner to make an application about the tree; and whether the owner refused
- whether the applicant has attempted to resolve the dispute
- whether, if the dispute is about overhanging branches, the branches extend over the applicant's property 50 metres or more from the common boundary and whether the branches are more than 2.5 metres above the ground.[398]

5.264 If the applicant is seeking an order that involves destroying the tree, the applicant is required to inform QCAT:

- how long they have known about the injury or damage
- whether the tree owner has taken any steps to prevent further injury or damage
- whether the applicant has taken any steps to prevent further injury or damage.

5.265 Because the Queensland Act includes substantial, ongoing and unreasonable interference as a cause of action, the applicant is asked additional questions about this cause of action.

5.266 The applicant is also asked whether the tree forms part of the dividing fence between their land and the respondent's land, and other questions relevant to fencing issues, such as whether the tree has damaged the dividing fence and whether the respondent has been given a notice to contribute for fencing work.

Tasmania

5.267 The application form to initiate proceedings in RMPAT is relatively straightforward and asks for similar information to the NSWLEC and QCAT application forms.[399] The form contains a helpful checklist for applicants to 'tick off' as they complete each step of the application process.[400]

5.268 The applicant is required to provide evidence of attempts made to resolve the dispute before lodging an application, such as correspondence between the parties or a statutory declaration or affidavit.[401]

396 Queensland Civil and Administrative Tribunal, *Application Checklist: Tree Dispute Resolution* (Form, version 3, 3 March 2017) <https://www.qcat.qld.gov.au/matter-types/tree-disputes>.
397 Ibid.
398 Queensland Civil and Administrative Tribunal, *Form 51: Application for Tree Dispute—Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* <https://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-dispute-application>.
399 Resource Management and Planning Appeal Tribunal, *Application under Neighbourhood Disputes About Plants Act 2017* <https://www.rmpat.tas.gov.au/forms#application>.
400 Ibid.
401 Ibid.

5.269 The applicant also needs to notify RMPAT if they are aware of any other person whose interests may be affected by the application.[402] The Tribunal asks applicants to outline any interim order sought, and to provide evidence that is the basis of the request, such as evidence of an imminent threat or injury to person or property.

5.270 Once an application is filed, RMPAT will review the application and determine whether it requires the parties to provide any additional information.[403]

The Commission's conclusions—application requirements

5.271 Application forms for a range of different civil and administrative cases are currently available on VCAT's website.[404] VCAT should consider developing a detailed application form that is modelled on the application forms for initiating tree disputes in the NSWLEC and QCAT.

5.272 There should be a single application form to simplify and streamline the application process. Applicants should supported with explanatory material. See Chapter 12.

5.273 The Commission was informed that the detailed application form in New South Wales can assist the Court by requiring an applicant to 'respond to all jurisdictional and discretionary issues upfront'.[405] The Court noted that although some applicants may not provide complete information, others pay a lot of attention to the form and complete it with detailed responses.[406]

5.274 The Commission supports the approach taken in application forms interstate. Key information sought from the applicant should include:

- a detailed description of the damage the applicant claims has occurred, is occurring or is likely to occur
- a detailed description of the harm the applicant claims is occurring or is likely to occur
- the location of the properties involved in the dispute
- any attempt the applicant has made to resolve the dispute informally
- the species of tree and whether it is a recognised weed
- any planning scheme requirements or requirements under other laws that apply to the tree
- whether the remedies sought would require the consent or authorisation of another government body (for example, whether a permit would normally be required to interfere with the tree)
- whether the matter relates to a fence
- details of statements from experts concerning the damage or likelihood of harm, such as an arborist's report or structural engineering advice
- the amount of compensation claimed for property damage and the basis for this amount
- whether the applicant is an owner or occupier of the land affected by the tree. If the applicant is an occupier of the land, they will need to satisfy the decision maker that they have asked the owner of the land to make an application about the tree and the owner has refused.

402 As per the Practice Direction for applications under the Tasmanian Act, RMPAT will 'also advertise the existence of the application in the Public Notices section of the regional newspaper circulating in the area in question'. In this way, individuals are invited to make an application to join and attend the Preliminary Conference if they believe their interests may be affected by an order related to a plant: Resource Management and Planning Appeal Tribunal, *Practice Direction No 18: Applications under the Neighbourhood Disputes About Plants Act 2017* (19 November 2018) 18.3.1.

403 Resource Management and Planning Appeal Tribunal, *Practice Direction No 18: Applications under the Neighbourhood Disputes About Plants Act 2017* (19 November 2018) [18.2.5]; See *Neighbourhood Disputes About Plants Act 2017* (Tas) s 25.

404 Victorian Civil and Administrative Tribunal, *Application Forms* (Web Page) <https://www.vcat.vic.gov.au/resources/application-forms>.

405 Consultation 11 (Land and Environment Court of New South Wales).

406 Ibid.

- a detailed diagram and/or photographic evidence clearly showing the location of the tree. This should identify the common boundary between the neighbours' properties, where the dwellings are located and any part of the dwelling that has been, is being, or is likely to be damaged by the tree. If relief for future harm is claimed, the applicant should point out each place on their property where the tree is likely to cause harm to a person.
- whether any party has entered into a contract for the sale of land, to ensure that VCAT is aware of all relevant parties to the dispute (Chapter 11).
- where a tree straddles the boundary of more than two properties, the names of all owners and information about proportional ownership by reference to the tree trunk.

The Victorian context

5.275 Some information sought in the application form will be particular to the Victorian context and the recommendations made in this report, and is specifically identified in the recommendation below. For example, specific information should be sought about whether there are other relevant laws which would help VCAT identify broader principles that may need to be considered in decision making; and about who may need to be invited to participate in a hearing. The zoning of the land should be identified. In Chapter 10 it is recommended that the new Act provide VCAT with the power to make orders under the Fences Act 1968 (Vic). Information should be sought for these types of claims at the start of the VCAT process.

5.276 The application form should require the applicant to provide information about any actions they or the tree owner have taken, or not taken, to prevent harm or damage or the likelihood of it. This is required in application forms prescribed under the New South Wales and Queensland schemes.

5.277 The application form should require applicants to turn their mind to the decision-making factors recommended in Chapter 8. This requirement will help the parties to better understand the decision-making process and may make resolution through an alternative dispute resolution process more likely if VCAT decides it should direct the parties to participate in ADR. Asking the parties to address decision-making principles early will also help VCAT to resolve the matter efficiently.

5.278 A checklist should accompany the application form to ensure that the tree dispute meets the jurisdictional requirements under the new Act and can be heard in VCAT. This will help to remove vexatious applications or applications that may be better suited to litigation through the court process such as personal injury compensation claims, trespass or criminal damage claims.

Recommendation

16 The Victorian Civil and Administrative Tribunal should consider developing a detailed application form that is modelled on the application forms for initiating a tree dispute in the Land and Environment Court of New South Wales and the Queensland Civil and Administrative Tribunal. Additional information should be sought in the application form about:

(a) the species of the tree and whether it is a recognised weed

(b) the steps the parties may have already taken to resolve their dispute

(c) how the decision-making principles in the Act are addressed

(d) the zone of the land the tree is situated on and any applicable planning scheme, overlay or other requirement affecting the management of the tree that the applicant is aware of under the *Planning and Environment Act 1987* (Vic) or any other Act or law

(e) whether any remedies are sought under the *Fences Act 1968* (Vic) to rectify damage to a fence caused by a tree or to prevent damage or harm from a tree that forms part of a fence

(f) any assessments or quotes that may have already been obtained from experts

(g) whether the applicant is the owner or occupier of the land. If the applicant is an occupier of land, evidence that the owner has refused to make an application

(h) whether any party has entered into a contract for the sale of land to ensure that the Victorian Civil and Administrative Tribunal is aware of all relevant parties to the dispute.

(i) the names of other parties and information about proportional ownership if a tree trunk straddles a boundary.

6

Informal resolution of neighbourhood tree disputes

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6. Informal resolution of neighbourhood tree disputes

Introduction

6.1 Informal resolution refers to negotiating an outcome without going to court or a tribunal. It can involve legal tools such as mediation or it might simply involve neighbours talking to each other. Because neighbours live close together and have ongoing relationships, solving a tree problem informally will often provide a better result.

6.2 In Victoria, neighbours can resolve their dispute without initiating legal proceedings through neighbour-led resolution, abatement and community-based alternative dispute resolution (ADR).[1] This chapter discusses how these informal resolution approaches in Victoria should fit within the framework of a new tree disputes Act. The approach to informal resolution in other states is considered as well as the views of the community on these matters. The chapter concludes with recommendations that emphasise the ongoing importance of informal resolution when a new Act is introduced.

6.3 The approaches considered in this chapter are:

- neighbour negotiation and community-based mediation
- abatement
- a formal requirement in legislation for 'reasonable attempts to reach negotiation'
- the inclusion of tree owner responsibilities in legislation
- the inclusion of branch removal notices in legislation
- the inclusion of a written notice process in legislation

Other jurisdictions—resolving disputes informally

Neighbour-led negotiation and community-based mediation

6.4 The Queensland Government encourages neighbours to discuss the issue and resolve the matter between themselves: 'taking time to talk the problem through could save you time and money'.[2] The website provides information on the most effective ways to begin this process.[3] Similarly, the New South Wales Government's Community Justice Centres (CJCs) encourage neighbours to talk to one another when the tree dispute arises. Their website states, 'Talking to your neighbour as soon as possible may avoid or resolve any problems. It will also help maintain a positive relationship, making it easier to deal with

1 The Dispute Settlement Centre of Victoria (DSCV) provides free dispute resolution services across Victoria. See Ch 3 for more information.
2 Queensland Government, *Step-by-step Guide to Resolving Tree and Fence Disputes* (Web Page, 14 July 2017) <https://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/step-by-step-guide-to-resolving-tree-and-fence-disputes>.
3 Queensland Government, *Ways to Approach Your Neighbour* (Web Page, 17 January 2018) <https://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/ways-to-approach-your-neighbour>.

other issues in the future.'[4] It states that taking a matter to court 'should always be the last resort' and that 'knowing your legal rights and obligations may also help you resolve your neighbour dispute'.[5]

6.5 Neighbours may need to enlist the help of an independent third party to facilitate negotiation where neighbour led negotiation fails. Free mediation services are available to the community in Queensland for neighbourhood disputes through Dispute Resolution Centres. [6] CJCs in New South Wales provide free mediation services.[7] In New South Wales disputes between neighbours are the most frequent type of dispute received by CJCs, and when neighbours agree to mediation, most disputes are resolved—81 per cent in 2017–18.[8] However, the NSWLEC noted that approximately half the applicants provide the Court with a letter from the CJC stating that the neighbour refused to participate in voluntary mediation.[9]

6.6 In Tasmania, private and government organisations provide mediation services.[10] However, there is a lack of free alternative dispute resolution (ADR) services for general disputes in Tasmania.[11]

Abatement

6.7 The common law self-help remedy of abatement allows an affected neighbour to remove parts of a tree that encroach onto their land up to their boundary line.

6.8 The remedy of abatement has not been modified under the NSW Act.[12] An affected neighbour is entitled to trim overhanging branches up to boundary lines or install root barriers on boundary lines. Any trimmed branches must be returned to the tree owner. The neighbour does not have to provide notice before carrying out abatement. An affected neighbour's right to abate may be limited by environmental planning policies[13] or Tree Preservation Orders in New South Wales.[14] If these protections apply, council authorisation may be required to carry out works to the tree.[15]

6.9 The Queensland Act modifies the common law right to abatement to the extent that the affected neighbour can now choose whether or not to return abated parts of the tree to the tree owner, including fruit.[16] This modification only applies to situations that fall within the jurisdiction of the Queensland Act.[17] The right to abatement may also be limited by Vegetation Protection Orders and other orders imposed by local and state government to protect trees in Queensland.[18]

6.10 The Tasmanian Act modifies the common law right to abatement in a similar way to the Queensland Act.[19]

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4 Community Justice Centres, Government of New South Wales, *Neighbours* (Web Page, 5 July 2018) <http://www.cjc.justice.nsw.gov.au/Pages/cjc_whatis_mediation/cjc_common_disputes/com_justice_neighbours.aspx>.

5 Ibid.

6 Queensland Government, *Neighbourhood Mediation* (Web Page, 2019) <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/neighbourhood-mediation>.

7 Community Justice Centres, Government of New South Wales, *Neighbours* (Web Page, 5 July 2018) <http://www.cjc.justice.nsw.gov.au/Pages/cjc_whatis_mediation/cjc_common_disputes/com_justice_neighbours.aspx>.

8 Community Justice Centres, Government of New South Wales, *About CJC (Web Page, 13 March 2019)* <http://www.cjc.justice.nsw.gov.au/Pages/com_justice_aboutus/com_justice_aboutus.aspx>.

9 Consultation 11 (Land and Environment Court of New South Wales).

10 Legal Aid Commission of Tasmania (Online Directory, 2019) <https://www.legalaid.tas.gov.au/referral-list>.

11 Tasmania Law Reform Institute, *Neighbours' Hedges as Barriers to Sunlight and a View* (Issues Paper No 19, 2014) [4.4.9].

12 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 5; Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (Report, 2009) 42–3.

13 The *Environmental Planning and Assessment Act 1979* (NSW) establishes the framework for the planning system in New South Wales. Environmental planning instruments sit under the EPA Act to introduce controls and requirements for specific issues in local government areas. These instruments include both the State Environment Planning Policies and Local Environmental Plans. Development Control Plans (DCPs) provide more detailed planning requirements. For more information see Ch 10.

14 The Commission understands that Tree Preservation Orders (TPOs) previously made under clauses 5.9 and 5.9AA of the Standard Instrument (Local Environmental Plans) have largely been replaced by the State Environment Planning Policy (Vegetation in Non-Rural areas) but that existing TPOs will continue to have effect: Office of Environment and Heritage (NSW), *Local Government Information and Resources* (Web Page, 23 November 2018) <https://www.environment.nsw.gov.au/biodiversity/localgovernment.htm>. See also Ch 10.

15 For more information see Ch 10.

16 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2).

17 Ibid s 42; Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) [3.221].

18 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 43.

19 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 12(2). This does not apply to trees that are not covered by the Act: s 5.

Informal resolution in the interstate Acts

6.11 The statutory schemes in New South Wales, Queensland and Tasmania encourage people involved in tree disputes to resolve them informally. There are subtle differences in how the schemes accommodate informal resolution.

6.12 The Queensland and Tasmanian Acts contain overarching provisions that encourage the use of informal resolution. These provisions are not binding. They operate in conjunction with other legislative mechanisms.

6.13 The Tasmanian Act includes a provision that enables an affected neighbour to request a tree owner to take action to ensure that land is no longer affected by the tree either verbally or in writing. Both parties are required to make reasonable attempts to prevent the land being affected by the plant or to minimise the degree to which land is affected.[20]

6.14 The Queensland Act encourages informal resolution and makes it clear to neighbours that they have the option to resolve their dispute through neighbour-led negotiation, as well as the formal rights and processes available under the Queensland Act.[21] The QLRC recently recommended that the Queensland Act should include a 'non-exhaustive list of examples of steps that could be taken by a person to attempt to resolve an issue informally'.[22] The QLRC observed 'that users of the legislation are often unsure what is intended by the references to 'informal' resolution. This has the potential to undermine the aim of the provisions, and the wider objectives of the Act, to encourage and assist neighbours to resolve issues themselves'.[23] Specifically, the QLRC suggested:

- approaching the other person, directly or in writing, to notify them of the issues and offering to discuss them;
- providing information to the other person to help them understand the issues and how they might be resolved, such as a quotation for any proposed work or a letter from a tree expert about the danger posed by the tree;
- inviting the other person to take part in a form of assisted dispute resolution, such as negotiation or mediation;
- taking steps to follow any local council process for resolving nuisance trees[24]
- other informal resolution processes provided under the Queensland Act rather than legal action.[25]

6.15 The QLRC also recommended that the Queensland Act should refer to mediation provided by a Dispute Resolution Centre as an example of how neighbours may attempt to resolve their dispute informally.[26] Neither of these recommendations have been implemented at the time of writing.[27]

6.16 Additional informal resolution mechanisms and pre-conditions to orders are also included in the interstate Acts and are discussed next.

20 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 19.
21 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 56(1), 60(1).
22 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) Recommendations 4-3, 4-5, 4-10.
23 Ibid [4.51].
24 Ibid Recommendation 4-3.
25 Ibid Recommendation 4-4.
26 Ibid Recommendation 4-6.
27 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(a).

A formal requirement in the interstate Acts for 'reasonable attempts to reach agreement'

6.17 The Land and Environment Court of New South Wales (NSWLEC) must not make an order under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (NSW Act) unless it is satisfied that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated.[28] The intention is that legal action should be a last resort.[29]

6.18 This reasonable effort does not have to be made before the filing of an application (though this is desirable) but it must be made before the Court makes any orders.[30] Writing to the tree owner, serving them with an application, or engaging in Alternative Dispute Resolution would qualify as a reasonable effort.[31] Even the presence of parties at a hearing may demonstrate a reasonable effort.[32]

6.19 Chief Justice Preston has explained that this requirement is 'less demanding than the language used in provisions of other statutory enactments which require parties to make reasonable attempts to reach agreement'[33] and that exhaustive negotiation is not required.[34]

6.20 Similar provisions apply in Queensland and Tasmania. The Queensland Civil and Administrative Tribunal (QCAT) may make an order pursuant to the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (QLD) if it is satisfied that the neighbour has made a reasonable effort to reach agreement with the tree owner. This provision is substantially the same as in the NSW Act, and the criteria are the same.[35] The requirement can be fulfilled by requesting the tree owner to fix the issue,[36] engaging in mediation,[37] or a Tribunal-ordered ADR process.[38]

6.21 Tasmania has a slightly different approach. Before hearing an application, the Resource Management and Planning Appeal Tribunal (RMPAT) must consider whether the parties have made reasonable attempts to resolve the matter. If not satisfied, it may direct parties to attempt to resolve the matter.[39] In deciding this point RMPAT may take into account:

- requests made verbally or in writing, in a Branch Removal Notice or in a Written Notice[40]
- whether the tree owner has refused to carry out work because they reasonably believe the health or structural stability of the tree will be affected or that safety will be compromised.[41]

28 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 10(1)(a).
29 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (Report, 2009) 7.
30 *Robson v Leischke* (2008) 72 NSWLR 98 [194]; Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 19–20.
31 Consultation 11 (Land and Environment Court of New South Wales); see, eg, *Aarons v MacDonell as Executor to the Estate of the late Ronald Ayres* [2015] NSWLEC 1058 [15].
32 *Aarons v MacDonell as Executor to the Estate of the late Ronald Ayres* [2015] NSWLEC 1058 [15].
33 *Robson v Leischke* (2008) 72 NSWLR 98 [195].
34 *Aarons v MacDonell as Executor to the Estate of the late Ronald Ayres* [2015] NSWLEC 1058 [15].
35 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(a).
36 See, eg, *Collins v McNeil* [2013] QCAT 429 [49], n 22.
37 Queensland Civil and Administrative Tribunal, *Tree Dispute Resolution* (Fact Sheet, version 4, March 2017) 1; see, eg, *Collins v McNeil* [2013] QCAT 429 [49], n 22.
38 See eg, *Moreno v Parer* [2017] QCAT 223 [24].
39 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 26(1)(a)–(b).
40 Ibid ss 19, 20, 22.
41 Ibid s 26(2)(b)(i)–(ii).

Tree owner responsibilities in the interstate Acts

6.22 Unlike the NSW Act, the Queensland Act includes tree-keeper (tree owner) responsibilities.[42] During parliamentary debate the Attorney-General explained:

> The proposed bill provides clear direction about a tree-keeper's responsibilities and reflects the strong community view that a tree owner, known as the 'tree-keeper' in the Bill, should be responsible for the proper care and maintenance of a tree growing on their land in the neighbourhood.[43]

6.23 The Queensland Act states that the tree owner is responsible for cutting and removing any branches of the tree that overhang a neighbour's land, and ensuring that the tree does not cause serious injury to a person or damage to property or substantial, ongoing and unreasonable interference with a person's use and enjoyment of their land.[44] The Act clearly states that a separate cause of action is not created for a breach of any of these responsibilities.[45]

6.24 The Tasmanian Act also includes responsibilities for tree owners. The responsibilities under the Tasmanian Act essentially mirror those under the Queensland Act and do not create a separate cause of action for a breach of any of the responsibilities.[46]

Branch removal notices in the interstate Acts

6.25 The Queensland and Tasmanian Acts incorporate a notice process for the removal of certain overhanging branches. These provisions provide an affected neighbour with a mechanism for requesting the tree owner to trim overhanging branches. Failure to do so entitles the affected neighbour to carry out the work themselves and recoup the associated costs. This process was introduced in Queensland to help people who had a right to abate but were unable to prune or remove overhanding branches themselves.[47]

Branches need to be a particular size

6.26 The overhanging branch must be a maximum of 2.5 metres above ground level and extend over the affected neighbour's land at least 50 centimetres from the common boundary.[48]

6.27 The maximum height and minimum length requirements aim to capture the spaces that are frequently encroached upon by overhanging branches. The QLRC explained that 'overhanging branches that are 2.5 metres or less above the ground may impede the passage of a person or vehicle. It is also a lower and safer height range to carry out the work of cutting and removing the branches'.[49] A length of at least 50 centimetres beyond the common boundary provides a 'reasonable balance between the right of a neighbour to have uninterrupted use of their property, and the burden that a tree-keeper may experience as a result of the ongoing need to trim or cut back trees close to the boundary'.[50] The QLRC acknowledged that that there is 'scope for a range of differing views about the appropriate height'.[51]

42 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3(a).
43 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).
44 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 52(1)–(2).
45 Ibid s 52(3).
46 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 10.
47 Queensland, *Parliamentary Debates, Legislative Assembly, 2 August 2011, 2306* (Paul Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State).
48 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(1)(a)–(b).
49 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.295].
50 Ibid [3.299].
51 Ibid [3.296].

The effect of the notice

6.28 If the branch meets the height and length requirements, the affected neighbour can choose to give the tree owner a written notice for branch removal. [52] The notice must:

- state a time for pruning or removal that is at least 30 days away[53]
- request the tree owner to respond in writing, at least one day before the works are scheduled, with information about who will be doing the work and when[54]
- give permission to the tree-keeper (owner) or their contractor to enter the affected neighbour's land to remove the branch between 8am and 5pm[55]
- have attached at least one quote of the cost[56]
- be accompanied by a copy of the relevant section of the Queensland Act.[57]

6.29 Substantial compliance[58] with the notice requirements is considered adequate.[59]

6.30 The neighbour may download and use *Form 3: Notice for Removal of Particular Overhanging Branches* from the Queensland Government's website.[60] However this form is not compulsory. The QLRC recommended the use of a compulsory form for consistency and clarity but this has not been implemented.[61]

6.31 A tree owner acting on the notice can obtain an independent quote, do the work themselves, or hire a contractor.[62]

6.32 It is the affected neighbour's responsibility to consider public liability insurance before giving a person permission to enter their land. It is the tree owner's responsibility to consider a contractor's insurance.[63]

Failure to act on the notice

6.33 If the tree owner does not respond to the notice within 30 days, the affected neighbour can arrange for the overhanging branches to be pruned or removed up to the boundary line.[64] They can do this themselves or engage an arborist. The affected neighbour may return the cut branches to the tree owner, but this is not required.[65]

6.34 The affected neighbour can then recoup from the tree owner up to $300 for reasonable expenses. The affected neighbour cannot recover the costs of their own labour in removing the branches themselves.[66] The $300 contribution is a 'limited right' to recoup some of the total cost.[67] The QLRC recommended increasing the amount to a maximum of $500 or any greater amount prescribed by legislation, however this has not been implemented. The QLRC explained that the current maximum $300 liability was

52 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(2).
53 Ibid s 57(3)(a).
54 Ibid s 57(3)(b)(i)–(ii).
55 Ibid s 57(3)(c).
56 Ibid s 57(3)(d)(i).
57 Ibid s 57(3)(d)(ii).
58 This is to 'ensure that unjust results do not flow from minor errors or omissions in a completed form of notice': Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [2.1.6.2]; see also *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 91.
59 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 91; Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.280].
60 Queensland Government , *What to Do if a Neighbour's Tree is Affecting You* (Web Page, 8 January 2019) <https://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/what-to-do-if-a-neighbours-tree-is-affecting-you>.
61 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report 72, December 2015), Recommendation 3.9.
62 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 30.
63 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(3)(c).
64 The affected neighbour cannot enter the tree owner's land without permission as this would amount to trespass, discussed in Ch 3.
65 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(2)(b).
66 Form 3 states 'this does not include the cost of my/our labour': Department of Justice and Attorney-General (Qld), *Form 3: Notice For Removal of Particular Overhanging Branches* (Version 3, 29 October 2015) 2.
67 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.260].

'insufficient to meet the costs to the neighbour of having work done to cut and remove overhanging branches 2.5 metres or less above the ground in all cases'.[68]

6.35 If the tree owner does not pay, the affected neighbour can pursue the debt in QCAT as a minor civil claim.[69]

6.36 Where the costs are significant and substantially exceed the $300 cap, then an affected neighbour would not be able to recover those costs using this process. Instead, they may choose to commence legal action in QCAT if the jurisdictional requirements under the Queensland Act are met.[70]

Safeguards

6.37 This process does not override any requirements to obtain authorisation or permits under any other law or local law.[71]

6.38 An affected neighbour cannot use this notice if they have issued a notice for *any tree* within the previous 12 months.[72] The QLRC considered this a fair balance between the affected neighbour's use and enjoyment of their land and the tree owner's liability. The QLRC further explained that the common law remedy of abatement was available to an affected neighbour who needed further intervention[73] or for other branches or parts of the tree that are not captured by this process. In addition, an affected neighbour can exercise their right to abate or commence legal action in QCAT.[74]

The Tasmanian approach

6.39 The Tasmanian 'Branch Removal Notice' procedure in Part 3 of the Act is modelled on the Queensland Act and is substantially the same. The Tasmanian Department of Justice has developed a template notice form which it recommends people use.[75]

6.40 The Tasmanian Act provides that a 'prescribed maximum amount' of $500 can be recouped from the affected neighbour.[76]

6.41 Similar safeguards apply under the Tasmanian and Queensland Acts. However, in Tasmania an affected neighbour cannot use the notice procedure if they have issued a notice within the previous 12 months for the same tree to the tree owner (unless there is a new tree owner).[77] In Queensland the safeguard prohibits issuing of a notice if a notice has been issued for *any tree* within the previous 12 months.[78]

6.42 In Tasmania, the affected neighbour can pursue money owed in the Magistrates' Court.[79] If the tree owner disagrees about the amount, they may apply to the Magistrates' Court for a determination of a 'fair and reasonable' amount, which they are then liable to pay.[80]

68 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, (Report No 72, December (2015) [3.313].
69 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 58(4)–(5).
70 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Discussion Paper No 72, June 2015) [3.81].
71 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 43, 55.
72 Ibid s 57(5).
73 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.327].
74 Ibid [3.449]. The QLRC explains that 'in effect, QCAT may make an order about an overhanging branch or branches only if the "land is affected by a tree" under section 46(a)(ii) and the cognate threshold requirements under sections 65 and 66 of the Act are met'.
75 Department of Justice (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.
76 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 21(3); Department of Justice (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.
77 *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 20(9)–(10).
78 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) 57(5).
79 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 21(4).
80 Ibid ss 21(5)–(7).

General notice process in the Tasmanian Act

6.43 Under the Tasmanian Act an affected neighbour can also issue a written notice to the tree owner that:

- states the grounds on which the tree is affecting their land[81]
- states the action the affected neighbour considers the tree owner should take to remedy the issue[82]
- requests a written response from the tree owner within a period of not less than 14 days.[83]

6.44 The Tasmanian Department of Justice has developed a template notice form which it recommends people use.[84] This process is likely to be of benefit where an affected neighbour seeks to resolve the tree dispute informally but the tree or tree parts are not captured by the branch removal process or are unable to be abated. This written notice appears to have been developed as a means of facilitating clear communication between neighbours. It does not set out any monetary amounts able to be recovered or what happens if the tree owner ignores the notice.

Community responses—resolving disputes informally

6.45 Responses from the community suggest that informal resolution is the primary way people currently try to resolve their tree disputes.[85] Most people explained that they did not take legal action[86] because it was too costly,[87] would damage neighbourly relations[88] or because the issues raised were unlikely to meet the requirements of a legal claim.[89]

6.46 The City of Boroondara stated that informal negotiation between neighbours is useful and has helped to resolve many disputes.[90] However, many affected neighbours who responded to the Commission reported that when they attempted to negotiate, the tree owner was uncooperative,[91] ignored them[92] or was hostile.[93] Some community members reported that lawyers were engaged because their neighbour refused to communicate informally.[94]

6.47 The Commission observes that members of the community who were most likely to respond to the inquiry were those who had a poor experience trying to resolve their disputes informally. Therefore, the views and experiences of those who were successful in resolving their dispute informally may not have been captured to the same extent.

Community responses—Community-based alternative dispute resolution

6.48 The most accessible form of ADR in Victoria is through the free mediation services by DSCV.

6.49 DSCV provided the Commission with examples of successful mediations in relation to neighbourhood tree disputes:

81 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 22(2)(a).
82 Ibid s 22(2)(b).
83 Ibid s 22(2)(c).
84 Department of Justice (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.
85 Over 90% of survey respondents reported that they did not take legal action: Victorian Law Reform Commission, *Neighbourhood Tree Disputes Survey* (2018). This is also discussed in Ch 3.
86 Submissions 6 (Name withheld), 11 (Name withheld), 13 (Mandy Collins), 19 (Name withheld), 23 (Name withheld), 33 (Annette Neville).
87 Submissions 6 (Name withheld) 21 (Pointon Partners Lawyers), 30 (Law Institute of Victoria).
88 Submission 22 (Name withheld); Survey Respondent 123.
89 For example, one survey respondent explained, 'we were advised that as the tree had not previously caused damage, the owner could argue [they] did not know it might cause damage and therefore would not be liable': Survey Respondent 42.
90 Consultation 8 (City of Boroondara).
91 Submissions 5 (Name withheld) 22 (Name withheld), 33 (Annette Neville), 34 (Allan Day), 38 (L. Barry Wollmer).
92 See, eg, Submission 36 (Monique Onezime); Survey Respondent 60.
93 Confidential submission; Consultation 1 (Aldo Taranto).
94 Submission 17 (Name withheld); Consultation 1 (Aldo Taranto).

> Issue 1: Party A is tired of cleaning leaf litter from their gutter and pool. Party A has approached Party B on a number of occasions requesting that they trim their tree. Party B advises that Party A has the right of abatement and can trim them himself up to the fence line at his own cost.
>
> Outcome: Party A seeks a contribution from Party B towards the trimming of the trees on an annual basis. Party B agrees in principle pending the provision of a number of quotes.
>
> Issue 2: Party A, without notice, elected to trim encroaching branches up to the fence line. Party B forms the view that the trimming was too aggressive and has harmed the tree and/or encroached on their boundary.
>
> Outcome: the parties agreed to a maintenance schedule for the trees and a communication plan where either party elects to trim the tree.[95]

6.50 Many people were keen to try to mediate a resolution to their disputes but were unable to engage in mediation because their neighbour would not agree to participate.[96] Other concerns were expressed about the non-binding nature of mediated resolution,[97] and an inability to locate a neighbour to organise mediation where, for example, the home is only occupied periodically.[98]

6.51 In Chapter 3 it was identified that DSCV data from December 2011 to May 2017 suggests that tree enquiries are less likely than other matters to progress to a dispute resolution outcome including through mediation.[99] The factors to which DSCV attributed the low resolution rates for these disputes were noted. Some of the reasons include that:

- rights and obligations under the law are unclear, making it hard to identify what parties can or cannot do without having to go to court to have a magistrate decide
- neighbours are not explicitly required to negotiate by legislation or case law and many therefore choose to opt out of the mediation process.[100]

6.52 Anecdotally DSCV suggests that the disputes that are most likely to settle are disputes between an affected neighbour and a landlord. DSCV may be contacted to approach the landlord when attempts to negotiate with the tenant have been unsuccessful. DSCV suggests that disputes about roots are generally the hardest to resolve because they are more complex than overhanging branches. DSCV also observes that the parties' personalities and attitudes will also influence the likelihood of success at mediation.[101]

6.53 Surprisingly, a large number of private arborists at ArborCamp2018 advised they were unaware of the free mediation services provided by DSCV. Although private arborists frequently become involved in tree disputes, they rarely refer neighbours to DSCV.[102] Ben Kenyon suggested that DSCV's services should be more widely publicised.[103]

95 Information provided by DSCV as part of a data request from the Commission, November 2018 and clarification of data provided in May 2019.
96 Submissions 5 (Name withheld), 6 (Name withheld), 24 (Name withheld), 31 (Barwon Community Legal Service), 38 (L. Barry Wollmer); Survey Respondent 60.
97 Submission 30 (Law Institute of Victoria).
98 Consultation 7 (Dispute Settlement Centre of Victoria).
99 Information provided by DSCV as part of a data request from the Commission, August 2017.
100 Ibid. See Ch 3.
101 Information provided by DSCV as part of a data request from the Commission, November 2018.
102 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018). Approximately 35–40 arborists from across Victoria were present during this consultation. The majority were private contractors.
103 Consultation 6 (Ben Kenyon).

6.54 Some people suggested or indicated that mediation services should be able to compel or force the other party to the tree dispute to participate in mediation.[104]

Community responses—Abatement

6.55 Most responses to the consultation paper agreed that abatement should continue to be available under any new Act.[105] As one community member noted, 'in many cases and with reasonable neighbours, it is enough to solve the day-to-day issues with overhanging branches'.[106]

Modifying the right to abate

6.56 Nearly all community members who responded to this issue supported modifying the right to abatement and made specific suggestions about how this should be done.[107] One submission stated that 'the right of abatement should remain, but a greater responsibility ought to be placed on tree owners to ensure that their tree/s do not threaten, cause annoyance or harm to neighbours'.[108]

6.57 Changing the remedy so that the affected neighbour was not required to return pruned material such as branches, roots or other tree parts to the tree owner, was broadly supported.[109] Responses indicated that there is confusion in the community about this.[110] Some people stated that the return of abated tree parts, particularly without any notice, may actually cause a tree dispute.[111] One survey respondent noted that 'wilfully throwing branches over to your neighbour's property' could result in 'potentially damaging plants or endangering others or hurting animals'.[112]

6.58 Another community member, who identified as a volunteer at Victoria State Emergency Service (SES), explained how there can be confusion about who to return branches or other tree parts to during emergency operations:

> Often I and my fellow volunteers are called to trees that have fallen or partially fallen where the limbs come from a neighbouring property. Sometimes the occupant complains to us about the tree being a nuisance. While we as members of the SES cannot and do not provide advice about tree disputes, we can only clear the elements of trees that block emergency access. Once the tree material has been cleared, it is unclear who is responsible for the disposal of that material. Sometimes we throw it back over the fence. Sometimes we drag it to the nature strip. And sometimes we leave it where it lies. I believe there should be guidelines for who is responsible for this material …[113]

6.59 Arborist Robert Mineo noted that in some situations a neighbour may want fruit or branches (for firewood) to be returned.[114]

6.60 Another change commonly suggested was modifying the law so that the tree owner could not object to or hinder any tree works undertaken by the affected neighbour in the course of abating.[115] Some people suggested introducing a process whereby the affected neighbour gives notice to the tree owner, similar to a Fencing Notice under section 13 of the *Fences Act 1968* (Vic).[116] A Notice to Fence is a formal notice that a person can give

104 Submissions 10 (Professor Phillip Hamilton), 38 (L. Barry Wollmer); Survey Respondents 72, 117.
105 Submissions 5 (Name withheld), 9 (Dr Karen Smith), 11 (Name withheld), 19 (Name withheld), 21 (Pointon Partners Lawyers), 23 (Name withheld), 38 (L. Barry Wollmer); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
106 Confidential submission.
107 Submissions 5 (Name withheld), 6 (Name withheld), 10 (Professor Phillip Hamilton), 19 (Name withheld), 23 (Name withheld), 38 (L. Barry Wollmer); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 10 (Baw Baw Shire Council).
108 Submission 38 (L. Barry Wollmer).
109 Submission 10 (Professor Phillip Hamilton); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 10 (Baw Baw Shire Council).
110 Submissions 7 (Ben Kenyon); Survey Respondents 44, 95, 96.
111 Submission 10 (Professor Phillip Hamilton); Consultation 14 (Robert Mineo); Survey Respondents 7, 44.
112 Survey Respondent 44.
113 Survey Respondent 103.
114 Consultation 14 (Robert Mineo).
115 Submissions 5 (Name withheld), 6 (Name withheld), 23 (Name withheld).
116 Submission 23 (Name withheld); Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).

to their neighbour, which outlines proposed construction or repairs to a dividing fence.[117] The notice contains details such as the location of where the works are to be carried out; the type of works required who will carry out the works (the contractor); a cost estimate and how much each neighbour should contribute.[118] The neighbour has 30 days to respond.[119]

6.61 Some community members suggested that the tree owner should be responsible for paying the cost of tree works or other maintenance incurred by the affected neighbour in the course of abating the nuisance.[120] One community member explained:

> At present the [affected neighbour] bears all of the expense and inconvenience of cutting back their neighbours trees. This is utterly outrageous. We have spent an horrendous amount of money abating the nuisance. We have now reached the point where it is no longer even possible for an arborist to trim our neighbours tree—the branches are too high for chainsaws on the end of long poles and cherry pickers cannot [get] into the narrow area along our fence.[121]

6.62 Another response favoured the approach taken in New Zealand. In New Zealand an affected neighbour may seek an order in the District Court for any costs incurred as a result of abating branches or roots causing damage to property.[122] It was suggested that if tree owners are responsible for paying for the costs of tree works then affected neighbours could more easily carry out works that would resolve the issue, such as installing a root barrier and annual tree pruning. The submission also noted that putting responsibility on the tree owner for the cost of tree works would be likely to make them more willing to listen to an affected neighbour's concerns.[123]

6.63 Pointon Partners suggested that the current scope and application of the remedy did not need to change.[124]

Interaction with Australian standards

6.64 A number of arborists identified the matter of the interaction between abatement and the relevant Australian Standards on pruning and other tree works that arborists are trained to follow.[125] The City of Boroondara advises its residents about the importance of conducting tree works in accordance with the Australian Standards to ensure the health and structural integrity of the tree. Boroondara stated that the best way for community members to adhere to the Australian Standards is to engage a suitably qualified arborist.[126]

6.65 One person suggested that abatement should be expanded to allow affected neighbours to prune beyond property lines without committing trespass. It was suggested that this should be allowed where a 'genuine need arises', such as where the tree owner refuses to cooperate with reasonable requests for tree works, or for practical reasons where it may be necessary to cross boundaries due to narrow or confined areas, or for reasons of maintaining the health and structure of the tree.[127]

117 Dispute Settlement Centre of Victoria, *Notice to Fence* (Web Page, 12 April 2019) <https://www.disputes.vic.gov.au/information-and-advice/fencing/notice-to-fence>.
118 *Fences Act 1968* (Vic) s 13(3); Dispute Settlement Centre of Victoria, *Notice to Fence* (Web Page, 12 April 2019) <https://www.disputes.vic.gov.au/information-and-advice/fencing/notice-to-fence>.
119 *Fences Act 1968* (Vic) ss 17, 19; Department of Justice and Community Safety (Vic), *Fencing Law in Victoria* (Web Page, 31 January 2019) <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/civil-law/fencing-law-in-victoria>.
120 Submissions 19 (Name withheld); Confidential submission.
121 Submission 19 (Name withheld).
122 Community Law (NZ), *Trees—Overview* (Web Page, 2019) <http://communitylaw.org.nz/community-law-manual/chapter-25-neighbourhood-life/trees/>; see also AFN v ZUI [2012] NZDT 187 [30].
123 Confidential submission.
124 Submission 21 (Pointon Partners Lawyers).
125 Submission 7 (Ben Kenyon); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon). See Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007); Standards Australia, *Protection of Trees on Development Sites* (AS 4970-2009) (Sydney, NSW: Standards Australia, 2009);
126 Consultation 8 (City of Boroondara).
127 Submission 23 (Name withheld).

6.66 Another response favoured only allowing abatement by a qualified arborist in accordance with the *Australian Standards AS 4373-2007—Pruning of Amenity Trees and AS 4970-2009—Protection of Trees on Development Sites*. It was argued 'this would protect both parties by avoiding excessive, unqualified canopy or root pruning that effectively destroys someone else's property and increases tree hazard, and that further complicates dispute situations'.[128]

6.67 Some arborists favoured incorporating the Australian Standards into the new Act to improve the resolution of tree disputes more generally.[129] Dr Gregory Moore OAM explained,

> These standards if properly applied could significantly reduce tree disputes between neighbours and also reduce the likelihood of tree damage and the costs of damage to trees and litigation … It is also worth noting that these [standards] can be useful beyond their defined purposes.[130]

Community responses—a formal requirement in the new Act for 'reasonable attempts to reach agreement'

6.68 The consultation paper asked whether parties should be required to satisfy any preconditions before orders could be made under a new Act. A number of people supported the requirement that neighbours attempt to resolve their tree dispute informally before commencing legal action,[131] either by way of neighbour-led negotiation, mediation or abatement.[132]

6.69 A tree disputes consultant in New South Wales cautioned that such a precondition could limit parties' ability to seek legal remedies, especially where the relationship has broken down and parties refuse to communicate. As a compromise, it was suggested that there should be a low threshold for meeting the requirement, for example, simply showing that a letter was sent to the neighbour about the issue. It was suggested that an advantage of such a precondition is the assurance that the legal scheme is used as a last resort.[133]

6.70 The Victorian Civil and Administrative Tribunal (VCAT) did not support any precondition being included in the new Act.[134] VCAT stated that it should not matter what the parties did or did not do before legal action and that a 'come as you are' approach would be fairer. This may reduce the chance of a 'strikeout' on a technicality,[135] especially where parties are in a hostile situation. It would also prevent VCAT from being 'caught up in administrative analysis of papers'.[136]

Community responses—Tree owner responsibilities

6.71 Some people proposed that the new Act should clearly set out the responsibilities of neighbours in relation to their trees.[137] Arborist Dr Karen Smith stated that the new Act should 'clarify the rights and responsibilities of tree owners and affected neighbours so that disputes can be prevented from arising'.[138] Arborist Ben Kenyon stated that the new Act should provide clarity about rights and responsibilities, otherwise it may cause confusion and frustration, causing disputes to escalate.[139]

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128 Confidential submission.
129 Submission 12 (Dr Gregory Moore OAM); Consultation 6 (Ben Kenyon).
130 Submission 12 (Dr Gregory Moore OAM).
131 Submissions 7 (Ben Kenyon), 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council).
132 See, eg, Submissions 7 (Ben Kenyon), 10 (Professor Phillip Hamilton).
133 Submission 20 (Name withheld).
134 Consultation 5 (Victorian Civil and Administrative Tribunal); Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
135 See Victorian Civil and Administrative Tribunal, *Ending a Case by Dismissal or Strikeout* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/when-vcat-opens-a-case/ending-a-case-by-dismissal-or-strikeout>.
136 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
137 Submissions 4 (Name withheld), 9 (Dr Karen Smith), 23 (Name withheld); Consultations 1 (Aldo Taranto), 3 (HVP Plantations), 6 (Ben Kenyon).
138 Submission 9 (Dr Karen Smith).
139 Consultation 6 (Ben Kenyon).

6.72 A number of affected neighbours told the Commission that the tree owner can choose to ignore the issue or refuse to assist because responsibility for managing a tree falls entirely on the neighbour who is being affected by it. This may present a significant burden in terms of cost and effort.[140] As one survey respondent said, 'The current law is very unfair. It is one-sided It will cost over $2,000 dollars to have it cut back to the fence line which won't even resolve the issues. It is their tree it should be their responsibility to keep it within their property.'[141]

6.73 QCAT stated that tree owner responsibilities under the Queensland Act are helpful because they provide clarity about the tree owner's obligations. However, the Tribunal cannot ascertain whether these responsibilities prevent a tree dispute from reaching the Tribunal.[142] QCAT explained that tree owner responsibilities overlap with the branch removal notice under the QCAT Act.[143] Further, QCAT noted that these tree owner responsibilities are linked to and mirrored in the factors QCAT takes into account when making decisions and orders.[144]

Community responses—Branch removal notices

6.74 The consultation paper asked whether other mechanisms should be available to assist people to resolve their disputes, such as a branch removal notice process as exists in the Queensland and Tasmanian Acts. There was some support for such a process.[145]

6.75 Many people were in favour of shifting the responsibility for arranging and funding tree works from the affected neighbour to the tree owner.[146] One community member favoured a process similar to issuing neighbours with a 'Notice to Fence under the *Fences Act 1968* (Vic) for seeking agreement about fencing works.[147]

6.76 Most local councils that were consulted did not raise any major concerns with implementing a similar process in Victoria. Baw Baw Shire Council and the City of Port Phillip stated that such a process would provide clarity and assurance for neighbours.[148] Nillumbik Shire Council, however, was concerned that this process may exacerbate a tree dispute. It was also concerned that a vindictive neighbour could issue a notice to recoup costs for unnecessary works.[149]

6.77 Nillumbik suggested that care needed to be taken about the type of branches the notice could apply to. Nillumbik proposed that if a branch removal process was introduced there should be a safeguard trigger such as a maximum applicable thickness of a branch at the point it connects with the trunk or main stem. Without this safeguard, neighbours could remove large, significant branches that may destabilise a tree.[150]

6.78 Arborist Robert Mineo did not support the introduction of a branch removal process. He noted the potential for a branch removal process to encourage and enable neighbours to cut away branches without arborist assessment, which could in turn adversely affect the tree.[151]

140 Submissions 5 (Name withheld), 6 (Name withheld), 17 (Name withheld), 19 (Name withheld), 22 (Name withheld), 23 (Name withheld), 33 (Annette Neville), 34 (Allan Day); Consultation 1 (Aldo Taranto); Survey Respondent 60.
141 Survey Respondent 72.
142 Consultation 15 (Queensland Civil and Administrative Tribunal).
143 Ibid.
144 Ibid.
145 Submission 23 (Name withheld); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
146 Submissions 5 (Name withheld), 6 (Name withheld), 19 (Name withheld), 23 (Name withheld). In Ch 3 the Commission outlined community feedback concerning an unequal balance of rights.
147 Submission 23 (Name withheld). See *Fences Act 1968* (Vic) s 13.
148 Consultations 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
149 Consultation 9 (Nillumbik Shire Council).
150 Ibid.
151 Consultation 14 (Robert Mineo).

The Commission's conclusions—resolving disputes informally

6.79 Informal resolution is cost-effective, allows neighbours to come up with creative solutions to their problems,[152] and may help to preserve neighbourly relations. Not all disputes will be suitable for informal negotiation. In many tree disputes relations between neighbours are so poor that resolution in VCAT is the best option. However, the more disputes that can be settled outside the tribunal system, the better.

Encouraging informal resolution in the new Act

6.80 The new Act should clearly state that nothing in the Act prevents parties from resolving their tree dispute informally between themselves.

6.81 The new Act should also include a non-exhaustive list of examples of the types of informal resolution tools that parties can use to resolve their disputes to help them understand their options better. The list recommended by the QLRC noted earlier is helpful.[153]

Community resources

6.82 The new Act should be supported by extensive community resources in order to make the law more accessible and more widely understood. Supporting information should incorporate the examples of informal resolution tools referred to in the new Act—for example, neighbour-led resolution, mediation through DSCV and abatement—and explain how these mechanisms work as well as tips about good negotiating strategies.

6.83 A sample standard letter would also be a useful community resource to facilitate communication and negotiation. The community should also be better informed about the role of arborists. Obtaining independent professional advice in the early stages may assist parties to reach agreement out of the tribunal process. See Chapter 12.

Community-based alternative dispute resolution

6.84 The Commission acknowledges the small number of tree disputes currently resolved through DSCV-led mediation. Low resolution rates for tree disputes can be attributed to a number of factors including unclear rights and responsibilities.

6.85 Mediation is a useful tool to resolve some tree disputes quickly and cost-effectively as illustrated by DSCV examples of mediated outcomes noted above. There are clear advantages of resolving a tree dispute through ADR, such as more flexible processes and greater scope to come up with creative solutions that both parties agree to. Mediation is also confidential. Any agreement that is reached can also be kept confidential by agreement between the parties. The NSWLEC identified that agreement via ADR, unlike court orders resulting from legal action, produces no 'winner' or 'loser', which is helpful for preserving relations between neighbours. It was suggested that legal action which results in court orders may have less scope to resolve underlying interpersonal issues between neighbours.[154]

6.86 Clearer laws will improve the resolution rates for community-based mediation. The introduction of the new Act will guide the community about how the law applies and address some of the concerns raised by DSCV. A new Act will help reduce the number of enquiries to DSCV and assist DSCV to resolve disputes that progress through its mediation service. The new Act will ensure that parties participating in mediation outside the VCAT process have a greater understanding of the way a matter would be resolved within VCAT and the range of likely orders. This will encourage parties to persevere with informal resolution.

152 Victorian Law Reform Commission, *Civil Justice Review (Report No 14, 2008)* [1.4].
153 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) Recommendation 4-4.
154 Consultation 11 (Land and Environment Court of New South Wales).

6.87 The rate of ADR outside the VCAT process may also be improved if the supporting information for the new Act clearly states that engaging in mediation through DSCV is one of the ways that neighbours may choose to informally resolve their tree dispute. This would lift the public profile of the role of DSCV. Supporting information should also outline VCAT's powers to refer parties to ADR in the formal tribunal process. This may also discourage parties from choosing to opt out of the informal mediation process.

6.88 DSCV should work with professional arboricultural associations to raise awareness about DSCV's services so that arborists can inform neighbours and refer them to DSCV. See Chapter 12.

6.89 The new Act should not compel neighbours to participate in DSCV-facilitated mediation outside the tribunal process. Community-based mediation is voluntary.[155] Any change compelling people to take part in mediation, other than as part of ADR ordered by a court or tribunal, would change the nature of informal community-based mediation.

6.90 In many situations, community-based mediation may not be helpful. In Queensland anecdotal evidence suggests that a reasonably high number of applicants in QCAT have attempted to resolve their matter through free mediation before proceeding to QCAT.[156] Of these, a considerable number of people report that their neighbour ignored any agreement reached. The NSWLEC also noted that many applicants had unsuccessfully attempted mediation through CJCs.[157]

6.91 Even so, a partially successful community-based mediation may help parties to narrow the issues in dispute for a subsequent VCAT hearing. The Commission is of the view that formal tribunal-ordered mediation may still be appropriate and successful even where community-based mediation was not. See Chapter 7 for a discussion on Tribunal ordered ADR.

Recommendations

17 The Act should state that the affected neighbour and tree owner are encouraged to resolve their dispute informally but that the affected neighbour may apply to the Victorian Civil and Administrative Tribunal to resolve the dispute.

18 The Act should include a non-exhaustive list of examples of informal resolution approaches including:

(a) communicating with the other party to notify them of the issues (including providing a quotation or arborist's assessment) and negotiate with them

(b) exercising the right to abate

(c) engaging in alternative dispute resolution, such as mediation through the Dispute Settlement Centre of Victoria.

155 Justice Bergin states: 'In the vast majority of cases in Australia mediation is voluntary. Although there may be a mandatory requirement to attend mediation, the outcome is always voluntary. The parties alone determine whether they will settle their dispute and the terms upon which they will settle their dispute, albeit that they are assisted in this regard by the mediator [footnotes omitted].' Justice P A Bergin, 'The Objectives, Scope and Focus of Mediation Legislation in Australia' (Paper presented at Mediate First, 11 May 2012) [7].

156 Consultation 15 (Queensland Civil and Administrative Tribunal).

157 Consultation 11 (Land and Environment Court of New South Wales).

Modification of abatement

6.92 The Commission agrees with the majority of community responses which support the continued availability of abatement as a remedy. Abatement is an effective tool for resolving many tree disputes and may prevent them from escalating.

6.93 In keeping with interstate reforms, the common law abatement remedy should be modified by the new Act to the extent that an affected neighbour should no longer be required to return abated tree parts, including fruit.[158]

6.94 The Commission is persuaded by the QLRC report and community feedback that the return of abated tree parts may cause a tree dispute or make it worse. However, neighbours should not be prevented from coming to their own agreement about how abated material is to be dealt with.

6.95 This modification should apply only to trees in zones captured under the proposed statutory scheme as recommended in Chapter 5. For example, in the farming context, it may be important to return tree parts such as branches containing important produce or feed for animals.

6.96 It should not be necessary to require an affected neighbour to give notice to a tree owner, whether verbally or in writing, before abating. This would limit the operation of a self-help remedy that is quick, simple and timely.

6.97 Abatement should remain subject to permit requirements under local planning schemes or other laws that seek to protect vegetation. This would act as an adequate safeguard against indiscriminate and potentially harmful pruning or cutting of environmentally and culturally significant trees.

Abatement costs

6.98 Many affected neighbours find the limited scope to recoup the costs of abatement unfair. The affected neighbour is generally wholly responsible for the cost. The tree owner is not required to reimburse the affected neighbour or contribute to the cost.[159] However, the Commission does not support the modification of abatement so that affected neighbours can recoup from the tree owner any costs incurred.

6.99 Abatement was developed under the common law for any type of private nuisance.[160] Allowing an affected neighbour to recoup the costs of abatement in the context of tree disputes would substantially displace the established common law, which only allows the costs to be recovered in limited circumstances where an affected neighbour has an obligation to mitigate damage that is already occurring.[161] It would also alter the 'self-help' nature of the remedy, by making the remedy dependent on or affected by the cooperation or contribution of another party.

6.100 Finally, it may place an unfair cost burden on the tree owner for the simple fact of having a tree on their land. Neighbours who are concerned about the costs of abatement may choose to informally negotiate an arrangement with the tree owner, engage in mediation or take legal action under the new Act if the overhanging branch has caused damage or is likely to cause damage or harm. In the discussion below, the Commission also proposes that further consideration is given to a formal branch removal process in the new Act which would provide scope to recover limited costs associated with some abatement.

158 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2); Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.261]–[3.262].
159 *Young v Wheeler* (1987) Aust Torts Reports 80–126, 68,972; *City of Richmond v Scantelbury* [1991] 2 VR 38, 48.
160 *Lemmon v Webb* [1895] AC 1; *Young v Wheeler* [1987] Aust Torts Reports s 80–126, 68,970.
161 *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478, 487.

Entry onto the tree owner's land

6.101 Access to the tree owner's land may be necessary in some situations for practical reasons, such as where a branch needs to be cut at the juncture of the trunk or main stem, or in very small spaces. However, it would not be appropriate to remove liability for trespass as it applies to abatement. To do so would result in substantial intrusions on people's land. Such a change may create a range of other issues including the removal of significant amounts of vegetation, disputes about the illegal destruction of vegetation and also potential physical altercations when neighbours disagree.[162]

6.102 The law only allows a defence of 'necessity' in cases of trespass where it is necessary to 'preserve life or protect property from real and imminent harm'.[163] The majority of ordinary tree encroachments are unlikely to satisfy this threshold. Allowing an affected neighbour to enter the tree owner's land without any independent assessment of the need would significantly erode a landowner's exclusive possession of and control over their property.[164]

6.103 The current limitation of abating within boundary lines appropriately balances competing interests. If a neighbour is concerned about imminent damage or harm and does not think that abatement will remedy the situation he or she may commence a matter in VCAT and seek an appropriate remedy. The orders recommended in Chapter 9 include entry to land to carry out tree works and to obtain a quote for works to a tree that is subject to the order. If the matter is urgent it would be triaged by the Tribunal.

Australian Standards

6.104 The Commission accepts the importance of the Australian Standards for tree works. However, it would not be reasonable or practicable to restrict a person's right to abate so that it can only be exercised by a qualified arborist in accordance with the Australian Standards. This would significantly limit the usefulness of the remedy, particularly for minor encroachments or where parties cannot afford an arborist.

6.105 Community members who undertake abatement without an arborist should not be required to comply with the Australian Standards on pruning. The Australian Standards are highly technical and difficult for the community to interpret and apply. Additionally, they are not easily accessible and are only accessible through purchase.[165]

6.106 The Commission concludes that the scope of abatement and the Australian Standards cannot be reconciled. The Australian Standards are intended to be used as guides and are not statutory instruments.

6.107 The only way for community members to comply with the Australian Standards is to engage a qualified arborist. Professional arboriculture associations and local councils should consider raising community awareness about the benefits of hiring a suitably qualified arborist. These recommendations are contained in Chapter 12. In addition, recommendations are made in Chapter 9 that VCAT orders be made in accordance with the Australian Standards and that VCAT may further specify that works must be carried out by a suitably qualified arborist.

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162 See eg, *R v Stenberg* [2013] NSWSC 1858; Order of Magistrate J Lesser (Magistrates Court of Victoria, H13012408, 14 February 2018); see also Mel Buttigieg, 'Neighbourhood tree-son! Family's CCTV catches man next door cutting down their tree', *Yahoo7 News* (online, 11 May 2017) <https://au.news.yahoo.com/geelong-man-catches-neighbour-on-cctv-hacking-trees-with-chainsaw-35448374.html>.

163 Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) [4.4.1]. The situation which the affected neighbour believes compels them to act to preserve life and property must be 'an urgent situation of imminent peril' that 'existed actually, and not merely in the belief of the [affected neighbour]': *Southwark London Borough Council v Williams* (1971) 1 Ch 734, 746; *Cope v Sharpe* (No 2) [1912] 1 KB 496, 508.

164 'There are two requirements for possession in law: the actual physical control of property *(factum possidendi)* and the intention to exercise dominium over it (animus possidendi). In sum, the legal conception of "possession" encapsulates the complete and unshakeable physical control with full awareness or knowledge of the property coupled with an obstinate will to exclude all others from it.': Thomson Reuters Westlaw, *The Laws of Australia* (at 1 January 2015) 28 Real Property, '2 Possession' [28.16.160].

165 The cost of Australian Standard 4970-2009 *Protection of Trees on Development Sites* is $128.19. The cost of Australian Standard 4373-2007 *Pruning of Amenity Trees* is $112.64. See generally SAI Global, 'Store', *Helping you Power Up Your World with Standards* (Web Page, 2019) <https://infostore.saiglobal.com/>.

Recommendation

19 The Act should modify the common law right to abate to the extent that abated tree parts such as branches, roots, fruit and other material are not required to be returned to the tree owner unless the neighbours have agreed otherwise.

Not recommended: a formal requirement in the Act for 'reasonable attempts to reach agreement'

6.108 The Commission is not persuaded that the new Act should include a requirement that an applicant must have made reasonable attempts to resolve the issue before an order can be made by VCAT. Such a requirement is included in the NSW and Queensland Acts.

6.109 Community feedback suggests that many neighbours do not necessarily want to take legal action against their neighbour, due to the stress and costs involved and the possibility of damaging their relationship.[166] As a result, legal action is generally only likely to be initiated as a last resort. It is reasonable to assume that when a neighbour commences legal action, the dispute has escalated to a point where resolution may no longer be possible without VCAT involvement. The Commission also notes VCAT's concern that any formal pre-condition may also lead to VCAT being 'caught up in administrative analysis of papers' on the issue of the extent of informal negotiation.[167] Further, because the threshold for meeting this statutory requirement is very low in New South Wales and Queensland, its practical effect may be limited.

6.110 However, these interstate provisions perform an important role in reinforcing to the community that legal action should be a last resort. The VCAT Act provides the Tribunal with the power to refer parties to ADR, such as compulsory conference or mediation.[168] Parties may be referred to a compulsory conference before the hearing, while a referral to mediation may occur at any point in proceedings where the Tribunal deems it appropriate.[169] The Commission is of the view that VCAT should be encouraged to use those existing powers in the context of tree disputes.

6.111 Any information that the Tribunal member can glean from previous informal discussions may also act to narrow the issues in dispute in a subsequent hearing. This is discussed further in Chapter 7. It was also recommended in Chapter 5 that the application form for initiating proceedings in VCAT require parties to detail what steps they have taken to resolve the dispute informally.

6.112 To reinforce the importance of attempting to negotiate informally where possible, information provided by VCAT about the operation of the new Act should specifically inform parties that VCAT can order them to participate in ADR. See Chapter 12.

Not recommended: tree owner responsibilities in the Act

6.113 The new Act should not contain non-actionable tree owner responsibilities, such as those included in the Queensland and Tasmanian Acts. The Commission favours the legislative approach in the NSW Act because it is simpler and more straightforward. The inclusion of tree owner responsibilities that are non-binding, together with a civil cause of action for damage or harm, may create confusion in the community. The Commission

166 See the discussion in Ch 2.
167 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
168 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 83(1), 88(1).
169 Ibid ss 83(1), 88(1).

is persuaded by the comments of the NSWLEC that tree owner responsibilities may intensify tree disputes and may have the effect of diminishing the urban forest if tree owners feel obliged to prune or remove their trees to meet their responsibilities.[170] While tree dispute issues affect many people, it would be a disproportionate response to create responsibilities in the new Act that extend to all tree owners on private land, even if they are nonbinding.

6.114 Clear decision-making principles under the new Act together with clear community information will provide guidance to the community about the application of the law to their own disputes. See Chapter 8. Ultimately, the ability of an affected neighbour to initiate a matter in VCAT and to obtain a quick remedy may motivate a tree owner to manage their tree in mutually beneficial ways.

For future consideration: branch removal notices

6.115 The introduction of a branch removal notice in the new Act received some community support.[171] However, some responses cautioned that care needs to be taken in determining which branches such a process would apply to, and how branches are pruned so as to avoid damaging trees.[172]

6.116 The QLRC found that the branch removal notice is 'working well' in Queensland and is 'a valuable means by which many disputes can be adequately addressed'.[173]

6.117 A branch removal notice would address one of the most common causes of tree disputes in Victoria—overhanging branches.[174] The Commission acknowledges that unless an overhanging branch issue raises concerns about damage or harm, it would not fit within the ambit of the new Act (see Chapter 5). In this situation the affected neighbour would need to pursue an informal remedy such as alternative dispute resolution[175] or abatement or bring an action in nuisance or negligence[176] at common law.

6.118 A formal branch removal notice process would facilitate communication between parties by setting out clear procedural steps that neighbours are required to follow to address concerns. It would also put the tree owner on notice and may assist in breaking a negotiation stalemate, especially where a tree owner is uncooperative. During the parliamentary debates for the Neighbourhood Disputes Resolution Bill 2010 (Qld), the Attorney-General of Queensland noted that a branch removal process may be particularly beneficial to people who cannot exercise their right to abate for physical or financial reasons.[177]

6.119 A branch removal notice would also address community concerns about the imbalance of rights between the tree owner and affected neighbour. The notice would formally shift responsibility for pruning or removing overhanging branches from the affected neighbour to the tree owner, subject to the limitation that the scheme would only apply to particular branches in 'high traffic' areas. Where the tree owner does not comply, a limited right to recoup the costs of tree works arranged by the affected neighbour up to a statutory limit, as occurs in Queensland, may help reduce a proportion of the financial burden on affected neighbours. It may also provide a financial incentive to a tree owner to address their neighbour's concerns.

170 Consultation 11 (Land and Environment Court of New South Wales).
171 Submission 23 (Name withheld); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
172 Consultations 9 (Nillumbik Shire Council), 14 (Robert Mineo).
173 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.353], [3.355].
174 As discussed in Ch 2.
175 As noted earlier, DSCV provided an example of a dispute over leaf litter being successfully mediated.
176 For personal injury or property damage as discussed in Ch 3. See, eg, *Marshall v Berndt* [2011] VCC 384 [234]; *Owners Corporation SP020030 v Keyt* [2016] VCC 1656 [13]; *Robson v Leischke* (2008) 72 NSWLR 98 [54].
177 Queensland, *Parliamentary Debates,* Legislative Assembly, 2 August 2011, 2306 (Paul Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State).

6.120 The Commission does not recommend that the new Act include a branch removal notice process from the outset. Instead, if necessary, the Act could be broadened to include this process when it is reviewed after five years of operation (see Chapter 13). At that time, it will be clearer if there is a genuine need for a formal branch removal process.

6.121 Further consultation should occur with the Queensland and Tasmanian Governments, as well as dispute resolution centres and community legal centres about how widely the branch removal notice is used, how well it is understood and whether it is effective in reducing the number of matters that proceed to a hearing in QCAT or RMPAT. Consultation should also consider any disadvantages of such a process and how well it fits with the underlying policy of the new Act. Further consultation is needed because this process would complicate the operation of the new Act. The branch removal notice processes in the Queensland and Tasmanian schemes work in conjunction with legislated tree owner responsibilities which the Commission is not recommending for the new Act. Therefore, consultation should also ascertain whether a statutory notice process would work effectively in a scheme that does not include tree owner responsibilities.

6.122 QCAT told the Commission that because QCAT does not receive applications for the types of disputes captured by this process, QCAT cannot comment definitively on the effectiveness of this mechanism.[178] The Tasmanian scheme has only recently commenced, and it may take some time before its effectiveness can be assessed. The Commission also observes that NSWLEC and QCAT manage a similar number of tree disputes even though New South Wales does not have a branch removal notice process.[179]

6.123 If a branch removal notice process is introduced the Commission's preliminary view is that:

- It should be accompanied by a compulsory form that puts the tree owner on notice and includes details about the overhanging branches and each neighbours' rights and include a response form.
- It should incorporate safeguards similar to those contained in the Queensland and Tasmanian Acts.
- The number of notices that can be issued for any tree in a calendar year should be limited to prevent the notice being used vexatiously and to prevent the unnecessary removal of vegetation.
- It should include a maximum statutory amount that can be recovered and that the cost of the affected neighbour's own labour should be excluded. Consultation should be undertaken about what would be an appropriate statutory cap noting that the QLRC recommended that the amount be increased from $300 to $500 and that the cap is $500 in Tasmania.[180]
- A third safeguard trigger (such as the thickness of the branch) should not be included as this would be difficult for community members to measure, especially where they do not have access to the tree owner's land.

6.124 Importantly, a branch removal notice should supplement the options available to people to resolve their disputes before initiating an application in VCAT. Branches covered by this process would continue to be able to be removed by the common law remedy of abatement and the affected neighbour would still be able to take legal action in VCAT if they are seeking particular repairs or to recoup costs over and above the statutory cap.

178 Consultation 15 (Queensland Civil and Administrative Tribunal).

179 The NSWLEC handles approximately 10–13 tree dispute cases per month and QCAT handles approximately 200 tree dispute cases per year (an average of approximately 16 cases a month): Consultations 11 (Land and Environment Court of New South Wales), 15 (Queensland Civil and Administrative Tribunal).

180 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.313]; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 21(3); Department of Justice (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.

Not recommended: a general notice process

6.125 The Commission does not recommend that the new Act incorporate a process allowing an affected neighbour to issue a formal notice requiring the tree owner to take action, as occurs in Tasmania. It would add a layer of complexity and bureaucracy that the community may find hard to navigate. The Commission recommends a standard sample letter as a separate community resource that neighbours may choose to use to communicate and negotiate with their neighbour. See Chapter 12.

7

Resolving neighbourhood tree disputes in VCAT

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7. Resolving neighbourhood tree disputes in VCAT

Introduction

7.1 Court and tribunal proceedings are described as 'formal' because they are conducted before a judicial officer (judge or magistrate) or tribunal member, in accordance with court or tribunal processes and with notice given to affected parties.[1] Unlike informal resolution, legal proceedings produce binding and enforceable legal outcomes.

7.2 The consultation paper asked the community which court/s or tribunal should have jurisdiction to hear formal tree disputes if a new Act was introduced. This chapter explores community responses and examines how tree disputes are currently decided in Victoria, interstate and overseas. It concludes by recommending that the Victorian Civil and Administrative Tribunal (VCAT) be given jurisdiction to decide matters under the new Act and examines some of VCAT's processes for managing those disputes.

In which forum should disputes be resolved?

7.3 In Victoria, tree disputes can currently be heard in three places:

- most often in the Magistrates' Court[2]
- larger claims in the County Court[3]
- more rarely cases involving very large or complex claims in the Supreme Court.[4]

7.4 The operation of each of these jurisdictions was examined in the consultation paper in detail.

7.5 The Magistrates' Court and VCAT are the jurisdictions that are most suitably placed to hear tree disputes under the new Act. Whether or not tree disputes should continue to be heard in the Magistrates' Court or in VCAT is a key consideration in the design of a new Act.

7.6 The differences between them are discussed in the following section.

1 Although proceedings in a tribunal are considered less formal than court proceedings: Department of Justice and Community Safety (Vic), *Courts and Tribunals* (Web Page, 9 August 2018) <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals>; see also *Victoria Legal Aid, Victoria's Courts and Tribunals* (Web Page, 31 December 2018) <https://www.legalaid.vic.gov.au/find-legal-answers/courts-and-legal-system/victorias-courts-and-tribunals>.

2 The Magistrates' Court has jurisdiction to hear civil matters where claims for works or damages are no more than $100,000: *Magistrates' Court Act 1989* (Vic) ss 3(1) ('jurisdictional limit'); s 100(1)(a)–(b).

3 The County Court has unlimited jurisdiction to hear all applications, claims, disputes and civil proceedings regardless of the type of relief sought or the subject matter that are not by this or any other Act excluded from its jurisdiction: *County Court Act 1958* (Vic) s 37(1)(a); see also *County Court of Victoria, Fees and Costs for Civil Proceedings* (Web Page, 2019) <https://www.countycourt.vic.gov.au/forms-and-fees/fees-and-costs-civil-proceedings>.

4 Claims for $200,000 and above in civil proceedings are heard in the Supreme Court of Victoria: Victoria Legal Aid, *Victoria's Courts and Tribunals* (Web Page, 13 December 2018) <https://www.legalaid.vic.gov.au/find-legal-answers/courts-and-legal-system/victorias-courts-and-tribunals>; see, eg, the Major Torts List which is 'designed to facilitate and expedite the passage of large or otherwise significant tortious claims to trial': Supreme Court of Victoria Common Law Division, *Practice Note SC CL No 4: Major Torts List,* October 2018, 1 <https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes>; see also Supreme Court of Victoria, *How the Court Works* (Web Page, 2019) <https://www.supremecourt.vic.gov.au/about-the-court/how-the-court-works>.

Magistrates' Court of Victoria

7.7 The Magistrates' Court has jurisdiction to hear civil matters such as tree disputes up to the value of $100,000.[5] As a court of law and equity it can provide a wide range of remedies. It can order people to do certain things or to stop doing something where the payment of money may not be sufficient.[6]

Fees—the Magistrates' Court

7.8 Bringing a case before the Magistrates' Court can be costly. In addition to the cost of legal representation, there are court fees.[7] The Court application/filing fee ranges from $147.40 (for claims under $500), to $702.30 (for claims over $70,000). Other fees may apply, for example for serving documents on the other party ($73).[8] These are generally applied on a sliding scale by reference to the value claimed for works or damages.[9] The Magistrates' Court may grant a fee waiver to persons experiencing financial hardship.[10]

Alternative dispute resolution—the Magistrates' Court

7.9 The Magistrates' Court has a specific arbitration process for smaller claims, such as neighbourhood disputes, designed to keep costs down, encourage early resolution and divert simpler cases away from full hearings.[11] Parties seeking relief under $10,000 are generally referred for compulsory arbitration.[12] Parties may also mutually agree to undertake arbitration, or one party will apply and the other will be required to participate. The arbitration process is less formal and simpler than a hearing.[13] The parties' cases are heard by an independent arbitrator, who is empowered to make a binding decision about the case.[14]

7.10 Other mechanisms to support early resolution of disputes include prehearing conferences, mediation and early neutral evaluation.[15] Pre-hearing conferences, if directed by the Court, are compulsory for the parties and their lawyers and are generally heard before an experienced registrar. The registrar identifies and explores the issues and promotes settlement.[16] If no resolution is reached, the registrar may make directions for the dispute to proceed to a hearing.[17]

7.11 Referral to mediation can occur with or without the parties' consent.[18] It is usually conducted by a registrar, a judicial registrar or an external mediator.[19] Mediation before a registrar costs $261.50, and $453.70 before a judicial registrar.[20]

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5 *Magistrates' Court Act 1989* (Vic) s 3 (definition of 'jurisdictional limit').

6 The jurisdictional limit for claims for equitable relief is also $100,000: see *Magistrates' Court Act 1989* (Vic) ss 3, 100(1)(b). Section 31 of the Supreme Court Act 1986 gives the Magistrates' Court power (subject to its jurisdictional limit) to grant such general equitable remedies as the Supreme Court has power to grant in like cases. The most common form of equitable relief sought is injunctive relief: Judicial College of Victoria, *Magistrates Court Bench Book* (at 31 January 2012) 1.6 'Equitable jurisdiction'.

7 Current values are set out in the Magistrates' Court of Victoria, *Fees and Costs Ready Reckoner* (effective 1 January 2019).

8 Ibid.

9 Ibid.

10 *Magistrates' Court Act 1989* (Vic) s 22(2).

11 For the purpose of the *Magistrates' Court Act 1989* (Vic), an arbitration is a simplified procedure of hearing a claim for monetary relief of $10,000 or less: s 102(1).

12 Unless the Court determines otherwise or approves the parties' application to have the matter heard without arbitration: *Magistrates' Court Act 1989* (Vic) ss 102(1)–(3). On its website, the Magistrates' Court states that 'Defended civil matters for car accidents and claims less than $1000 are referred straight to arbitration': Magistrates' Court of Victoria, *Resolving A Dispute* (Web Page, 13 December 2018) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute>.

13 *Magistrates' Court Act 1989* (Vic) s 103(2).

14 Ibid s 104(3).

15 Submission 16 (Magistrates' Court of Victoria). See also *Magistrates' Court Act 1989* (Vic) s 107; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) Ord 50; Magistrates' Court of Victoria, *Mediation* (Web Page, 14 January 2019) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/mediation>.

16 *Magistrates' Court Act 1989* (Vic) s 107; see also Magistrates' Court of Victoria, *Pre-Hearing Conferences* (Web Page, 13 December 2018) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/pre-hearing-conferences>.

17 *Magistrates' Court Act 1989* (Vic) ss 107, 107(2)(a); Magistrates' Court of Victoria, *Pre-Hearing Conferences* (Web Page, 13 December 2018) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/pre-hearing-conferences>.

18 *Magistrates' Court Act 1989* (Vic) s 108(1).

19 An external mediator can be selected from the Magistrates' Court Single List of External Mediators: Magistrates' Court of Victoria, *Mediation* (Web Page, 14 January 2019) <https://www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>.

20 Magistrates' Court of Victoria, *Fees and Costs Ready Reckoner* (effective 1 January 2019).

7.12 The Dispute Settlement centre of Victoria (DSCV) operates a Civil Claims Program for defended civil claims in the Magistrates Court for claims under $40,000.[21] This 'is a quick and inexpensive way for the parties to resolve their civil claim without … a court hearing'.[22] The program operates in a number of Magistrates' Court locations in metropolitan and regional areas.[23] Mediations by DSCV are free.[24]

7.13 The Court may direct any matter to proceed to early neutral evaluation.[25] This involves a magistrate, in the presence of the parties and their legal representatives, hearing a statement of the relevant evidence and principles of law from each party, facilitating discussion and presenting a non-binding opinion on the likely outcome.[26] If the parties do not reach a resolution, their matter can proceed to a hearing.[27]

Subject-matter expertise—the Magistrates' Court

7.14 The Magistrates' Court currently hears fence disputes under the *Fences Act 1968* (Vic). These disputes include matters about building and repairing fences, such as who pays, what type of fence is built and where.[28] The Magistrates' Court has power to make a broad range of orders about fencing disputes.[29]

Flexibility and support—the Magistrates' Court

7.15 The Magistrates' Court 'has the largest suburban and regional reach of any adjudicative body in Victoria'.[30] It sits at 51 metropolitan and regional locations in Victoria[31] and also operates through specialist court models that are comparatively informal and flexible.[32] For example, the Neighbourhood Justice Division of the Magistrates' Court sits at the Neighbourhood Justice Centre in the City of Yarra and has jurisdiction to hear a range of matters including fence disputes pursuant to the *Fences Act 1968* (Vic).[33]

7.16 Of all the Victorian courts, self-represented litigants appear most frequently in the Magistrates' Court.[34] The Magistrates' Court has processes in place to make sure that it is accessible for the people who need it. It monitors its information, forms and processes to ensure that cases are resolved efficiently and is easy to use.[35]

21 'Except at the Melbourne Magistrates' Court, defended civil claims in the Magistrates' Court of less than $40,000 value are referred to mediation conducted by the Dispute Settlement Centre of Victoria.': Magistrates' Court of Victoria, *Mediation* (Web Page, 14 January 2019) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/mediation>.
22 Dispute Settlement Centre of Victoria, *Civil Claims Program* (Web Page, 22 May 2019) <https://www.disputes.vic.gov.au/about-us/civil-claims-program>.
23 Ibid.
24 Dispute Settlement Centre of Victoria, *DSCV FAQS* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/information-and-advice/dscv-faqs>.
25 Early neutral evaluation is 'a process for parties to try and resolve a dispute by presenting their arguments to a magistrate. A magistrate will make an evaluation and indicate a possible court outcome'. Any dispute may be referred to early neutral evaluation but mainly disputes where the amount of the claim is $50 000 or more or issues raise complex legal arguments or factual disputes: Magistrates' Court of Victoria, *Early Neutral Evaluation* (Web Page, 3 December 2018) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/early-neutral-evaluation>.
26 Ibid.
27 Early neutral evaluation does not prejudice parties' chances in any future hearing, as the magistrate who presides over the process will not determine the case at hearing: Magistrates' Court of Victoria, *Early Neutral Evaluation* (Web Page, 3 December 2018) <https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/early-neutral-evaluation>.
28 Magistrates' Court of Victoria, *Information Guide: Fencing Disputes* (9 January 2019) <https://www.mcv.vic.gov.au/news-and-resources/publications>.
29 *Fences Act 1968* (Vic) s 30C; see also Department of Justice and Community Safety (Vic), *Fencing Law in Victoria* (Web Page, 31 January 2019) <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/civil-law/fencing-law-in-victoria>.
30 Submission 16 (Magistrates' Court of Victoria).
31 Magistrates' Court of Victoria, *The Court System* (Web Page, 4 December 2018) <https://www.mcv.vic.gov.au/court-system>.
32 See, eg, Magistrates' Court of Victoria, *Annual Report 2015–2016* (2016) 47–71.
33 *Magistrates' Court Act 1989* (Vic) ss 4M, 4O(3)(d); *Magistrates' Court (Miscellaneous Civil Proceedings) Rules 2010* (Vic) r 11.02(a).
34 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—Self-Represented Litigants* (Report, 2015) 2.
35 Magistrates' Court of Victoria, *Annual Report 2015–2016* (2016) 26.

Victorian Civil and Administrative Tribunal (VCAT)

7.17 VCAT hears and decides civil and administrative cases in Victoria.[36] It was established under the *Victorian Civil and Administrative Tribunal Act 1998*.[37] VCAT is a 'modern, accessible, efficient, cost-effective, and independent judicially-governed tribunal'.[38]

7.18 VCAT does not currently have jurisdiction to hear private tree disputes between neighbours at common law because VCAT only derives its jurisdiction from Acts of parliament.[39]

7.19 VCAT comprises four main divisions: the Administrative Division, the Civil Division, the Human Rights Division and the Residential Tenancies Division.[40] Claims before VCAT can be monetary and nonmonetary in nature.

7.20 The Civil Division deals largely with monetary claims. It hears disputes over matters such as consumer issues, domestic building works, owners' corporations matters, retail tenancies, sale and ownership of property, and use or flow of water between properties.[41] Although VCAT is known for handling smaller civil claims,[42] there is no limit on the amount that can be claimed in the Civil Division[43]—VCAT may hear complex and high-value claims.

Fees—VCAT

7.21 Fees are significantly lower than in the courts. An example of an application fee in VCAT is $63.70 for an owners' corporation, rent, or goods and services dispute.[44] This is waived if the applicant holds a health care card and the claim is $15,000 or less. Fees increase as the value of the dispute increases.[45] If the claim is for over $15,000, then hearing fees may apply for the second and subsequent hearing days.[46]

7.22 VCAT has a fee relief program for people experiencing financial hardship.[47] VCAT states on its website that 'financial hardship means that paying the VCAT fee would make the person unable to provide the following for themselves, their family or other dependents: food, accommodation, clothing, medical treatment, education, other basic necessities'.[48] Parties may also seek to have their fees waived on the grounds of financial hardship or if they are represented by a community legal centre. [49]

36 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–2018* (Report, 2018) 2.
37 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 1, 8.
38 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 245.
39 VCAT has original jurisdiction and review jurisdiction. See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 3 ('enabling enactment'), 42–44, 67, 69.
40 See, eg, Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–2018* (Report, 2018) 9.
41 See, eg, Ibid 11. In other divisions such as the Residential Tenancies Division and Human Rights Division, claims are more likely to be non-monetary, and deal with issues such as anti-discrimination, tenancy or guardianship: Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 245. These lists are not exhaustive.
42 Generally considered to be claims not exceeding $10,000. 'This is consistent with the definition of a 'small claim' in part 2AB of schedule 1 of the *Victorian Civil and Administrative Act 1998* (Vic) which applies to proceedings under the *Australian Consumer Law and Fair Trading Act 2012* (Vic) and Part 5 of the *Magistrates' Court Act 1989* (Vic)': Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper —VCAT Small Civil Claims* (Report) 5 <https://engage.vic.gov.au/accesstojustice>.
43 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—VCAT Small Civil Claims* (Report) 3 <https://engage.vic.gov.au/accesstojustice>.
44 Fees are generally applied on a sliding scale depending on the amount in dispute. Victorian Civil and Administrative Tribunal, *Owners Corporations Fees* (Web Page, 1 July 2018) <https://www.vcat.vic.gov.au/resources/owners-corporations-fees>; *Victorian Civil and Administrative Tribunal, Renting a Home Fees* (Web Page, 1 July 2018) <https://www.vcat.vic.gov.au/resources/renting-a-home-fees>; *Victorian Civil and Administrative Tribunal, Goods and Services Fees* (Web Page, 1 July 2018) <https://www.vcat.vic.gov.au/resources/goods-and-services-fees>.
45 Victorian Civil and Administrative Tribunal, *Owners Corporations Fees* (Web Page, 1 July 2018) <https://www.vcat.vic.gov.au/resources/owners-corporations-fees>; *Victorian Civil and Administrative Tribunal, Renting a Home Fees (*Web Page, 1 July 2018) <https://www.vcat.vic.gov.au/resources/renting-a-home-fees>; *Victorian Civil and Administrative Tribunal, Goods and Services Fees* (Web Page, 1 July 2018) <https://www.vcat.vic.gov.au/resources/goods-and-services-fees>.
46 Victorian Civil and Administrative Tribunal, *Fee Categories* (Web Page, 9 May 2017) <https://www.vcat.vic.gov.au/resources/fee-categories>.
47 Victorian Civil and Administrative Tribunal, *Fee Relief* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/fees-at-vcat/fee-relief>.
48 Ibid.
49 Ibid.

7.23 VCAT revised its fees in July 2016, making it more affordable.[50] The Access to Justice Review found that this 'new fee structure adequately meets concerns about the affordability of commencing applications for small civil claims'.[51]

Subject-matter expertise—VCAT

7.24 VCAT has substantial review jurisdiction[52] in a number of areas that intersect with tree disputes, including planning, environment, heritage and land management.[53]

7.25 VCAT is headed by a President, who is a judge of the Supreme Court of Victoria.[54] VCAT also has 14 Vice Presidents, who are judges of the County Court of Victoria.[55] The President and Vice-Presidents are responsible for the management and administration of VCAT.[56]

7.26 Claims in VCAT's specialist divisions and lists are determined by members who 'have specialist knowledge and qualifications'; most of whom also have a legal background.[57] Similar requirements apply to commissioners of bodies that resolve tree disputes in New South Wales, Queensland and Tasmania.

The jurisdiction of VCAT and the Magistrates' Court

7.27 VCAT's jurisdiction to hear civil claims aligns with (and extends beyond) the Magistrates' Courts jurisdiction to hear similar claims, particularly in relation to 'debts, damages for breach of contract, other contractual disputes, and claims under the Australian Consumer Law'.[58]

7.28 However, VCAT does not have the same powers as the Magistrates' Court. VCAT typically cannot make an award for legal costs[59] unless it is fair to do so,[60] whereas the Magistrates' Court has a broader discretion to award legal costs.[61] In VCAT hearings, parties generally bear their own costs.[62]

Flexibility and support—VCAT

7.29 VCAT's is the busiest tribunal of its kind in Australia, finalising 83,424 cases in 2017–18.[63] VCAT's primary location is in Melbourne but it also hears cases in various Magistrates' Court locations and local council customer service offices across the suburbs and regional Victoria,[64] and sits at the Neighbourhood Justice Centre in the City of Yarra.[65]

50 See, eg, Victorian Civil and Administrative Tribunal, *Annual Report 2016–17* (Report, 2017) 2, 29.
51 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 284.
52 'Review jurisdiction' means VCAT has the power to review decisions made by an original decision maker such as a government agency, a statutory authority or other Administrative decision maker: Victorian Civil and Administrative Tribunal, *Application for Review of a Decision* (Web Page) <https://www.vcat.vic.gov.au/get-started/review-and-regulation/application-for-review-of-a-decision>.
53 See, eg, *Aboriginal Heritage Act 2006* (Vic) pt 8; *Heritage Act 2017* (Vic) ss 109–12; Planning and Environment Act 1987 (Vic) ss 77–82B.
54 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 10(1).
55 Ibid s 11(1)–(2); see also *Victorian Civil and Administrative Tribunal, List Of VCAT Members* (Web Page, 1 February 2019) <https://www.vcat.vic.gov.au/about-us/list-of-vcat-members>.
56 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 30(2); *Victorian Civil and Administrative Tribunal, Our Leadership* (Web Page) <https://www.vcat.vic.gov.au/about-us/our-leadership>.
57 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 10; see also *Victorian Civil and Administrative Tribunal, Who We Are* (Web Page) <www.vcat.vic.gov.au/about-us/who-we-are>.
58 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—VCAT Small Civil Claims* (Report) 4 <https://engage.vic.gov.au/accesstojustice>.
59 An order of a court or tribunal stipulating that legal costs be paid by one party to another. Also known as 'party–party' costs. These costs are 'either the amounts lawyers charge their clients for providing legal services or amounts recoverable by the successful party for the work done by their lawyers in legal proceedings. Legal costs include charges for the lawyers' services and disbursements, including barristers' fees, doctors' reports and the reasonable costs of court recordings and transcripts.' Parties can also agree that one party will pay the other parties' costs to settle their dispute: see Supreme Court of Victoria, *Costs Court* (Web Page, 2019) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/costs-court>.
60 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(3).
61 *Magistrates' Court Act 1989* (Vic) s 131.
62 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1).
63 Victorian Civil and Administrative Tribunal, *About VCAT* (Web Page) <www.vcat.vic.gov.au/about-vcat>; *Victorian Civil and Administrative Tribunal, Annual Report 2017–18* (Report, 2018) 7.
64 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 87; see also *Victorian Civil and Administrative Tribunal, Contact Us (Web Page) <www.vcat.vic.gov.au/contact-us>.*
65 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 87; see also Neighbourhood Justice Centre, *What Happens at VCAT* (Web Pag, 22 June 2018) <https://www.neighbourhoodjustice.vic.gov.au/attend-court/going-to-vcat/what-happens-at-vcat>.

7.30 VCAT's decision makers and processes differ from a court's.[66] It is less formal than a court. VCAT is bound by the rules of natural justice,[67] but not by the complex rules of evidence,[68] or other procedures of the courts.[69] Hearings must be conducted with 'as little formality and technicality' and 'as much speed' as the law and a proper consideration of the matter allow.[70] Parties may only appear with lawyers in limited circumstances or with VCAT's permission.[71] Unlike most courts, VCAT may conduct hearings in a 'quasi-inquisitorial' manner, taking an active role in determining the facts of a matter, such as by asking the parties questions.[72]

7.31 VCAT's website provides parties with informative material to help guide them through VCAT's processes including videos and a YouTube clip.[73] Further information is also available through the registries and the Litigant in Person Co-ordinator.

7.32 The Access to Justice Review noted that VCAT's active case management systems are helpful. It provides an example of active case management in VCAT's Human Rights List:

> Once a person has filed their matter, VCAT will serve the documents on the respondent and, in some cases, contact the parties to discuss the matter proceeding direct to a compulsory conference or mediation. Alternatively, the case will be listed for a directions hearing where VCAT's processes are explained and discussed with the parties.[74]

7.33 VCAT's website aims to assist people who speak languages other than English, by providing information in eight languages[75] and free access to interpreters and translators.[76]

7.34 VCAT has also improved the website's accessibility for people with disabilities.[77] VCAT's Accessibility Action Plan 2018–2022 sets out how VCAT 'will assist people with disability to gain better access to the tribunal'.[78]

Alternative dispute resolution—VCAT

7.35 VCAT uses a range of alternative dispute resolution (ADR) processes to help parties resolve their dispute without a full hearing.[79] They are conducted by 'members, staff, and external mediators from a panel who are engaged on a sessional basis'.[80]

66 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 10; Victorian Civil and Administrative Tribunal, Submission No 34 to Victorian Government, *Access to Justice Review* (2016) 1.
67 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(a). Natural justice means 'the right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased … decision maker, and the right to have that decision based on logically probative evidence per *Salemi v MacKellar* (No 2) (1977) 137 CLR 396': Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004).
68 '… except to the extent that it adopts those rules …': *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b). The body of law regulating the ascertainment of facts in litigation. Evidence law operated to apply rules of proof as a constraint upon the adduction of facts in civil and criminal trials: Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'evidence'.
69 '… except to the extent that it adopts those rules, practices or procedures': *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b).
70 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d).
71 Ibid (Vic) s 62; see also Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 10; Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—Self-Represented Litigants* (Report) 4 <https://engage.vic.gov.au/accesstojustice>.
72 Victorian Civil and Administrative Tribunal (VCAT), *VCAT Practice Note PNVCAT3: Fair Hearing Obligation,* 1 January 2013, [13]–[14].
73 Victorian Civil and Administrative Tribunal, *YouTube* (January 2019) <https://www.youtube.com/channel/UCc73nMfBWIiAc0w_Gb4vAEw>
74 Department of Justice and Regulation (Vic), *Access to Justice Review Background Paper—Self-Represented Litigants* (Report) 5 <https://engage.vic.gov.au/accesstojustice>.
75 Victorian Civil and Administrative Tribunal, *Other Languages* (Web Page) <https://www.vcat.vic.gov.au/other-languages>.
76 Victorian Civil and Administrative Tribunal, *Practice Note— PNVCAT3 Fair Hearing Obligation*, 1 January 2013 [10].
77 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 18.
78 Victorian Civil and Administrative Tribunal, *VCAT Accessibility Action Plan 2018–2022* (Report, November 2017) 3; see also Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 22.
79 See Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018.
80 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 204.

Compulsory conference

7.36 Any claim may be referred to a compulsory conference before a hearing by a Tribunal member (or principal registrar) or parties may refer themselves.[81] Compulsory conferences are conducted by a Tribunal member or the principal registrar.[82]

7.37 Compulsory conferences are private and confidential. They allow the Tribunal member to take an active role in helping the parties to resolve the dispute. The Tribunal member will assist parties in identifying issues of fact and law, encourage settlement, and offer opinions as to the strengths and weaknesses of each party's case.[83]

7.38 If resolution cannot be achieved through the compulsory conference, then the Tribunal member can issue orders and directions for the final hearing at a later date. Parties do not incur additional costs for compulsory conferencing.[84] Conversations during compulsory conferences are generally confidential and cannot be used in hearings.[85]

Mediation

7.39 Any claim may be referred to mediation and is conducted pursuant to section 88 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). This can occur with or without the consent of the parties.

7.40 Mediation is conducted by a person nominated by the Tribunal or principal registrar.[86] Key issues are identified and settlement is encouraged. Mediation may target all the issues or a subset of them. Conversations are confidential and cannot be used in hearings.[87]

7.41 The mediator or Tribunal member's role is less active than in compulsory conferencing, as they cannot 'give advice about a party's prospects of success' or 'put forward options for settlement of the proceeding'.[88]

Fast track mediation and hearing program

7.42 For some Civil Division claims for goods and services between $500 and $10,000 parties may participate in VCAT's fast track mediation and hearing program.[89]

7.43 The fast track program is administered by the Dispute Settlement Centre of Victoria (DSCV). It began operating in VCAT's main location in Melbourne and then in Geelong.[90] The program leverages DSCV's existing presence in regional areas.[91] Parties engage in the program approximately six weeks after an application has been lodged. The typical process involves:

- an initial telephone conversation with DSCV mediators to explore options for resolution
- the parties are scheduled for mediation and provided with information about the mediation process
- mediation (up to 90 minutes).[92]

7.44 If mediation does not result in an agreement, the matter will generally proceed to a VCAT

81 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 83; See Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018, 5. See also *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 64 and 65.
82 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 83(1).
83 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018, 4–5; see also Victorian Civil and Administrative Tribunal, *Compulsory Conferences* (Web Page) <www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/compulsory-conferences>.
84 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 83; Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018, 6. See also Victorian Civil and Administrative Tribunal, *Compulsory Conferences* (Web Page) <www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/compulsory-conferences>.
85 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 85.
86 Ibid (Vic) s 88(1).
87 Ibid s 92; Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018, 3.
88 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 204–5; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88; Victorian Civil and Administrative Tribunal, *Mediations* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/mediations>.
89 Victorian Civil and Administrative Tribunal, *Fast Track Mediation and Hearing* (Web Page) <https://www.vcat.vic.gov.au/resources/fast-track-mediation-and-hearing>.
90 The FTMH program is a staged program, starting in Geelong and Warrnambool: Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–18* (Report, 2018) 25.
91 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–-18* (Report, 2018) 25. Further regional expansion is planned.
92 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–18* (Report, 2018) 25.

hearing on the same day for a legally binding decision.[93] VCAT can review agreements reached in mediation and issue consent orders.[94] Even if no settlement is reached during mediation, 'parties enter the final hearing with a better understanding of each other's points of view'.[95] Engaging in mediation before a hearing may also shorten the typical timeframe for VCAT hearings.[96]

VCAT and the 1998 Fences Review

7.45 The possibility of conferring jurisdiction on VCAT to hear fence disputes was previously explored by the then Parliamentary Law Reform Committee[97] in its 1998 review of the Fences Act:[98]

> VCAT could perform a larger role in providing an efficient and cost effective forum for the resolution of a wider range of neighbour disputes. Consequently, the Committee recommends the creation of a 'Neighbour Disputes' Division of the Tribunal with the jurisdiction under the proposed Boundaries and Dividing Fences Act at its core.[99]

7.46 This recommendation was not, however, implemented. The Government's 2001 response to this recommendation provides some context:

> The Government … notes that there are complex issues to be considered in the relocation of any jurisdiction. In particular, the Government is concerned that regional and rural Victoria remain serviced in the comprehensive manner in which they are currently serviced by local Magistrates' courts. It proposes to consider further the necessity of an entirely new Division at the Tribunal, and whether broader disputes would be better resolved in another arena.[100]

7.47 Currently, fencing disputes are heard in the Magistrates' Court.

The approach in other jurisdictions

7.48 As mentioned earlier in this report, neighbourhood tree disputes are heard in the Land and Environment Court of New South Wales (NSWLEC), the Queensland Civil and Administrative Tribunal (QCAT), and the Resource Management and Planning Appeal Tribunal (RMPAT) in Tasmania.

New South Wales

7.49 The NSWLEC adjudicates tree disputes under the NSW Act. The NSWLEC is a superior court, with equal status to the NSW Supreme Court.[101]

93 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal); Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–18* (Report, 2018) 25.

94 Victorian Civil and Administrative Tribunal, *Practice Direction PNVCAT1: Common Procedures,* 14 December 2018, cl 34. A consent order is a legal document issued by VCAT to confirm an agreement between parties: Victorian Civil and Administrative Tribunal, *Consent Orders* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/consent-orders>.

95 Consultation 7 (Dispute Settlement Centre of Victoria).

96 Ibid.

97 A bipartisan committee of the Victorian Parliament which can inquire into and report on legal, constitutional or parliamentary reform, the administration of justice, and law reform. The Parliamentary Law Reform Committee is a former Joint Investigatory Committee of the Parliament of Victoria. On 1 August 2013 it merged with the Drugs and Crime Prevention Committee and became the Law Reform, Drugs and Crime Prevention Committee: see Parliament of Victoria, 'Law Reform', *Committees* (Web Page) <https://www.parliament.vic.gov.au/57th-parliament/lawreform>.

98 Law Reform Committee, Parliament of Victoria, *Review of the Fences Act 1968* (Report, 1998).

99 Ibid 2.32.

100 Victorian Government, *Government Response to the Victorian Law Reform Committee Review of the Fences Act 1968* (Report, 2001) 1–2.

101 *Land and Environment Court Act 1979* (NSW) s 5(1); see also Land and Environment Court of New South Wales, *About Us* (Web Page, 29 April 2015) <http://www.lec.justice.nsw.gov.au/Pages/about/about.aspx>.

Decision-making expertise

7.50 The NSWLEC is a specialist jurisdiction.[102] Its decision makers are judges and commissioners, led by a chief judge.[103]

7.51 Tree disputes are usually heard by 'at least one Commissioner with specialist knowledge in arboriculture who is an arborist'.[104] This provides the parties with some flexibility in relation to the need for expert evidence.

7.52 Judges of the NSWLEC may also hear and determine tree disputes. However, these hearings are conducted in Court rather than on-site.[105] Judges contribute to the development of jurisprudence in this area and Tree Dispute Principles.[106]

Case management and preliminary directions

7.53 There is a high level of self-representation among litigants in the NSWLEC for tree dispute matters. The NSWLEC's assistant registrar helps triage matters when they are filed, keeps parties on track and assists them to comply with procedural requirements.[107]

7.54 Once it is determined that the tree dispute falls within the scope of the NSWLEC's jurisdiction, a preliminary hearing is held.[108] A final hearing date is set for a time that is usually no more than six weeks after the preliminary hearing.[109]

Alternative dispute resolution

7.55 The NSWLEC encourages the use of ADR to resolve disputes.[110] However, the Commission was informed that parties are rarely referred to ADR once a hearing has commenced.[111] The NSWLEC informed the Commission that only one legally complex tree dispute has been referred to ADR.[112]

7.56 The Commission was told that informal negotiations have generally reached a stalemate by the time an application to the Court is made. However, the Court advised that if it appears that the parties may be open to negotiating a resolution, the Court may offer to adjourn the matter, and make consent orders if parties reach an agreement, for example, through mediation.[113]

Final on-site hearing

7.57 Nearly all tree disputes are heard and determined on site on the same day.[114] Commissioners will travel to the site of the tree dispute, including all regional areas.[115]

7.58 The hearing begins on neutral territory to the parties, such as a footpath or alleyway. The Commissioner and the parties visit the tree owner's site and the affected neighbour's site to view and assess the tree. Decisions are normally made at the conclusion of the on-site hearing in the presence of the parties.[116]

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102 *Land and Environment Court Act 1979* (NSW) s 5(1).
103 Ibid ss 7,12.
104 Land and Environment Court of New South Wales, *Practice Note No 2: Class 2 Tree Disputes,* 1 December 2018, [42].
105 Consultation 11 (Land and Environment Court of New South Wales).
106 The Court will set out tree dispute principles, from time to time, when appropriate cases arise, to provide an understanding of how the Court has approached a particular aspect of such disputes. While tree dispute principles are stated in general terms, they may be applied to particular cases to promote consistency. Tree dispute principles are not legally binding'. For a list of the Court's Tree Dispute Principles, see Land and Environment Court of New South Wales, *Tree Dispute Principles* (Web Page, 25 September 2017) <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/tree_principles.aspx>.
107 Consultation 11 (Land and Environment Court of New South Wales).
108 Land and Environment Court of New South Wales, *Practice Note Class 2: Tree Disputes*, 1 December 2018, [14].
109 Ibid [16].
110 Land and Environment Court of New South Wales, *Annual Review* (Report, 2017) 18.
111 Consultation 11 (Land and Environment Court of New South Wales).
112 This occurred under section 26 of the *Civil Procedure Act 2005* (NSW). This matter was resolved in mediation: Consultation 11 (Land and Environment Court of New South Wales).
113 Consultation 11 (Land and Environment Court of New South Wales).
114 Only matters involving large sums of money or complex legal or structural engineering issues may be too complex to be determined on site, although an on-site hearing would be conducted before the matter is decided in Court: Consultation 11 (Land and Environment Court of New South Wales).
115 Consultation 11 (Land and Environment Court of New South Wales).
116 Ibid.

7.59 Although hearings are conducted on site, the usual formalities of the NSWLEC still apply, such as giving exhibit numbers to documents. [117]

Timeframes

7.60 A hearing generally occurs three months after the application is filed. This is shorter than matters in other lists of the Court.[118] If a matter is urgent, it is heard in less than three months and may be heard in Court, however urgent matters of this kind are generally rare.[119]

Queensland

7.61 QCAT is a tribunal established under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) to determine and review disputes and administrative decisions.[120]

7.62 QCAT is also a 'court of record'[121] (or a 'court of the State')[122] 'capable of being invested with the judicial power of the Commonwealth'.[123] In *Amos v Fett,*[124] QCAT explained that:

> although the tribunal has the formal status of a court of record with summary jurisdiction, it is really a 'court substitute' characterised and distinguished by greater procedural flexibility and evidentiary freedom than a regular court; offering wider remedial options including making 'fair and equitable orders' in resolving minor civil disputes, awarding compensation for future rental losses caused by wrongful termination and granting relief from excessive hardship.[125] [Footnotes omitted]

7.63 In *Queensland Building & Construction Commission v Whalley,*[126] QCAT further explained that although it is a court of record, it is an 'inferior court of record' and that it:

> has no jurisdiction other than as granted by the QCAT Act or other enabling legislation. It has no inherent power to make decisions appropriate to redress perceived or discovered wrongs in a matter before it as might be presumed to be the case in a matter before the Supreme Court.[127]

7.64 QCAT is unusual because it also has an internal Appeal Tribunal. A person can appeal the decision of a QCAT member on a question of law, fact or combination of law and fact in certain circumstances with leave of the Appeal Tribunal.[128] See Chapter 9.

Decision-making expertise

7.65 QCAT is led by the president, who is a Supreme Court judge.[129] Tribunal members are legal experts or other specialists with knowledge relevant to the matter being heard.[130] QCAT members who hear tree disputes do not have particular expertise in arboriculture, although they are legally qualified.[131]

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117 Consultation 11 (Land and Environment Court of New South Wales).
118 Ibid.
119 Ibid.
120 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 11. For a full list of matter types, see Queensland Civil and Administrative Tribunal, *Matter Types* (Web Page, 29 November 2017) <www.qcat.qld.gov.au/matter-types>.
121 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.
122 Within the meaning of section 77(iii) of the *Australian Constitution: Owen v Menzies* (2012) 293 ALR 571; see also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.
123 Pamela O'Connor, *Tribunal Independence* (The Australasian Institute of Judicial Administration Incorporated, 2013) 3 n 19.
124 [2016] QCATA 120 [30].
125 *Amos v Fett* [2016] QCATA 120 [30].
126 [2018] QCATA 38.
127 *Queensland Building & Construction Commission v Whalley* [2018] QCATA 38 [37].
128 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 146, 147. See also Queensland Civil and Administrative Tribunal, *Decision About a Minor Civil Dispute* (Web Page, 15 February 2019) <https://www.qcat.qld.gov.au/qcat-decisions/appealing-a-qcat-decision/decision-about-a-minor-civil-dispute>. Whereas Cf appeals of VCAT decisions, which are limited to questions of law and determined by a court with leave. In order to appeal on a question of law, a person needs to seek leave of the Supreme Court of Victoria Court, Court of Appeal if the decision was made by a judge at VCAT, or the Trial Division of the Supreme Court if the decision was made by a VCAT member: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).
129 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 175(1).
130 Consultation 15 (Queensland Civil and Administrative Tribunal); Queensland Civil and Administrative Tribunal, *Organisational Structure* (Web Page, 24 September 2018) <https://www.qcat.qld.gov.au/about-qcat/organisational-structure>. The president decides which member(s) will hear a matter, with no more than three members hearing a matter.
131 Consultation 15 (Queensland Civil and Administrative Tribunal).

7.66 QCAT may appoint an independent tree assessor, a senior arborist with a qualification equivalent to an AQF Level 5 with five years of experience,[132] to provide the Tribunal with expert evidence.[133] The cost of a tree assessor is capped at $1000.[134] QCAT will start from the general proposition that the parties are to share the costs of the tree assessor.[135]

7.67 QCAT may appoint a tree assessor where it is obvious that parties cannot come to an agreement or where QCAT is unable to make a decision without expert arboricultural opinion (for example, in a complex matter with a large number of trees).[136] Tree assessors travel throughout Queensland to conduct inspections.[137] Even if a tree dispute is not heard on site, QCAT has the benefit of the tree assessor's expertise where one is appointed. A QCAT tree assessor provides similar arboriculture expertise to that which a Commissioner of the NSWLEC would bring to a case.

Case management and preliminary directions

7.68 A directions hearing is conducted before a final hearing. At a directions hearing QCAT will triage the matter by identifying the nature of the dispute and the issues in dispute. Parties may be referred to ADR (mediation or compulsory conference) or advised to negotiate with one another. A tree assessor may also be appointed.[138]

7.69 Section 29 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) requires the Tribunal to ensure that parties understand the practices and procedures of QCAT as well as the nature of the claims being brought and the power of the Tribunal in relation to the claims. Accordingly, QCAT will ensure that parties are educated about the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* and QCAT processes and powers.

7.70 Parties are also informed about the different implications of resolving their matter through ADR with an agreement versus resolution via court orders. At directions hearings parties are encouraged to talk to each other. The member can pause proceedings to allow parties to leave the hearing room to negotiate.[139]

Alternative dispute resolution

7.71 There is a significant focus on alternative dispute resolution (ADR) within the tree disputes jurisdiction of QCAT. Only a small number of tree disputes proceed to a final hearing—most are resolved through ADR.[140] A referral to a compulsory conference is more common than mediation.[141]

7.72 Compulsory conferences have a high rate of resolution, with 207 out of 216 matters referred from 2013 to October 2018 having been resolved through this method.[142] A compulsory conference is chaired by a Tribunal member, who may meet privately with each party to discuss the issue confidentially. All discussions at a compulsory conference are confidential.[143]

132 Consultation 15 (Queensland Civil and Administrative Tribunal).
133 Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013: Arrangements for Applications for Orders to Resolve Other Issues about Trees,* 3 April 2014 [4]–[5].
134 Ibid [6].
135 Ibid [7].
136 Consultation 15 (Queensland Civil and Administrative Tribunal).
137 See generally Ibid [5].
138 Consultation 15 (Queensland Civil and Administrative Tribunal).
139 Ibid.
140 Ibid.
141 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 67; *Consultation 15* (Queensland Civil and Administrative Tribunal). QCAT explained that members prefer to conduct compulsory conferences as a means of meeting the obligations set out in sections 28–29 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). Section 28 refers to 'Conducting proceedings generally' and section 29 refers to 'Ensuring proper understanding and regard'.
142 Consultation 15 (Queensland Civil and Administrative Tribunal).
143 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 70(2), 74; *Consultation 15* (Queensland Civil and Administrative Tribunal).

7.73 If the compulsory conference results in an agreement, the member will produce a written record to be signed by all parties and the member. The majority of tree disputes referred to a compulsory conference are resolved in this way. If the compulsory conference does not result in an agreement, the member will make directions or orders aimed at reducing the issues to be determined at the hearing.[144]

7.74 A similar process is applied for mediations.[145] Mediation also has a high resolution rate; with 59 out of 61 matters referred to mediation from 2013 to October 2018 having been resolved through this method.[146] If the parties reach an agreement, the mediator may record the terms of the agreement in writing and each party will then sign the agreement and receive a copy.[147] If the parties are not able to resolve the matter at mediation, the issues in dispute will be identified and provided to the Tribunal.[148] The matter will be set down for a subsequent hearing.[149]

7.75 QCAT may conduct ADR on site, usually on the tree owner's land.[150] However, on-site ADR is usually reserved for applications relating to an obstruction of a view.[151]

Final hearing

7.76 Matters are generally heard in QCAT's main location in Brisbane or at regional Magistrates' Court locations. QCAT members can travel to the nearest Magistrates' Court in the area to hear these matters.[152]

7.77 Final hearings in regional areas can be conducted via telephone conference.[153] The Tribunal member coordinates the telephone conference from Brisbane and parties join by phone.[154]

Timeframes

7.78 The average time for a matter to be resolved, from the lodgment of the application to the making of orders, is 16 weeks.[155] QCAT noted that it very rarely needs to expedite matters. Where needed, it has power to order interim injunctive relief.[156]

Tasmania

7.79 RMPAT is an independent tribunal that hears appeals relating to the management of natural and physical resources and planning and tree disputes under the *Neighbourhood Disputes About Trees Act 2017* (Tas) (The Tasmanian Act).[157]

Decision makers

7.80 RMPAT is led by an Australian legal practitioner of not less than five years standing.[158] Tribunal members are appointed for their 'knowledge and expertise in relevant areas to the appeal proceedings'.[159] The Tribunal is ordinarily constituted by three members and matters are usually heard by the chairperson or a member.[160]

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144 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 69; *Consultation 15* (Queensland Civil and Administrative Tribunal).
145 See generally, *Queensland Civil and Administrative Tribunal Act 2009* (Qld) div 3.
146 Consultation 15 (Queensland Civil and Administrative Tribunal).
147 Queensland Civil and Administrative Tribunal, *Mediation* (Web Page, 12 April 2017) <https://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings/mediation>.
148 Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 6 of 2010: Compulsory Conferences and Mediation,* 20 April 2010.
149 Consultation 15 (Queensland Civil and Administrative Tribunal).
150 Ibid.
151 Disputes over trees that obstruct a view are outside the scope of this inquiry's terms of reference.
152 Consultation 15 (Queensland Civil and Administrative Tribunal).
153 See, eg, Queensland Civil and Administrative Tribunal, *Attending by Phone* (Web Page, 12 March 2019) <https://www.qcat.qld.gov.au/going-to-the-tribunal/attending-by-phone>.
154 Consultation 15 (Queensland Civil and Administrative Tribunal).
155 Ibid.
156 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 59(1); Consultation 15 (Queensland Civil and Administrative Tribunal).
157 Resource Management and Planning Appeal Tribunal, *Resource Management and Planning Appeal Tribunal* (Web Page, 2 January 2019) <www.rmpat.tas.gov.au/>.
158 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 6(a).
159 Resource Management and Planning Appeal Tribunal, *Practice Direction No 7: Hearing Process*, 19 November 2018 [7.2].
160 Ibid.

Case management and preliminary directions

7.81 Once an application is filed, the Tribunal will review the application and determine if any additional information is required from the parties.[161] RMPAT explained 'an intake assessment of an application is made to ensure that information required by the legislation and the Tribunal has been filed. Requests for the provision of information may be issued before the application may proceed for service upon respondents or listing for hearing may occur'. In 4 of the 16 applications filed under the Tasmanian Act, the Tribunal has requested additional information from the applicant before acceptance of the application.[162]

7.82 If the Tribunal is satisfied the application has met all the necessary requirements, it will set a preliminary conference within approximately 14 to 21 days.[163] At the preliminary conference the Tribunal will consider a number of matters, such as the preparation of evidence and material, and whether ADR may be appropriate to assist the parties to resolve the dispute.[164]

Alternative dispute resolution

7.83 At the preliminary conference RMPAT must consider whether the matter could be settled through ADR such as mediation, conciliation or neutral expert evaluation.[165] The Tribunal notes that 'virtually all disputes … will be referred' to ADR before 'proceeding to a full hearing'.[166]

7.84 Mediation is the most common form of ADR used by RMPAT.[167] The Tasmanian Act requires RMPAT to consider the following factors when determining whether or not to direct parties to resolve their tree dispute, including by making mediation or conference directions under sections 16A or 17 of the RMPAT Act:

- any threats of violence made by one of parties;
- any court orders restraining the behaviour of the parties; and
- whether the parties have already participated in any form of ADR.[168]

7.85 Mediation can occur before a hearing or during a hearing following an order to stay proceedings. Matters discussed in mediation remain confidential.[169]

7.86 RMPAT advised that a 'significant proportion of applications are withdrawn before proceeding to hearing'. It was suggested that in the majority of these cases the parties had engaged in negotiations themselves or through formal mediation.[170]

7.87 Parties who reach an agreement through ADR can submit their agreement to the chairperson for consideration as consent orders of the Tribunal. Consent orders will be issued if the chairperson is satisfied the orders are appropriate and within the Tribunal's power.[171]

161 Resource Management and Planning Appeal Tribunal, *Practice Direction No 18: Applications under the Neighbourhood Disputes About Plants Act 2017*, 19 November 2018 [18.2.5].
162 Information provided by RMPAT to the Commission, April 2019.
163 Resource Management and Planning Appeal Tribunal, *Practice Direction No 18: Applications under the Neighbourhood Disputes About Plants Act 2017*, 19 November 2018 [18.3.1].
164 Ibid [18.3.3], [18.3.5].
165 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 16a; see also Resource Management and Planning Appeal Tribunal, *Practice Direction No 5: Alternative Dispute Resolution* (Practice Document, 19 November 2018) [5.1].
166 Resource Management and Planning Appeal Tribunal, *Practice Direction No 5: Alternative Dispute Resolution*, 19 November 2018 [5.2].
167 Ibid [5.7].
168 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 26(3).
169 Ibid s 16A.
170 Information provided by RMPAT to the Commission, April 2019.
171 Resource Management and Planning Appeal Tribunal, *Practice Direction 18: Applications under the Neighbourhood Disputes About Plants Act 2017*, 19 November 2018 [18.3.4]

Final hearing

7.88 If the parties cannot resolve their dispute through ADR, then the matter will proceed to a hearing in Hobart.[172]

7.89 Site inspections are conducted as part of the hearing process, usually without parties or their representatives present. However, 'if the parties wish to specifically ensure that the Tribunal members have regard to certain matters on the subject site', then they may arrange such a site inspection and notify RMPAT and other parties.[173]

Timeframes

7.90 RMPAT must deliver its decision in writing. A decision is usually made '14 to 21 days from the conclusion of the hearing', depending on the complexity of the matter.[174]

International jurisdictions

7.91 Neighbourhood disputes, including those about trees, are heard in tribunals in some international jurisdictions.

7.92 In New Zealand, tree disputes can be resolved in the Disputes Tribunal or the District Court depending on the type of claim. For claims in tort over destruction or damage to property and generally less than $15,000 (NZD),[175] parties may take legal action in the Disputes Tribunal.[176]

7.93 Legal action under the *Property Law Act 2007* (NZ) is taken in the District Court.[177] The *Property Law Act 2007* (NZ) sets out a statutory scheme for resolving tree disputes separately to actions in tort and allows an affected neighbour to seek orders in the District Court for the trimming or removal of a tree on the basis that it causes actual or potential risk to their life, health or property.[178]

7.94 In Singapore, neighbour disputes are resolved in specialised Community Disputes Resolution Tribunals (CDRTs) under the *Community Disputes Resolution Act 2015*.[179] CDRTs operate under a division of state courts and deal exclusively with neighbour disputes. Matters are heard by tribunal judges who are appointed district judges of the State Courts.[180]

7.95 The Act was implemented 'to hear cases involving intractable disputes between neighbours, after all efforts including community mediation have been exhausted'[181] and aims to 'facilitate the resolution of community disputes by providing for a statutory tort for community disputes and for the establishment of Community Disputes Resolution Tribunals to deal with such disputes'.[182]

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172 Resource Management and Planning Appeal Tribunal, *Practice Direction 7: Hearing Process*, 19 November 2018 [7.3].
173 Ibid [7.12].
174 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 24; Resource Management and Planning Appeal Tribunal, *Practice Direction 7: Hearing Process,* 19 November 2018 [7.13].
175 Or, if everyone agrees, up to NZ$20,000 (NZD): Disputes Tribunal of New Zealand, *What the Tribunal Can Help With* (Web Page, 29 June 2016) <https://www.disputestribunal.govt.nz/can-help-with/>.
176 *Disputes Tribunal Act 1988* (NZ) s 10(1)(c). The Disputes Tribunal is less formal than a court; it encourages parties to come to an agreement and makes a decision on the dispute if the parties cannot reach agreement: Disputes Tribunal of New Zealand, *'About the Tribunal'* (Web Page, 2 April 2019) <https://www.disputestribunal.govt.nz/about-2/>. If the amount claimed exceeds $15,000, an affected neighbour will usually need to make their claim in the District Court, which forms the base of New Zealand's court hierarchy: Disputes Tribunal of New Zealand, *What the Tribunal Can Help With* (Web Page, 29 June 2016) <https://www.disputestribunal.govt.nz/can-help-with/>; Courts of New Zealand, *Overview* (Web Page) <https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system>.
177 The *Disputes Tribunal Act 1988* (NZ) does not list the *Property Act 2007* (NZ) as an enactment that confers jurisdiction to on it: see sch 1, Pt 1.
178 It also allows an affected neighbour to seek orders on the basis that a tree unduly obstructs a view, and causes undue interference with the use and enjoyment of the applicant's land due to leaf litter, overhanging branches or by blocking sunlight: *Property Law Act 2007* (NZ) ss 334–5. However, these matters are beyond the scope of this inquiry.
179 A full list of actionable neighbour disputes is listed in section 4 of the *Community Disputes Resolution Act* (Singapore, 2015 rev ed). Although tree disputes are not explicitly mentioned in this list, the Act states that this list is not exhaustive, Ibid s 4(2).
180 Ibid s 14.
181 Ministry of Culture, Community and Youth (Singapore), *Community Dispute Management Framework* (Web Page, 15 February 2019) MCCY <https://www.mccy.gov.sg/sector/initiatives/community-dispute-management-framework>.
182 *Community Disputes Resolution Act* (Singapore, 2015 rev ed).

Community responses—where should tree disputes be resolved?

7.96 The consultation paper asked which decision-making forum should have jurisdiction to hear tree disputes under a new Act.

7.97 Community members and stakeholders were invited to take into account the following factors in their responses:

- cost
- formality
- the capacity of parties to participate in proceedings and represent themselves
- expertise of the decision makers
- powers of the decision makers
- resources of the court/tribunal
- location of the court/tribunal.

Community support for VCAT

7.98 Most responses on this issue were in favour of VCAT hearing tree disputes.[183]

7.99 Some community members explained that they considered VCAT to be less formal than a court and that it had the advantages of easier processes to navigate, and faster decision making.[184] Arborist Ben Kenyon described VCAT as having a 'round table feel'.[185] One person noted that VCAT was less costly.[186]

7.100 The City of Port Phillip explained that VCAT regularly makes decisions concerning vegetation in its Planning and Environment List. Port Phillip noted that vegetation and other environmental matters form an integral part of permit applications for development, and it would make sense for tree disputes concerning similar matters to be heard by the same decision-making body.[187] On the other hand, Dr Gregory Moore OAM stated that VCAT's current processes and procedures in matters involving vegetation can result in outcomes that disregard or overlook the merits of the tree.[188]

7.101 VCAT proposed that it would be the most suitable jurisdiction to administer the new Act. It suggested that tree disputes should be resolved at the lowest judicial level possible, involve informal processes[189] and low costs. VCAT highlighted its flexible processes and willingness to be more experimental than the courts. For example, directions hearings can be held over the phone and parties can be sent documents without the need to respond unless they object. VCAT is also reluctant to make parties attend the Tribunal more than necessary because of the associated costs, such as loss of income.[190]

7.102 VCAT indicated that tree disputes may be best determined in the Civil Division. In that list members already deal with civil disputes between parties and, if needed, can be supported by the expertise of planning and environment members. VCAT also stated that tree disputes involving damage to property could be heard in the Building and Property List.[191]

183 Submissions 7 (Ben Kenyon), 11 (Name withheld), 23 (Name withheld), 27 (Name withheld); Consultations 3 (HVP Plantations), 6 (Ben Kenyon), 12 (City of Port Phillip); Survey Respondents 42, 121.
184 Submission 27 (Name withheld); Consultations 3 (HVP Plantations), 6 (Ben Kenyon).
185 Consultation 6 (Ben Kenyon).
186 Submission 27 (Name withheld).
187 Consultation 12 (City of Port Phillip).
188 Consultation 2 (Dr Gregory Moore OAM).
189 VCAT contrasted its informal processes to the more formal process of the court, such as pleadings: Consultation 5 (Victorian Civil and Administrative Tribunal). Pleadings are 'written or printed statements that alternate between the parties to a dispute and define the issues to be decided in an action: *Chadwick v Bridge* (1951) 83 CLR 314; *Child v Stenning* (1877) 5 Ch D 695: Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004).
190 Consultation 5 (Victorian Civil and Administrative Tribunal).
191 Ibid. The Civil Division has three Lists: Civil Claims, Building and Property and Owners Corporations.

7.103 VCAT expressed support for carrying out on-site inspections of the tree and properties in appropriate circumstances. VCAT explained that inspections might be helpful for obvious cases of damage but may not be appropriate for more complex issues which may require the attendance of experts and other witnesses. On-site inspections often occur in the Planning and Environment List in the form of a visit by a VCAT member accompanied by parties or unaccompanied, before, during or after the hearing. Section 129 of the VCAT Act provides for the power of entry and inspection. [192]

7.104 VCAT's preferred approach is for an on-site inspection to occur after a hearing has taken place when the evidence has been heard.[193] Parties who are present during an inspection cannot argue their case but they can answer the member's questions about factual issues. The way on-site inspections are conducted is at the discretion of VCAT and may vary between VCAT Lists.[194]

7.105 VCAT also emphasised its 'strong ADR culture' and explained that in all of its Lists, parties have the opportunity to resolve their own disputes. VCAT is currently expanding its ADR program following recommendations of the Access to Justice Review.[195]

Community support for the Magistrates' Court

7.106 A number of people suggested that the Magistrates' Court should have jurisdiction to hear tree disputes under the new Act.[196]

7.107 The Magistrates' Court submission advised that it is well placed to hear and determine tree disputes and that a statutory scheme 'would readily work in conjunction with the suite of powers the [Magistrates' Court] already possesses as a court of law'.[197] The Magistrates' Court highlighted that it has the 'largest suburban and regional reach of any adjudicative body in Victoria'. Other advantages noted were that it has:

- equitable jurisdiction, allowing it to grant an injunction compelling a person to do or restrain from doing certain things and to provide a remedy where proceedings have not yet been commenced and damage has not yet occurred but is imminent
- a substantial video-hearing capacity
- the power to transfer a matter to a higher jurisdiction if needed
- power that may be exercised under the *Civil Procedure Act 2010* (Vic) which provides for extensive case management of matters to ensure the 'just, efficient, timely and cost effective resolution of the real issues in dispute'
- a suite of ADR mechanisms

7.108 The Court stated that it has successfully implemented other statutory schemes in its jurisdiction, such as the *Fences Act 1968* (Vic).[198]

7.109 Pointon Partners expressed the view that the Magistrates' Court should have jurisdiction because it already determines fence disputes.[199] It noted that where a dispute involves both fence and tree matters, then 'the same court should be permitted to make orders in relation to both fences and trees'.[200]

192 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal); see also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 129.
193 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
194 Ibid.
195 Consultation 5 (Victorian Civil and Administrative Tribunal).
196 Submissions 4 (Name withheld), 10 (Professor Phillip Hamilton), 21 (Pointon Partners Lawyers).
197 Submission 16 (Magistrates' Court of Victoria).
198 Ibid.
199 Submissions 21 (Pointon Partners Lawyers).
200 Ibid.

Community support for other options

7.110 A small number of people made suggestions for alternative decision-making forums.[201] The City of Port Phillip and one community member supported the introduction of a land and environment court or a land court in Victoria, to exclusively decide land and environmental matters[202] including disputes between neighbours about trees on private land

7.111 Pointon Partners and one community member suggested the introduction of a specialist tribunal for tree disputes:[203]

> constituted by one or more members with specialist knowledge of the key issues that are likely to arise (potentially lawyers, arborists, town planners, environmental consultants, etc). They might also include conciliators from DSCV, who would have significant experience in this area.[204]

7.112 Pointon Partners further stated that where a party is unsatisfied with the outcome, they should be:

> entitled to seek a review in the Magistrates' Court, and that this right of appeal operate as a hearing *ab initio.*[205]In this way, parties wishing to have complicated matters determined by the courts are not shut out from doing so. However, parties with simpler disputes (which are the overwhelming majority of disputes), would be entitled to have their dispute resolved in an informal, yet effective manner.[206]

7.113 Dr Gregory Moore OAM suggested there may be a case for establishing an Office of the State Arborist which would have 'powers similar to an ombudsman in tree-related matters on private and public land'.[207] The State Arborist should have significant arboricultural understanding and could provide independent and impartial advice when a tree dispute occurs.[208] The State Arborist could also 'take part in mediation and court cases related to trees'.[209] In Dr Moore's view, this approach would be cost-effective, consisting of only a few positions, such as the State Arborist, a lawyer and support staff, and costs could be met from the fees paid by the parties to the dispute.[210]

7.114 One person suggested that both VCAT and the Magistrates' Court should have jurisdiction. This would allow an applicant to decide the jurisdiction in which to commence legal action.[211]

7.115 Other responses proposed a role for local councils, through local laws or otherwise, to inspect trees and put tree owners on notice for trees causing interference. These community members suggested that tree owners who do not comply should be issued with a fine.[212]

201 Submissions 12 (Dr Gregory Moore OAM),19 (Name withheld), 21 (Pointon Partners Lawyers), 23 (Name withheld); Consultation 12 (City of Port Phillip).
202 Submission 19 (Name withheld); Consultation 12 (City of Port Phillip).
203 Submissions 21 (Pointon Partners Lawyers), 23 (Name withheld).
204 Submission 21 (Pointon Partners Lawyers).
205 *Ab initio* (Latin) means 'from the beginning': Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004).
206 Submission 21 (Pointon Partners Lawyers).
207 Submission 12 (Dr Gregory Moore OAM).
208 Ibid.
209 Ibid.
210 Ibid.
211 Submission 5 (Name withheld).
212 Submissions 5 (Name withheld), 6 (Name withheld).

Community responses—important characteristics of a tree dispute forum

The expertise of decision makers

7.116 A large number of people suggested that one of the most important characteristics of a decision maker in tree disputes should be an expert in arboriculture or other relevant fields.[213] Many endorsed the approach of the NSWLEC where commissioners trained in arboriculture determine matters.[214]

7.117 Dr Gregory Moore OAM stated:

> One of the advantages of the NSW Land and Environment Court in dealing with trees was that it appointed people with arboricultural expertise as commissioners to deal with cases involving trees … It would be worth considering following this model in Victoria.[215]

7.118 Acting Commissioner David Galwey of the NSWLEC explained:

> In my experience, appointing decision-makers with some arboricultural expertise to hear these matters allows discerning review of the situation and any specialist evidence. Experts' evidence may occasionally be misleading, despite the experts' obligation to a court. If the decision-maker has some expertise in the matter, this also allows many parties, especially in less complex matters, to come to court without having to pay for expert evidence. In NSW, the Commissioner hearing the matter has suitable expertise and can view the situation at the onsite hearing.[216]

7.119 Nillumbik Shire Council noted that an arborist would be best placed to identify any risks posed by a tree.[217] This approach was further supported by the City of Port Phillip.[218] The City of Boroondara stated:

> Cases should be heard by people with technical expertise in the field. Council considers that if a merits-based assessment is going to be made about a tree, then such decisions should be made by technical experts. This is the way in which the Planning and Environment List at the Victorian Civil and Administrative Tribunal (VCAT) operates. Council is also aware that some commissioners of the NSW Land and Environment Court have an environmental and/or arboricultural background.[219]

7.120 One submission cautioned that the expertise and practices of arborists can vary greatly. Accordingly, they stated that skills and qualifications would be best assessed by a panel that included experienced arborists and in accordance with clear criteria.[220]

On-site hearings or inspections

7.121 The community also felt strongly about the ability of the decision maker to conduct inspections or hear the matter on site.[221]

7.122 The NSWLEC advised that on-site hearings are a crucial aspect of the NSW scheme.[222] Acting Commissioner Galwey of the NSWLEC submited:

213 Submissions 4 (Name withheld), 19 (Name withheld), 23 (Name withheld), 25 (City of Boroondara).
214 Submissions 12 (Dr Gregory Moore OAM), 17 (Name withheld), 21 (Pointon Partners Lawyers), 25 (City of Boorondara), 27 (Name withheld), 29 (David Galwey); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo).
215 Submission 12 (Dr Gregory Moore OAM).
216 Submission 29 (David Galwey).
217 Consultation 9 (Nillumbik Shire Council).
218 Consultation 12 (City of Port Phillip).
219 Submission 25 (City of Boorondara).
220 Confidential submission.
221 Submissions 10 (Professor Phillip Hamilton), 29 (David Galwey); Consultations 9 (Nillumbik Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo).
222 Consultation 11 (Land and Environment Court of New South Wales).

> Having the hearing onsite is invaluable. Most matters in NSW are also completed onsite. There are often many factors to consider in a tree dispute, and the interaction between these can be important. It can be difficult to fully present this in a court.[223]

7.123 QCAT members are supported by the expertise of Tribunal-appointed tree assessors. QCAT explained that a site inspection is a 'critical' part of the tree assessor's assessment process.[224]

7.124 The City of Boroondara, which also favoured inspections of the tree on site, gave the example of VCAT, which conducts site visits in planning disputes to determine subjective issues such as neighbourhood character. Boroondara stated that it believes these on-site visits have been helpful in this context. Boroondara explained that, in the context of a tree dispute, words and photos do not necessarily provide the complete story, and on-site visits can lead to more creative solutions.[225]

Other important features

7.125 Other characteristics that community members considered important included:

- support for self-represented litigants[226]
- conducting hearings in accessible locations so that parties do not have to travel great distances[227]
- ensuring formal adjudication is not too costly.[228]

The Commission's conclusions—where should tree disputes be resolved?

VCAT to determine tree disputes under the new Act

7.126 The Magistrates' Court has many characteristics that would make it suitable to administer the new Act. However, on balance, the Commission concludes that VCAT is better placed to administer the new Act and to resolve these community-based disputes. This conclusion aligns with community responses.

7.127 Tree disputes are generally small matters between two parties that involve factual interpretation, not complex legal analysis. The new Act is intended to help parties to reach a practical and low-cost solution to their dispute so that they can carry on living close to each other.

7.128 The Commission is impressed by the success of interstate schemes and observes that they do not demand significant resources. In these circumstances it is unnecessary to burden the courts with these cases.

223 Submission 29 (David Galwey).
224 Consultation 15 (Queensland Civil and Administrative Tribunal).
225 Consultation 8 (City of Boroondara).
226 Submission 31 (Barwon Community Legal Service).
227 Consultation 10 (Baw Baw Shire Council).
228 Ibid.

7.129 Victoria does not have the benefit of a specialised Land and Environment Court as exists in New South Wales. Many of the practical features of the New South Wales and Queensland schemes could be adapted to work well in VCAT because VCAT has the most flexibility to enable this to occur.

7.130 Disputes would most appropriately be adjudicated in VCAT for the following reasons:

- Application costs can be kept to a minimum in VCAT proceedings and parties generally bear their own costs.
- The use of ADR is encouraged and VCAT has established ADR programs.
- VCAT has considerable flexibility in the way it can conduct hearings, is specifically designed for parties without legal representation and is less formal than a court.
- VCAT decision makers have existing relevant experience in hearing planning, environmental and small civil claims.

7.131 The Commission's reasons are explained in the following section.

Affordability and fast decision making

7.132 It is less costly to pursue a matter in VCAT than in the Magistrates' Court. VCAT has a fee relief program for people experiencing financial hardship.[229] Fees may be postponed, reduced or completely waived.[230]

7.133 Parties in VCAT are expected to bear their own costs.[231] The Commission also acknowledges BCLS' view that tree disputes should be a 'no cost jurisdiction' so that parties already experiencing financial hardship are not burdened by a cost order made against them.[232]

7.134 Baw Baw Shire Council was in favour of awarding costs when matters are commenced vexatiously or without merit.[233] VCAT may order costs in certain circumstances, such as where the matter was brought without merit, or to harass, annoy or distress someone, or is not well supported in fact or law.[234]

7.135 Matters are likely to be resolved more quickly in VCAT, with many matters heard within four to eight weeks depending on their subject matter.[235] VCAT aims to limit the duration of hearings where practical so as not to overburden parties.[236]

Alternative dispute resolution and flexibility

7.136 Tree disputes in Queensland and Tasmania can often be resolved at mediation or negotiation prior to a hearing.[237] QCAT's resolution rates through ADR processes are high.[238]

229 Victorian Civil and Administrative Tribunal, *Fee Relief* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/fees-at-vcat/fee-relief>.
230 Ibid.
231 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1); see also Victorian Civil and Administrative Tribunal, *Who Pays For My Legal Costs?* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/on-hearing-day/who-pays-for-my-legal-costs>.
232 Submission 31 (Barwon Community Legal Service).
233 Consultation 10 (Baw Baw Shire Council).
234 For a full list of circumstances in which VCAT can award costs, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1); see also Victorian Civil and Administrative Tribunal, *Who Pays For My Legal Costs?* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/on-hearing-day/who-pays-for-my-legal-costs>.
235 For example, owners corporation matters take eight weeks to reach a final hearing; residential tenancies matters take two weeks from the termination date to reach a final hearing; civil claims such as for goods and services take eight weeks to reach a final hearing. Some matters in the Building and Property List are resolved in eight weeks but many matters 'may take longer for other reasons, such as the complexity of legal and technical issues particularly where the dispute concerns multi-unit developments, multiple related files, additional parties are joined to a proceeding and defects are identified after a proceeding starts.': See Victorian Civil and Administrative Tribunal, *How Long a VCAT Case Takes* (Web Page) <https://www.vcat.vic.gov.au/about-us/how-long-a-vcat-case-takes>
236 Consultation 5 (Victorian Civil and Administrative Tribunal).
237 Consultation 15 (Queensland Civil and Administrative Tribunal); information provided by RMPAT to the Commission, April 2019.
238 Consultation 15 (Queensland Civil and Administrative Tribunal).

7.137 VCAT already offers extensive ADR services.[239] Importantly, in 2017 VCAT and DSCV formally partnered to expand the provision of DSCV's ADR services to VCAT.[240] DSCV's experience in managing tree disputes will be of great benefit to VCAT in determining tree disputes. The Commission considers that VCAT's existing ADR mechanisms should be used for tree disputes that are initiated in the Tribunal.

7.138 VCAT allows for more responsive and flexible processes than the Magistrates' Court. Unlike most Australian courts, VCAT can take an active role in determining the facts of a matter before the Tribunal, usually by asking questions.

Accessibility and regional presence

7.139 Court processes are more difficult to navigate than those of a tribunal. VCAT has been established to enable people to participate in matters without lawyers. It provides active case management and resources to help selfrepresented litigants.[241] It also provides free interpreter services[242] and volunteers from Court Network who offer assistance, information and emotional support.[243]

7.140 VCAT is making further improvements flowing from recommendations from the Access to Justice Review. It has partnered with Justice Connect[244] 'to identify the unmet needs of people representing themselves and scope a proposed model for a self-help service at VCAT'.[245] This partnership builds on VCAT's previous Self Help Centre pilot program[246]

7.141 VCAT is also changing the way it manages cases. VCAT is instigating a 'system where all parties can start a matter online, have access to an electronic case file and follow its progress online'.[247] In July 2017, VCAT began a four-year digital strategy 'to deliver better online services'.[248]

7.142 VCAT has less regional reach than the Magistrates' Court. VCAT's only standalone location is in Melbourne's Central Business District.

7.143 Since the publication of the government's response to the Fences Review in 2001 which expressed concern about VCAT's regional reach, VCAT has expanded its regional presence.[249] VCAT's Strategic Plan 2018–22 states:

> We want to expand access for people living in regional areas. We will enhance our regional and suburban coverage with venues conveniently located in areas where our services are needed most. We are focussed on providing welcoming, fit-for-purpose venues that respond to local needs within local communities.[250]

7.144 The Tribunal now visits a regional area every day in Victoria, as determined by scheduled hearings and needs.[251] VCAT sits at regional locations in Magistrates' Courts, local council customer service centres and the City of Yarra's Neighbourhood Justice Centre. During 2017–18, VCAT held hearings at Magistrates' Court locations in Bairnsdale, Ballarat, Benalla, Bendigo, Castlemaine, Colac, Dromana, Echuca, Geelong, Hamilton, Horsham,

239 See, eg, Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018.
240 Consultation 7 (Dispute Settlement Centre of Victoria).
241 See, eg, Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT3: Fair Hearing Obligation*, 1 January 2013, 4–5.
242 Ibid 3.
243 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal). Volunteers cannot provide legal advice. Court Network is a community organisation that supports people accessing the court system: see Court Network, *What We Do* (Web Page, 2019) <https://courtnetwork.com.au/about/what-we-do/>.
244 Justice Connect is a not-for-profit organisation that aims to improve access to the justice system by putting people in touch with pro bono (free) legal assistance, conducting research and engaging in advocacy: Justice Connect, *How We Help* (Web Page) <https://justiceconnect.org.au/how-we-help/>.
245 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–2018* (Report, 2018) 21.
246 Victorian Civil and Administrative Tribunal, *Building a Better VCAT: Strategic Plan 2014–17* (Report) 1.
247 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2016–2017* (Report, 2017) 24.
248 Ibid 16.
249 See, eg, Justice Kevin Bell, *One VCAT–President's Review of VCAT* (Report, 30 November 2009) 71–2; Recommendations 54–56; *Victorian Civil and Administrative Tribunal, Building A Better VCAT: Strategic Plan 2014–17* (Report) 3; *Victorian Civil and Administrative Tribunal, VCAT For the Future: Strategic Plan 2018–22* (Report) 8.
250 Victorian Civil and Administrative Tribunal, *VCAT For the Future: Strategic Plan 2018–22* (Report) 8.
251 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).

Kerang, Korumburra, Mildura, Moe, Morwell, Portland, Sale, Seymour, Shepparton, Swan Hill, Wangaratta, Warrnambool and Wodonga.[252]

7.145 VCAT offers parties a range of technologies to provide flexible processes such as telephone conference and video conference facilities.[253] Video conferencing 'allows a party or multiple parties to participate in a hearing from metropolitan, regional, rural, interstate or international locations including public and private facilities'.[254] These facilities may be of particular benefit to people who live in regional areas and may help to limit the need to appear in person at a final hearing or on-site inspection or for mediation.

7.146 The Tribunal has started delivering on some aspects of its strategic plan, which will make its services more efficient and accessible for people living in regional areas:

- VCAT has extended principal registrar delegations to qualified regional staff members to speed up processing or matters (for example, certifying Tribunal orders). This was implemented in VCAT's Review and Regulation and Legal Practice lists and will be further expanded, especially into regional areas.[255]
- The new Shepparton Law Courts opened in March 2018 and have been specifically designed for use by all Victorian courts and by VCAT. This court has many innovative features, including a 'remote judge' facility that uses technology to enable a VCAT member in Melbourne to conduct a hearing in Shepparton.[256]

Existing experience

7.147 VCAT has power to review decisions made by responsible authorities under the *Planning and Environment Act 1987* (Vic) and heritage laws pursuant to the *Heritage Act 2017* (Vic) and other Acts. VCAT's existing experience in these areas supports the conclusion that it should be given jurisdiction to hear tree disputes. It will also ensure that where there is overlap with an existing law, VCAT is able to triage the matter into the most appropriate list or utilise relevant member expertise (see Chapter 10).

Alternative options

7.148 The Commission acknowledges the suggestions for other decision-making forums from community members. One is for a Victorian Land and Environment Court[257] or a new specialist Tribunal.[258] While the proposal has merit, the appropriateness of establishing such a court is outside the scope of this inquiry. The use of an existing jurisdiction is preferable to the creation of a new court or a new specialist tribunal. VCAT already has established expertise and programs that align well with the requirements for tree dispute hearings.

7.149 For similar reasons the establishment of an Office of the State Arborist is not recommended.[259] Although such an office would be able to provide independent expertise, the new Act envisages a scheme that uses expert decision makers or where decision makers are guided by provision of independent expert evidence from suitably qualified and experienced arborists.

252 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–2018* (Report, 2018) 87.
253 For a full list of facilities, see Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT7: Hearing Room Technology,* 14 December 2018 <https://www.vcat.vic.gov.au/resources/vcat-practice-note-pnvcat7-hearing-room-technology>.
254 Ibid.
255 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2016–2017* (Report, 2017) 14, 28.
256 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–2018* (Report, 2018) 30.
257 Submission 19 (Name withheld); Consultation 12 (City of Port Phillip).
258 Submissions 21 (Pointon Partners Lawyers), 23 (Name withheld).
259 Consultation 2 (Dr Gregory Moore OAM).

7.150 With its existing expertise in civil disputes, VCAT would also be better equipped to decide certain matters, such as the extent and apportionment of liability. VCAT can provide accessible locations in regional areas, opportunities to engage in alternative dispute resolution, and appeal and enforcement mechanisms. This approach is consistent with New South Wales, Queensland and Tasmania, which have conferred jurisdiction under their respective Acts to existing courts and tribunals.

7.151 The proposals for a resolution and enforcement process through local government recognise local councils' expertise in tree management, particularly in public areas and developments on private land.[260] However, the primary objective of local councils is to achieve the best outcomes for the local community as a collective in areas such as health services, planning, economic development, waste and environmental management, and human and community services.[261] Local councils do not manage matters between private citizens. Any system for resolving tree disputes that is administered by local councils would therefore be at odds with the role and objectives of local councils under the *Local Government Act 1989* (Vic).

The nature of jurisdiction given to VCAT

7.152 The new Act should provide VCAT with original jurisdiction to determine matters that fall within its scope. Jurisdiction should not be conferred in tree dispute matters on either the Magistrates' Court or the County Court.[262] Original jurisdiction means that VCAT is the first instance decision maker under the new Act. It does not have exclusive jurisdiction. It is the intention that VCAT hear the majority of tree dispute matters. However, the Supreme Court will also have jurisdiction to hear tree disputes. This is because the Supreme Court has unlimited jurisdiction under the Victorian Constitution unless processes specified in the Constitution are followed to limit it in some way. [263] The Commission does not recommend that those processes should be implemented.

7.153 The practical reality is that most tree disputes will be initiated by a party in VCAT rather than the Supreme Court because VCAT is less costly and less formal. However, for reasons of clarity, it may be useful for the new Act to state that VCAT is 'to be chiefly responsible'[264] for determining tree disputes and to introduce a provision which gives the Supreme Court power to stay a proceeding commenced there if it could be heard in VCAT and the Court is satisfied that it would be more appropriately dealt with by VCAT.[265]

Recommendation

20 The Victorian Civil and Administrative Tribunal should have original but not exclusive jurisdiction to determine tree disputes under the new Act.

260 Submissions 5 (Name withheld), 6 (Name withheld).
261 *Local Government Act 1989* (Vic) s 3C; Victorian Government, *Guide to Councils* (Web Page) <http://knowyourcouncil.vic.gov.au/guide-to-councils/how-councils-work/local-government-in-victoria>.
262 See *Magistrates' Court Act 1989* (Vic) s 100; *County Court Act 1958* (Vic) s 37(1).
263 Section 85(1) of the *Constitution Act 1975* (Vic) provides that, subject to that Act, the Supreme Court has 'unlimited jurisdiction', so the Supreme Court will have jurisdiction to determine tree disputes unless the processes provided for in sections 18(2A) and 85(5) of the Victorian Constitution are followed to render VCAT's jurisdiction exclusive.
264 See, eg, *Domestic Building Contracts Act 1995* (Vic) s 57.
265 See, similarly, *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 188; *Domestic Building Contracts Act 1995* (Vic) s 57. Depending on how such a provision is drafted, it might itself be considered to limit the jurisdiction of the Supreme Court: see *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 231; *Domestic Building Contracts Act 1995* (Vic) s 134. This means that it will not be effective unless the process prescribed in section 85 of the Constitution Act is followed, including that the third reading of the Bill is passed by an absolute majority of both Houses of Parliament: *Constitution Act 1975* (Vic) s 18(2A). Nevertheless, on balance the Commission is of the view that this approach is sensible even if it may attract the operation of section 85 of the Victorian Constitution.

Diversity jurisdiction

7.154 Given that VCAT is recommended as the appropriate forum in which tree disputes should be adjudicated, it is necessary to note that diversity jurisdiction issues may arise.

7.155 In Chapter 5 it is recommended that legal action under the new Act should be able to be brought against the owner of land on which the tree is situated. A situation may arise where a tree owner owns a property in Victoria but resides in another state.

7.156 This raises complex constitutional issues because the adjudication of a matter between natural people[266] who permanently reside in different states[267] requires the exercise of federal 'diversity jurisdiction'. Diversity jurisdiction can be understood as the authority to exercise judicial power to resolve disputes between residents of different states.[268] Diversity jurisdiction can only be exercised by a court of the state.[269] VCAT is a tribunal and not a court of the state.[270]

7.157 The High Court of Australia held in *Burns v Corbett*[271] that New South Wales' equivalent tribunal, the New South Wales Civil and Administrative Tribunal (NCAT), did not have authority to exercise diversity jurisdiction on an antidiscrimination complaint because it was a tribunal and not a court of the state.[272]

7.158 Legal commentators have stated that this ruling also extends to VCAT.[273] However, VCAT notes on its website that the High Court's decision 'is specific to NCAT proceedings … whether VCAT's jurisdiction is affected is yet to be determined'.[274] VCAT further states that if its authority were to be challenged in a case with similar grounds as *Burns v Corbett*[275] then it can 'hear from the parties on whether to refer a question of law to the Supreme Court of Victoria, and give notice to the State of Victoria to consider making submissions or to also be heard'.[276]

7.159 The issue of diversity jurisdiction and VCAT is beyond the scope of this inquiry. However, the Commission acknowledges that some tree disputes under the new Act may be affected. Therefore, any future government consideration of diversity jurisdiction issues in VCAT should extend to consideration of the scenarios raised above and the implementation of the new Act.

Recommendation

21 **Any Government consideration of diversity jurisdiction issues that apply to the Victorian Civil and Administrative Tribunal should also include consideration of the new Act.**

266 A natural person means a human being in the ordinary sense, as opposed to artificial persons or entities such as companies which are recognised as legal persons under the law: LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 15 April 2019).

267 Within the meaning of section 75(iv) of the *Australian Constitution.* A resident of a state does not include a resident of a territory: Victorian Civil and Administrative Tribunal, *Resolving Disputes Between Residents of Different Australian States* (Web Page, 13 June 2018) <https://www.vcat.vic.gov.au/news/resolving-disputes-between-residents-of-different-australian-states>.

268 *Burns v Corbett* (2018) 92 ALJR 423 [149].

269 Within the meaning of s 77(iii) of the *Australian Constitution.*

270 See generally *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 8.

271 (2018) 92 ALJR 423.

272 *Burns v Corbett* (2018) 92 ALJR 423 [64] (Kiefel CJ, Bell J, Keane J); see also *Judiciary Act 1903* (Cth) s 39(2).

273 Talitha Fishburn, 'If NCAT is Not a Court It Has No Standing to Hear Interstate Party Disputes' [2018] (Spring), *The Journal of the NSW Bar Association,* 33, 34; WestLaw AU, *Lawyers Practice Manual Vic* (online at 11 June 2019) '7 Administrative Law' [7.1.204]; Victoria Legal Aid, 'High Court Decision Affecting Your Practice in VCAT', *News* (Web Page, 30 May 2018) <https://www.legalaid.vic.gov.au/about-us/news/high-court-decision-affecting-your-practice-in-vcat>.

274 Victorian Civil and Administrative Tribunal, *Resolving Disputes Between Residents of Different Australian States* (Web Page, 13 June 2018) <https://www.vcat.vic.gov.au/news/resolving-disputes-between-residents-of-different-australian-states>.

275 (2018) 92 ALJR 423.

276 Victorian Civil and Administrative Tribunal, *Resolving Disputes Between Residents of Different Australian States* (Web Page, 13 June 2018) <https://www.vcat.vic.gov.au/news/resolving-disputes-between-residents-of-different-australian-states>. VCAT also states on this webpage that 'any referral to the Supreme Court requires the consent of VCAT's President'.

VCAT process for tree disputes

Tribunal-referred alternative dispute resolution

7.160 It is intended that the new Act will provide an improved framework for the resolution of tree disputes generally, including through mediation that is either community-based or referred by VCAT.

7.161 Tribunal-referred mediation should be used wherever appropriate to resolve tree disputes under the new Act. The Commission is encouraged by the successful resolution of tree disputes through tribunal-ordered ADR in Queensland and Tasmania. The Commission was informed that the formality of the tribunal environment, combined with information about what orders can and cannot be made and the factors the tribunal will consider in reaching its decision, encourage parties to negotiate informally.[277] Similarly, RMPAT explained that the majority of applications were withdrawn because parties had engaged in negotiations between themselves or had participated in formal mediation that had led to resolution of the dispute. Formal orders were not sought in these matters.[278]

7.162 The usefulness of ADR generally will be further enhanced by community information which states that VCAT has the power to refer parties to mediation. See Chapter 12.

7.163 The fast track mediation hearing program should be expanded to tree disputes. This program is currently only available for disputes concerning goods and services up to $10,000.[279] It is administered by DSCV and benefits from DSCV's vast expertise in handling and mediating tree disputes. The program is currently expanding in regional areas.[280]

7.164 The Commission acknowledges VCAT's comments that fast-track mediation may not be suitable for all cases, particularly those that are more complex and involve multiple witnesses, because the matter may not be able to be referred to a hearing on the same day.[281] The suitability of particular cases for the fast track program should be determined by VCAT but the Commission considers it may be of benefit in tree dispute matters.

7.165 For those matters that are referred to mediation by the Tribunal, the Commission favours the approach in the Tasmanian Act, which outlines a range of factors for the Tribunal to consider in determining whether this is appropriate (for example, whether there are threats of violence).[282]

Recommendation

22 The Victorian Civil and Administrative Tribunal should consider extending the Fast Track Mediation and Hearing Program administered by the Dispute Settlement Centre of Victoria in VCAT to suitable tree disputes.

277 Consultation 15 (Queensland Civil and Administrative Tribunal).
278 Information provided by the Resource Management and Planning Appeal Tribunal to the Commission, April 2019.
279 Victorian Civil and Administrative Tribunal, *Fast Track Mediation and Hearing* (Web Page) <https://www.vcat.vic.gov.au/resources/fast-track-mediation-and-hearing>. In its most recent annual report VCAT explains that 'further regional expansion of the program is planned and the value of disputes mediated will gradually increase in stages to $15,000 over four years': Victorian Civil and Administrative Tribunal, VCAT *Annual Report 2017–2018* (Report, 2018) 25.
280 See Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2017–2018* (Report, 2018) 25; see also Dispute Settlement Centre of Victoria, *Civil Mediation at VCAT Program* (Web Page, 7 June 2019) <https://www.disputes.vic.gov.au/about-us/civil-mediation-at-vcat-program>.
281 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
282 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 26(3).

The expertise of decision makers

7.166 The Commission agrees with community responses about the advantages of having tree disputes heard and determined by expert decision makers.

7.167 VCAT matters are heard by members with expertise in fields relevant to the subject matter of VCAT's Lists. In contrast decision makers in courts are judges and magistrates trained in the law.

7.168 One of the advantages of having matters heard by expert decision makers is that the decision maker can rely on their own expertise to evaluate a dispute and the evidence put forward by the parties, which can be important in cases where expert witnesses have adversarial bias. Parties who cannot access or afford an expert can also rely on the expertise of the decision maker. The use of expert decision makers also potentially allows for more creative and practical solutions to problems, as an expert decision maker is able to draw on their own practical experience to assess the workability of a solution.

7.169 Government should consider appointing members to VCAT with significant arboriculture experience to hear tree disputes, as occurs in New South Wales.[283] Alternatively, VCAT should consider appointing Tribunal appointed independent tree assessors to provide expert assistance to the tribunal, as occurs in Queensland. An expert decision maker or tree assessor should hold a minimum qualification equivalent to an Australian Qualification Framework (AQF) Level 5 and at least two years' experience. Arborists qualified at this level are specifically trained in the assessment and management of trees.[284] Expert assessors should conduct on-site inspections, as occurs in Queensland.

7.170 The use of tree assessors may also limit expert costs for the parties in these matters. As noted earlier, parties will generally share the cost of a tree assessor, up to a total of $1000.[285]

7.171 Queensland's tree assessor model may also be of use to VCAT in regional areas. There is a large pool of tree assessors in Queensland who travel to inspect trees across Queensland.[286]

7.172 VCAT has suggested that tree disputes would best fit in the Civil Division.[287] The Commission observes that tree disputes between neighbours are unique and sit at the intersection of civil disputes between neighbours and the broader environmental context. Community feedback also stressed the importance of recognising the public and environmental benefit of trees. Additionally, tree disputes are likely to involve complex matters relating to planning laws and regulation, for which this expertise would be highly valuable in a decision maker.

283 Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sets out how the tribunal may be constituted for various proceedings pursuant to enabling enactments. For example, part 1A, section 2A outlines how the Tribunal is to be constituted for the purposes of a proceeding under part 8 of the *Aboriginal Heritage Act 2006* (Vic) as: (a) one member who has sound knowledge of, and experience in, Aboriginal cultural heritage; or (b) if it is constituted by 2 members, at least one member who has sound knowledge of, and experience in, Aboriginal cultural heritage; or (c) if it is constituted by 3, 4 or 5 members, at least 2 members who have sound knowledge of, and experience in, Aboriginal cultural heritage.

284 See, eg, Department of Education and Training (Vic), *Diploma of Arboriculture* (Web Page, 2017) <https://www.skills.vic.gov.au/victorianskillsgateway/Students/Pages/CourseSearchDescription.aspx?type=course&CourseId=12920&new=1>.

285 Queensland Civil and Administrative Tribunal, *QCAT Practice Direction No 7 of 2013—Arrangements for Applications for Orders to Resolve Other Issues About Trees* (Practice Document, 1 July 2013, updated 3 April 2014) 2; see also *Queensland Civil and Administrative Act 2009* (Qld) s 112.

286 Queensland Civil and Administrative Tribunal, *Information Kit: Tree Assessors Expression of Interest* (EOI) (2013) 3.

287 Consultation 5 (Victorian Civil and Administrative Tribunal).

Recommendation

23 Government should consider appointing members with arboricultural expertise to the Victorian Civil and Administrative Tribunal to hear tree dispute matters. Alternatively, in order to obtain expert opinions on arboriculture matters and to obtain the complete context of the dispute, the Victorian Civil and Administrative Tribunal should consider adopting the Queensland Civil and Administrative Tribunal approach of using independent tree assessors throughout Victoria.

On-site hearings or inspections

7.173 The Commission agrees with community responses about the importance of inspecting a tree in its physical context in order to make a thorough assessment of both the arboricultural problem and the broader context of the dispute. An on-site hearing would be easier to implement and more appropriate in VCAT than in the Magistrates' Court. VCAT informed the Commission that on-site inspections often occur in the Planning and Environment List.[288]

7.174 A member of VCAT notes the following about the importance of on-site inspections:

> When I conduct inspections of properties after a hearing it is surprising how often the person letting me onto the property says words to the effect of 'thank you, you are the first person to come and have a look'. The benefit of a site inspection cannot and should not be underestimated. It has been said to me in other hearings that Council officers do not have time to undertake inspections. Expert witnesses sometimes say they have inspected the site but in reality it is a streetscape inspection only and not an inspection of the whole of the site. Often these approaches are just not good enough … in a case such as this one, where there are narrow properties; neighbours saying their amenity is being unreasonably impacted; and the rear/back gardens of the properties are not clearly visible from the street boundaries, the veracity of the opinions and decision making becomes questionable in the absence of an inspection.[289]

7.175 The Commission is persuaded by the advice of the NSWLEC and QCAT about the importance of inspecting a tree, either via on-site hearings or inspections by tree assessors, and how this feature is critical to the success of these interstate schemes. The NSWLEC noted that an on-site hearing provides the decision maker with the 'complete picture' of the tree and the dispute and enables the most efficient and practical resolution. The Court stated that the hearing process would not be as successful if decisions were made on the basis of descriptions, reports, photographs and drawings alone. The Court noted that nearly all tree disputes can be heard and determined entirely on site.[290] The Commission has also been guided by responses from arborists and local councils which suggested that inspection of a tree in its physical context is often necessary for a professional arboricultural assessment.

Recommendation

24 The Victorian Civil and Administrative Tribunal should conduct on-site final hearings or on-site inspections for all tree disputes.

288 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal); see, eg, *Gordon v Port Phillip CC* [2016] VCAT 282 [6]; *Broome v Maroondah CC* [2016] VCAT 1161 [11]; *Jones v Darebin CC* [2014] VCAT 1161 [12].
289 *Gordon v Port Phillip CC* [2016] VCAT 282 [6].
290 Consultation 11 (Land and Environment Court of New South Wales).

8

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8. VCAT decision-making principles and expert evidence in neighbourhood tree disputes

Introduction

8.1 This chapter makes recommendations about the decision-making principles that should be contained in the new Act. Decision-making principles in Victorian planning schemes, local laws and interstate Acts are examined as well as community views about the matters a decision maker should consider in tree disputes.

8.2 This chapter also makes recommendations about the use of expert evidence to help the Victorian Civil and Administrative Tribunal (VCAT) in its decision-making process. It includes recommendations about who should give expert evidence, what qualifications they should have, and the format of their evidence.

Decision-making principles

8.3 A range of existing laws and regulations are relevant to the rights and responsibilities of parties in tree disputes. They contain decision-making principles that assist decision makers to decide in what circumstances trees on private land may be pruned or removed. These principles have informed the Commission's recommendations in this chapter.

Decision-making guidelines in planning schemes

8.4 The *Planning and Environment Act 1987* (Vic) provides the framework for Victoria's planning system. If a regular planning permit process applies and vegetation on private land is protected by a Significant Landscape Overlay,[1] the Environmental Significance Overlay,[2] the Vegetation Protection Overlay,[3] the Heritage Overlay,[4] the Bushfire Management Overlay[5] or the Native Vegetation Particular Provisions,[6] standard decision guidelines apply for each of these overlays.[7] These guidelines outline principles that the relevant authority must consider before granting a permit. For example, the decision guidelines for the Vegetation Protection Overlay require the decision maker to consider, among other things:

1 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.03.
2 Ibid, cl 42.01.
3 Ibid, cl 42.02.
4 Ibid, cl 43.01.
5 Ibid, cl 44.06. Other VPPs that relate to bushfire and vegetation removal are: cl 53.02 'Bushfire Planning'; cl 52.12 'Bushfire Protections: Exemptions'. See also Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 64: Local Planning for Bushfire Protection,* September 2015, 3 <www.planning.vic.gov.au/publications/planning-practice-notes>.
6 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 52.17. Particular provisions are specific prerequisites or planning provisions for a range of particular uses and developments. They apply consistently across the state: Department of Environment, Land, Water and Planning (Vic), *A Practitioner's Guide to Victorian Planning Schemes* (Version 1.1, October 2018) [3.4] <https://www.planning.vic.gov.au/guide-home/a-practitioners-guide-to-victorian-planning-schemes>.
7 These decision guidelines in overlays or schedules to overlays must also be considered as part of the VicSmart permit application process. For the native vegetation particular provisions these guidelines are encompassed within the Department of Environment, Land, Water and Planning, *Guidelines for the Removal, Destruction or Lopping of Native Vegetation* (2017), an incorporated document in all Victorian planning schemes: see Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 59.06-2 'Decision guidelines'; 72.04 'Documents incorporated in this planning scheme'.

- the effect of the proposed use, building, works or subdivision on the nature and type of vegetation to be protected
- the role of native vegetation in conserving flora and fauna
- the need to retain native or other vegetation if it is rare, supports rare species of flora or fauna or forms part of a wildlife corridor
- the need to retain vegetation which prevents or limits adverse effects on ground water recharge
- whether provision is made or is to be made to establish and maintain vegetation elsewhere on the land
- the need to retain vegetation which is of heritage or cultural significance
- any other matters specified in a schedule to this overlay.

Planning scheme schedules

8.5 Councils may add local content to planning schemes through schedules.[8] These schedules may modify the state wide decision-making principles in the Victoria Planning Provisions (VPPs).

8.6 The East Gippsland Shire has eight local schedules to the Vegetation Protection Overlay which outline the nature and significance of the vegetation to be protected as well as additional decision-making guidelines to those contained within the standard overlay clause.[9] Schedule 8 is the Mallacoota Vegetation Protection Area.[10] It seeks to protect vegetation of high conservation value and vegetation with high aesthetic and landscape value within built-up areas around the township of Mallacoota. Before deciding on an application, in addition to the decision guidelines in clause 42.02-5, the responsible authority must consider, as appropriate:

- the extent to which the vegetation sought to be removed or cleared contributes towards the need to:
  - conserve and enhance areas of high conservation value vegetation, as determined by the Draft East Gippsland Native Vegetation Plan
  - conserve and enhance fauna habitat and habitat corridors
  - protect and enhance the visual amenity and landscape quality of the area
  - minimise the risk of soil erosion, sedimentation and degradation of water quality
- the need to work towards the Victorian Government's policy of achieving a net gain in the extent and quality of native vegetation throughout Victoria
- whether there are other options regarding the removal of vegetation, to better achieve the overlay objectives
- whether there is a need to undertake revegetation with appropriate indigenous species to offset any loss of environmental values resulting from the works or development, or to replace key non-indigenous vegetation where this is important to the aesthetic values of a particular site
- whether the vegetation is planted vegetation that blocks views from adjoining properties.[11]

8 Department of Environment, Land, Water and Planning (Vic), *A Practitioner's Guide to Victorian Planning Schemes* (Version 1.1, October 2018) [3.4] <https://www.planning.vic.gov.au/guide-home/a-practitioners-guide-to-victorian-planning-schemes>.

9 Department of Environment, Land, Water and Planning (Vic), 'East Gippsland Planning Scheme', *Planning Schemes Online* (11 April 2019) cl 42.02-5 'Decision guidelines', <http://planning-schemes.delwp.vic.gov.au/schemes/eastgippsland>.

10 East Gippsland Shire Council, *East Gippsland Planning Scheme* (11 April 2019) sch 8 to the Vegetation Protection Overlay—Mallacoota Vegetation Protection Area <http://planning-schemes.delwp.vic.gov.au/schemes/eastgippsland>.

11 Ibid.

8.7 Decision-making principles in the planning schemes reflect the broader policy considerations that underpin the planning scheme framework in Victoria. Not all of them will be relevant in the context of tree disputes but where they are it will be important that they continue to be considered by VCAT under the new Act. Relevant recommendations can also be found in Chapter 10.

Local laws

8.8 Some councils have local laws to protect trees on private and public land. The Commission consulted with two councils who have enacted local laws to protect trees on private land.[12] The decision-making process applied by councils provides another useful insight into the types of issue that may need to be considered by VCAT under the new Act. Some of these considerations are similar to those in planning schemes. Local laws are also discussed in detail in Chapter 10.

City of Boroondara

8.9 The City of Boroondara in the eastern suburbs of Melbourne includes established leafy suburbs alongside the Yarra River.[13] The City of Boroondara Tree Protection Local Law 2016 was enacted to:

- ensure that the established treed character of the municipal district is maintained
- prohibit, regulate and control any activities which may endanger Significant Trees and canopy trees within the municipal district.[14]

8.10 The Boroondara Local Law sets out detailed decision-making criteria that council must apply, to the extent it considers appropriate, when determining permit applications for works to protected trees:

- the effect of the proposed action on the aesthetics of the neighbourhood
- whether the tree is a significant tree
- the condition of the tree (health and structural integrity)
- the appropriateness of the tree for its location on the property having regard to the existing buildings and conditions on the property
- whether the proposed action is to be undertaken for reasons of health or safety
- whether the tree is causing any unreasonable property damage
- whether the tree is causing any unreasonable public nuisance or creating any unreasonable nuisance to private property owners or occupiers
- whether the tree is a recognised weed
- zoning under the Boroondara Planning Scheme
- any legislative requirements
- any other relevant matter.[15]

8.11 The decision-making principles are intended to produce a decision that is 'holistic and balanced'.[16]

12 Local laws are made by local governments under the *Local Government Act 1989* (Vic). Local laws are therefore aimed at dealing with local issues only.

13 It includes the suburbs of Ashburton, Balwyn, Balwyn North, Burwood, Camberwell, Canterbury, Deepdene, Glen Iris, Glenferrie South, Greythorn, Hawthorn, Hawthorn East, Kew, Kew East, Mont Albert and Surrey Hills: Victorian Government, 'Boroondara City', *Know Your Council* (Web Page) <http://knowyourcouncil.vic.gov.au/councils/boroondara>.

14 *Tree Protection Local Law 2016* (City of Boroondara) s 2. A 'significant tree' means a tree listed in Council's Significant Tree Study. A 'canopy tree' means any tree (a) with a total trunk circumference of 110cm or more measured at a point 1.5 metres along the trunk's length from the closest point above ground level; or (b) if multi-stemmed, with a total trunk circumference of all its trunks of 110cm or more measured at a point 1.5 metres along the trunks' lengths from the closest point above ground level; or (c) with a trunk circumference of 150cm or more measured at ground level.

15 *Tree Protection Local Law 2016* (City of Boroondara) s 12(2).

16 Ibid.

8.12 Boroondara supports the principle that if the tree existed prior to occupation or development, it should generally not be disturbed or removed in favour of newer structures.[17] However, each application still needs to be assessed on its merits having regard to evidence.[18]

8.13 If a permit to remove vegetation is granted under local law, Council may also require replanting to offset any net loss of vegetation.[19]

City of Port Phillip

8.14 The City of Port Phillip Local Law No 1 (Community Amenity) 2013 protects significant trees.[20] Council advised the Commission that the local law applies to and protects a large number of trees within the municipality.[21] A permit is required to carry out works or allow works to a significant tree or palm.[22]

8.15 In eciding whether to grant a permit Council must have regard to:

- whether an arborist's report is needed
- whether the tree is included on any register
- the reasons for the permit request
- the impact on the amenity and the safety of the area
- any proposed replacement plantings
- any other matter considered relevant by council.[23]

Decision-making principles in other jurisdictions

8.16 The New South Wales, Queensland and Tasmanian Acts require the decision makers to consider certain matters before determining an application.[24] The New South Wales Land and Environment Court informed the Commission the decision maker does not need to address every decision-making principle in its decision even though it is mandatory to consider each one, because some principles may be irrelevant in the particular circumstances.[25] In Tasmania, decision makers must consider these principles but only to the extent that they are relevant.[26]

8.17 Principles to be considered which are common to all three Acts include:[27]

- the location of the tree in relation to the boundary or other structures on the land
- whether consent or authorisation would ordinarily be required under local laws and Acts, and whether that consent has been obtained
- whether the tree has any historical, cultural, social or scientific value
- any contribution the tree makes to the local ecosystem and biodiversity
- any contribution the tree makes to public amenity

17 Consultation 8 (City of Boroondara).
18 Ibid.
19 Ibid.
20 *Local Law No.1 (Community Amenity) 2013* (City of Port Phillip) defines a significant tree as 'a tree or palm on private land: with a trunk circumference or 150 centimetres or greater, measured 1 metre above the ground; or with multiple stems where the circumference of its exterior stems is equal to, or greater than 150 centimetres when measured 1 metre about ground level'.
21 Consultation 12 (City of Port Phillip).
22 *Local Law No 1 (Community Amenity) 2013* (City of Port Phillip) s 44(1). Note that a permit does not apply where an adjacent landowner removes branches which overhang that adjacent land.
23 Ibid.
24 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 12; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30.
25 Consultation 11 (Land and Environment Court of New South Wales).
26 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30; see, eg, Tasmania, *Parliamentary Debates, House of Assembly,* 4 April 2017, 6 (Rene Hidding); *Neighbourhood Disputes About Plants Bill 2017* (Tas).
27 See generally *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 12; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30.

- any contribution the tree makes to the natural landscape, garden design, privacy and protection from natural elements.
- the impact of works such as pruning (including maintaining the tree at a particular height, width or shape) to the health of the tree
- any impact of the tree on soil stability, water table or other natural features of the land or locality
- the type of tree and whether it is native, protected or considered a pest
- such other matters that the decision maker considers relevant in the circumstances of the case
- any risk associated with the tree due to seasonal changes and extreme weather events.[28]

8.18 If the applicant's allegations relate to the tree causing damage to property or harm, additional decision-making considerations apply in the interstate Acts. These include:

- anything other than the tree that may have contributed to the damage or harm, including any act or omission by the applicant
- any steps taken by the applicant or the owner of the land to prevent or rectify the damage or harm.[29]

8.19 The Queensland and Tasmanian Acts further specify that the decision maker may consider additional principles where an order could involve destroying a tree or plant.[30]

New South Wales

8.20 The NSWLEC advised that the decision-making principles underpinning the NSW Act are sufficient and cover a broad range of issues such as the social, public amenity and environmental value of trees.[31] The Court also identified that the decision-making principles in the NSW Act reflect the public policy position that trees are beneficial to the community and that people wish to live among trees.[32]

8.21 New South Wales has an annotated version of its Act outlining how some of the decision-making principles have been applied to particular cases.[33] Of particular note is section 12(h) of the Act, which requires the court to consider whether anything other than the tree in question may have contributed to the damage, or likelihood of damage or injury, and the steps taken by both the affected neighbour and the owner or occupier of land on which the tree is situated to prevent such damage or injury.[34] This decision-making principle enables the court to consider any past actions or omissions of both parties, including any development on land that occurred subsequent to the tree's existence.

28 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(i); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30(h). This decision-making principle is unique to the dedicated tree dispute schemes in Queensland and Tasmania only.
29 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 12(h)(i); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 31(1).
30 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 31(2). These principles include anything, other than the tree or plant, that has contributed, or is contributing, to the injury or damage or likelihood of injury or damage, including any act or omission by the affected landholder or neighbour and the effect of any tree or plant situated on the affected landholder's or neighbour's land and any steps taken by the affected landholder or neighbour, or the owner of the area of land or tree-keeper on which the tree or plant is situated, to prevent or rectify the injury or damage or the likelihood of injury or damage.
31 Consultation 11 (Land and Environment Court of New South Wales).
32 Ibid.
33 Land and Environment Court of New South Wales, *Annotated Trees (Disputes Between Neighbours) Act 2006* (14 January 2013).
34 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 12(h).

8.22 Under this provision of the NSW Act, the NSWLEC has adopted a tree dispute principle: 'the tree was there first':[35]

> The existence of a tree prior to the construction of a structure which has subsequently been damaged by the tree is not a matter likely to be taken into consideration on the question of whether or not some order should be made for interference with or removal of that tree or other remedial work. On that question, the seriousness of the damage and any attendant risks are the primary matters for consideration.
>
> If interference with or removal of the tree or other work is warranted because of the extent of the damage the tree has caused or risks now posed by the damage, the fact that the tree was already growing in the vicinity at the time the structure was built is a matter which may be relevant and appropriate to take into account on the question of who should undertake any work and/or apportionment of the cost of such work.
>
> However, it will also be relevant to consider whether or not the tree was self-sown or was planted. If it was planted, consideration will need to be given to the appropriateness or otherwise of:
>
> - the type of tree planted; and
> - the suitability of the location in which it has been planted.
>
> Equally, it will be relevant to consider whether the choice of location for the structure was unnecessary or avoidable or, on the other hand, if it would have been an unreasonable constraint on the development potential of the site had the existence of the tree limited that potential.[36]

8.23 In other cases the Court has ordered that the costs of rectifying the damage caused by a tree should be shared equally by both parties.[37] For example, in *O'Connell v Gallagher*[38] it was held that because the affected neighbours had not made any effort to remedy the damage which had been developing over a number of years, the costs to rectify it should be equally shared between the parties.[39]

8.24 Steps taken by tree owners to address potential problems have also been taken into account by the Court. For example in *Nolan v Psaltis*[40] the owner of land had installed root barriers along the fence and regularly pruned the tree to prevent damage or injury to neighbours. It was determined that the installation of the root barrier had reduced the growth of the tree rendering it less likely to cause damage or injury and that the tree should not be removed.[41]

35 The Court publishes decisions under the NSW Act which contain 'tree dispute principles'. These principles provide an understanding of how the Court has approached a particular aspect of a dispute. Three principles have been published to date – 'claims for structural damage to property', 'the tree was there first' and 'urban trees and ordinary maintenance.' For a list of the Court's Tree Dispute Principles, see Land and Environment Court of New South Wales, *Tree Dispute Principles* (Web Page, 25 September 2017) <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/tree_principles.aspx>.

36 This tree dispute principle is derived from the case of *Black v Johnson (No 2)* [2007] NSWLEC 513 [15]. In this case the court ordered the removal of a tree on a common boundary that had caused damage to the affected neighbour's building. A relevant consideration was that the tree pre-existed the construction of the building. The court considered whether alternative designs of the building and an alternative location would have mitigated the damage that resulted. The court determined that the tree would have posed a problem regardless and therefore did not require the affected neighbour to pay for its removal.

37 *O'Connell v Gallagher* [2007] NSWLEC 718; See also *Osborne v Hook* [2008] NSWLEC 1231; *Lazarus v Le* [2010] NSWLEC 1118, [11–13] where the Court considered the failure by the affected neighbour to give notice to the tree owner when the damage occurred.

38 [2007] NSWLEC 718.

39 *O'Connell v Gallagher* [2007] NSWLEC 718. The damage was caused by a tree root to a low brick wall supporting a hot water pipe.

40 [2007] NSWLEC 764.

41 *Nolan v Psaltis* [2007] NSWLEC 764, 9.

Queensland

8.25 The Queensland Act sets out mandatory decision-making criteria that largely replicate the approach in the NSW Act. Queensland's vulnerability to cyclones any other extreme weather events is an additional consideration.[42]

8.26 The Queensland Act also provides additional principles that *may* be considered by the decision maker in specific situations —where serious injury, damage or unreasonable interference are alleged or where a tree is ordered to be destroyed under section 66.[43] For example, in making an order to carry out work that involves destroying a tree, Queensland Civil and Administrative Tribunal *may* consider:

- how long the neighbour has known of the injury or damage
- any steps that have been taken by the tree-keeper or the neighbour to prevent further injury or damage
- anything other than the tree that may have caused or contributed to some or all of the injury or damage
- any other matters QCAT considers relevant.[44]

8.27 Another key difference between the NSW and Queensland legislation is that the Queensland Act sets out the responsibilities of tree owners.[45] QCAT confirmed that the tree owner's responsibilities under the Queensland Act are mirrored in the principles QCAT takes into account when making decisions.[46]

8.28 Under the Queensland Act, the primary consideration is the safety of any individual.[47] However, in an attempt to counteract any presumption about the removal of trees in the interest of safety, section 72 of the Act provides that a living tree should not be removed or destroyed unless there is no other satisfactory means to resolve the issue.[48] Further, one of the decision-making principles relating to substantial, ongoing and unreasonable interference is whether the tree existed before the neighbour acquired the land.[49]

8.29 In response to community suggestions on the statutory review of the Queensland Act the Queensland Law Reform Commission (QLRC) recommended that QCAT must consider whether the tree is interfering with the use and enjoyment of the neighbour's land.[50] While the QLRC accepted that the actions of neighbours are relevant in some cases, it did not recommend the elevation of this consideration to a mandatory decision-making criteria.[51]

Tasmania

8.30 The Tasmanian Act largely replicates the Queensland Act by having a list of general matters that must, to the extent that they are relevant to the application, be considered by the Resource Management and Planning Appeal Tribunal (RMPAT).[52] The Act also contains additional matters that RMPAT *may* consider if an application relates to an alleged threat of serious injury or damage.[53] These additional principles largely mirror those in New South Wales and Queensland.

42 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(i). The Queensland Act also provides that 'no financial value or carbon trading value may be placed on a tree': see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(3). This provision aims to prevent the resolution of disputes being affected or frustrated by 'unsettled methods of calculating the monetary value of trees': see Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) cl 73.
43 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 74–75.
44 Ibid ss 66, 74(2).
45 Ibid s 41(1).
46 Consultation 15 (Queensland Civil and Administrative Tribunal).
47 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 71.
48 Ibid s 72.
49 Ibid s 75(d).
50 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December (2015) 125—6.
51 Ibid 128.
52 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30.
53 Ibid s 31.

8.31 If RMPAT is considering an order that involves destroying a plant, RMPAT may consider additional principles akin to the Queensland Act, for example how long the neighbour has known of the injury or damage.[54]

8.32 RMPAT may also consider additional matters if unreasonable interference is alleged by the applicant.[55] One of these considerations is whether the plant existed before the applicant owned the affected land.[56]

Community responses—decision-making principles

8.33 There was strong community support for including decision-making principles in the new Act.[57] VCAT supported the idea of including a non-exhaustive list of decision-making guidelines in the new Act, as long as this list was not overly prescriptive. VCAT noted that a list of decision-making guidelines would also assist and guide experts drafting reports for tree dispute hearings.[58]

8.34 The Commission received a number of suggestions about what kinds of principles should be taken into account by the decision maker determining tree disputes. Several submissions stated that the decision-making principles contained in interstate statutory schemes would be appropriate for a new statutory scheme in Victoria.[59]

8.35 The majority of responses related to the following themes:

- protecting the community from harm or damage.
- consideration of the benefits provided by the tree to the broader community, and balancing that against any harm it causes
- the 'first in time' principle—whether the tree existed before the affected neighbour began to occupy the land affected by the tree
- past actions of the parties that may have contributed to the dispute

8.36 These themes are discussed in the following paragraphs.

Protecting the community from harm or damage

8.37 Some community members emphasised that physical well-being should be a primary consideration under the new Act.[60] This view was supported by Baw Baw Shire Council.[61]

8.38 The Commission received a handful of responses about whether the decision maker should give greater weight to particular decision-making principles. Arborist Dr Karen Smith stated:

> The highest weight should be always determined based on a risk assessment. It is no good saying heritage or conservation value should take precedence, if the risk cannot be mitigated or managed.[62]

8.39 ENSPEC noted that 'management of unreasonable risk is appropriate; however, the elimination of all risk from any cause, including trees, is not practical'.[63]

54 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 31(2)(a).
55 Ibid s 32.
56 Ibid s 32(d).
57 Submissions 4 (Name withheld), 5 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 12 (Dr Gregory Moore OAM),17 (Name withheld), 18 (ENSPEC), 19 (Name Withheld), 20 (Name Withheld), 22 (Name withheld), 25 (City of Boroondara), 27 (Name withheld), 28 (HVP Plantations), 29 (David Galwey); Consultations 2 (Dr Gregory Moore OAM), 6 (Ben Kenyon), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip), 14 (Robert Mineo).
58 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
59 Submissions 20 (Name withheld); Confidential submission.
60 Submissions 9 (Dr Karen Smith), 19 (Name withheld), 22 (Name withheld), 24 (Name withheld), 38 (L. Barry Wollmer); Consultations 3 (HVP Plantations), 10 (Baw Baw Shire Council).
61 Consultation 10 (Baw Baw Shire Council).
62 Submission 9 (Dr Karen Smith).
63 Submission 18 (ENSPEC).

The broader benefits of trees

8.40 Trees are increasingly viewed as community assets.[64] Several responses to the Commission emphasised the need for the decision maker to consider any benefits the tree provides to the broader community.[65] Arborist Dr Karen Smith expressed the view that one of the aims of new laws should be to 'bring the law up to date with community views and expectations where possible'.[66] Another arborist, Mr Kenyon, explained that the community's knowledge, appreciation for and expectations of trees and urban forests have changed considerably over the past decades.[67]

8.41 Acting Commissioner David Galwey of the NSWLEC stated:

> I would suggest any statutory scheme should give significant consideration to the benefits of the tree to the broader community, including its ecosystem services and amenity. This is one clear advantage of a statutory scheme over the traditional common law process, reflecting current scientific understanding, social attitudes and government policy.[68]

8.42 There was broad community support for a decision maker to balance the value of the tree with any damage or harm caused or likely to be caused by the tree.[69] The City of Boroondara argued that:

> Legislation should set out criteria that the Court/Tribunal must consider when determining what order they should make. These criteria should ensure that the benefits of the tree are weighed against its disbenefits. At a minimum, the criteria should require consideration of matters such as the aesthetic benefits of the tree, the environmental/ ecological benefits of the tree and the benefits of the tree to the neighbourhood character of the area. In Council's experience, it is often the case that a tree may be causing minor damage or nuisance but that the benefit of the tree outweighs these impacts.[70]

8.43 VCAT noted that a tree's contribution to amenity as well as other broader benefits are considerations that intersect with planning and environment law. It suggested that these factors are also important considerations in neighbourhood tree disputes.[71]

8.44 Dr Gregory Moore OAM explained that a tree should be assessed through a cost-benefit model, stating 'if the cost of repair is greater than the benefit the tree offers, then the tree can go'.[72] Dr Moore referred to quantifiable benefits provided by trees:

- Trees provide shade and natural cooling, and reduce deaths during heat waves.
- In a storm, leaves and branches filter wind and remove force, preventing damage to property.
- Trees in a front garden add to the value of a suburban house.[73]

8.45 Dr Moore suggested that VCAT's current processes and procedures in matters concerning vegetation can result in outcomes that disregard or overlook the merits of the tree.[74]

64 Submission 9 (Dr Karen Smith); Consultations 6 (Ben Kenyon), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 11 (Land and Environment Court of New South Wales), 12 (City of Port Phillip).
65 Submissions 18 (ENSPEC), 19 (Name Withheld), 25 (City of Boroondara); 29 (David Galwey); Consultations 2 (Dr Gregory Moore OAM), 14 (Robert Mineo).
66 Submission 9 (Dr Karen Smith).
67 Consultation 6 (Ben Kenyon).
68 Submission 29 (David Galwey).
69 Submissions 7 (Ben Kenyon), 18 (ENSPEC), 25 (City of Boroondara); 27 (Name withheld); Consultation 2 (Dr Gregory Moore OAM).
70 Submission 25 (City of Boroondara).
71 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
72 Consultation 2 (Dr Gregory Moore OAM).
73 Ibid.
74 Ibid.

8.46 ENSPEC submitted that 'urban tree canopy is being lost, both through overall reduction in tree numbers, as well through "replacement" of trees with smaller growing species and shrubs. Planting a new tree is not a replacement of the loss of a mature tree, even if it is replaced by the same species, as the decades of growth required to develop to maturity are lost. It is therefore necessary to prevent the removal of mature trees without solid justification.'[75]

'First in time' principle

8.47 The Commission was told that consideration should be given to whether the tree existed before the built structure on adjoining land. As discussed under the NSW Act, if damage is caused by an existing/established tree to a new dwelling on neighbouring land, then this may result in the affected neighbour paying some or all of the costs associated with pruning or removing the tree.[76] Similar considerations exist in the Tasmanian Act and Queensland Acts in relation to interference claims.[77]

8.48 VCAT suggested that if a tree pre-dates development on neighbouring land, consideration should be given to whether any conditions were attached to a development permit requiring protection of the tree, for example to avoid the tree's protection zone. VCAT suggested that these protections are not always followed in planning matters.[78]

8.49 Arborist Ben Kenyon expressed the view that 'one of the most important considerations should be whether the tree pre-existed the built structure or landowners taking control of [neighbouring] land'.[79] He provided the example of concerns that emerged in a 10–15 year old housing estate about the potential for damage from remnant trees that were hundreds of years old. In his view, people need to accept that trees are part of the environment they are looking to occupy and should be more accommodating of them.[80]

8.50 Baw Baw Shire Council also stated that the decision maker should have to consider whether the tree or the built structure came first.[81] HVP Plantations added that the 'first in time principle' could be considered in the allocation of legal costs to ensure the outcome is just and fair.[82]

Past actions of the parties

8.51 A number of community members suggested that any past actions of the parties that may have contributed to the tree dispute should also be taken into account.[83] One community member stated that irresponsible tree planting, for example allowing a tall tree to grow close to a house, should be taken into consideration by the decision maker.[84]

75 Submission 18 (ENSPEC).
76 This is a Tree Dispute Principle developed by the Court under section 12(h) of the *Trees (Disputes Between Neighbours) Act 2006* (NSW).
77 See *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 30(d), 32(d); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(d).
78 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
79 Consultation 6 (Ben Kenyon).
80 Ibid.
81 Consultation 10 (Baw Baw Shire Council).
82 Submission 28 (HVP Plantations).
83 Submissions 5 (Name withheld), 22 (Name withheld).
84 Submission 22 (Name withheld).

Other issues

Consideration of other laws

8.52 One submission advised that consideration should be given to the application of other laws protecting the tree, for example significant tree registers.[85] The City of Boroondara explained that:

> [decision-making] criteria should also require the Court/Tribunal to consider whether the tree is protected by a planning scheme, a current valid Planning Permit, a Local Law or other legislation such as the Aboriginal Heritage Act 2006.[86]

Tree removal as a last resort

8.53 The City of Boroondara, Nillumbik Shire Council and arborist Robert Mineo submitted that the decision maker should first consider remedies that do not require removal of the tree.[87]

The Commission's conclusions—decision-making principles

8.54 The new Act should facilitate evidence-based, transparent and consistent decision making. This will require clear and comprehensive principles to be introduced in the new Act.

8.55 In practice this means that if a claim is initiated about damage or harm, a range of additional matters will be considered by the decision maker in determining orders. Importantly, 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.

8.56 Mandatory decision-making principles will:

- ensure that all relevant information about the tree dispute is taken into account during the decision-making process;
- help to balance competing rights and interests fairly and transparently
- guide the community about the application of the law and help the parties anticipate the likely outcome of a hearing
- help the community to resolve their disputes informally by applying these principles to their own disputes.

One list of decision-making principles

8.57 The New South Wales approach of having all decision-making principles under the one provision is the best way to ensure that no principle is excluded from the decision-making process. This will also allow parties or other community members to easily find and determine the principles that VCAT will consider when it decides a matter.

Principles should be mandatory

8.58 The Queensland and Tasmanian schemes distinguish between mandatory and discretionary decision-making criteria. The New South Wales approach of grouping all decision-making principles together and requiring the court to consider them all is preferred. The Commission sees value in the Tasmanian Act's limitation that the Tribunal only needs to consider the listed principles 'to the extent that they are relevant in relation to the application'.[88]

85 Submissions 17 (Name withheld).
86 Submission 25 (City of Boroondara).
87 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 14 (Robert Mineo).
88 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30.

Principles should be non-exhaustive

8.59 Tree disputes can be complex. They may involve claims of property damage that need to be assessed by experts including builders, or claims of future harm requiring specialist medical evidence. For this reason it is recommended that the list of decision-making principles in the new Act be non-exhaustive and that VCAT be able to consider such other matters as it considers relevant in the circumstances of the case. For example, VCAT may decide that if a tree is to be removed, another should be planted in its place.

Other Acts and laws

8.60 The Commission has been guided by the decision-making guidelines set out in other laws and policies. Many of these broader considerations are reflected in the Commission's recommendations below and will assist VCAT to balance competing rights and interests fairly and transparently.

8.61 The list of decision-making principles in the new Act should require the decision maker to consider whether interference with the tree would otherwise require consent or authorisation under other Acts or local laws and, if so, whether such consent or authorisation has been obtained. The decision maker should also be required to consider the requirements that may apply under other laws and policies to that land or tree. Even where consent or authorisation is not required under other laws, these laws may still point to matters that VCAT should have regard to in making its decision, for example, the zone use of the land in question.

8.62 Other relevant laws include:

- the *Planning and Environment Act 1987* (Vic)
- local laws made pursuant to the *Local Government Act 1989* (Vic)
- the *Heritage Act 2017* (Vic)
- the *Aboriginal Heritage Act 2006* (Vic)
- the *Fences Act 1968* (Vic)
- the *Catchment and Land Protection Act 1994* (Vic)
- the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).[89]

8.63 In Chapter 10 the Commission makes recommendations about the interaction of laws and elaborates on some of these decision making principles. The weight that should be given to other laws and policies in the decision making process is also considered.

The benefits of trees

8.64 Decision-making principles should recognise the broader intrinsic benefits of trees to the community (for example, shade and natural cooling). Our community is also placing increasing importance on protecting and encouraging more vegetation in urban spaces. Viewing tree disputes strictly as party–party disputes overlooks some of the broader interests and considerations that arise in our modern urban spaces.

8.65 The new Act should seek to balance the tension between property owners' rights and the community benefits of living in a leafy environment. Broader environmental considerations often underpin decision-making guidelines in planning schemes and local laws. The Commission supports the decision-making principles in interstate legislation that aim to consider the amenity, scientific, social, cultural, historic and environmental contributions of the tree. The importance of the tree for soil stability should also be considered.[90]

89 Other Acts also relate to the management of vegetation for fire prevention; to minimise interference with powerlines and to protect public health and wellbeing and the environment. These Acts are less likely to impact the new Act. See Ch 10.

90 See, eg, *Lee v Waugh* [2012] NSWLEC 1341. In this case the tree owner contended that the tree was 'important as a means of retaining the sandy soil in the sloping backyard. The Court took this into account by ordering that steps be taken to stabilise the soil in removing the tree. This was by way of reducing the tree to a stump of 1m high: [25],[36]

8.66 In addition, the decision maker should have regard to whether the tree is listed on the Victorian Heritage Register under the *Heritage Act 2017* (Vic) or whether the tree is an Aboriginal scarred tree or other tree of Aboriginal cultural heritage significance protected under the *Aboriginal Heritage Act 2006* (Vic). This approach will ensure that the new Act either does not interfere with the existing Acts in place to protect trees of heritage value or only does so in an emergency, where the tree poses an imminent danger to life or property.[91] This is the approach taken in the Queensland scheme to identify culturally significant trees.[92]

Location and health of the tree and impact of works

8.67 VCAT should have regard to the location of the tree, for example in relation to the common boundary and any nearby built structures. This is the approach in all interstate jurisdictions. In the case of *Robson v Leischke*[93] the Court advised that this decision-making principle enables a determination of whether the tree is 'sufficiently proximate' to adjoining land that it could in fact cause damage or harm in the event that it failed.

8.68 VCAT should also have regard to the condition of the tree, for example its health and structural integrity. This is the approach taken by the City of Boroondara.[94] It would ensure the decision maker takes into account arboricultural evidence about the health of the tree and any risks that are posed by the tree.

8.69 It follows that the impact of works to the tree should be articulated as a distinct decision-making principle. In New South Wales this decision-making principle has enabled the Court to consider whether pruning of the tree would be detrimental to the tree's health and structural stability.[95] For example, if the tree is assessed as healthy, pruning works should be conducted so as to not render the tree unsafe in the future. Alternatively, if the tree is unhealthy the most appropriate order may be to remove it.[96]

Past actions of parties

8.70 VCAT should also consider whether anything other than the tree may have contributed to the damage or harm. For example, this may require the decision maker to consider whether trees on the affected neighbour's land have contributed to the damage or harm[97] or whether the affected neighbour failed to give the tree owner an adequate opportunity to respond to the damage.[98] While this would not result in an otherwise hazardous tree being retained, it may result in a portion of the cost of repairs an affected neighbour might be seeking being borne by them.

8.71 This decision-making principle would also require the decision maker to consider any steps taken by the affected neighbour or the tree owner to resolve the dispute. If the tree owner has taken steps to prevent damage or harm then this may mean that an order for ongoing maintenance is more appropriate than tree removal.

91 See, eg, *Aboriginal Heritage Act 2006* (Vic) s 29(c).
92 See *Neighbourhood Disputes (Dividing Fences and Trees) 2011* (Qld) s 73(2).
93 (2008) 72 NSWLR 98 [222].
94 See *Tree Protection Local Law 2016* (City of Boroondara) s 12(2).
95 *Morris v Kedziora* [2011] NSWLEC 1156.
96 In *Morris v Kedziora* [2011] NSWLEC 1156 the Court determined that pruning the tree would make it unstable and therefore the Court ordered its removal. The lopping sought by the applicants (that is, the 'flat-topping' of the tree) would have had a detrimental impact on the structural integrity of the tree [17].
97 See, eg, *O'Connell v Gallagher* [2007] NSWLEC 718; *Culgan v Bradley* [2009] NSWLEC 1347.
98 See, eg, *Osborne v Hook* [2008] NSWLEC 1231; *Turner v O'Donnell* [2009] NSWLEC 1349 [23].

'First in time' principle

8.72 The new Act should specifically include a decision-making principle that addresses whether the tree existed before the affected neighbour began to occupy the land that is affected by the tree.

8.73 It is not intended that this principle have the effect of preventing an applicant from pursuing relief under the new Act but instead that it is one of a range of principles that VCAT should consider in making its orders. This approach most closely aligns with the provision in the Tasmanian Act.[99] The Commission observes that the NSWLEC has produced a tree dispute principle on this issue.[100] The Commission considers that the same outcome may be better achieved by clearly articulating the principle in the new Act.

Recognised weed

8.74 The new Act should apply to a recognised weed provided it both meets the definition of 'tree' in the new Act and has caused, is causing or is likely to cause damage to property or land or harm to people in the next 12 months. The VCAT application form should also specifically ask the applicant for information about the species of tree and whether it is a recognised weed.

8.75 Whether the tree is a recognised weed should also be considered by VCAT in making orders. It may be appropriate for VCAT to consider any past actions taken by the landowner with respect to the weed, for example whether or not the landowner was issued with a directions notice under the *Catchment and Land Protection Act 1994* (Vic) and failed to comply with this notice.[101] It may also be more appropriate for VCAT to order the removal of a recognised weed.

Not recommended: Tree removal as a last resort

8.76 The Commission is not persuaded that the new Act should include a decision-making principle that the tree be removed only as a last resort. The cumulative effect of the range of other decision-making principles is that tree removal and indeed any tree works will only occur as a last resort where the situation demands it. The principles do this by encouraging the decision maker to find solutions that consider the broader benefits of the tree and underpinning decisions with impartial arboricultural evidence.

99 See *Neighbourhood Disputes About Plants Act 2017* (Tas) s 30(d).
100 *Black v Johnson (No 2)* [2007] NSWLEC 513.
101 *Catchment and Land Protection Act 1994* (Vic) s 70B.

Recommendations

25 The Act should state that before determining an application the Victorian Civil and Administrative Tribunal must consider the following matters to the extent that they are relevant to an application:

(a) the location of the tree in relation to the boundary of the land and any structures or premises

(b) the condition of the tree in respect of its health and structural integrity

(c) whether works to the tree would require any consent or authorisation under other Acts or laws and, if so, whether the consent or authorisation has been obtained

(d) the provisions of the planning scheme which apply to the land under the *Planning and Environment Act 1987* (Vic) including relevant zones and overlays and the provisions of other relevant Acts or laws that apply to the land or tree

(e) the impact any pruning, including the impact of maintaining the tree at a particular height, width or shape, would have on the tree

(f) any contribution the tree makes to:

  i. the amenity of land on which it is situated, including its contribution to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke

  ii. the local ecosystem and biodiversity

  iii. the natural landscape and scenic value of the land

(g) whether the tree has any historical, cultural, social or scientific value. This includes a tree that is part of Aboriginal cultural heritage under the *Aboriginal Heritage Act 2006* (Vic) or is a registered tree or is situated in a Victorian heritage place under the *Heritage Act 2017* (Vic).

(h) any impact the tree has on soil stability, the water table or other natural features of the land or locality

(i) anything, other than the tree, that has contributed, or is contributing, to any harm or damage or likelihood of harm or damage, including:

  i. any act or omission by the applicant and the impact of any other trees owned by the applicant

  ii. any steps taken by the applicant or the owner of the land on which the tree is situated to prevent or rectify damage

(j) whether the tree and any risk, obstruction or interference associated with the tree existed before the affected neighbour began to occupy the land affected by the tree

(k) whether the tree is a recognised weed

(l) such other matters as the decision-making body considers relevant in the circumstances of the case.

Expert evidence

8.77 Expert evidence will be important in the formal hearing process under the new Act. Tree disputes can encompass complex issues such as the condition of the tree, tree roots, issues with damaged pavements and built structures, and medical issues such as pollen allergies and psychological distress. The new Act should be underpinned by the requirement for arboricultural evidence that shows that the tree is the real and actual cause of damage or harm that has occurred or is likely to occur in the next 12 months. This was broadly supported by community responses.[102]

8.78 Nillumbik Shire Council expressed concern that any new Act 'not provide scope for vindictive neighbours to take advantage of a new scheme by bringing unmeritorious claims against neighbours on adjoining land'.[103] The requirement for expert evidence will reduce the scope for neighbours to bring claims without merit. Arboricultural evidence will also help VCAT devise workable solutions to tree problems.

8.79 This chapter focuses on arboricultural evidence because most submissions and consultations emphasised this issue. However, some comments about medical evidence were also received, such as where pollen allergies are claimed.[104] The role of qualified building inspectors and surveyors,[105] construction and geotechnical engineers for property damage[106] and plumbers for damage to pipes was also raised in submissions.[107]

8.80 Arborists specialise in the assessment and management of individual trees.[108] The Commission has been informed that the quality of arboricultural assessment can vary significantly and can affect the direction of neighbourhood tree disputes.[109] Conflicting assessments could result in an escalation of the dispute. Further, poor quality assessments could result in trees being unnecessarily removed or, alternatively, trees being retained that present risks to health and safety. In addition, the Commission was informed that assessments undertaken by arborists can be prohibitively expensive for many members of the community.[110]

8.81 The next section examines evidentiary requirements in planning schemes and local laws. It then considers how VCAT currently manages expert evidence across its lists and how this is done by decision makers in tree disputes interstate. Community responses are also considered.

Expert evidence—planning schemes

8.82 Planning scheme overlays and native vegetation particular provisions can protect vegetation on private land. In deciding whether to grant a permit for proposed tree works, such as pruning or tree removal, the responsible authority must consider certain decision-making criteria. Planning schemes can specify the information that permit applicants are required to provide to the responsible authority to facilitate informed decision making. Often this is done through local schedules to the planning scheme. This information may require supporting evidence from an arborist and specify the form of that evidence.

8.83 Under schedule 1 of the Significant Landscape Overlay within the City of Boroondara Planning Scheme, the following evidence is required to obtain a permit to remove, destroy or lop vegetation:

102 Submissions 2 (Name withheld), 12 (Dr Gregory Moore OAM), 18 (ENSPEC), 20 (Name withheld), 25 (City of Boroondara).
103 Consultation 9 (Nillumbik Shire Council).
104 Consultations 8 (City of Boroondara),12 (City of Port Phillip).
105 Submission 4 (Name withheld).
106 Submission 9 (Dr Karen Smith).
107 Submission 4 (Name withheld); Consultation 8 (City of Boroondara).
108 Arboriculture Australia, *Australian Qualification Framework (AQF) and Australian Training Programs* (Web Page) <http://arboriculture.org.au/Qualification>.
109 Submission 18 (ENSPEC); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 11 (Land and Environment Court of New South Wales), 14 (Robert Mineo).
110 Consultations 5 (Victorian Civil and Administrative Tribunal), 10 (Baw Baw Shire Council), 14 (Robert Mineo).

- a written explanation justifying the removal of the vegetation, supported by a suitably qualified arborist[111]
- a description and accurate site plan denoting the position, height, number, trunk circumference, branch spread, slope of land and species of any vegetation to be removed
- plan details of the location of proposed replanting.[112]

8.84 The planning scheme does not define what it means by a suitably qualified arborist. However, council advised that it has report writing guidelines for arborists for the assessment of development applications under the planning scheme.[113] These guidelines recommend that arboricultural reports 'should be prepared by a suitably qualified and experienced arborist with a Diploma in Arboriculture (AQF Level 5) or higher relevant qualification and demonstrated tree assessment and report writing experience'.[114] They also recommend that:

- reports must be written within the preceding three months of submission
- reports must be submitted in an accepted format and all resource material including any calculations, figures, or photographs must be appropriately referenced using an acceptable format
- a clear and detailed existing survey plan and/or proposed development plan must be used within all reports
- the report must focus on the characteristics of each tree. It must define each tree's size, health and vigour, the structural condition and longevity, and rate the retention value of each tree as high, medium or low. Consideration must be given to the requirements of the Preliminary Arboricultural Assessment as defined in Section 2.3.2 of the Australian Standard AS 4970-2009—Protection of Trees on Development Sites.[115]

8.85 The guidelines further outline what must be included in a report, including a description of the inspection process used, for example the risk assessment methodology; a discussion of the application of any local planning policies or tree protection controls; and an overview of the retention value of the tree.[116] Council may reject a report with significant errors or omissions.[117] Council has found that the reports it receives from arborists vary considerably in quality and content.[118] The most common error that arborists make is not undertaking a risk assessment in line with an industry-recognised methodology.[119]

8.86 Nillumbik Shire Council advised that if a planning application is received by Council which requires tree removal or may impact on existing vegetation, a private consulting arborist has usually been engaged by the developer to undertake a site inspection and assessment. If not, an arborist's report will be required for assessment.[120] Generally, all arborist reports submitted with a planning application will be reviewed by the Planning Services' consulting arborist, which will include a site inspection, to ensure the information

111 The qualification requirements of arborists are not further defined within the City of Boroondara Planning Scheme.
112 City of Boroondara, *City of Boroondara Planning Scheme*, 15 March 2019) cl 42.03 sch 1, 4.0 Application Requirements.
113 City of Boroondara, *Arboricultural Report Writing Guide: Guide for the Preparation of Preliminary Arboricultural Reports, Arboricultural Impact Assessments, Root Investigation/ Mapping Reports, Tree Management and Protection Plans and Transplant Method Statement,* (Guidelines, June 2017).
114 Ibid.
115 Ibid 3. See Ch 6 for a detailed discussion on the Australian Standards *Pruning of Amenity Trees* AS4373-2007 and *Protection of Trees on Development Sites* AS4970-2009. In Ch 9 the Commission recommends that orders for tree works made under a the new Act be carried out by a qualified arborist in accordance with the Australian Standards *AS4373-2007 Pruning of Amenity Trees* and *AS4970-2009 Protection of Trees on Development Sites*.
116 City of Boroondara, *Arboricultural Report Writing Guide: Guide for the Preparation of Preliminary Arboricultural Reports, Arboricultural Impact Assessments, Root Investigation/ Mapping Reports, Tree Management and Protection Plans and Transplant Method Statements* (Guidelines, June 2017) 4.
117 Ibid 3.
118 Consultation 8 (City of Boroondara).
119 Ibid.
120 Consultation 9 (Nillumbik Shire Council).

is correct and the impacts to trees can be mitigated.[121] Nillumbik believes that the best way to avoid poor quality arboricultural assessments is to require a minimum set of qualifications.[122]

8.87 Baw Baw Shire Council noted that if a tree is subject to a heritage overlay, the tree owner needs to apply to council for a permit to prune, chop, lop or remove it.[123] After receiving an application, council arranges for an independent arborist to assess the tree.[124] Council does not have any in-house arborists of AQF Level 5. Council arborists are of AQF Level 4. Council advises community members to have risk assessments made by arborists with qualifications of AQF Level 5.[125] Council contracts external arborists of AQF Level 5 when they need to conduct a tree assessment.[126] Council then determines whether the tree can be pruned or removed, based on the tree's current health and expected lifespan.[127] Council stated that photographs, including aerial photographs, can be helpful in making permit decisions.[128] Photos allow Council to determine the species of tree, and its appearance and position.[129]

8.88 Baw Baw stated that residents generally provide the correct information in their applications.[130] In some cases the cost of gathering material for an application (including photography and arborist report) can be prohibitive, and sometimes people choose to run the risk of a fine for unauthorised tree works or removal.[131] Council explained that a major problem with arborists' assessments is that many fail to complete a risk assessment as part of their overall assessment of tree health.[132] While they may assess the health of a tree as 'poor', they do not necessarily assess the consequences if it fails.[133] Council requires arborists' reports to contain risk assessments as well as health assessments.[134]

8.89 The City of Port Phillip noted that Council will generally require a report from a suitably qualified arborist prior to approving a development application.[135]

Expert evidence—local laws

City of Boroondara

8.90 The City of Boroondara advised that:

> Council makes its decisions based on evidence. Where sufficient and compelling evidence is provided, Council will generally grant the permit requested by the tree owner. Council accepts that obtaining expert evidence can be costly for residents but believes informed decisions cannot be made without this information.[136]

8.91 Boroondara explained that council arborists generally receive permit applications under the local law and conduct an on-site inspection of the vegetation prior to making a decision about whether to grant the permit.[137] All Council arborists have a minimum AQF Level 5 qualification and appropriate risk assessment qualifications; and all application assessment is conducted in accordance with the Tree Protection Local Law assessment guidelines.[138]

121 Consultation 9 (Nillumbik Shire Council).
122 Ibid.
123 Consultation 10 (Baw Baw Shire Council).
124 Ibid.
125 Ibid.
126 Ibid.
127 Ibid.
128 Ibid.
129 Ibid.
130 Ibid.
131 Ibid.
132 Ibid.
133 Ibid.
134 Ibid.
135 Consultation 12 (City of Port Phillip).
136 Consultation 8 (City of Boroondara).
137 Ibid.
138 Ibid; see *Tree Protection Local Law 2016* (City of Boroondara) s 12(2).

8.92 Council does not provide formal guidelines for report writing for applications under the local law. However, guidelines for arborists' reports are in place for the assessment of development applications under the Planning Scheme.[139]

8.93 Boroondara receives approximately half a dozen claims relating to pollen allergies each year. Council has started to gather information from medical practitioners, including immunologists from the Australasian Society of Clinical Immunology and Allergy, about the sources of common allergens. Pathology services can run allergy tests for a wide range of tree and vegetation species. Council confirmed that if a reaction is severe and limits a resident's use of property, then they will consider issuing a permit for removal. In this situation council will consider a range of factors when it examines causation, such as whether the allergy can be attributed to more than one tree, and whether the removal of the tree would solve the problem.[140]

City of Port Phillip

8.94 People who wish to remove a significant tree or palm under council's local law are required to apply to the City Permits Unit (CPU)[141] which must decide the application within 15 days. The decision is evidence-based. Council's arborist will make a recommendation about the permit application to the Coordinator of the CPU who will then make a decision.[142]

8.95 Council arborists provide expert advice on permit applications under the local law.[143] There are currently three council arborists with relevant qualifications such as a Certificate IV, diploma or degree. Council requires an objective arboricultural assessment by an experienced arborist, providing observations on tree health and whether or not they support removal of the tree or palm.[144]

8.96 It is not uncommon for permit applicants to submit their own expert advice, but Council advised that the quality of information provided can be poor.[145] For example, applicants may submit only a quote as evidence that they have engaged an arborist or structural engineer. Often no further information about the expert's assessment of the tree is provided. In these cases, Council will request further information prior to making a decision under the local law.[146] Council noted that the community is generally unaware of how to obtain advice from a suitably qualified arborist.

8.97 Local law requires pruning of significant trees or palms to be done to *Australian Standard AS 4373-2007—Pruning of Amenity Trees.* A suitably qualified arborist would be needed to carry out these works.[147]

8.98 Council noted that if a pollen allergy is given as the reason for requesting removal of the tree or palm, then this will generally need to be supported by specialist medical evidence. Psychological distress caused by fear of a tree has sometimes formed the basis for an application to remove a tree or palm.[148]

Expert evidence—VCAT

8.99 In VCAT, an expert witness is defined as 'a person who has specialised knowledge based on the person's training, study or experience'.[149] Schedule 3 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the VCAT Act) sets out the broad powers

139 Consultation 8 (City of Boroondara).
140 Ibid.
141 Consultation 12 (City of Port Phillip).
142 Ibid.
143 Ibid.
144 Ibid; see also *Local Law No 1 (Community Amenity) 2013* (City of Port Phillip) cl 44(4)(a).
145 Consultation 12 (City of Port Phillip).
146 Ibid.
147 Ibid.
148 Ibid.
149 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 3.

VCAT has in relation to the appointment of expert witnesses and the provision of expert evidence. Section 80 of the VCAT Act confers broad discretion on VCAT to make a range of directions:

- providing for the appointment of single joint experts or Tribunal-appointed experts
- limiting expert evidence to specified issues.[150]

8.100 In appropriate cases VCAT may appoint its own expert under clause 7 of schedule 3 of the Act or a special referee under section 95 of the Act.[151] The Tribunal may do this at the request of the parties, or occasionally on its own initiative.[152] If the Tribunal proposes to appoint an expert or special referee on its own initiative, it will first obtain the views of the parties in writing or at a directions hearing. The costs of the expert will be shared equally by the parties, unless otherwise ordered.[153]

8.101 VCAT can direct experts to narrow the issues in dispute and provide the Tribunal with a joint report specifying matters agreed, matters not agreed, and the reasons for the disagreement.[154] In addition, VCAT can require experts to provide evidence concurrently, generally doing so in a panel format.[155]

8.102 VCAT can appoint ordinary members with specialised knowledge or experience to enable the proper functioning of the Tribunal.[156]

Expert reports—VCAT

8.103 VCAT provides the following guidance about what to include in an expert report, under clause 11 of its Practice Note – PNVCAT2 – Expert Evidence (1 October 2014):

- the full name and address of the expert witness
- qualifications, experience and area of expertise
- a statement of expertise to make the report
- reference to any private or business relationship between the expert witness and the party for whom the report is prepared
- all instructions that define the scope of the report (original and supplementary and whether in writing or oral)
- the facts, matters and all assumptions upon which the report proceeds
- reference to those documents and other materials the expert has been instructed to consider or take into account in preparing his or her report and the literature or other material used in making the report
- the identity and qualifications of the person who carried out any tests or experiments upon which the expert relied in making the report
- a statement including:
  - a summary of the opinion
  - whether there are provisional opinions that are not fully researched for any reason (including the reasons)
  - any questions falling outside the expert's expertise
  - whether the report is incomplete or inaccurate in any respect

150 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 80.
151 VCAT may refer a question to a special referee for opinion/determination.
152 Victorian Civil and Administrative Tribunal (VCAT), *Practice Note PNVCAT2: Expert Evidence,* 1 October 2014, 7.
153 Ibid 8.
154 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 3; see also Victorian Civil and Administrative Tribunal (VCAT), *Practice Note PNVCAT2: Expert Evidence,* 1 October 2014, 6.
155 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 3; see also Victorian Civil and Administrative Tribunal (VCAT), *Practice Note PNVCAT2: Expert Evidence,* 1 October 2014, 7.
156 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 14.

- a signed declaration by the expert:

  I have made all the inquiries that I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Tribunal.[157]

8.104 The requirements of clause 11 do not apply to reports obtained from treating doctors and hospitals, unless the Tribunal directs otherwise.[158] Doctors and hospitals are nonetheless encouraged to follow these requirements to the extent practicable.[159] Written submissions are not compulsory, but they are the most common and preferred form of presentation to VCAT.[160]

Duty of expert witnesses—VCAT

8.105 The duty of an expert witness to the Tribunal is described in the VCAT Act as follows:

- An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.
- An expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise.
- An expert witness is not an advocate for a party to a proceeding.[161]

8.106 VCAT told the Commission that 80 per cent of parties at VCAT are self-represented.[162] Expert evidence can be a significant cost to the parties. It was suggested that regardless of whether the parties have engaged an expert or not, they are often dependent on the expertise of the judicial officer or member.[163]

8.107 In the Planning and Environment List, expert evidence from arborists is frequently received about the health of a tree, its longevity, implications of cutting roots, and protective mechanisms.[164] It was suggested that VCAT members in the Planning and Environment List develop skills in assessing the accuracy of reports and VCAT members are not bound by the evidence presented to them.[165]

Other jurisdictions—expert evidence

New South Wales

8.108 The application form in New South Wales puts parties on notice about the importance of evidence.[166] The NSWLEC encourages parties to carefully consider whether expert evidence is necessary.[167] It does this because tree dispute hearings are generally fixed for a final hearing before a commissioner who is a qualified arborist[168] and therefore able to use his or her knowledge of arboriculture in deciding the application. The Court may also engage arborists as court-appointed experts in certain circumstances.[169]

157 Victorian Civil and Administrative Tribunal (VCAT), *Practice Note PNVCAT2: Expert Evidence*, 1 October 2014, cl 11.
158 Ibid cl 13.
159 Ibid.
160 Victorian Civil and Administrative Tribunal (VCAT), *Submissions* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/how-to-prepare-for-your-hearing/submissions>.
161 Victorian Civil and Administrative Tribunal (VCAT), *Practice Note PNVCAT2: Expert Evidence,* 1 October 2014, 3; see also Victorian Civil and Administrative Tribunal Act 1998 (Vic) sch 3.
162 Consultation 5 (Victorian Civil and Administrative Tribunal).
163 Ibid.
164 Ibid.
165 Ibid.
166 Consultation 11 (Land and Environment Court of New South Wales); see Land and Environment Court of New South Wales, *Form C: Tree Dispute Application* (Version 3) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_how.aspx>; Land and Environment Court of New South Wales, Form H: *Tree Dispute Claim Details (Damage to Property or Injury to a Person)* (Version 1) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_how.aspx>.
167 Land and Environment Court of New South Wales (NSWLEC), *Practice Note Class 2: Tree Applications*, 1 December 2018 [41].
168 Ibid [42].
169 *Uniform Civil Procedure Rules 2005* (NSW) r 31.20(2)(g); see generally Justice Rachel Pepper, 'Expert Evidence in the Land and Environment Court' (Speech delivered at the Australian Property Institute, 21 January 2013) <http://www.lec.justice.nsw.gov.au/Pages/publications/speeches_papers.aspx>.

8.109 The Court acknowledged that arborists engaged by parties may have a high level of adversarial bias.[170] Where parties have their own experts who cannot agree, the Court may order the experts to meet together on site.[171] Concurrent evidence is favoured by the NSWLEC because it facilitates a discussion between the experts and helps to narrow the issues in dispute.[172] It can also reduce the likelihood of adversarial bias and save costs and time.[173]

8.110 There is no requirement that expert evidence be provided by an arborist with particular qualifications.[174] However, it is generally accepted that only arborists of AQF Level 5 will complete assessment reports. The Court considers that arborists in New South Wales are generally well trained and knowledgeable.[175] The Court also noted that all arborists know about the relevant Australian Standards relating to pruning and tree protection zones.[176]

8.111 Any experts engaged independently by the parties are generally not required to attend the hearing. Written evidence is considered sufficient.[177] The expert and expert's report must comply with the *Uniform Civil Procedure Rules 2005* (NSW).[178] Rule 31.27 provides that an expert's report must include the following:

- the expert's qualifications as an expert on the issue the subject of the report
- the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed)
- the expert's reasons for each opinion expressed
- if applicable, that a particular issue falls outside the expert's field of expertise
- any literature or other materials used in support of the opinions
- any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out
- in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

8.112 If an expert witness believes that their expert report may be incomplete or requires clarification on certain points, this must be stated in the report.[179] These requirements broadly replicate the expert report writing guidelines published by VCAT. The NSWLEC Practice Note for tree disputes hearings also states that 'it is not the role of experts to express an opinion about whether a tree application should be granted or dismissed'.[180]

8.113 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.[181]

Queensland

8.114 QCAT may make an order requiring a survey to be undertaken to clarify the tree's location in relation to the common boundary; authorising a person to enter the tree-keeper's land to carry out an order, including entering land to obtain a quotation for carrying out an order; and requiring a report by an 'appropriately qualified arborist'.[182] QCAT informed

170 Consultation 11 (Land and Environment Court of New South Wales).
171 Ibid.
172 See Justice Rachel Pepper, 'Expert Evidence in the Land and Environment Court' (Speech delivered at the Australian Property Institute, 21 January 2013) 18 <http://www.lec.justice.nsw.gov.au/Pages/publications/speeches_papers.aspx>.
173 See, eg, Justice Peter Garling, 'Concurrent Expert Evidence: Reflections and Development' (2011) 49(10) *Law Society Journal* 59, 60.
174 Consultation 11 (Land and Environment Court of New South Wales).
175 Ibid.
176 Ibid.
177 Land and Environment Court of New South Wales (NSWLEC), *Practice Note Class 2: Tree Applications,* 1 December 2018, [43].
178 *Uniform Civil Procedure Rules 2005* (NSW) r 31.27.
179 Ibid.
180 Land and Environment Court of New South Wales (NSWLEC), *Practice Note Class 2: Tree Applications*, 1 December 2018, [44]. The Commission notes that Practice Notes do not have legislative force.
181 Ibid 3, 11.
182 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.

the Commission that it will appoint a tree assessor[183] if the Tribunal is unable to make a decision without expert arboricultural opinion.[184]

8.115 QCAT has issued a Practice Direction detailing 'Arrangements for applications for orders to resolve other issues about trees'.[185] The directive states that QCAT will generally appoint an expert tree assessor to assist with disputes.[186] The assessor is asked to inspect the tree/s and the properties subject to the application and provide a report which outlines solutions to the dispute.[187]

8.116 Alternatively, parties may engage an expert to provide a report. In this case, the experts may be required to attend an experts' conclave,[188] after which, the experts should be able to produce a short joint report.[189] On QCAT's website, community members are encouraged to contact the Queensland Aboricultural Association to locate a qualified arborist.[190] The Association's website details the criteria for both a qualified arborist consultant and a qualified arborist contractor.[191]

8.117 Expert reports must adhere to Rule 428 of the *Uniform Civil Procedure Rules 1999 (Qld)*, containing the same requirements as under the NSW Act.

Tasmania

8.118 In Tasmania, under section 33(6)(g) of the *Neighbourhood Disputes About Plants Act 2017* (Tas), RMPAT may make an order requiring a report to be obtained from an appropriately qualified arborist. No further information is provided about the qualification required of arborists.

8.119 RMPAT requires experts to adhere to a code of conduct.[192] It can direct experts to concur and submit a joint report.[193]

8.120 Expert reports must contain certain information as set out in a RMPAT Practice Direction governing the giving of evidence by expert witnesses.[194] This information is the same as that required by the NSWLEC and QCAT.

Community responses—expert evidence

8.121 There was broad community support for tree dispute decisions to be underpinned by expert evidence.[195] Dr Gregory Moore OAM explained that:

> Too often trees are assumed to be causing problems to infrastructure but there are no data to support the assumptions or assertions made. If for example tree roots are said to be damaging infrastructure, there should be some evidence that the roots of the said

183 An AQF Level 5 arborist with 5 years of experience: Consultation 15 (Queensland Civil and Administrative Tribunal).
184 Consultation 15 (Queensland Civil and Administrative Tribunal).
185 Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013: Arrangements for Applications for Orders to Resolve Other Issues About Trees*, 2013.
186 An AQF Level 5 arborist with 5 years of experience: Consultation 15 (Queensland Civil and Administrative Tribunal); Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013: Arrangements for Applications for Orders to Resolve Other Issues About Trees,* 2013, 1.
187 Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013: Arrangements for Applications for Orders to Resolve Other Issues About Trees,* 2013, 2.
188 This is a private meeting between the experts, chaired by a member of the Tribunal: see Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2009: Guide to Expert Conferences*, 2009.
189 See Ibid 1.
190 Queensland Civil and Administrative Tribunal, *Tree Disputes* (Web Page, 29 February 2019) <http://www.qcat.qld.gov.au/matter-types/tree-disputes>.
191 Queensland Arboricultural Association, *About Approved Arborists* (Web Page, 2018) <https://qaa.net.au/approved-arborist/>
192 Resource Management and Planning Appeal Tribunal, *Practice Direction No 12A: Expert Witness Code of Conduct'* <https://www.rmpat.tas.gov.au/practice_directions>.
193 Ibid; Resource Management and Planning Appeal Tribunal, *Practice Direction No 12: Expert Witnesses* <https://www.rmpat.tas.gov.au/practice_directions>.
194 Resource Management and Planning Appeal Tribunal, *Practice Direction No 12A: Expert Witness Code of Conduct* <https://www.rmpat.tas.gov.au/practice_directions>; Resource Management and Planning Appeal Tribunal, *Practice Direction No 12: Expert Witnesses* <https://www.rmpat.tas.gov.au/practice_directions>.
195 Submissions 12 (Dr Gregory Moore OAM), 25 (City of Boroondara); Consultations 2 (Dr Gregory Moore OAM), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).

> tree are found in the vicinity of the damaged structure. For far too long, lazy consultants have got away with asserting that trees are causing problems without providing evidence.[196]

8.122 The City of Boroondara agreed:

> Legislation should be prefaced by the principle that the party seeking the removal of the tree must be able to establish an actual and real impact of the tree, rather than a perceived or fanciful impact. In Council's experience, perceived (and often irrationally perceived) impacts of trees are difficult, if not impossible, to assess.[197]

8.123 The City of Port Phillip and Baw Baw Shire Council commented that assessment and expert advice from an appropriately qualified arborist would assist the decision-making process.[198] Baw Baw Shire Council suggested that expert advice from other suitably qualified individuals, such as environmental scientists and botanists, would be appropriate.[199]

8.124 Other community responses supported specialist medical evidence or pathology testing for claims relating to future harm.[200]

Qualifications of arborists

8.125 Community members overwhelmingly supported an approach that would require minimum qualification levels for arborists who provide evidence for matters initiated under the new Act. In particular, a minimum AQF Level 5 qualification with additional practical experience was supported.[201] However, one submission noted that a new scheme should not attempt to 'codify the role of arborists as the admissibility of evidence would be a matter for the decision-making body to consider'.[202]

8.126 Arborist Ben Kenyon explained that:

> The guidelines set out in AS 4970-2009 Protection of trees on development sites should be followed. The standard specifies that a suitably qualified person is one that has an AQF Level 5 in arboriculture as the minimum.[203]

8.127 Dr Gregory Moore OAM supported such an approach:

> In Victoria, there is a very good argument that it should be higher such as a minimum of level 5. The reason for this is that there are several hundred trained/educated arborists in Victoria at level 5 or above, but this is not the case in other states.[204]

8.128 Arborist Robert Mineo explained that arboricultural qualifications under the Australian Qualification Framework have undergone some changes. Mr Mineo stated:

> Many experienced arborists are qualified with what used to be a Level IV arborists' qualification (advanced certificate). This was described as the 'old school diploma' and it is no longer offered. The arborist qualification regime changed in 2009–10. Under the current qualification framework, a full tree assessment qualification is usually at Level V (diploma) but lesser elements of tree assessment, mostly to determine safely working around trees, is undertaken in Level 3.[205]

196 Submission 12 (Dr Gregory Moore OAM).
197 Submission 25 (City of Boroondara).
198 Consultations 10 (Baw Baw Shire Council); 12 (City of Port Phillip).
199 Consultation 10 (Baw Baw Shire Council).
200 Submission 12 (Dr Gregory Moore OAM); Consultation 8 (City of Boroondara), 12 (City of Port Phillip).
201 Submissions 2 (Name withheld), 4 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 12 (Dr Gregory Moore OAM); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon), 8 (City of Boroondara), 9 (Nillumbik Shire Council).
202 Submission 21 (Pointon Partners Lawyers).
203 Submission 7 (Ben Kenyon).
204 Submission 12 (Dr Gregory Moore OAM).
205 Consultation 14 (Robert Mineo).

8.129 ENSPEC, an arboricultural consulting firm, advised:

> Arboriculture is a specialist skillset and knowledge base that is still relatively new and evolving. Many people, both lay persons and other professions, believe they "know trees" without having the training and experience of an arborist. Expertise must be demonstrated through formal training, experience and ongoing updating of knowledge in arboriculture, and not, as is often found in practice, from related disciplines such as landscape architecture or horticulture, or outdated training.
>
> The arboricultural training packages under the Australian Qualifications Framework have been updated regularly and substantially since first introduced. Practitioners who were qualified under the earlier versions, or even before the AQF, and have not updated their qualifications, are out of date. Further, the AQF is structured in such a way that persons with a qualification below AQF Level 5 would not be expected to provide consultancy or expert witness testimony.[206]

8.130 VCAT was supportive of the need for experts to provide assistance during tree dispute hearings. VCAT suggested experts should be suitably qualified and experienced, but it did not support enshrining minimum qualification levels and experience in the new Act. VCAT noted that qualifications are subject to change over time.[207]

8.131 QCAT informed the Commission that the qualification of an arborist is a relevant consideration when determining the weight given to evidence submitted on behalf of a party.[208]

Duty to the Court

8.132 A common theme raised in submissions and consultations was the need for independent and impartial arboricultural assessment to guide decision making under a new Act.[209] At present, it is claimed, people shop around for arborists to support their case for tree removal or retention, rather than seeking impartial advice.[210]

8.133 The City of Boroondara noted that 'it is Council's experience that people seeking to remove trees will often be able to find an expert who will support their application'.[211] ENSPEC stated that:

> Unfortunately, arboriculture is an unregulated profession, meaning that there is a wide variation in the quality of training, experience and up-to-date knowledge amongst practitioners. There is also no professional recourse to address unethical behaviour as there is in licensed professions. There are also many practitioners that provide both consultancy/advice and undertake practical tree work, leading to a potential conflict of interest in providing impartiality. Establishing impartiality of expertise will be crucial to good outcomes. [212]

8.134 Dr Gregory Moore OAM suggested that 'expert witnesses should be experts of the court not of either of the parties'.[213] One community member stated that experts under new laws should 'be bound by an appropriate Code of Conduct and be independent from either neighbour'.[214]

8.135 Some respondents preferred the approach of appointing one independent expert to guide the tree dispute hearing. Professor Phillip Hamilton stated, 'One expert should be appointed in each case. Otherwise there will be a dispute as to the expert report. We

206 Submission 18 (ENSPEC).
207 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
208 Consultation 15 (Queensland Civil and Administrative Tribunal).
209 Submissions 10 (Professor Phillip Hamilton), 12 (Dr Gregory Moore OAM), 18 (ENSPEC), 25 (City of Boroondara); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 12 (City of Port Phillip).
210 Submission 12 (Dr Gregory Moore OAM); Consultation 8 (City of Boroondara).
211 Submission 25 (City of Boroondara).
212 Submission 18 (ENSPEC).
213 Submission 12 (Dr Gregory Moore OAM).
214 Confidential submission.

want to achieve quick results at minimal cost.'[215] The City of Boroondara supported an approach that would enable the Tribunal to appoint an independent expert rather than the expert being appointed by the party.[216]

8.136 Nillumbik Shire Council endorsed QCAT's use of independent tree assessors by stating that 'this is a sensible approach and could facilitate better outcomes'.[217] Nillumbik suggested that if parties are each responsible for 50 per cent of this cost it would encourage them to be more reasonable about resolving the dispute.[218] It further observed that sharing this cost 'may also discourage vindictive neighbours from bringing unmeritorious claims'.[219] Arborist Robert Mineo supported the appointment of an independent tree assessor and noted that requiring the costs to be shared equally could save each party the total cost of engaging an arborist.[220]

The quality of expert reports

8.137 There was general agreement amongst arborists, councils, VCAT and QCAT that the quality of arboricultural reporting can vary.[221] Boroondara and Baw Baw Councils explained that a key issue with reports is a failure to complete an industry-recognised risk assessment as part of their overall assessment of the tree.[222]

8.138 To address this issue, some arborists favoured a template for report writing or report writing guidelines. Arborists at ArborCamp agreed that the Council Arboriculture Victoria's Arboricultural Reporting Guidelines are useful.[223] Arborist Robert Mineo added that:

> It would be wise for arborists to have a template for reporting writing. This would encourage arborists to adhere to the same benchmark, and for the decision-making body to receive unified reports. A report writing template would also make it easier for arborists to supply information and for decisionmakers to consider information.[224]

The Commission's conclusions—expert evidence

Evidence-based decision making

8.139 The new Act should be underpinned by evidence-based decision making, supported by arboricultural (and other) expert evidence. Expert evidence will assist VCAT to ensure that the tree is the real and actual cause of the damage or harm that has occurred or is likely to occur in the next 12 months. Expert assistance will also help VCAT to incorporate practical and durable solutions in its orders.

8.140 The recommendations in Chapter 7 support the use of VCAT members with arboricultural expertise or the use of independent tree assessors in hearings under the new Act. This means that parties may not need to retain experts to provide evidence to VCAT. It will also help to reduce the cost of expert evidence. However, the Commission acknowledges that tree disputes can be highly emotive and contentious and that parties will sometimes want their own experts to assist them during a hearing. Parties that provide expert evidence to VCAT in a tree dispute including any independent tree assessors should be required to meet certain evidentiary requirements as discussed below.

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215 Submission 10 (Professor Phillip Hamilton).
216 Consultation 8 (City of Boroondara).
217 Consultation 9 (Nillumbik Shire Council).
218 Ibid.
219 Ibid.
220 Consultation 14 (Robert Mineo).
221 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 5 (Victorian Civil and Administrative Tribunal), 8 (City of Boroondara), 10 (Baw Baw Shire Council), 14 (Robert Mineo), 15 (Queensland Civil and Administrative Tribunal).
222 Consultations 8 (City of Boroondara), 10 (Baw Baw Shire Council).
223 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018). See also Council Arboriculture Victoria, *Arboricultural Reporting Guidelines for Developments* (Version 2.0, November 2009) <https://www.councilarboriculturevictoria.com.au/wp-content/uploads/2016/04/Arboricultural-Reporting-Guidelines-for-developments-Version-2.0-2009.pdf>
224 Consultation 14 (Robert Mineo).

Minimum qualification requirements

8.141 The Act should specify minimum qualification requirements for expert roles in VCAT.

8.142 Requiring minimum qualification levels will help ensure trees are appropriately assessed in line with industry-approved risk assessment methods.[225] This is of primary importance for a scheme that will consider whether trees have caused damage or may cause future damage or harm.

8.143 Arborists trained to AQF Level 5 have relevant expertise in using industry-approved risk assessment tools to properly determine whether the tree may fail and cause damage or harm.[226] The City of Boroondara identified the following risk assessment methodologies and explained that one or more of these assessments form part of the regular training of an AQF Level 5 arborist:

- Quantified Tree Risk Assessment (QTRA) —a United Kingdom system with two-day courses offered in Australia[227]
- Tree Risk Assessment Qualification (TRAQ)—a United States system with two-day courses followed by a half-day assessment offered in Australia[228]
- the Matheny & Clarke method.[229]

8.144 The Commission has considered the course requirements of a diploma in Arboriculture and notes that an additional tree assessment method, the Visual Tree Assessment (VTA), is listed as required knowledge.[230] ENSPEC relies on the VTA 'to inspect and assess trees in order to identity any defects or problems that may lead to structural instability or failure'.[231]

8.145 Independent expert evidence provided to VCAT about the health of the tree and likelihood of risk should be provided by those at a minimum AQF Level 5 or equivalent with at least two years of practical experience. This is reasonable given that Victoria is home to 'several hundred trained/educated arborists in Victoria at level 5 or above'.[232]

8.146 This requirement will also act as a reference point for people in the community who wish to obtain their own expert advice outside VCAT. See Chapter 12 for recommendations about providing the community with information about what to look for when hiring an arborist.

8.147 Enabling arborists to provide evidence with a qualification that is equivalent to an AQF Level 5 will help to account for any changes to arborist qualifications over time, as identified by VCAT.[233] The Commission is aware that a review of existing arborist qualifications is currently being undertaken.[234] Any changes will enhance the provision of expert arboricultural evidence at tree dispute hearings. It follows that changes to the arborist qualification framework will need to be taken into account in implementing the recommendations in this chapter.

225 Submissions 2 (Name withheld), 4 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 12 (Dr Gregory Moore OAM); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon), 8 (City of Boroondara), 9 (Nillumbik Shire Council).
226 Consultation 8 (City of Boroondara).
227 See Quantified Tree Risk Assessment, *Training in Quantified Tree Risk Assessment* (Web Page, 2019) <https://www.qtra.co.uk/cms/index.php?section=124>.
228 See International Society of Arboriculture, *Credentials* (Web Page) <https://www.isa-arbor.com/Credentials/ISA-Tree-Risk-Assessment-Qualification>.
229 See Nelda P. Matheny & James R. Clark, *A Photographic Guide to the Evaluation of Hazard Trees in Urban Areas* (International Society of Arboriculture, 1 December 1993).
230 National Register of Vocational Education and Training (VET) in Australia, *Unit of Competency Details: AHCARB501A—Examine and Assess Trees* (Release 2) (Database entry, 21 December 2017) <https://training.gov.au/Training/Details/AHCARB601>.
231 ENSPEC, 'Visual and Hazard Tree Assessments', *Consultancy* (Web Page, 2019) <http://www.enspec.com/Consultancy/VisualTreeAssessments.aspx>.
232 Submission 12 (Dr Gregory Moore OAM).
233 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
234 Skills Impact, *Amenity Horticulture, Landscaping, Conservation & Land Management Industry Reference Committee* (Web Page, 2019) <https://www.skillsimpact.com.au/horticulture-conservation-and-land-management/training-package-projects/arboriculture-project/>.

Recommendation

26 The Act should require that arborists who provide evidence to the Victorian Civil and Administrative Tribunal hold a relevant arboricultural qualification of minimum Australian Qualifications Framework (AQF) Level 5 or equivalent and have at least two years practical experience.

Expert's duty to VCAT

8.148 VCAT should remind the parties and experts in the tree disputes hearing about the duties of expert witnesses to the Tribunal:

- An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.
- An expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise.
- An expert witness is not an advocate for a party to a proceeding.[235]

8.149 These duties, outlined in a Tribunal practice note, should be referred to in the detailed information guide that VCAT should produce on the new Act. See Chapter 12.

Concurrent evidence

8.150 In situations where both parties decide to bring their own arborists to VCAT tree dispute hearings, the provision of a joint report or concurrent evidence would be appropriate. VCAT is able to direct experts to provide the Tribunal with a joint report, or require experts to provide evidence concurrently. [236] The provision of joint evidence would assist VCAT to:

- narrow the issues in dispute
- resolve the matter more quickly and efficiently
- assist the parties to accept the final decision in the hearing.

8.151 This approach would also help to reduce the incentive for parties to hire arborists to simply advocate on their behalf.

8.152 One arborist provided the example of three arborists jointly conferring in a coronial matter. It was suggested that this process took approximately two hours whereas it was estimated that it may have taken two days for the arborists to provide their evidence individually.[237]

235 *Victorian* Civil and Administrative Tribunal, *Practice Note PNVCAT2: Expert Evidence,* 1 October 2014, 3; see also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 3.

236 *Victorian Civil and Administrative Tribunal 1998* (Vic) sch 3; see also Victorian Civil and Administrative Tribunal (VCAT), *VCAT Practice Note PNVCAT2: Expert Evidence,* 1 October 2014, 6.

237 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).

Guidelines for written reports

8.153 In accordance with existing VCAT procedure, experts engaged by the Tribunal or by the parties to the dispute should submit a written report adhering to the requirements set out in clause 11 of VCAT's Practice Note PNVCAT2.[238]

8.154 Additional requirements should apply to written reports from arborists, given that the quality of arboricultural reporting can vary. The Commission has identified additional requirements from the Council Arboriculture Victoria, Arboricultural Reporting Guidelines for Development.[239] They are:

- a requirement that the on-site assessment has been undertaken within the three months preceding the hearing
- a detailed description of the assessment methodology relied on, including the date of the tree inspection and any limitations of the assessment
- a record of the expert's observation of the tree, providing an assessment of the categories for the tree's health, condition, form and structure[240]
- a photograph supporting observations and highlighting points of interest
- details of the local planning scheme overlays and local laws applying to the tree
- a statement of whether the tree is remnant, indigenous, native, exotic or weed species
- a statement of the retention value of trees based on the objectives of the local planning scheme or the local law.[241]

8.155 Claims relating to future harm may encompass risks of slipping and falling over leaf litter,[242] pollen allergies[243] and psychological distress.[244] Specialist medical evidence and/or testing demonstrating a causal link between the tree and the medical condition should be required. This view was supported by one community member and a number of councils.[245] VCAT should develop a specific Practice Note about this requirement.

8.156 Where an application is made based on injury said to arise from a medical condition, the NSWLEC gives supplementary standard directions requiring applicants to 'to provide properly qualified medical or scientific evidence of a link between the injury and the trees'.[246] This approach is a good guide for Victoria.

8.157 Other experts who may be relied upon by the Tribunal, such as building surveyors, engineers and plumbers, will also need to adhere to the procedures VCAT has in place for expert evidence.

238 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT2: Expert Evidence,* 1 October 2014.
239 Council Arboriculture Victoria, *Arboricultural Reporting Guidelines for Developments* (Version 2.0, November 2009).
240 The categories must be explained in the report (ie good, fair, poor etc) and the descriptors listed in the appendix at the end of the report: Ibid 2.
241 As a guide, trees that have 'high' value should be retained and trees that have 'low' value may be unsuitable for retention: Ibid 3.
242 Consultation 12 (City of Port Phillip).
243 Submission 9 (Dr Karen Smith); Consultations 6 (Ben Kenyon), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 12 (City of Port Phillip).
244 Consultations 8 (City of Boroondara), 12 (City of Port Phillip). As discussed in Ch 5, the Commission is not recommending a compensation scheme for personal injury under the new Act,
245 Submission 9 (Dr Karen Smith); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 12 (City of Port Phillip).
246 Land and Environment Court of New South Wales (NSWLEC), *Practice Note Class 2: Tree Applications*, 1 December 2018, sch B.

Recommendations

27 The Victorian Civil and Administrative Tribunal should direct experts in tree dispute matters to comply with clause 11 of Practice Note PNVCAT2: Expert Evidence, 1 October 2014 with the following additional requirements:

(a) a requirement that the on-site assessment has been undertaken during the three months leading up to the hearing

(b) a detailed description of the assessment methodology relied upon, including the date of the tree inspection and any limitations of the assessment

(c) a record of the expert's observation of the tree, providing an assessment of the categories for the tree's health, condition, form and structure

(d) a photograph supporting observations and highlighting points of interest

(e) details of the local planning scheme overlays and local laws applying to the tree

(f) information about whether the tree is remnant, indigenous, native, exotic or weed species

(g) information about the retention value of the tree based on the objectives of the local planning scheme or the local law.

28 The Victorian Civil and Administrative Tribunal should develop a Practice Note about the requirement for a causal link between the tree and any harm, such as a medical condition, that is the subject of an application.

Orders, appeals and enforcement in neighbourhood tree disputes

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9. Orders, appeals and enforcement in neighbourhood tree disputes

Introduction

9.1 The new Act should allow for timely, practical and effective remedies for tree disputes. This section considers the types of order available in interstate Acts and community responses. The Commission's recommendations respond to some of the limitations with the common law remedies of negligence, nuisance and trespass. They aim to provide greater clarity about the range of likely outcomes if matters proceed to hearing at VCAT.

9.2 This chapter considers:

- the types of order that the Victorian Civil and Administrative Tribunal (VCAT) should be able to make under the new Act
- rights to seek an appeal or a variation of orders
- how orders should be enforced.

Other jurisdictions—orders available

New South Wales

9.3 Section 9 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (the NSW Act) sets out the types of orders that the Land and Environment Court of New South Wales (NSWLEC) can make in tree disputes. The NSWLEC has broad jurisdiction to make 'such orders as it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person' and is not limited to making orders requested by the parties to the dispute.[1]

9.4 The NSWLEC may make orders that:

- require specified action to be taken to remedy damage to property or restrain or prevent damage or future damage to property
- require specified action to be taken to prevent injury to any person
- authorise the applicant to take specified action to remedy, restrain or prevent damage or future damage to property
- authorise the applicant to take specified action to prevent injury to any person
- require a party to make an application to obtain consent or authorisation that is required under another Act
- authorise the entry onto land for the purposes of carrying out an order[2]
- require the payment of costs for works specified in an order

1 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 9(1); Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 8.

2 This includes entry onto land for the purposes of obtaining quotations for the carrying out of work on the land.

- require the payment of compensation for property damage
- require a replacement tree to be planted and specify that the new tree is to be of a mature growth.[3]

9.5 It is common for the NSWLEC to adjust or deviate from the order that the parties seek. For example, instead of ordering the removal of the tree, the Court may order ongoing pruning of overhanging branches.[4]

9.6 Applications for an award of legal costs are usually sought by the successful party in the NSWLEC and are heard by judges. Commissioners who hear tree disputes cannot make orders for legal costs.[5] The NSWLEC power to award costs is similar to those of RMPAT and QCAT,[6] in that the NSWLEC may not order payment for costs unless the Court considers that an order for the whole or any part of the costs is fair and reasonable in the circumstances [of each individual case].[7]

Queensland

9.7 The Queensland Civil and Administrative Tribunal may make any order it considers necessary to prevent serious injury or prevent, remedy or restrain serious damage to property or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.[8]

9.8 The range of orders are similar to those in New South Wales, but the Queensland Act additionally provides that orders may:

- require the production of a report by an appropriately qualified arborist
- require that a survey be undertaken to clarify the tree's location in relation to the common boundary.[9]

9.9 Where an affected neighbour's application relates to a tree that has been completely removed after causing damage, QCAT can make an order about the removed tree, for example to pay compensation or repair costs, provided the tree owner did not sell their land in the meantime.[10]

9.10 If QCAT makes an order for the destruction or removal of a tree, it can also make an order for the tree to be replaced with one that is more appropriate to the surroundings, or of a different maturity, or to be placed in a more appropriate location.[11]

9.11 The Queensland Act provides that a living tree should not be removed or destroyed unless the issue relating to the tree cannot otherwise be satisfactorily resolved.[12]

9.12 In QCAT each party is expected to bear their own costs of proceeding. The Tribunal may order costs if it is in the interest of justice to do so.[13]

3 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 9(2).
4 Consultation 11 (Land and Environment Court of New South Wales).
5 Ibid. An order of a court of tribunal stipulating that legal costs be paid by one party to another. Also known as 'party–party' costs. These costs are 'either the amounts lawyers charge their clients for providing legal services or amounts recoverable by the successful party for the work done by their lawyers in legal proceedings. Legal costs include charges for the lawyers' services and disbursements, including barristers' fees, doctors' reports and the reasonable costs of court recordings and transcripts'. Parties can also agree that one party will pay the other parties' costs to settle their dispute: Supreme Court of Victoria, *Costs Court* (Web Page, 2019) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/costs-court>.
6 See discussion below.
7 *Land and Environment Court Rules 2007* (NSW) cl 3.7(2).
8 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.
9 Ibid s 66(5)(b), (g).
10 Ibid s 68.
11 Ibid s 69.
12 Ibid s 72.
13 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 101,102

Tasmania

9.13 The Resource Management and Planning Appeal Tribunal (RMPAT) may make the orders it considers appropriate to prevent, restrain or reduce the likelihood of serious injury to a person or serious damage to a person's land or any property. It may also make orders to ensure a branch does not overhang another person's land[14] and make orders to prevent, restrain or reduce substantial, ongoing and unreasonable interference with a person's use and enjoyment of land caused by a plant.[15]

9.14 Orders under the Tasmanian Act largely mirror those that QCAT may make under the Queensland Act.[16] The Tasmanian Act provides an order is not to be made requiring the removal or destruction of a living plant to which the order relates unless the Tribunal is satisfied that the purpose for which the application was sought could not otherwise be met.[17]

9.15 In RMPAT each party is to pay its own costs. The Tribunal may order costs if it considers that it is fair and reasonable to do so.[18]

Community responses—orders available

9.16 The Commission received a number of suggestions in response to the question about what types of orders should be available under a new Act.[19] Suggestions included that orders should provide for:

- pruning or other maintenance of the tree[20]
- removal of the tree[21]
- installation of root barriers[22]
- recovery of costs for ongoing tree maintenance[23]
- orders that mirrored the NSW approach[24]
- the replacement planting of trees.[25]

9.17 Some community members were cautious about trees being removed too readily and thought other remedies should be explored first.[26] For example, Dr Gregory Moore OAM stated 'removing a tree can also cause future structural issues for properties' and 'can lead to wind damage to roof tiles and structures'.[27] Arborist Robert Mineo advised that the removal of a significant number of branches can lead to the growth of 'emergency branches' which are more prone to failure.[28]

9.18 Baw Baw Shire Council identified that one of the aims of a new Act should be to require the replanting of suitable species in the same location in order to discourage people who simply want a tree removed even if it is not causing damage or harm.[29] Under Baw Baw's Planning Scheme, the council must consider the future development of the land and whether planting, replanting or other treatment should be undertaken on any part of the land prior to determining an application that may result in interference with vegetation under schedule 3 of the Significant Landscape Overlay.[30]

14 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 33(2)(a),
15 Ibid s 33(2)(d).
16 Ibid s 33(6).
17 Ibid s 33(5).
18 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 28.
19 Submissions 2 (Name withheld), 4 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 19 (Name withheld), 20 (Name withheld), 21 (Pointon Partners Lawyers), 25 (City of Boroondara), 29 (David Galwey); Consultations 2 (Dr Gregory Moore OAM), 10 (Baw Baw Shire Council), 11 (Land and Environment Court of New South Wales).
20 Submissions 2 (Name withheld), 4 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 19 (Name withheld), 21 (Pointon Partners Lawyers).
21 Submissions 2 (Name withheld), 9 (Dr Karen Smith), 19 (Name withheld), 21 (Pointon Partners Lawyers).
22 Submissions 4 (Name withheld), 21 (Pointon Partners Lawyers), 25 (City of Boroondara).
23 Submission 7 (Ben Kenyon).
24 Submissions 20 (Name withheld); Confidential submission.
25 Consultation 10 (Baw Baw Shire Council).
26 Submission 25 (City of Boroondara); Consultations 2 (Dr Gregory Moore OAM), 9 (Nillumbik Shire Council).
27 Consultation 2 (Dr Gregory Moore OAM).
28 Consultation 14 (Robert Mineo).
29 Consultation 10 (Baw Baw Shire Council).
30 Baw Baw Shire Council, *Baw Baw Planning Scheme* (3 May 2019) cl 42.03 sch 3, 4.0 Decision guidelines.

9.19 The City of Boroondara advised that it may require a replacement tree to be planted where residents illegally remove, damage, kill or destroy protected trees without a permit under its local law.[31] A fine may also be issued under local law. Replacement planting may include planting an established tree of a particular species and in the same position on the site to neutralise potential advantage gained from illegal tree works and to ensure that the benefits of the removed tree are restored in the longer term.[32]

9.20 One submission proposed that the remedies available to the decision-making body should not be limited to those requested by an affected neighbour.[33]

9.21 Baw Baw Shire Council stated that any new adjudicating body should have the power to award legal costs for vexatious or unmeritorious matters.[34] However, Barwon Community Legal Service suggested that costs should not be awarded where one or both parties may be of lower socio-economic backgrounds.[35]

9.22 The NSWLEC reported that the types of orders set out in the NSW Act are sufficient for the Court's purposes and that tree pruning is the most common order made by the Court.[36]

The Commission's conclusions—orders available

9.23 Chapter 3 identified some of the limitations of the remedies available for nuisance, negligence and trespass at common law when applied to tree disputes. These common law remedies generally only react to interference, damage or trespass to land after it has occurred. They also focus solely on the civil aspects of the dispute and do not necessarily take into consideration the broader role of trees in the community.

9.24 The new Act should give the decision-making body broad discretion to remedy, restrain or prevent damage to property or prevent harm to a person on adjoining land. The list of remedies suggested by the community aligns with the remedies that are available under the NSW Act. The Commission is of the view that the range of orders provided for in the NSW Act would be appropriate in Victoria.

Access to a neighbour's land

9.25 The new Act should allow for access to land to carry out orders or to obtain a quote to carry out works to the tree that is the subject of an order. This will also ensure that the problem can be properly assessed from both properties and that tree works can also be carried out in the most effective way and in accordance with the Australian Standards.[37] It is common for the NSWLEC to order access to an applicant's property (affected neighbour) to permit effective pruning or other tree works.[38] The Commission notes that other Victorian Acts allow entry onto neighbouring land in similar circumstances. For example, under section 33 of the *Fences Act 1968* (Vic), an owner of land can be granted authority to enter adjoining land to carry out fencing works.

31 Consultation 8 (City of Boroondara); see also *Tree Protection Local Law 2016* (City of Boroondara).
32 Consultation 8 (City of Boroondara).
33 Submission 20 (Name withheld).
34 Consultation 10 (Baw Baw Shire Council).
35 Submission 31 (Barwon Community Legal Service).
36 Consultation 11 (Land and Environment Court of New South Wales).
37 Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007); see also Standards Australia, *Protection of Trees on Development Sites* (AS4970-2009) (Sydney, NSW: Standards Australia, 2009).
38 Land and Environment Court of New South Wales, *Annotated Trees (Disputes Between Neighbours) Act 2006* (14 January 2013) 16.

Planting a replacement tree

9.26 The new Act should specifically include the power to order that a replacement tree is planted if VCAT considers that this is appropriate in the circumstances. Replacement planting is an approach that received widespread support from councils and community members involved in this inquiry.[39]

9.27 Replacement planting is a feature of the NSW and Queensland Acts.[40] Replacement planting can be required under Victorian planning permits as well as local tree protection laws. The City of Port Phillip and the City of Boroondara often order replacement planting.[41] Heritage Victoria also advised that it will generally require replanting or replacement of a heritage-listed tree that has been removed.[42]

9.28 Replacement tree planting may help to ensure that any environmental and social benefits lost from the tree's removal are restored, although the Commission notes the caution expressed by ENSPEC that:

> planting a new tree is not a replacement of the loss of a mature tree, even if it is replaced by the same species, as the decades of growth required to develop to maturity are lost. It is therefore necessary to prevent the removal of mature trees without solid justification.[43]

9.29 It may also deter people from illegally removing vegetation, for example, in breach of a local law or planning scheme regulation, or deter applications made simply because a neighbour has unreasonable expectations about living near vegetation. A neighbour may be less likely to seek the removal of a tree simply because they do not like it or to think twice about removing it illegally if another tree is ordered to be planted in its place.

Ongoing maintenance orders

9.30 The new Act should allow for ongoing maintenance orders if VCAT determines that this is appropriate in the circumstances. VCAT told the Commission that it is rare for it to make an order with ongoing obligations when exercising original jurisdiction.[44] VCAT stated that any requirement for it to monitor or follow up on orders would not be appropriate.[45] However, the Commission is of the view that an ongoing order may be appropriate in certain circumstances in a tree dispute, such as where the tree needs to be pruned or inspected at regular intervals.

9.31 Ongoing maintenance orders can be made under the interstate Acts.[46] These orders often require maintenance at specified intervals to prevent future disputes.[47] Ongoing maintenance orders were supported by a number of community members.[48]

9.32 In New South Wales, for example, the Commission was told that orders made for ongoing maintenance they are typically for periods of 12 to 18 months.[49] The NSWLEC advised that ongoing maintenance orders are less likely for claims relating to damage and harm. Claims based on the obstruction of sunlight and views caused by high hedges

39 Submissions 1 (Ian Collier), 5 (Name withheld), 22 (Name withheld), 24 (Name withheld); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 8 (City of Boroondara), 10 (Baw Baw Shire Council), 11 (Land and Environment Court of New South Wales), 12 (City of Port Phillip); Survey Respondents 1, 3, 18, 20, 27, 51, 52, 59, 76, 93, 109, 111, 123.
40 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 9(2)(j); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 69.
41 Consultations 8 (City of Boroondara), 12 (City of Port Phillip).
42 Consultation 16 (Heritage Victoria).
43 Submission 18 (ENSPEC).
44 Original jurisdiction means VCAT is the first instance decision maker under the Act. See Victorian Civil and Administrative Tribunal, *Application to VCAT to Make an Original Jurisdiction Decision* (Web Page) <https://www.vcat.vic.gov.au/case-types/review-and-regulation/application-to-vcat-to-make-an-original-jurisdiction-decision>.
45 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
46 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 9; *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(a); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 33(6)(a). See, eg, *Urquhart v Hayman (No 2)* [2012] NSWLEC 269; in this case the respondent was ordered to have the roots of the trees pruned to the boundary between the applicant's property and the respondent's property at intervals of not less than every 12 months. See also *Adamski v Betty* [2007] NSWLEC 200 (maintenance de-coning of a Bunya pine); *Sahyoun v Jessop* [2009] NSWLEC 1313 (periodic removal of deadwood).
47 See, eg, Queensland Civil and Administrative Tribunal, *Frequently Asked Questions—Tree Disputes* (Web Page, 21 February 2019) <https://www.qcat.qld.gov.au/matter-types/tree-disputes/faq-tree-disputes>.
48 Submissions 2 (Name withheld), 4 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 20 (Name withheld).
49 Consultation 11 (Land and Environment Court of New South Wales).

are more suited to ongoing orders.[50] The NSW Act allows maintenance orders to bind successors in title, provided the affected neighbour or the immediate successor in title of the affected neighbour gives a copy of the order to the new tree owner.[51] Only the immediate successor in title to the applicant is entitled to benefit from the original order.[52]The issue of new purchasers of land is discussed further in Chapter 11.

9.33 QCAT advised that many of the orders it makes do not place ongoing obligations on tree owners. However, when ongoing orders are made (for example, for annual pruning), they will remain active for 10 years unless otherwise specified.[53] Likewise, in Tasmania, an order lapses after a period of 10 years from the day on which it was made unless the order expressly states otherwise.[54]

9.34 DSCV provides an example of ongoing maintenance featuring in a mediation agreement on its website.[55] In the example, a mediated agreement provided that the affected neighbour would be responsible for pruning back the overhanging branches on a day-to-day basis, but the parties agreed that the trees would be maintained annually by a professional with the costs to be split between them.[56]

9.35 The Commission does not support limiting the duration of orders in the new Act as occurs in Tasmania and Queensland. Instead the duration of orders should be left to VCAT's discretion or otherwise apply indefinitely until revoked.

Australian Standards and arborist qualifications

9.36 Work carried out pursuant to orders made under the Act should be made in accordance with the Australian Standards Pruning of Amenity Trees[57] and Protection of Trees on Development Sites[58] and carried out by a suitably qualified arborist.

9.37 The Commission is of the view that incorporating the Australian Standards into tree works ordered by the Tribunal will ensure that those tree works are more likely to be effective and less likely to damage the tree, thereby reducing the likelihood of future problems. The new Act should refer to the Australian Standards generally rather than list them specifically because the relevant standards may change over time.

9.38 Some councils advise community members to prune in accordance with the Standards and that failure to do so may result in damage to the tree. It was suggested that the best way to satisfy the Standards is to hire an arborist.[59] VCAT was supportive of any works ordered under a new Act to be carried out by a person with relevant expertise.[60]

9.39 A suitably qualified arborist is likely to hold a qualification equivalent to Level 3 of the Australian Qualification Framework (AQF),[61] to prune or remove a tree, or a qualification of AQF Level 5 for more complex tree issues involving an assessment of whether the tree may fail. AQF Level 5 arborists are trained to draft expert reports.[62]

9.40 The NSWLEC typically requires orders for pruning or tree removal to be undertaken by an AQF Level 3 arborist with appropriate insurance cover and in compliance with the

50 Consultation 11 (Land and Environment Court of New South Wales).
51 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16(2).
52 Ibid s 16A.
53 Consultation 15 (Queensland Civil and Administrative Tribunal); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 78(1).
54 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 35.
55 Dispute Settlement Centre of Victoria, *Case Study—Tree Dispute* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/information-and-advicetrees/case-study-tree-dispute>.
56 Ibid.
57 Standards Australia, *Pruning of Amenity Trees* (AS 4373-2007) (Sydney, NSW: Standards Australia, 2007) [4]. The objective of the standard is to 'provide arborists, tree workers, government departments, property owners, and contractors with a guide defining uniform tree pruning procedures and practices in order to minimize the adverse or negative impact of pruning on trees'.
58 See also Standards Australia, *Protection of Trees on Development Sites* (AS4970-2009) (Sydney, NSW: Standards Australia, 2009). The objective of this standard is to 'provide guidance on the principles for protecting trees on land subject to development'.
59 Consultations 8 (City of Boroondara), 12 (City of Port Phillip).
60 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
61 The Australian Qualifications Framework (AQF) is the agreed policy of Commonwealth, state and territory ministers for regulated qualifications in the Australian education and training system: Australian Qualifications Framework, *What is the AQF?* (Web Page) <www.aqf.edu.au/what-is-the-aqf>.
62 Information provided by Robert Mineo to the Commission, 20 March 2019.

Australian Standard Pruning of Amenity Trees.[63] QCAT noted that orders made pursuant to the Queensland Act will usually specify that tree works are to be conducted by an appropriately qualified arborist.[64]

9.41 The qualification level should be determined by VCAT depending on the circumstances of the case and the work that needs to be done. The Commission is of the view that requiring work to be carried out by a suitably qualified arborist will also educate and guide the community more generally about arborists' qualifications and practice standards.

Not recommended: Tree removal as a last resort

9.42 The recommendations in this report should avoid the need for the Act to specify that tree removal should be ordered as a last resort. In Chapters 7 and 8 the Commission emphasises that the new Act should be underpinned by a requirement for arboricultural evidence that shows that the tree is the real and actual cause of damage or harm that has occurred or is likely to occur in the next 12 months. The decision-making principles in Chapter 8 also require consideration of a wide range of factors that recognise the contribution of the tree to amenity, local eco-systems and biodiversity, and its social, cultural and scientific value. The combined effect of these recommendations is that tree removal is only likely to occur as a last resort.

Legal costs

9.43 Parties are expected to bear their own legal costs in VCAT.[65] However, VCAT may order legal costs in certain circumstances such as where the matter was brought without merit or to harass, annoy or distress someone, or is not well supported in fact or law.[66]

9.44 It may be appropriate for VCAT to exercise this power where a tree dispute is initiated by a neighbour purely to annoy or distress the tree owner.

Recommendations

29 The Act should provide the decision maker with broad discretion to make such orders as it considers appropriate, including:

(a) requiring the taking of specified action

(b) enabling entry to land for the purposes of carrying out an order or to obtain a quote for carrying out the tree works

(c) requiring the payment of the costs of tree works

(d) requiring the payment of compensation for property damage

(e) requiring a replacement tree to be planted in a specified location and to be maintained to mature growth if a tree is ordered to be removed, or

(f) requiring ongoing maintenance for a specified time period.

30 The Act should require that work that is carried out pursuant to orders complies with the relevant Australian Standards and undertaken by a suitably qualified arborist as determined by the Victorian Civil and Administrative Tribunal.

63 Land and Environment Court of New South Wales, *Annotated Trees (Disputes Between Neighbours) Act 2006* (14 January 2013) 14–15.
64 Consultation 15 (Queensland Civil and Administrative Tribunal).
65 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1).
66 For a full list of circumstances in which VCAT can award costs, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(3); *Victorian Civil and Administrative Tribunal, Who Pays for My Legal Costs?* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/on-hearing-day/who-pays-for-my-legal-costs>.

Notification of orders

9.45 VCAT should ensure that any party who appeared in the proceeding should be provided with a copy of the order under the new Act. Any party who would otherwise be required under other laws to provide consent or authorisation for tree works should also be notified of an order regardless of whether they attend the hearing. This recommendation aligns with those in Chapter 5 about notice of an application under the new Act. It also mirrors interstate requirements.

9.46 The NSWLEC must provide a copy of any order it makes to the council of the local government area on which the tree is situated, regardless of whether the local council appeared in the hearing, and also to the Heritage Council if it appeared in the proceedings.[67] The same requirement applies in QCAT.[68] In Tasmania RMPAT will provide a copy of the order made to the council in relation to the land on which the tree is situated and any government body or party who appeared in the proceedings.[69]

9.47 Nillumbik Shire Council stated that if a new statutory scheme were to be adopted in Victoria, then it would want to be notified of any orders made as the relevant local council.[70]

Recommendation

31 The Act should require the Victorian Civil and Administrative Tribunal to provide a copy of any orders made to any relevant authority who would otherwise be required to authorise or consent to works on the tree.

Appeals

9.48 An appeal is an application to a court with jurisdiction to hear an appeal (also known as 'appellate jurisdiction') on the ground that there has been an error in the original decision.[71] Where the decision has been made by a lower court in the first instance, an appeal must be made to a higher court. Where the decision has been made by VCAT in the first instance, an appeal must be made to the Supreme Court of Victoria.[72] An appeal may be as of right or by leave. An appeal as of right means that the appeal can be pursued without the need to obtain leave (or permission) of the appellate court. For appeals by leave, the appellate court must grant permission to a party wishing to pursue the appeal.[73]

Appealing VCAT orders

9.49 The VCAT Act provides for only a limited right to appeal.[74] Most VCAT decisions are final and binding.[75] The limit on appeals in VCAT is designed to provide certainty and clarity once VCAT makes a determination.[76]

67 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14.
68 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 76.
69 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 34(3).
70 Consultation 9 (Nilumbik Shire Council).
71 Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'appeal'.
72 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.
73 Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'appeal by leave'.
74 See generally *Victorian Civil and Administrative Tribunal Act 1998* (Vic) pt 5.
75 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 10; see also Victorian Civil and Administrative Tribunal, *Appeal a VCAT Decision* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/appeal-a-vcat-decision>.
76 Victorian Civil and Administrative Tribunal, *Annual Report 2017–18* (Report, 2018) 10.

Appeal on a question of law

9.50 Appeals of VCAT decisions are limited to questions of law and determined by a court with leave.[77] An appeal on a question of law is made where a party believes that VCAT made a mistake in the way it applied the law.[78] In order to appeal on a question of law, a person needs to seek leave of the Court of Appeal of the Supreme Court of Victoria, if the VCAT decision was made by the president or the vice president[79] of VCAT (even if other members also heard the matter),[80] or of the Trial Division of the Supreme Court if the decision was made by a VCAT member other than the president or vice president.[81]

9.51 An application seeking leave to appeal must be made no later than 28 days after VCAT makes an order and in accordance with the rules of the Supreme Court.[82]

9.52 The Court of Appeal or the Trial Division may make an order affirming, varying or setting aside: the order of the Tribunal; an order that the Tribunal could have made in the proceeding; an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court; or any other order the Court thinks appropriate.[83]

9.53 In the 2017–18 financial year, the total number of appeals lodged from VCAT was 82. Only nine applicants were granted leave to appeal to the Supreme Court of Victoria. Of these, four appeals were dismissed and five appeals were upheld.[84]

Reopening an order

9.54 VCAT may reopen an order on substantive grounds in limited circumstances under the VCAT Act.[85] If a matter is reopened on substantive grounds, VCAT may make an order that revokes or varies the original order.[86]

9.55 The VCAT Act allows VCAT to reopen an Order where a 'person in respect of whom an order is made' did not attend or was not represented at the hearing.[87] In deciding whether to reopen an order, VCAT may consider whether the applicant had a reasonable excuse for not attending or being represented at the hearing and that it is appropriate to conduct a re-hearing.[88]

9.56 If an application to reopen a matter is successful, the original order is suspended until the subsequent hearing takes place.[89] These hearings are conducted internally within VCAT and not by a court. If the application is unsuccessful, the original order remains in place.[90]

77 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1)(a).
78 A question of law, also known as a 'legal error', is 'a question to be resolved by applying legal principles, rather than by determining a factual situation; an issue involving the application or interpretation of a law and reserved for a judge': Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'question of law'.
79 The president of VCAT is a judge of the Supreme Court; vice-presidents of VCAT are judges of the County Court: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 10(1); 11(2).
80 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1)(a).
81 Ibid s 148(1)(b).
82 Ibid s 148(2); *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018* (Vic) ord 4; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ord 64. See also order 64.19 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), which permits the Court of Appeal constituted by two or more judges to treat an application for leave to appeal as the hearing of the appeal.
83 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(7)(a)–(d).
84 Victorian Civil and Administrative Tribunal, *Annual Report 2017–2018* (Report, 2018) 82.
85 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 120.
86 Ibid s 120(4)(b).
87 Ibid s 120(1). A person seeking to reopen an order must apply and obtain the leave of VCAT within 14 days after they become aware of the order: *Victorian Civil and Administrative Tribunal Rules 2018* (Vic) reg 4.24(1).
88 VCAT must also consider whether the applicant had a reasonable case to argue in relation to the subject matter of the order as well as any prejudice that may be caused to another party if the application is heard and determined: See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 120(4)(a)(i), (ii), 120(4A).
89 Victorian Civil and Administrative Tribunal, 'Application to Reopen An Order (Application for Review Section 120)', *Forms, Guides and Resources* (Online Form, 26 July 2016) 1 <https://www.vcat.vic.gov.au/resources/application-to-reopen-an-order-application-for-review-section-120>.
90 Ibid.

Re-hearing

9.57 Some enabling statutes also allow a person to apply for a rehearing[91] in VCAT. Re-hearings are generally limited to matters that involve human rights matters, for example, a Guardianship and Administration case.[92] These re-hearings are conducted within VCAT and not by a court.[93]

Other jurisdictions—appeals

New South Wales

9.58 The appeal of tree disputes determined under the NSW Act is governed by the *Land and Environment Court Act 1979* (NSW), the Act governing the Land and Environment Court of New South Wales (NSWLEC).

9.59 The NSWLEC is a superior court.[94] An appeal of a tree dispute order made by NSWLEC can be made on a question of law only.[95] If the appeal is against a decision of a commissioner of the NSWLEC, it is determined by a judge in the NSWLEC.[96] If the appeal is against a decision of a judge of the NSWLEC, it is heard by the NSW Court of Appeal.[97]

9.60 For tree disputes, an appeal will be in the form of a rehearing and 'fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal'.[98]

Queensland

9.61 The appeal of tree disputes determined under the Queensland Act is governed by the Queensland Civil and Administrative Tribunal Act 2009 (Qld).

9.62 As noted in Chapter 7 QCAT is a 'court of record'[99] (or a 'court of the State')[100] 'capable of being invested with the judicial power of the Commonwealth'.[101] Unlike VCAT, QCAT has an internal Appeal Tribunal. A person can appeal the decision of a QCAT member on a question of law, fact or combination of law and fact in certain circumstances.[102] A person must seek leave of the Appeal Tribunal to appeal a decision.[103] A person seeking leave needs to show that 'there is a reasonable argument the QCAT decision was wrong, for example, if the tribunal applied the wrong legal test and/or there has been a substantial injustice and an appeal is necessary to correct the decision'.[104]

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91 Rehearings are a form of appeal which allows a case to be reopened and determined on both issues of fact and law. New material that was not produced in the original hearing may also be considered: Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (Lexis Nexis/Butterworths, 3rd ed, 2004) 're-hearing'.

92 In limited circumstances it is possible to apply for a re-hearing of a Guardianship and Administration case, Power of Attorney case, Disability Act case or Medical Treatment Planning and Decisions Act case. *Guardianship and Administration Act 1986* (Vic), s 60A; *Disability Act 2006* (Vic) s 197; *Powers of Attorney Act 2014* (Vic) divs 4–5; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 88.

93 *Guardianship and Administration Act 1986* (Vic), s 60C; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 89; *Disability Act 2006* (Vic) s 198; *Powers of Attorney Act 2014* (Vic) ss 127, 129.

94 *Land and Environment Court Act 1979* (NSW) s 5(1).

95 Ibid ss 56A(1), 57(1).

96 Ibid s 56A(1). See, eg, *Li v Fang* [2018] NSWLEC 33.

97 Ibid ss 57(1), 57(4)(a)–(b).

98 Ibid s 39(3).

99 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.

100 Within the meaning of section 77(iii) of the *Australian Constitution: Owen v Menzies* (2012) 293 ALR 571. See also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.

101 Pamela O'Connor, *Tribunal Independence* (The Australasian Institute of Judicial Administration Incorporated, 2013) 3 n [19].

102 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 146, 147; Queensland Civil and Administrative Tribunal, *Decision About a Minor Civil Dispute* (Web Page, 15 February 2019) <https://www.qcat.qld.gov.au/qcat-decisions/appealing-a-qcat-decision/decision-about-a-minor-civil-dispute>.

103 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(3); Queensland Civil and Administrative Tribunal, *Decision About a Minor Civil Dispute* (Web Page,15 February 2019) <https://www.qcat.qld.gov.au/qcat-decisions/appealing-a-qcat-decision/decision-about-a-minor-civil-dispute>.

104 Queensland Civil and Administrative Tribunal, *Minor Civil Disputes—Appeals* (Factsheet, version 3, May 2017) 1 https://www.qcat.qld.gov.au/qcat-decisions/appeals-in-minor-civil-disputes; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 Dictionary 'reopening ground'.

9.63 If leave is granted, then the appeal will be decided by way of a rehearing in which the original information and evidence are presented again.[105] New information and evidence can also be presented with leave.[106]

9.64 However, if the original QCAT decision was made by a judge sitting in QCAT then a party may appeal the decision to the Queensland Court of Appeal.[107] Appeals on a question of law only are as of right.[108] Appeals on questions of fact or mixed fact and law require leave of the Court.[109]

9.65 A person may also apply for QCAT to reopen a matter if they did not attend the hearing or if they would suffer substantial injustice if the matter were not reopened due to the availability of significant new evidence since the original hearing.[110] The hearing will be conducted in QCAT as a new hearing on its merits.[111]

Tasmania

9.66 The appeal of tree disputes determined under the Tasmanian Act is governed by the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas), the Act governing the Resource Management and Planning Appeal Tribunal (RMPAT).

9.67 Any decision of RMPAT may be appealed as of right to the Tasmanian Supreme Court on questions of law.[112]

9.68 The Tasmanian Supreme Court can make any orders it considers appropriate, including orders affirming or setting aside the original RMPAT decision; substituting its own decision for the original RMPAT decision; or remitting the matter to RMPAT for reconsideration in accordance with any directions.[113]

Community responses—appeals

9.69 Community responses about the grounds and scope of appeals of orders made under a new Act were not sought in the consultation paper. However, some respondents provided views on this topic.

9.70 One suggestion was that matters should start in VCAT and then be appealed to the Magistrates' Court of Victoria.[114]

9.71 The NSWLEC also provided insight into its appeals processes. The Court considers it important to confine all appeals to questions of law because a broader right of appeal may raise complex legal issues related to the legal doctrines of estoppel[115] and res judicata, a legal principle that prevents a party from re-litigating an issue or a defence which has already been determined.[116] By confining an appeal to a question of law, the Court is able to provide certainty to parties about the outcome of its decisions.

105 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 147(2). For appeals concerning a question of fact or mixed law and fact, the appeal is decided by way of rehearing.

106 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 147(2). In *Bailey v Sullivan* [2017] QCATA 86 Member Hughes explains, 'The Appeal Tribunal will only accept fresh evidence if it was not reasonably available at the time the proceeding was heard and determined. Ordinarily, an applicant for leave to adduce fresh evidence must satisfy three tests. Could the parties have obtained the evidence with reasonable diligence for use at the trial? If allowed, would the evidence probably have an important impact on the result of the case? Is the evidence credible?': [19], citing *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.

107 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149(2).

108 Ibid s 149(3)(a)–(b).

109 Ibid s 149(3)(b).

110 Ibid div 7; sch 3 Dictionary 'reopening ground'.

111 Ibid s 140(2).

112 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) s 25(1). See also Justice Alan Blow, Chief Justice of Tasmania, 'Planning, Environment and Heritage Litigation and Legislation in Tasmania' (Speech, Australasian Conference of Planning and Environment Courts and Tribunals, 5 March 2014) < https://www.supremecourt.tas.gov.au/publications/speeches-articles/>.

113 *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) ss 25(5), 25(6)(a)–(b).

114 Confidential submission.

115 The doctrine of estoppel 'is designed to protect a party from the detriment which would flow from that party's change of position if the assumption or execution that led to it were to be rendered groundless by another': Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'estoppel'.

116 Consultation 11 (Land and Environment Court of New South Wales). Res judicata is 'the rule that if a dispute is judged by a court of competent jurisdiction, the judgment of the court is final and conclusive as to the rights and duties of the parties involved. Res judicata constitutes an absolute bar to a subsequent suit for the same cause of action': Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'res judicata'.

9.72 The NSWLEC noted that the subject matter of a tree dispute that has already been determined by the Court cannot be the subject of a new application to the Court unless there is a change in circumstances or fresh evidence is presented. It was suggested that this prevents parties from seeking to have the matter re-heard before a more favourable commissioner. [117]

The Commission's conclusions—appeals

9.73 VCAT, like other tribunals that derive their powers from enabling statutes, is intended to be a forum that provides for the final resolution of matters. Rights of appeal are thus often limited to questions of law in a court with appellate jurisdiction.

9.74 Chapter 7 recommends that VCAT be given original jurisdiction and not exclusive jurisdiction to hear and determine neighbourhood tree disputes under the new Act.[118] This means that VCAT's rights to review a decision would be limited to an appeal on a question of law to the Supreme Court and the re-opening of an order on substantive grounds in the interests of fairness as provided for in the VCAT Act, where a person did not attend or was not represented at the hearing.[119] The Commission is of the view that these existing appeal processes are appropriate for tree disputes under the new Act.

9.75 The costs of commencing an appeal in the Supreme Court may be prohibitive, and there is a high level of formality and complexity in its processes, which is at odds with the policy objectives of the new Act. However, on balance it is more important to provide for the resolution of party–party tree disputes in a final and timely manner. The Commission also notes that appeal processes at VCAT were recently considered in the 2016 *Access to Justice* Review which concluded that 'it is preferable not to introduce an internal appeal mechanism in VCAT'.[120]

Varying or revoking an order

9.76 Trees are dynamic living organisms and therefore circumstances relating to the trees in dispute can change.

9.77 In New South Wales, Senior Commissioner Moore and Acting Commissioner Thyer explained:

> Trees, whether living or dead, are evolving, changing dynamic structures. Living trees may grow, flower, fruit or react to climatic changes such as drought… They are also subject to the influence, malignant or benign depending on the species and the circumstances, of all four of the ancient elements – earth, air, fire or water.[121]

9.78 Arborists advised that predictions about how trees will live and grow are not necessarily precise because of the variations in arboricultural assessments and dynamic environmental factors.[122]

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117 The Court compared the outcomes in two cases: *Zangari v Miller (No 2)* [2010] NSWLEC 1093 and *Hinde v Anderson* [2009] NSWLEC 1148. In *Zangari v Miller (No 2)*, the application was dismissed because further evidence from excavation works, which were not carried out in the first instance, did not present a change in circumstances or new evidence, as the evidence was available at the time of the original application: [3]–[5]. In *Hinde v Anderson,* where the applicant alleged the tree had caused damage subsequent to the original decision, the application for a new hearing was allowed because the Court considered there was scope to consider on substantive grounds these new circumstances and whether fresh evidence had become available: [39]. In the proceeding case, *Hinde v Anderson (No 2)* [2009] NSWLEC 1258, the application was considered on substantive grounds but dismissed due to a lack of evidence [15].

118 Original jurisdiction means VCAT is the first instance decision maker under the Act. VCAT has original jurisdiction under Acts such as the *Local Government Act 1989* (Vic) and the *Owners Corporations Act 2006* (Vic). See Victorian Civil and Administrative Tribunal, *Application to VCAT to Make an Original Jurisdiction Decision* (Web Page) <https://www.vcat.vic.gov.au/case-types/review-and-regulation/application-to-vcat-to-make-an-original-jurisdiction-decision>.

119 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 120, 148(1).

120 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1 [4.3.7].

121 *Hinde v Anderson* [2009] NSWLEC 1148 [1]–[2].

122 Consultations 2 (Dr Gregory Moore OAM), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 14 (Robert Mineo).

9.79 As tree problems can also change over time, an order may no longer accommodate the original problem, or may no longer be able to be complied with, through no fault of the parties. For example, an order may specify that the branches of a tree are to be pruned in a certain manner. This may not be possible where weather events permanently change the character of the tree. As a tree changes with age, it may become necessary to enter a neighbour's land in order to prune it and this may not be accommodated in an original order.

9.80 The new Act should provide VCAT with the power on application by the tree owner or affected neighbour (or immediate successors in title[123]) to vary or revoke an order. This may be necessary if VCAT is satisfied that the original circumstances that caused the damage or harm have changed, and that the new circumstances are not accommodated in the original order. VCAT should be empowered to vary the original order by altering the terms of the order or by substituting any other order. VCAT may also need to revoke an order where it is no longer relevant in the circumstances—for example, where there is an order for ongoing maintenance of a tree but the tree owner (or their successor in title) subsequently decides to remove the tree. The tree owner may want to revoke the order to formally remove the payment obligation. Alternatively, a vendor may want to revoke an order for ongoing maintenance to ensure clear title before the sale of a property.

9.81 These powers should be specified in the new Act rather than relying on s 51(2) of the VCAT Act. This provision outlines VCAT's powers when reviewing a decision and will not generally be applicable to a situation where the VCAT decision maker is exercising original jurisdiction.[124] This is similar to the approach in the Tasmanian Act, which provides that either party to a tree dispute may apply to RMPAT for a variation or revocation of an order.[125]

9.82 The Queensland Act provides that QCAT may revoke an order by its own motion but does not provide QCAT with the right to vary an order. However, the Queensland Act provides QCAT with the power to renew its orders where the order cannot be complied with due to difficulties with 'interpreting, implementing or enforcing' the order.[126] The effect of this provision is similar to that proposed by the Commission and in the Tasmanian Act—for example, there may be difficulties interpreting the way in which the tree is ordered to be pruned.[127] A party can apply for a renewal of an order and 'QCAT may make the same decision or another decision that could have been made when the proceeding was originally decided. That decision is then enforceable as a final decision of QCAT.'[128] An order can only be reviewed once under this division.[129]

9.83 It is important to limit the number of times a party may seek to have an order varied or revoked under the new Act to one application per year. This is consistent with the Commission's recommendation concerning damage or harm anticipated to occur within the following 12 months.[130] This requirement should limit opportunities for the matter to be repeatedly revisited at VCAT.

9.84 The applicant would have to provide notice to the original parties to the dispute as well as any other interested parties that were given notice of the original application. Successors in title may also need to be notified if either of the original parties sold the land.

123 Successors in title are discussed in Ch 11.
124 Section 51(2) of the VCAT Act outlines the orders VCAT may make when reviewing a decision.
125 *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 36(1), (6).
126 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 133(1)(a)–(b); *Queensland Civil and Administrative Tribunal, Renewal of QCAT's Final Decision* (Web Page, 26 May 2017) <https://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision/renewal-of-qcats-final-decision>.
127 Consultation 15 (Queensland Civil and Administrative Tribunal).
128 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 134; *Queensland Civil and Administrative Tribunal, Renewal of QCAT's Final Decision* (Web Page, 26 May 2017) <https://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision/renewal-of-qcats-final-decision>.
129 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 134(4).
130 See Ch 5 for more information about the recommended causes of action under the new Act.

9.85 Where circumstances change such that there is an entirely new set of circumstances that were not considered in an original application or order, or where new evidence becomes available, the applicant would need to commence a new matter in VCAT. A new application would be needed if there is evidence that the health of a tree has declined since the original application, such that there is greater support for an applicant's claim that the tree may cause damage or harm. Another example may be where a tree grows a new branch, not contemplated in the original application, which overhangs neighbouring land and may cause future damage or harm.

Recommendations

32 Where new circumstances are not accommodated in the original order, the Act should allow the tree owner or affected neighbour or immediate successors in title to apply to the Victorian Civil and Administrative Tribunal to vary or revoke the original order.

33 The Victorian Civil and Administrative Tribunal's powers in determining the application to vary or revoke the order should be stated in the Act as the power to:

(a) affirm the original order

(b) vary the original order by altering the terms of the order or by substituting any other order that the Victorian Civil and Administrative Tribunal may make under the new Act

(c) revoke an existing order.

34 The applicant should provide notice in writing of the application to vary or revoke the original order to the original parties to the dispute as well as any other affected parties that were given notice of the original application or any successors in title.

35 The Act should only provide for one application to vary or revoke the order per year.

Enforcement of orders

9.86 The consultation paper asked how orders issued under a new Act should be enforced when a party fails to comply with them.

Enforcement in VCAT

9.87 The options for a person to enforce an order where the other party refuses to comply are set out in the VCAT Act. They are:

- Enforcement of a monetary order. A monetary order requires a party to pay money to another party.[131]
- Enforcement of a non-monetary order. A non-monetary order is any other order that does not involve monetary payments.[132]

131 *Victorian Civil and Administrative Tribunal 1998* (Vic) s 121; see also Victorian Civil and Administrative Tribunal, *VCAT Decisions and Orders* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/vcat-decisions-and-orders>.

132 *Victorian Civil and Administrative Tribunal 1998* (Vic) s 122; see also Victorian Civil and Administrative Tribunal, *VCAT Decisions and Orders* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/vcat-decisions-and-orders>.

- Contempt is a broad term for a body of law that seeks to prevent or punish conduct that interferes with the proper administration of justice, including failure to comply with a Tribunal order.[133]

9.88 VCAT itself does not have power to enforce monetary or non-monetary orders.[134]

9.89 Enforcement proceedings in VCAT will be more accessible with the implementation of Part 10 Division five of the *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) (the amending Act).[135] The amending Act will alter some of the procedural requirements for the enforcement of VCAT orders.[136]

Enforcing monetary orders

9.90 At present, when a person does not comply with a VCAT monetary order, the aggrieved party can pursue the amount as a judgment debt in the court of relevant jurisdictional limit by filing the order in the relevant court.[137] For tree disputes under the new Act, this is mostly like to be the Magistrates' Court which has a jurisdictional limit of $100,000.[138]

9.91 A person will need to file in the Magistrates' Court a certified true copy of the VCAT order and an affidavit about the amount not paid. There is no fee for filing an order.[139] Once filed, the VCAT order will be taken to be an order of the Magistrates' Court and enforced accordingly.[140]

9.92 When the relevant provisions of the amending Act come into operation, the aggrieved party will no longer need to take any additional procedural steps to file the VCAT order in the relevant court. The VCAT order will be automatically deemed to be an order of the court and enforced accordingly once enforcement proceedings are commenced.[141] This is intended to avoid additional procedural burden to the successful party.[142]

Enforcing non-monetary orders

9.93 When a person does not comply with a non-monetary order issued by VCAT, the aggrieved party can seek to compel performance in the Supreme Court of Victoria.

9.94 A person who does not comply with a non-monetary VCAT order is guilty of an offence.[143] Penalties include imprisonment[144] or a fine for 20 penalty units ($3223.80) with 5 penalty units ($805.95) added for each day of non-compliance, up to a maximum of 50 penalty units ($8059.50); or both imprisonment and a fine.[145] Criminal proceedings take place in the Magistrates' Court.[146]

9.95 If a person wishes to compel their neighbour to carry out the nonmonetary order, then the matter needs to be taken to the Supreme Court for enforcement. The aggrieved party will need to file a certified true copy of the VCAT order; an affidavit about the non-

133 *Victorian Civil and Administrative Tribunal 1998* (Vic) s 137; see, eg, Julie R Davis, 'Contempt in the Tribunal', *Foley's List* (Research Paper, 23 May 2014) <https://www.foleys.com.au/mobile/CpdResources.aspx>; Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'contempt of court'.
134 Victorian Civil and Administrative Tribunal, *Enforcing VCAT Orders* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case/what-to-expect-after-the-final-hearing/enforcing-vcat-orders>.
135 See *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) pt 10 div 5.
136 The enforcement of orders in VCAT are in Part 10, Division 5 of the Amending Act. Part 10 comes into operation on a day or days to be proclaimed: s 2(2). If a provision of division 5 of part 10 does not come into operation before 1 July 2020, it comes into operation on that day: s 2(5).
137 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 121(4).
138 'Jurisdictional limit' in a civil proceeding means $100,000: Magistrates' *Court Act 1989* (Vic) s 3.
139 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 121(2).
140 Ibid s 121.
141 *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 68.
142 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1 288.
143 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 133.
144 Imprisonment is to last until compliance occurs or for three months (whichever is sooner): *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 133(1).
145 Ibid s 133(1). The current value of a penalty unit is $161.19 (as at 1 July 2018 to 30 June 2019): Victorian Government Gazette, 'Notice Under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' (GG No S135, Thursday 29 March 2018) <https://www.dtf.vic.gov.au/financial-management-government/indexation-fees-and-penalties>.
146 See, eg, *Magistrates Court Act 1989* (Vic) s 25.

compliance; and a certificate from VCAT stating that the order is appropriate for filing in the Supreme Court.[147] There is no fee for filing an order.[148] Once filed, the VCAT order will be taken to be an order of the Supreme Court and enforced accordingly.[149]

9.96 The *Access to Justice* Review recommended that this process should be repealed so that parties are not directed to the Supreme Court to seek enforcement of a non-monetary order. Instead, the Access to Justice Review recommended that non-monetary orders of VCAT 'should be enforced, in exceptional circumstances, using VCAT's existing contempt powers'.[150]

9.97 The amending Act does not implement this recommendation but will make it easier for a party to pursue enforcement by removing some of the existing procedural burdens.[151] As is the case with monetary orders, the amending Act will no longer require the aggrieved party to take any additional procedural steps to file the VCAT order and other documents in the Supreme Court. Instead, the VCAT order will be automatically deemed to be an order of the Supreme Court and can be enforced accordingly.[152]

9.98 An enabling Act may also contain separate enforcement mechanisms. For example, under the *Planning and Environment Act 1987* (Vic), if a party fails to carry out any work specified in an enforcement or interim enforcement order issued by VCAT under the Act, then a local council or, with the consent of VCAT, any other party, may carry out those works themselves. Any costs incurred as a result of carrying out these works may then be recovered from the defaulting party in the relevant court as a debt.[153]

Contempt

9.99 In limited circumstances, VCAT's contempt powers can be used to enforce an order.[154] VCAT's contempt power reflects:

> the importance of compliance with Tribunal Orders and the importance of preserving the authority and standing of the Tribunal. However, the power should be exercised cautiously and should not be used unless there is no other effective way of enforcing the Tribunal's Order.[155]

9.100 When a person is found guilty of contempt, VCAT can order imprisonment, a fine or both.[156] The prison term is to be not more than five years. The fine is to be not more than an amount that is 1000 times the value of a penalty unit ($161,190).[157] An example of a finding of contempt in VCAT can be found in the case of *Kanter v Milroy Investments Australia Pty Ltd (Owners Corporations)*[158] where the respondent was fined $10,000 for failing to comply with previously issued VCAT orders.[159] VCAT told the Commission that proceedings for contempt can be lengthy and complex.[160]

147 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 122(1).
148 Ibid s 122(2).
149 Ibid s 122(3). A non-monetary order is commonly enforced in the Supreme Court by proceedings for contempt of court: *Access to Justice Review Report and Recommendations* (2016) vol 1, 254. A person found to be in contempt will face a fine, imprisonment or both. Imprisonment may be appropriate as 'a coercive sanction, to compel compliance with the order, disregard of which constituted the contempt': Judicial College of Victoria, '8.7 Sentencing in Contempt Cases', *Victorian Criminal Proceedings Manual* (26 February 2018) <http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#48747.htm>.
150 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 288.
151 *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 69.
152 Ibid s 69.
153 *Planning and Environment Act 1987* (Vic) s 123.
154 A person is guilty of contempt of the Tribunal if they insult a member of the Tribunal while that member is performing functions as member; insult, obstruct or hinder a person attending a hearing before the Tribunal; misbehave at a hearing before the Tribunal; interrupt a hearing before the Tribunal; obstruct or hinder a person from complying with an order of the Tribunal or a summons to attend the Tribunal; do any other act that would, if the Tribunal were the Supreme Court, constitute contempt of that Court: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137(1).
155 *Kanter v Milroy Investments Australia Pty Ltd* (Owners Corporations) [2015] VCAT 90 [222].
156 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 137(1), 137(5).
157 Ibid s 137(5)(a). The current value of a penalty unit is $161.19 (as at 1 July 2018 to 30 June 2019): Victorian Government Gazette, 'Notice Under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' (GG No S135, Thursday 29 March 2018) <https://www.dtf.vic.gov.au/financial-management-government/indexation-fees-and-penalties>.
158 [2015] VCAT 90.
159 *Kanter v Milroy Investments Australia Pty Ltd* (Owners Corporations) [2015] VCAT 90 [268], [274].
160 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).

9.101 The amending Act will broaden VCAT's contempt powers. Once the amendments come into operation, VCAT will be able to hold a person guilty of contempt where they fail to comply with an order 'in circumstances where, if the Order were an Order of the Supreme Court, the failure would constitute contempt of that Court'.[161]

Reopening an order

9.102 As discussed earlier in the context of appeals, VCAT can reopen a matter on substantive grounds when a party did not appear or was not represented at the time of the hearing and making of an order.[162]

9.103 The *Access to Justice* Review recommended that VCAT's powers to reopen orders should be expanded for enforcement reasons. The review recommended:

> The VCAT Act should be amended to enable VCAT to reopen or renew a proceeding where there has been a problem with enforcement, similar to section 133 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). This would provide an easy way to convert a non-monetary order to a monetary order where there has not been compliance with the former.[163]

9.104 Once the relevant provisions of the amending Act come into operation 'a person in whose favour an order of the Tribunal is made may apply to the Tribunal for review of the order to remedy a problem with enforcing or complying with the order'.[164] The Tribunal must be satisfied that there are problems with enforcing or complying with the order and that it is therefore appropriate to vary, revoke or make any other order.[165]

Other jurisdictions—enforcement of orders

New South Wales

9.105 The NSW Act states that failure to comply with an order is an offence with a maximum of 1000 penalty units.[166] This equates to a maximum of $110,000.[167] Prosecution of this offence takes place in the summary jurisdiction of the NSWLEC.[168]

9.106 The NSW Act also provides an enforcement mechanism through local government. On the request of the affected neighbour, the local council may also arrange for an authorised person to enter the tree owner's land to ascertain whether any orders relating to tree works have been carried out and if not, arrange for the works to be carried out.[169] The local council can bring legal action to recoup any costs incurred in carrying out the order. A judgement debt can be registered as a charge on the tree owner's land.[170] During the statutory review of the NSW Act it was found that local councils usually do not agree to enforce orders on the request of neighbours.[171]

161 *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 70(1)(ea).
162 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 120(1).
163 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 288, Recommendation [5].
164 *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 67(1).
165 Ibid s 67(4).
166 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 15(1).
167 Land and Environment Court of New South Wales, *Enforcement* (Web Page, 2 May 2015) <http://www.lec.justice.nsw.gov.au/Pages/coming_to_the_court/end_of_a_case/enforcement.aspx>; see section 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides that 'unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying $110 by that number of penalty units'.
168 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 15(2); *Land and Environment Court Act 1979* (NSW) s 21. See also Land and Environment Court of New South Wales, *Practice Note Class 5: Proceedings,* 29 March 2018 <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/practice_notes.aspx>. Enforcement of a non-monetary order may also be pursued based on the *Uniform Civil Procedure Rules 2005* (NSW) pt 40 div 2, which also set out criminal penalties for non-compliance.
169 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 17.
170 Ibid ss 17(8), 17A.
171 Department of Justice and Attorney General (NSW), *Review of the Trees (Dispute Between Neighbours) Act 2006* (NSW) (Report, 2009) 1.

9.107 Where the NSWLEC makes a monetary order, such as for the payment of compensation of the cost of works, then the order can also be enforced through an action to recover a debt in the Local Court or District Court depending on the amount.[172]

Queensland

9.108 The Queensland Act states that substantial compliance with an order will be considered adequate.[173] The Queensland Law Reform Commission (QLRC) explains that this provision 'recognises that minor deviations from precise specifications are a practical reality of the sort of work required by an Order' and that QCAT has recognised that minor variations are 'not of such magnitude as to constitute noncompliance'.[174]

9.109 However, if the tree owner fails to follow an order without reasonable excuse, they can be held liable under the Queensland Act for an offence with a maximum of 1000 penalty units.[175] This equates to a maximum of $130,550.[176]

9.110 During its statutory review of the Queensland Act, the QLRC recommended the removal of the penalty under section 77 of the Queensland Act for failing to comply with a QCAT order.[177] The QLRC thought that it was unclear whether the penalty 'has a deterrent effect'[178] and a better approach may be to create practical measures that would give effect to orders.[179] The QLRC noted that the penalty under section 213 of the QCAT Act ($13,055) was 'sufficient to deal with contravention of an order…'.[180] This recommendation has not been implemented.

9.111 The QLRC also recommended a new provision in the Queensland Act where the affected neighbour could apply to carry out work that had was not performed in accordance with an Order and recover the reasonable costs from the tree owner as a debt.[181] The QLRC noted that, in some cases, 'the failure of one party to comply with an order may be addressed in the way the original order is framed'.[182] These are known as 'guillotine' orders which 'build in the consequences of non-compliance' by providing that the other party can carry out the works and recover the costs from the defaulting party.[183] However, such orders are not frequently used.[184] The QLRC's recommendation has not been implemented.

9.112 Like the NSW Act, the Queensland Act also provides a 'last resort' enforcement mechanism through local councils in the case where the tree owner fails to carry out a QCAT order. The affected neighbour can contact their local council and ask it to carry out the order because the tree owner has failed to do so. The local council is under no obligation to follow this request.[185] The QLRC reported that this mechanism is not frequently used.[186]

172 Land and Environment Court of New South Wales, *Enforcement* (Web Page, 2 May 2015) <http://www.lec.justice.nsw.gov.au/Pages/coming_to_the_court/end_of_a_case/enforcement.aspx>.
173 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 91.
174 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [5.25] citing *Franchi v Yazdani* (No 2) [2015] QCAT 112, [11].
175 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 77.
176 Queensland Government, *Sentencing Fine and Penalties for Offences* (Web Page, 5 July 2018) <https://www.qld.gov.au/law/fines-and-penalties/types-of-fines/sentencing-fines-and-penalties-for-offences>. The penalty unit value in Queensland is $130.55 (current from 1 July 2018).
177 Instead it was suggested that the general penalty for non- compliance under the QCAT Act would be sufficient. *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213.
178 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011,* (Report No 72, December (2015) [5.125]
179 Ibid [5.127]
180 Ibid [5.126]
181 Ibid 242.
182 Ibid [5.68].
183 Ibid [5.68]; see, eg, *Attwell v Oman* [2017] QCAT 251.
184 Ibid [5.69].
185 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88.
186 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011,* (Report No 72, December (2015) [5.93].

9.113 QCAT does not have jurisdiction to enforce its own orders when there is noncompliance. A person wishing to enforce a monetary order must file the QCAT order and an affidavit confirming non-compliance in a court of competent jurisdiction, usually the Magistrates' Court.[187] A person wishing to enforce a nonmonetary order must file the QCAT order and an affidavit confirming noncompliance in the Supreme Court.[188] The Supreme Court may transfer the application to either the District Court or Magistrates Court.[189]

Tasmania

9.114 The Tasmanian Act does not set out penalties for parties who fail to follow RMPAT's orders as the New South Wales and Queensland Acts do.

9.115 RMPAT does not have power to enforce its own orders. Where an order is not complied with, the aggrieved party may take legal action for noncompliance in a court of competent jurisdiction, such as the Civil Division of the Tasmanian Magistrates' Court.[190]

Community responses—enforcement of orders

9.116 There was general agreement that orders under any new Act should be binding and enforceable.[191] Suggestions were made about how orders should be enforced.

9.117 A number of people submitted that local councils should enforce orders when a party fails to comply with them.[192] Others argued that it was not appropriate for local councils to play an enforcement role because of the private nature of tree disputes and the substantial council resources this would require.[193]

9.118 The City of Boroondara submitted:

> Council would not support legislation which requires local government to enforce Orders made by the Court/Tribunal. This would require local government to enforce what are essentially Court orders about civil matters. This would also have resourcing implications for local government.[194]

9.119 Nillumbik Shire Council told the Commission that the NSW approach of enforcement through local councils would not be appropriate. Nillumbik stated that it is reluctant to become involved in private civil disputes between neighbours and would not have the resources to carry out an enforcement process.[195]

9.120 Baw Baw Shire Council advised that enforcement should not be the responsibility of local councils. Baw Baw explained that any new statutory scheme for tree disputes should not generate additional work for local councils. Baw Baw also expressed significant safety concerns for Council officers if they were required to enforce orders.[196]

9.121 The NSWLEC and QCAT told the Commission that they are not aware of any local councils exercising their discretion to enforce orders despite the provisions in the NSW and Queensland Acts.[197] The NSWLEC further surmised that it is unclear why a local council

187 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 131. The Magistrates Court has jurisdiction to enforce monetary orders up to and including $150,000. For larger amounts, the QCAT order may need to be enforced through the District Court (from $150,000 up to $750,000) or the Supreme Court (more than $750,000): Queensland Civil and Administrative Tribunal, *Enforcing a QCAT Decision* (Web Page, 13 November 2018) <https://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision#Non-monetary%20decisions>.
188 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(6)(a). Non-monetary QCAT Orders for minor civil disputes can be filed in the Magistrates' Court: s 132(7)(a); however tree disputes under the Queensland Act are not considered minor civil disputes (cf. fence disputes): Queensland Civil and Administrative Tribunal, *Minor Civil Disputes* (Web Page, 25 October 2018) <https://www.qcat.qld.gov.au/matter-types/minor-civil-disputes>.
189 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(5).
190 Resource Management and Planning Appeal Tribunal, *Practice Direction No 14—Civil Enforcement Proceedings*, amended 1 March 2016) 14.12 <https://www.rmpat.tas.gov.au/practice_directions>.
191 Submissions 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 20 (Name withheld), 21 (Pointon Partners Lawyers), 23 (Name withheld), 27 (Name withheld).
192 Submissions 4 (Name withheld), 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon).
193 Submissions 2 (Name withheld), 25 (City of Boorondara); Consultations 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council).
194 Submission 25 (City of Boorondara).
195 Consultation 9 (Nillumbik Shire Council).
196 Consultation 10 (Baw Baw Shire Council).
197 Consultations 11 (Land and Environment Court of New South Wales), 15 (Queensland Civil and Administrative Tribunal).

would choose to enforce the orders issued by the NSWLEC as there is no obvious benefit to be gained by the local council.[198] VCAT also told the Commission that in the context of the *Planning and Environment Act 1987* (Vic), local councils rarely take up the option of carrying out works that a party has failed to complete under an enforcement or interim enforcement order.[199]

9.122 Some respondents suggested that orders should be enforced through the existing enforcement processes in the court or tribunal that made the order.[200] Boroondara further stated that 'continued non-compliance should be prosecuted as a criminal offence.'[201] Another person suggested that VCAT orders should have the same status as orders of the Magistrates' Court and be enforced accordingly.[202]

9.123 One respondent expressed concern about VCAT's enforcement powers and noted that, in their view, VCAT orders in other existing matters are often disregarded without significant repercussions or recourse for the affected party.[203]

9.124 VCAT noted that the enforcement provisions under the *Planning and Environment Act 1987* (Vic) could provide a possible model for enforcement under the new Act. VCAT suggested that a party could be given the right to carry out the work prescribed in an order themselves when it has not been performed, and to recover the costs incurred as a debt in the relevant court.[204]

9.125 Other suggestions were that orders be enforced by the Department of Justice and Community Safety[205] or through 'substantial fines'.[206]

The Commission's conclusions—enforcement of orders

9.126 The Commission acknowledges that sometimes a party will simply refuse to comply with a VCAT order if they do not agree with it. At times, it may be expedient for a party to simply incur the cost of a fine, especially if the fine is less than the cost associated with the order. As the Access to Justice Review noted:

> While most people comply with VCAT's orders as a matter of course, there are some who disregard them. It can be difficult to compel an unwilling person to comply with an order. This challenge is not unique to VCAT.[207]

9.127 Reviewing the general enforcement powers of VCAT is beyond the scope of this inquiry. However, the Commission refers to the findings of the *Access to Justice Review* which illustrate the complexity of the issue*:*

> One option for reform would be to amend the VCAT Act to enable VCAT to enforce its own orders, both monetary and non-monetary, similar to the Magistrates' Court's powers to enforce its orders. However, this would require VCAT to establish rules and processes that reflect those used in the courts to compel payment. Further, VCAT would have to allocate the time of members and registry staff to deal with these processes, which would require either more staff or redirection of resources within VCAT. In addition, giving VCAT power to enforce its own orders would further fragment the process for enforcement of monetary orders, creating greater procedural variations between Victorian jurisdictions.[208]

198 Consultation 11 (Land and Environment Court of New South Wales).
199 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
200 Submissions 11 (Name withheld), 25 (City of Boorondara).
201 Submission 25 (City of Boorondara).
202 Submission 23 (Name withheld).
203 Consultation 2 (Dr Gregory Moore OAM).
204 This is a similar approach to section 123 of the *Planning and Environment Act 1987* (Vic).
205 Submission 27 (Name withheld).
206 Submission 19 (Name withheld).
207 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 288.
208 Ibid vol 1, 288.

9.128 Amendments contained in the *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) will make it easier for aggrieved parties to pursue the enforcement of both monetary and non-monetary orders with respect to tree disputes under the new Act. An aggrieved party will have the option of recouping any money owed to them as a debt in the Magistrates' Court, compelling performance of an action in the Supreme Court of Victoria, or applying to have their matter reopened in VCAT due to problems with compliance.

9.129 The Commission concludes that the enforcement mechanisms under the VCAT Act should be relied upon and supplemented by practical enforcement provisions in the new Act.

Penalties for failure to comply

9.130 As discussed, the NSW and Queensland Acts both provide for fines where a party does not comply with an order.

9.131 The Commission acknowledges the comments of the QLRC about the effectiveness of the penalty provision in the Queensland Act. However, on balance it would be helpful to include a maximum penalty provision in the new Act.

9.132 Existing penalties under the VCAT Act,[209] which would also apply for non-compliance with orders under a new Act, are significantly smaller than the penalty provisions in interstate tree dispute Acts.

9.133 On balance the Commission considers that including a penalty provision in the new Act will send a clear message to the community about the seriousness of the hearing process.[210] It will be also be easier for the community to identify a monetary penalty in new Act than it would be to determine penalties for non-compliance of orders under the VCAT Act. It should also be easier to revise and update a penalty in the new Act if needed in the future. For the sake of simplicity the Act should as far as possible contain a full statement of rights and obligations of parties. The Commission recommends that the new Act disapply section 133 of the VCAT Act and include a specific penalty provision instead.[211]

9.134 The Government should determine the appropriate amount for the penalty provision in consultation with VCAT.

Councils should not enforce VCAT orders

9.135 There was strong community support for the enforcement of tree dispute orders under the new Act to be undertaken by local councils.[212] However, the Commission is persuaded by councils and others who advised that such a role would be at odds with the role of local councils to provide for the collective public benefit of residents. Councils are understandably reluctant to adjudicate private disputes between residents.

9.136 The Commission is also persuaded by concerns expressed by Baw Baw Shire that this role would require significant resources and may affect the safety of council staff tasked to enforce orders in often emotive and potentially hostile circumstances.[213]

209 For example, the VCAT Act states that for non-compliance with a non-monetary order, a person may be fined $3223.80 plus an additional $805.95 for each day of non-compliance up to a maximum of $8059.50: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 133(1). The current value of a penalty unit is $161.19 (as at 1 July 2018 to 30 June 2019): Victorian Government Gazette, 'Notice Under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' (GG No S135, Thursday 29 March 2018) <https://www.dtf.vic.gov.au/financial-management-government/indexation-fees-and-penalties>.

210 VCAT noted that several enabling Acts contain penalty provisions for failure to comply with orders, for example, the *Motor Car Traders Act 1986* and the *Owners Corporations Act 2006:* Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).

211 See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic), sch 1 cl 77A.

212 Submissions 4 (Name withheld), 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 38 (L. Barry Wollmer).

213 Consultation 10 (Baw Baw Shire Council).

9.137 Further, the Commission received advice that local councils generally refuse to enforce orders where requested to in New South Wales and Queensland where voluntary enforcement provisions exist.[214]The same is also true for similar enforcement provisions under the *Planning and Environment Act 1987* (Vic).[215] The Commission can therefore see little practical benefit in such provisions.

Empowering the applicant to give effect to a VCAT order

9.138 Rather than empowering council to enforce a VCAT order, the new Act should empower the applicant to carry out tree works where a tree owner fails to comply with an order within the specified time.[216]

9.139 This approach aligns with VCAT's powers under the *Planning and Environment Act 1987* (Vic)[217] and with the approach under the Fences Act.[218] The Commission agrees with the approach recommended by the QLRC[219] and is of the view that this enforcement mechanism will provide practical benefit to neighbours and provide certainty about the resolution of the dispute.

9.140 Such an order may be necessary where the tree owner has deliberately refused to comply with the order within the required time, or where the tree owner has failed to comply with the order and the affected neighbour is unable to identify or locate the tree owner. The reasonable costs of carrying out tree works should be able to be recouped as a debt against the non-complying party in the relevant court. The affected neighbour would need to make a new application to VCAT for this order.

9.141 The Commission is mindful of the possibility of trespass and recommends that any works carried out by the affected neighbour pursuant to this power should require VCAT's permission to enter the tree owner's land. Additional safeguards in line with the approach taken by the NSWLEC for third-party access to adjoining land to carry out an inspection[220] may also be prudent, namely:

- that reasonable notice is given to the landowner or occupier whose land is to be accessed by the applicant
- that access only occur at a reasonable time during the day
- any other limitations that VCAT considers are appropriate.

Recommendation

36 The Act should include a penalty, to be determined by Government, for the failure to comply with an order.

214 Note also during the NSW Act's statutory review the NSW Department of Justice and Attorney General found that local councils usually do not agree to enforce orders on the request of neighbours: See Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 17.

215 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).

216 See Ch 11 for discussion of options when a purchaser of land is not properly informed about an existing action in VCAT or an order.

217 *Planning and Environment Act 1987* (Vic) s 123.

218 *Fences Act 1968* (Vic) s 30F and 30I.

219 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) Recommendation 5-1(a)–(b).

220 Land and Environment Court of New South Wales, *Practice Note Class 2: Tree Applications*, 1 December 2018, 10 <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/practice_notes.aspx>; Land and Environment Court of New South Wales, *Schedule A. Usual Directions on the Preliminary Hearing for Tree Applications* (November 2018) cl 13 <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/treedisputes_prelimhearing.aspx>.

Recommendations

37 If an order has not been complied with by the required time, the Act should provide that a party may apply to the Victorian Civil and Administrative Tribunal to seek permission to enter the tree owner's land and carry out the works specified in the order themselves. Reasonable costs incurred as a result of carrying out the order should be able to be recouped from the non-complying party as a debt in the relevant court.

38 The right of the affected neighbour to enter a tree owner's land should be subject to the requirement that:

(a) reasonable notice is given to the owner of land or occupier whose land is to be accessed by the applicant

(b) access only occurs at a reasonable time during the day

(c) any other requirements that the Victorian Civil and Administrative Tribunal considers are appropriate, for example, that relevant insurance is obtained by the applicant.

Interaction of the new Neighbourhood Tree Disputes Act with other laws

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10. Interaction of the new Neighbourhood Tree Disputes Act with other laws

Introduction

10.1 In Victoria the management and removal of trees on private land is affected by numerous laws and policies. These laws and policies may be relevant to the rights and responsibilities of parties in tree disputes and their relationship to the new Tree Disputes Act must be considered. The new Act may intersect with the following:

- the *Planning and Environment Act 1987* (Vic)
- local tree protection laws made under the *Local Government Act 1989* (Vic)
- the *Heritage Act 2017* (Vic)
- the *Aboriginal Heritage Act 2006* (Vic)
- the *Fences Act 1968* (Vic)
- the *Catchment and Land Protection Act 1994* (Vic)
- the *Victorian Conservation Trust Act 1972* (Vic)
- the *Conservation, Forests and Lands Act 1987* (Vic)
- the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (Cth)

10.2 Other Acts also relate to the management of vegetation for fire prevention; to minimise interference with powerlines and to protect public health and wellbeing and the environment.[1] These Acts are less likely to impact the new Act.

10.3 The first section of this chapter examines how the above laws operate and how they may intersect with the new Act. The chapter then considers community responses on this issue and discusses how the interstate Acts address the interaction of laws. The chapter concludes with recommendations to ensure that the new Act interacts with existing laws and policies as simply as possible and causes minimal disruption to existing legal processes and established policies.

10.4 A key recommendation made in this Chapter is amendment to the Victoria Planning Provisions (VPPs) to exempt orders made under the Act from requirements to obtain a permit to remove, destroy or lop vegetation under some planning provisions. Orders made by VCAT should override local tree protection laws. An amendment to the Heritage Act should address a situation of imminent danger to life or property by a tree, and damage to fences should be addressed in the new Act by an amendment to the Fences Act. In the case of other legislation discussed in this chapter, the Commission is not recommending amendments or recommends further consultation.

1 *Country Fire Authority Act 1958* (Vic); *Metropolitan Fire Brigades Act 1958* (Vic); *Electrical Safety Act 1998* (Vic); *Flora and Fauna Guarantee Act 1988* (Vic); *Public Health and Wellbeing Act 2008* (Vic); *Road Management Act 2004* (Vic); *Rail Management Act 1996* (Vic).

10.5 The technical content of this chapter is intended to assist in drafting the new Act, and to explain why the Commission recommends that the new Act should constrain existing laws in some situations.

The Planning and Environment Act

10.6 The *Planning and Environment Act 1987* (Vic) (the P&E Act) provides the framework for Victoria's planning system. The P&E Act sets out objectives for planning in Victoria including provision for the fair, orderly, economic and sustainable use and development of land, as well as provision for the protection of natural and man-made resources.[2] The P&E Act does two key things: it establishes the Victoria Planning Provisions (the VPPs), and enables the responsible authority (in most cases a council)[3] to build its own planning schemes from those standard provisions.[4]

10.7 The VPPs are a statewide reference used to construct a planning scheme. They comprise a comprehensive set of model planning provisions that may be incorporated into individual planning schemes in each municipality across Victoria.[5] VPPs ensure consistent rules for planning across Victoria, and consistency across local planning schemes.

10.8 The VPPs outline the purpose of a number of zones and overlays that councils may apply, where appropriate, to land within their municipality. Some zones and overlays have local content added to them as schedules, which 'can be used to supplement and fine-tune the basic provisions of a state-standard clause, zone or overlay in a planning scheme, adapting it to local circumstances and locally defined objectives'.[6] Specific provisions of the VPPs control the removal of native vegetation.[7]

10.9 The purpose of local planning schemes is to:

- provide a clear and consistent framework within which decisions about the use and development of land can be made
- express state, regional, local and community expectations for areas and land uses
- provide for the implementation of state, regional and local policies affecting land use and development.[8]

10.10 Planning schemes are higher level subordinate legislation. They may identify and manage significant or important vegetation on public and private land.[9] Planning schemes typically require a permit to be obtained to remove, lop or destroy native or other identified vegetation.[10]

2 *Planning and Environment Act 1987* (Vic) s 4. The objectives of the planning framework established by the P&E Act include enabling land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at state, regional and municipal levels: *Planning and Environment Act 1987* (Vic) s 4(2)(c). To this end, the effects on the environment, as well as social and economic effects, must be considered as part of the decision-making process about the use and development of land: *Planning and Environment Act 1987* (Vic) s 4(2)(d).

3 *Planning and Environment Act 1987* (Vic) ss 13–14. The administration and enforcement of a planning scheme is the duty of a responsible authority. In most cases this will be a council but it can be the Minister administering the Act or any other person whom the planning scheme specifies as a responsible authority for that purpose.

4 Ibid pts 1A, 2; Department of Environment, Land, Water and Planning (Vic), *A Practitioner's Guide to Victorian Planning Schemes,* (Version 1.1, October 2018) [2.2]-[2.4] <https://www.planning.vic.gov.au/guide-home/a-practitioners-guide-to-victorian-planning-schemes>; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 23.

5 *Planning and Environment Act 1987* (Vic) pt 1A. These provisions are under the central control of the Minister for Planning.

6 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [1.8.7] <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>; see also Department of Environment, Land, Water and Planning (Vic), *A Practitioner's Guide to Victorian Planning Schemes* (Version 1.1, October 2018) [6.5.3].

7 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 52.17.

8 *Planning and Environment Act 1987* (Vic) ss 6–7; see, eg, Hume City Council, *General Planning Information Fact Sheet* <https://www.hume.vic.gov.au/Building_Planning/Planning/About_Planning>.

9 See generally *Planning and Environment Act 1987* (Vic) s 6.

10 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 59.06.

Different policy considerations

10.11 Planning laws are underpinned by broad and complex policy considerations. Section 4 of the P&E Act lists the objectives of planning law in Victoria which are to:

- provide for the fair, orderly, economic and sustainable use, and development of land;
- provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
- secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
- conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
- protect public utilities and other assets and enable the orderly provision and coordination of public utilities and other facilities for the benefit of the community;
- facilitate development in accordance with the objectives set out above;
- provide affordable housing in Victoria; and
- balance the present and future interests of all Victorians.

10.12 The relevant authority must make all planning applications available for inspection by the public.[11]There are strict requirements to advertise some development applications where a proposal may cause a detriment to another party. This mechanism allows an affected person to consider the development proposal and its potential impact on them.[12] VicSmart applications are not advertised in this way.[13]

10.13 In addition, planning laws are applied consistently across Victoria:

- The permit is the principal instrument of development approval.
- Local variations cannot be made to the state-standard provisions.
- Local provisions must not conflict with the state provisions.
- Local requirements are expressed in a schedule following the relevant state-standard provision.[14]

10.14 Importantly, it is very difficult to change these existing policies. Any amendment to a planning scheme must be formally approved and gazetted.[15]

10.15 These features of planning schemes reveal the policy considerations at play that are typically broader than those present in disputes between adjoining neighbours about trees. The Victorian planning framework assumes and enables greater community involvement in everyday planning decisions and in setting standard planning policies that are applied consistently across Victoria.

Permit process

10.16 The next part of this chapter considers the two permit processes and the key planning mechanisms that apply to trees on private land in Victoria that may intersect with the new Act. This may occur in two key ways:

- a permit may need to be obtained before any works can be carried out to the problem tree, or

11 *Planning and Environment Act 1987* (Vic) s 51.
12 Ibid s 52.
13 VicSmart applications are not advertised because VicSmart is a streamlined assessment process for straightforward planning permit applications: Department of Environment, Land, Water and Planning (Vic), *VicSmart—A Simpler Planning Permit Process* (Web Page, 20 March 2019) <https://www.planning.vic.gov.au/permits-and-applications/vicsmart>.
14 See, eg, Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) 2 <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 22-26, 42-44.
15 *Planning and Environment Act 1987* (Vic) ss 4B, D-E, G-J; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 164-183.

- an existing permit may need to be amended or revoked so that works on the problem tree can be carried out.

10.17 Two types of permit processes are provided—regular and fast-tracked (VicSmart). Determining which permit process to use will depend upon the number of trees involved and the nature of the new tree works. Planning schemes may also specify what evidence needs to be provided to obtain a permit.

10.18 An application for a permit is made to the responsible authority, generally the local council.[16] Permit applications for overlays are generally made by the owner of the land covered by the overlay.[17] If the permit applicant is not the owner, the application must be signed by the owner of the land or include a declaration that the applicant has notified the owner about the application.[18] In this way, the P&E Act does not restrict the category of persons who can apply for a planning permit to the owner of the tree.[19]

Regular permit process

10.19 The permit process is outlined in Part 4 of the P&E Act. Key components of the permit process are:

- notifying:
  a) the owners and occupiers of adjoining land to which the application applies, unless the responsible authority is satisfied that the application will not cause material detriment to any person[20]
  b) any other persons if the responsible authority considers it may cause material detriment to them
  c) the municipal council if the application applies to or may materially affect land within its municipal district
- allowing members of the public to inspect the permit application prior to determination of the application by either the responsible authority, or the Victorian Civil and Administrative Tribunal (VCAT) on review21
- allowing any affected person to object in writing to a grant of the permit application.[22]

10.20 In deciding whether to grant a permit, the responsible authority, generally the local council, must consider:

- the relevant planning scheme
- the objectives of planning in Victoria
- all the objections and submissions it has received in relation to the permit application

16 *Planning and Environment Act 1987* (Vic) s 47.
17 Ibid s 48.
18 Ibid s 48(1).
19 Cf *Heritage Act 2017* (Vic) and some local laws made under the *Local Government Act 1989* (Vic).
20 *Planning and Environment Act 1987* (Vic) s 52. The Act does not specify what matters may be taken into account by the responsible authority in deciding whether or not material detriment may be caused. Each application must be considered on its merits. As a basic rule, it should be possible to link detriment to specific matters such as restriction of access, visual intrusion, unreasonable noise, overshadowing or some other specific reason. General terms such as 'amenity' and 'nuisance' are not specific enough, nor is the fact that the matter is controversial a conclusive test that a person may suffer material detriment. Conversely, agreement to the proposal by the owners and occupiers of adjoining land is not conclusive, although it may help the responsible authority form an opinion. Careful judgment of the situation by the responsible authority is necessary: see Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [3.1.2] <www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.
21 *Planning and Environment Act 1987* (Vic) s 51. A planning scheme may exempt any class or classes of application from some or all of the notice requirements that may otherwise apply under section 52(1) of the Act. In these cases, there is no opportunity for other people to make submissions or objections in relation to the application. The application must still be referred to any referral authority and the responsible authority must still take into account all relevant planning considerations in deciding the application.
22 Ibid s 57.

- any decision and comments of a referral authority which it has received[23]
- any significant effects on the environment
- any social and economic impacts.[24]

10.21 The responsible authority may also consider other plans, policies, planning scheme amendments adopted by a planning authority and any agreement made pursuant to section 173 of the P&E Act affecting the land.[25]

10.22 Reviews of permit decisions are heard by VCAT. In reviewing the application, VCAT is limited to considering only the matters that were before the original decision maker.[26] VCAT also has original jurisdiction to hear some types of matters, including applications to cancel or amend permits and applications for enforcement of orders.[27]

VicSmart permit process

10.23 VicSmart is a simple, fast planning permit assessment process for straightforward, low-impact planning and development applications in Victoria.[28] VicSmart allows for a quick planning decision to be made to 'remove, destroy or lop a tree'.[29]

10.24 The VicSmart process has fewer steps than the regular permit process and decisions are made within 10 business days.[30] Key features of the VicSmart permit process are:

- Applications are exempt from the notice requirements under section 52 of the P&E Act. This means that they are not required to be publicly advertised.
- The application is only assessed against specific decision-making guidelines set out in the planning scheme. [31]
- The information to be submitted with an application is pre-set and includes the species and size of the tree and any other significant trees removed in the past three years on the site. It must also explain why works need to be conducted and include a photograph of the tree.[32]
- Decision are made by the Chief Executive Officer of the Council or a delegate.[33]

23 *Planning and Environment Act 1987* (Vic) s 60(1)(a)–(d). A referral authority may be a determining referral authority or a recommending referral authority. Both types of referral authority can object to the granting of a permit, decide not to object, or specify conditions to be included on a permit. The effect of that advice on the final outcome of an application is different for each type of referral authority. If a determining referral authority objects, the responsible authority must refuse to grant a permit, and if a determining referral authority specifies conditions, those conditions must be included in any permit granted. In contrast, a responsible authority must consider the recommending referral authority's advice but is not obliged to refuse the application or to include any recommended conditions. A recommending referral authority can seek a review at the Victorian Civil and Administrative Tribunal if it objects to the granting of a permit or it recommends conditions that are not included in the permit by the responsible authority: Department of Environment, Land, Water and Planning, *Planning Practice Note No 54: Referral and Notice Provisions,* June 2015 <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.

24 *Planning and Environment Act 1987* (Vic) s 60(1)(e)–(f). For the complete list of considerations see *Planning and Environment Act 1987* (Vic) s 60.

25 *Planning and Environment Act 1987* (Vic) s 60(1A)(b)–(h). For example, if needed the responsible authority may consider the approved regional strategy plan under section 17 of the *Upper Yarra Valley* and *Dandenong Ranges Authority Act 1976* (Vic); the Melbourne Environs Strategy Plan approved under section 46U(2); and any relevant state environment policy declared in any order made by the Governor-in-Council under section 16 of the *Environment Protection Act 1970* (Vic).

26 *Planning and Environment Act 1987* (Vic) s 84B.

27 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [5.1.1] and Table 5.1 <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>. For example, the Responsible Authority or a person can apply for an enforcement order against one or more persons if a use or development of land will contravene the Act: *Planning and Environment Act 1987* (Vic) s 114.

28 Department of Environment, Land, Water and Planning (Vic), 'VicSmart Permits in 10 Days—Fast Decisions for Simple Planning Decisions', *Permits and Applications* (Web Page, March 2017) 2 <https://www.planning.vic.gov.au/permits-and-applications/vicsmart>.

29 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 59.06.

30 Department of Environment, Land, Water and Planning (Vic), 'VicSmart—A Simpler Planning Permit Process', *Permits and Applications* (Web Page, 20 March 2019) <https://www.planning.vic.gov.au/permits-and-applications/vicsmart>.

31 These include considerations of the objectives of any applicable overlay, whether the tree contributes to the significance of the area and the extent to which the health, appearance or significance of the tree will be affected by the works. Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 59.06 –2 Decision guidelines. Additional requirements apply to lopping trees the subject of a Heritage Overlay under clause 59.07.

32 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 59.06 –1 Information requirements.

33 See Department of Environment, Land, Water and Planning (Vic), 'VicSmart Permits in 10 Days—Applicant's Guide to Lodging a VicSmart Application', *Permits and Applications* (Web Page, January 2019) <https://www.planning.vic.gov.au/permits-and-applications/vicsmart>.

10.25 Reviews of VicSmart applications take place at VCAT. Unlike the regular permit process, reviews of VicSmart permit applications do not extend to third-party objectors. They are limited to the applicant requesting a review of a decision to refuse a permit application. These applications are heard in VCAT's Short Cases List.[34]

Restrictions on tree works in planning provisions

Tree protection overlays

10.26 Overlays are one of the main tools in the VPPs to protect vegetation.[35] An overlay details practical constraints that apply to a particular site.[36] Overlay requirements could restrict or limit the ability of an affected neighbour to obtain a remedy under the new Act. Standard overlays for Victoria are included in the VPPs.

10.27 Local councils are able to use schedules to include 'local content in planning schemes'[37] and to describe when an overlay will apply to particular land through the planning scheme map. For example, councils can use schedules to remove a permit requirement as long as this accords with the broader planning objectives of the overlay.[38]

10.28 The Commission has identified four main overlays[39] that operate to protect or preserve trees, other vegetation and significant landscapes on private land within Victoria:

- The **Significant Landscape Overlay (SLO)** aims to conserve and enhance the character of significant landscapes. It mainly applies when vegetation is aesthetically or visually important in the broader landscape and vegetation is identified as 'an important contributor to the character of an area'.[40]
- The **Environmental Significance Overlay (ESO)** is applied if vegetation protection is 'part of the wider objective to protect the environmental significance of the area'.[41]
- The **Vegetation Protection Overlay (VPO)** focuses on the protection of significant vegetation, including native and introduced vegetation in urban and rural environments.[42]
- The **Heritage Overlay**[43] aims to conserve and enhance heritage places of natural or cultural significance and to ensure that development does not adversely affect the significance of heritage places.[44]

10.29 Tree protection overlays can apply to significant portions of land with Victoria.[45] As an example, in 2013, the VPO applied to 2500 residential properties within the City of Monash.[46] The Environmental Significance Overlay (ESO) applies to a significant proportion of land within the Nillumbik Shire.[47]

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34 Department of Environment, Land, Water and Planning (Vic), 'VicSmart Permits in 10 Days—Fast Decisions for Simple Planning Decisions', *Permits and Applications* (Web Page, March 2017) 2 <https://www.planning.vic.gov.au/permits-and-applications/vicsmart>. The Short Cases List is a sub-list of the Planning and Environment List and handles short and less complex disputes that allow parties to have their matter heard and determined within a short timeframe. Tribunal members hearing cases in this list are encouraged to provide oral decisions at the conclusion of the hearing. Site inspections are unlikely to be undertaken.

35 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 7: Vegetation Protection in Urban Areas*, August 1999.

36 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 33. An overlay differs from a zone because it considers the practical constraints that apply to a particular site, whereas a zone control is directed at the central purpose of the land.

37 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 2015) [1.8.7] <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.

38 Ibid [6.5.3] <https://www.planning.vic.gov.au/guide-home/a-practitioners-guide-to-victorian-planning-schemes>.

39 See Department of Environment, Land, Water and Planning, *A Practitioner's Guide to Victorian Planning Schemes* (Version 1.1, October 2018) [5.2.3] <https://www.planning.vic.gov.au/guide-home/a-practitioners-guide-to-victorian-planning-schemes>.

40 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.03; Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 7: Vegetation Protection in Urban Areas*, August 1999, 6.

41 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.01; Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 7: Vegetation Protection in Urban Areas,* August 1999, 5.

42 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.02.

43 Ibid, cl 43.01.

44 A 'heritage place' includes both the listed heritage item and its associated land.

45 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 12 (City of Port Phillip), 16 (Heritage Victoria).

46 Chris Harty, Robin Crocker and Lyn Denison, *Panel Report—Monash Planning Scheme Amendment C115—Vegetation Protection Overlay Schedule 1—Tree Protection Area* (Panel Report, 13 August 2013) 7. This Panel was appointed under delegation on the 8 May 2013 pursuant to Sections 153 and 155 of the *Planning and Environment Act 1987* to hear and consider submissions in respect of the Amendment.

47 Consultation 9 (Nillumbik Shire Council).

10.30 Under the SLO, ESO and VPO a planning permit is required to remove, destroy or lop any specified vegetation. The regular permit process applies to works to more than one tree and the VicSmart process applies to only one tree.

10.31 A Heritage Overlay schedule can apply to the whole of a heritage place (for example, over a house site or an area) or a tree or group of trees could be specifically nominated as the heritage place. Heritage Overlay tree controls are intended to protect trees that are 'of intrinsic significance' (such as trees that are included on the National Trust Register or trees that contribute to the significance of a heritage place).[48] A VicSmart permit will only apply to the lopping of heritage trees. A regular permit is still required to remove or destroy one or more trees covered by a heritage overlay.

10.32 There is a standard list of exemptions to the requirement to obtain a permit under the SLO, ESO and VPO.[49] The Heritage Overlay also contains an exemption that enables works to keep whole or part of a tree clear of electricity power lines,[50] or 'if the tree presents an immediate risk of personal injury or damage to property'.[51]

10.33 The standard exemption across all of these overlays allows tree works or removal where a tree presents an immediate risk of personal injury or damage to property.[52] The risk is considered immediate if the vegetation needs to be removed before a permit can be granted.[53] The exemption does not extend to vegetation that may cause injury or damage in the longer term. A qualified arborist should assess whether there is an immediate risk of tree failure, where practical to do so.[54]

10.34 As noted above, schedules to overlays may modify permit requirements to create additional exemptions. For example, schedule 1 to the City of Whitehorse SLO provides that a permit to remove, destroy or lop a tree does not apply to:

- a tree with a single trunk circumference of 0.5 metre or less at a height of one metre above ground level
- the pruning of a tree for regeneration or ornamental shaping
- a tree which is dead or dying to the satisfaction of the responsible authority.[55]

10.35 In addition, schedule 1 to the VPO in the City of Whitehorse provides that a permit is not required to remove, destroy or lop a tree which is 'deemed unsafe by a suitably qualified arborist, and to the satisfaction of the responsible authority'.[56]

Bushfire management overlay

10.36 The Bushfire Management Overlay is used to guide the development of land in areas where vegetation can create an extreme bushfire hazard.[57] It operates to 'prioritise human life and strengthen community resilience to bushfire'.[58] Therefore, it manages vegetation

48 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 1: Applying the Heritage Overlay,* August 2018, 4.

49 See, eg, Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 43.02-3 'Significant Landscape Overlay', 'Table of Exemptions'. For example, the requirement to obtain a permit does not apply to vegetation that is to be removed, destroyed or lopped in an emergency or where it presents an immediate risk of personal injury or damage to property or to vegetation that is to be removed, destroyed or lopped to the minimum extent necessary to enable the carrying out of fire protection activities. For a full list of examples see Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.01-3, 42.02-3, 42.03-3, 'Table of Exemptions'. These exemptions also apply to some processes in other Acts including the *Geothermal Energy Resources Act 2005* (Vic), the *Greenhouse Gas Geological Sequestration Act 2008* (Vic), the *Catchment and Land Protection Act 1994* (Vic) and the *Traditional Owner Settlement Act 2010* (Vic).

50 Action must be carried out in accordance with a code of practice prepared under section 86 of the *Electricity Safety Act 1998* (Vic): Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 43.01-1.

51 Ibid, cl 43.01-1.

52 For the SLO, ESO and VPO only that part of the vegetation that presents a risk may be removed, destroyed or lopped under this exemption: Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.01-3, 42.02-3, 42.03-3.

53 See Department of Environment, Land, Water and Planning (Vic), *Guidance—Exemptions From Requiring a Planning Permit To Remove, Destroy or Lop Native Vegetation* (Practice Document, December 2017) 10.

54 Ibid.

55 City of Whitehorse, *Planning Scheme* (15 March 2019) sch 1 to the Significant Landscape Overlay at cl 42.03.

56 Ibid sch 1 to the Vegetation Protection Overlay at cl 42.02. See also City of Monash, *Planning Scheme* (29 April 2019) sch 1 to the Vegetation Protection Overlay at 42.02 which provides that permit is required to remove or destroy vegetation protected under this provision but not to lop vegetation.

57 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 44.06; see Department of Environment, Land, Water and Planning (Vic), 'Information for Owners', *Bushfire Management Overlay*, 2017 <https://www.planning.vic.gov.au/policy-and-strategy/bushfire-protection/bushfire-management-overlay>.

58 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 44.06.

differently to the other environmental overlays.

10.37 Bushfire protection provisions in planning schemes also create permit exemptions to allow people to create defendable spaces around certain buildings used for accommodation and along a fence line to reduce fuel load.[59] Bushfire exemptions override any other requirement to obtain a permit in a planning scheme, including if a different overlay requires a permit.[60] These provisions were added following the recommendations of the 2009 Victorian Bushfire Royal Commission.[61]

10.38 Nillumbik Shire Council informed the Commission that the permit exemptions allowing the clearing of vegetation to create a defendable space around buildings used for accommodation have reduced the number of enquiries council receives about removing trees on private land.[62]

Native vegetation particular provisions

10.39 The native vegetation particular provisions of the VPPs control the removal of native vegetation.[63] A permit is usually required to remove, destroy or lop native vegetation unless an exemption applies.[64] The process has three steps: avoidance of removal; minimisation of impacts; and offset requirements.[65] Offset requirements compensate for removal, with the aim of ensuring that clearing native vegetation has a neutral impact on Victoria's biodiversity.[66] The type of offset required depends on the characteristics of the native vegetation being removed, and the extent of the loss.[67]

The native vegetation particular provisions will not affect most private properties in Victoria. They 'aim to prevent broad-scale clearing of vegetation and will have limited applicability in urban areas with small lot sizes'.[68] They are more relevant in country areas with larger lots or Green Wedge areas because this is where most native vegetation is located and because of how the VPP define native vegetation[69] and how exemptions are framed.

10.40 If native vegetation particular provisions apply to private property, the provisions allow the clearing of some vegetation without a permit. A permit is not required for sites of less than 0.4 hectares.[70] An exemption to the requirement to obtain a permit also applies in an emergency or where there is an immediate risk of personal injury or damage to property.[71] A further exemption allows lopping and pruning to maintain vegetation provided no more than 1/3 of the foliage of each individual plant is lopped or pruned.[72]

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59 Ibid, cl 53.02 'Bushfire Planning'; cl 52.12 'Bushfire Protections: Exemptions'.

60 Department of Planning and Community Development (Vic), *Planning Advisory Note 39—Bushfire Protection: Vegetation Exemptions* (Practice Document, November 2011) <www.planning.vic.gov.au/publications/planning-advisory-notes>. The exemptions do not apply if there is a legal agreement or covenant in place that prohibits the removal, destruction or lopping of the native vegetation. This might arise if the vegetation is subject to a native vegetation offset. Legal agreements and covenants can be used to secure offsets for vegetation that has been permitted to be removed. Agreements are typically established under section 173 of the *Planning and Environment Act 1987* or section 69 of the *Conservation, Forests and Lands Act 1987*. A covenant can also be applied to vegetation under section 3A of the *Victorian Conservation Trust Act 1972*.

61 Department of Planning and Community Development (Vic), *Planning Advisory Note 39—Bushfire Protection: Vegetation Exemptions* (Practice Document, November 2011) <www.planning.vic.gov.au/publications/planning-advisory-notes>.

62 Consultation 9 (Nillumbik Shire Council).

63 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 52.17. Particular provisions are specific prerequisites or planning provisions for a range of particular uses and developments. They apply consistently across the state and there is no ability to include in planning schemes particular provisions which are not in the VPP: Department of Environment, Land, Water and Planning (Vic), *A Practitioner's Guide to Victorian Planning Schemes* (Version 1.1, October 2018) [3.4] <https://www.planning.vic.gov.au/guide-home/a-practitioners-guide-to-victorian-planning-schemes>.

64 See Department of Environment, Land, Water and Planning (Vic), *Guidelines for the Removal, Destruction or Lopping of Native Vegetation* (Practice Document, December 2017).

65 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 52.17.

66 See Department of Environment, Land, Water and Planning (Vic), *Guidelines for the Removal, Destruction or Lopping of Native Vegetation* (Practice Document, December 2017) 13–18.

67 See Ibid 15.

68 Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note No 7: Vegetation Protection in Urban Areas,* August 1999, 4 <www.planning.vic.gov.au/publications/planning-practice-notes>.

69 Native vegetation is defined as 'plants that are indigenous to Victoria, including trees, shrubs, herbs, and grasses: Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 73.01 'General Terms'. *The Guidelines for The Removal, Destruction or Lopping of Native Vegetation* (2017) further classify native vegetation as a patch or a scattered tree: [3.1].

70 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 52.17-7 'Table of exemptions'.

71 Ibid, cl 52.17-7 'Table of exemptions'.

72 This does not apply to the pruning or lopping of the trunk of a native tree.

Trees planted or maintained as a condition of existing planning permits

10.41 A permit that has already been granted may need to be enforced or amended in some way to enable a resolution of the tree dispute under the new Act. For example, a planning permit granted for the development of land may specify that a tree is to be planted and maintained as part of an endorsed landscaping plan (landscaping plan) which forms part of the permit.[73] Model conditions of landscaping plans require:

- maintenance to the satisfaction of the responsible authority, including that any dead, diseased or damaged plants are to be replaced
- that any tree or particular trees to be retained during development are pruned by a qualified arborist to Australian Standard AS 4373-2007 Pruning of Amenity Trees.[74]

10.42 Permits generally operate indefinitely when acted on or after a development project has commenced, and for as long as the landholder is still benefiting from the use of the land.[75] This means that trees planted and maintained as part of a permit may need to be maintained for months or years following the initial development of the land.[76] This may not occur if a permit contains a sunset provision that limits the duration of its operation or under the circumstances listed in section 68 of the P&E Act, which provides for the expiry of permits.[77]

10.43 Two scenarios may arise where an affected neighbour wants to obtain a remedy under the new Act in relation to a problem tree that already forms part of an existing planning permit.

10.44 First, where an affected neighbour seeks to have a problem tree on adjoining land properly maintained in accordance with the model maintenance provisions in a landscaping plan. In this situation the affected neighbour would be able to contact the responsible authority and ask them to investigate their complaint about the tree.[78] If this is unable to resolve their concerns, section 114 of the P&E Act provides that any person may apply to VCAT to force a permit holder to comply with a condition of their permit.

10.45 However, if the permit conditions are such that the affected neighbour needs the existing permit amended to resolve the dispute, the affected neighbour would have little redress. VCAT currently only has the power to cancel or amend a permit at the request of:

- the responsible authority
- any person under section 89 of the P&E Act (this includes any person who objected or would have been entitled to object to the issue of the permit)[79]
- a referral authority
- the owner or occupier of the land concerned, or
- any person who is entitled to use or develop the land concerned.[80]

10.46 Further, VCAT must be satisfied that one of the following circumstances has occurred before it will interfere with a permit:

73 See *Broome v Maroondah CC* [2016] VCAT 1161 [28]. Permit conditions can control more than just the actual development that may need planning approval. Conditions regarding fencing and landscaping are common on permits relating to the development of multiple dwellings on a lot. See also City of Boroondara, *Landscape Plan Guidelines* (Practice Document, 2019) <https://www.boroondara.vic.gov.au/planning-building/planning-permit-applications/landscape-plan-guidelines>.

74 Department of Sustainability and Environment, *Writing Planning Permits* (2nd ed, February 2007) 20–21; see also Growth Areas Authority, *Growth Area Model Planning Permit Conditions—A Manual for Implementation* (October 2011); see, eg, Knox City Council, *Landscape Plan Guidelines—How to Prepare a Landscape Plan for Planning Applications* (2017).

75 Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 148.

76 Ibid.

77 Ibid.

78 Ibid 163.

79 The Commission notes that further limitations apply under section 89(1) of the P&E Act. VCAT may cancel or amend the permit if a) the person believes that they should have been but were not given notice of the permit application; or b) the person believes that they have been adversely affected by i) a material mis-statement or concealment of fact in relation to the permit application; or ii) any substantial failure to comply with the conditions of the permit; or iii) any material mistake in relation to the grant of the permit. VCAT may refuse to consider a request unless satisfied that the request has been made as soon as practical after the personal making it had notice of the facts relied upon in support of the request: s 89(3).

80 *Planning and Environment Act 1987* (Vic) s 87(3).

- a material mis-statement or concealment of fact in relation to the application for the permit
- any substantial failure to comply with the conditions of the permit
- any material mistake in relation to the grant of the permit
- any material change of circumstances which has occurred since the grant of the permit
- any failure to give notice in accordance with this Act, or
- any failure to comply with sections 55, 61(2) or 62(1) of the P&E Act.[81]

10.47 Under the current legislative framework, VCAT's ability to amend planning permits is limited to the circumstances outlined above and this amendment process would only be available to affected neighbours on adjoining land who could show that they either objected or would have been entitled to object to the grant of the permit. VCAT will only act on such a request by an affected neighbour if the person:

- could not reasonably be expected to have been aware of the application for the permit in time to lodge an objection
- was substantially disadvantaged by the issue of the permit
- it would be just and fair in the circumstances to do so.[82]

10.48 The provisions of the P&E Act are complex and there are a number of hurdles that must be satisfied if a request by a third party to amend a permit is to succeed.[83] Further, if the Tribunal amends a permit, then compensation may be payable to any person who has incurred expenditure or liability that is now wasted as a result of the permit amendment.[84]

Section 173 agreements

10.49 Some councils use section 173 of the P&E Act to protect trees on private land.[85] This provision allows councils to enter into agreements with private residents to protect and retain particular trees on private property or to achieve other planning objectives in relation to the land.[86] These agreements may expressly require owners of land to maintain vegetation to the satisfaction of council.[87] For example, in Nillumbik Shire these agreements typically apply to applications to subdivide land less than 0.4 hectares in size.[88] Lots of this size are not covered by the native vegetation particular provision under its planning scheme.

10.50 Section 173 agreements can be recorded on the title of the land so that future owners and occupiers can be bound by conditions under the agreement.[89] VCAT has some scope to direct the responsible authority to amend or end these agreements.[90] However, the council must initially agree to such a review being undertaken.[91] If the responsible authority decides that it does not agree in principle to a proposal to amend or end an

81 *Planning and Environment Act 1987* (Vic) s 87(1). The P&E Act provides that the Tribunal cannot cancel or amend a permit in a variety of circumstances including: the permit is for the construction of building or works, and the construction or works are completed; the permit is for other development, and the development is substantially carried out; or the permit is for subdivision or consolidation of land and the plan has been registered under the *Subdivision Act 1988:* ss 88, 91(5); See also Victorian Civil and Administrative Tribunal, *Planning and Environment List Guidelines—Cancellation & Amendment of Permits* (Sections 87 & 89 Planning and Environment Act 1987) (Practice Document, 20 July 2016) <https://www.vcat.vic.gov.au/get-started/planning-and-environment/apply-to-cancel-or-amend-a-permit>.
82 *Planning and Environment Act 1987* (Vic) s 91(3).
83 See, eg, *The Secretary to the Department of Health and Human Services and Melbourne Health v Melbourne CC* [2016] VCAT 2051 [64]–[65].
84 *Planning and Environment Act 1987* (Vic) s 94.
85 Consultation 9 (Nillumbik Shire Council).
86 *Planning and Environment Act 1987* (Vic) ss 173, 174; see also Department of Environment, Land, Water and Planning, *Using Victoria's Planning System* (Guide, 28 May 2015) [8.1] <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.
87 See generally Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [8.3.1].
88 Consultation 9 (Nillumbik Shire Council).
89 *Planning and Environment Act 1987* (Vic) s 181; *Consultation 9* (Nillumbik Shire Council).
90 Ibid s 184G.
91 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [8.8.2] <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.

agreement, then the agreement will remain in place.[92] The applicant cannot apply to VCAT for a review of this initial decision.

10.51 Landowners can also enter into these agreements as an 'ontitle security agreement' to establish native vegetation offset sites.[93] This means that once the agreement is signed and registered on title, native vegetation credits will be registered in the landowner's name.[94] The nature of these agreements are therefore varied and complex.

Local tree protection laws made under the Local Government Act

10.52 Trees on private land may also be protected or managed under local council laws. Local Laws are made by local governments under the *Local Government Act 1989* (Vic). Under section 111 of this Act a local law must not be inconsistent with any other Act or regulation. Local laws are therefore aimed at dealing with local issues only. Decisions are made by council officers. There are no appeal rights to VCAT for decisions made under local laws; instead councils may offer internal review processes.[95] Local laws enable councils to make the final decision in relation to the protection of a valued tree in a timely and efficient manner.[96]

10.53 Not all councils have enacted local laws to manage vegetation. Where they do exist, local laws generally contain similar tree protections which operate to:

- protect trees identified as 'significant' or 'protected' on private land
- extend protection by reference to a tree's large size, age, rarity, ecological value or cultural and historical significance
- extend protections to a root zone around the base of the tree and/or a tree protection zone (TPZ) around the trunk of the tree
- require the owner to obtain a permit to prune or remove protected trees or to carry out works in proximity to the TPZ.[97]

10.54 Some councils have enacted local laws in response to community concern about the loss of significant trees and other vegetation.[98] Local laws can supplement overlays and sometimes councils choose to use local laws as the main vegetation protection mechanism in the municipality.[99] Some councils choose not to use local laws at all. Nillumbik Shire Council suggested that local laws complicate internal processes and it prefers to protect trees under the planning scheme.[100]

10.55 In Boroondara, the Tree Protection Local Law 2016 (City of Boroondara) protects 'significant trees' and 'canopy trees' on private land within the municipality.[101]

92 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [8.8.2] <https://www.planning.vic.gov.au/guide-home/using-victorias-planning-system>. See also *Planning and Environment Act 1987* (Vic) s 178.

93 This may be a first party offset site on land owned by the permit holder to remove native vegetation and used to meet the landowner's own offset requirements.

94 Department of Environment, Land, Water and Planning (Vic), *Native Vegetation Credit Register: Process to Establish a Native Vegetation Credit Site on Private Land* (Register) <https://www.environment.vic.gov.au/native-vegetation/native-vegetation/offsets-for-the-removal-of-native-vegetation/i-want-to-establish-a-native-vegetation-credit-site>.

95 This is in contrast to decisions about permits under planning schemes which can be appealed to VCAT. The *Local Government Act* does not specifically require local laws to contain a provision for internal review of decisions made or actions taken under local laws, however, the guidelines encourage councils to have an internal review process: Department of Planning and Community Development, *Guidelines for Local Laws* (Manual, February 2010) <https://www.localgovernment.vic.gov.au/council-innovation-and-performance/local-laws>.

96 Consultation 8 (City of Boroondara). Section 114(c)(iii) of the *Local Government Act 1989* (Vic) provides that a local law may delegate to a member of the council staff the power to do any act, matter or thing necessary or incidental to the performance or exercise of any function or power by the council.

97 See, eg, *Tree Protection Local Law 2016* (City of Boroondara).

98 Consultations 8 (City of Boroondara), 12 (City of Port Phillip).

99 Consultations 8 (City of Boroondara), 12 (City of Port Phillip).

100 Consultation 9 (Nillumbik Shire Council). If a planning scheme is in force in the municipal district of a council, the council must not make a local law which duplicates or is inconsistent with the planning scheme: *Local Government Act 1989* (Vic) s 111(4).

101 'Canopy Tree' means any tree: (a) with a total trunk circumference of 110cm or more measured at a point 1.5 metres along the trunk's length from the closest point above ground level; or (b) if multi-stemmed, with a total trunk circumference of all its trunks of 110cm or more measured at a point 1.5 metres along the trunks' lengths from the closest point above ground level; or (c) with a trunk circumference of 150cm or more measured at ground level. 'Significant Tree' means a tree listed in Council's Significant Tree Study. 'Significant Tree Study' means the study prepared by John Patrick and Associates in May 2001 of trees and vegetation within the Municipal District that are considered to be of environmental, historic, horticultural, bio-diversity or other value and includes any subsequent trees added to the Significant Tree Study by way of Schedule to the Significant Tree Study: *Tree Protection Local Law 2016* (City of Boroondara) ss 2, 8(1).

Landowners and contractors need a permit to interfere, or to authorise interference, with the protected tree.[102] If a permit is not issued and a protected tree is interfered with, the landowner is guilty of an offence,[103] whether or not the person who actually interfered with the tree is identified.[104] The burden is on the landowner to prove that the interference was undertaken by another party without the landowner's knowledge.[105]

10.56 As discussed in Chapter 8, the Boroondara local law sets out detailed decision-making criteria that must be applied by council when determining applications under the local laws.[106] A decision must be made within five to 10 working days and an applicant for a permit is able to apply for an internal review of the decision to refuse to grant a permit.[107]

10.57 The City of Boroondara noted that approximately 75 per cent of rateable properties in Boroondara contain trees protected by the local law.[108] Boroondara stated that 'the local law had been recently reviewed and was working well to protect tree canopy'.[109]

10.58 The City of Port Phillip local law applies to and protects a large number of significant trees on private land in the locality.[110] Port Phillip informed the Commission that 'there are approximately 200 significant trees registered in the council area, and the significant tree register is constantly evolving'.[111] A permit is needed from the City Permits Unit (CPU) to remove a significant tree or palm.[112] The CPU must decide the application within 15 days and the applicant has no right of appeal if a permit is refused, but the applicant will be advised of the reasons for the decision.[113] Council investigates all alleged breaches of the local law and has issued infringement notices on a few occasions.[114]

The Heritage Act

10.59 The *Heritage Act 2017* (Vic) establishes the Victorian Heritage Register.[115] Places and objects of cultural heritage significance[116] to the state are protected by the Register.[117] A permit is required to carry out any works on a place or object protected by the Register.

10.60 Trees, gardens or other places of natural or cultural significance and associated land can be listed on the Register.[118] Therefore, a permit may be required for works to a registered heritage place, such as a tree or garden.[119] The Commission was informed that it very unusual for single trees to be listed on the Register.[120]

102 For, eg, a permit is needed to prune or remove a protected tree, or to carry out works within a specific area surrounding the protected tree: *Tree Protection Local Law 2016* (City of Boroondara) s 8(3).
103 A person found guilty of an offence will be liable to a penalty not exceeding 20 penalty units, unless otherwise specified.
104 *Tree Protection Local Law 2016* (City of Boroondara) s 8(5).
105 Ibid s 8(5).
106 Ibid s 12(2).
107 Ibid s 18.
108 Consultation 8 (City of Boroondara).
109 Ibid.
110 Consultation 12 (City of Port Phillip). The City of Port Phillip's *Local Law No.1* (Community Amenity) 2013, defines a significant tree, as 'a tree or palm on private land: with a trunk circumference or 150 centimetres or greater, measured 1 metre above the ground; or with multiple stems where the circumference of its exterior stems is equal to, or greater than 150 centimetres when measured 1 metre about ground level'.
111 Consultation 12 (City of Port Phillip).
112 *Local Law No 1* (Community Amenity) 2013 (City of Port Phillip) s 44. The requirement to obtain a permit does not apply: (a) where a person cuts, trims or prunes a significant tree to comply with clause 38 of this Local Law; (b) where an adjacent landowner removes branches which are overhanging that adjacent land: s 44(2).
113 Consultation 12 (City of Port Phillip).
114 Consultation 12 (City of Port Phillip). See also City of Port Phillip, *City Permits—Fact Sheet Significant Tree Permits* (29 November 2017) <http://www.portphillip.vic.gov.au/significant-tree-permit.htm>.
115 *Heritage Act 2017* (Vic) s 1.
116 Cultural heritage significance means aesthetic, archaeological, architectural, cultural, historical, scientific or social significance: *Heritage Act 2017* (Vic) s 3 'Definitions'.
117 *Heritage Act 2017* (Vic) s 24. Places and objects of local significance may be protected by a listing on a schedule to the Heritage Overlay, and are therefore reflected in planning schemes. The Commission notes that section 56 of the *Heritage Act* requires the amendment of planning schemes to reflect the current status of the Register. However, places and objects listed on the Register are managed by Heritage Victoria and not via the planning scheme permit process administered by local councils.
118 *Heritage Act 2017* (Vic) s 3.
119 Ibid s 3 'Definitions', pt 5. It is a criminal offence to undertake works to a Heritage place without first obtaining a permit.
120 Consultation 16 (Heritage Victoria).

10.61 Heritage Victoria is the principal State Government agency that identifies and protects non-Aboriginal cultural heritage resources that are of state-level significance.[121] The Act establishes the Heritage Council, which is an independent statutory body that identifies and protects registered places and objects of cultural significance to Victoria.[122] The Heritage Council or the Executive Director of Heritage Victoria can create exemptions to permits to allow certain works or activities to be undertaken without a heritage permit.[123] The Heritage Act specifies that a formal application must be made to seek an exemption from the need to obtain a permit.[124] A permit exemption will generally be issued:

- if the works relate to conservation of a place or object
- for routine maintenance activities which will not harm the cultural heritage significance of the place or object
- to remove dead, diseased or dangerous trees provided an arborist's report is submitted verifying the condition of the tree.[125]

10.62 The Heritage Act does not otherwise contain an exemption allowing emergency works to heritage-listed places or objects.

10.63 The Heritage Council can review permits that have been refused by Heritage Victoria and conditions attached to permits.[126] The Minister may also call-in a review and either determine the matter or refer the matter to VCAT for determination.[127]

The Aboriginal Heritage Act

10.64 The *Aboriginal Heritage Act 2006* (Vic) establishes the Victorian Aboriginal Heritage Register (VAHR), which records the details of all known Aboriginal objects and places in Victoria.[128] The Act is administered by Aboriginal Victoria.[129]

10.65 Aboriginal Victoria is a government agency under the auspices of the Department of Premier and Cabinet (Vic). It is responsible for the implementation of the *Aboriginal Heritage Act 2006* (Vic). It has a statutory function to maintain the VAHR and 'has regional teams who assess recommendations for areas or objects of Aboriginal cultural heritage significance for inclusion on the VAHR'.[130]

10.66 Registered Aboriginal Parties (RAPs) are organisations that hold decision-making responsibilities under the Aboriginal Heritage Act in a specified geographical area.[131]

10.67 The Aboriginal Heritage Act aims to minimise or prevent harm to Aboriginal heritage, including Aboriginal scarred trees and other trees of indigenous cultural significance.[132] Harm is broadly defined to include damage, destroy, disturb, injure or interfere with.[133] Harm would include pruning an Aboriginal scarred tree.[134]

121 Heritage Victoria exercises its functions in a number of ways, including: Administering the *Heritage Act 2017* (Vic); Maintaining the Victorian Heritage Register; Recommending places and objects that should be included in the Heritage Register; Issuing permits to make changed to heritage places and objects: See Department of Environment, Land, *Water and Planning* (Vic), *Heritage Victoria* (Web Page, 9 July 2018) <https://www.heritage.vic.gov.au/about-heritage-in-victoria/heritage-in-victoria>.
122 *Heritage Act 2017* (Vic) ss 9–11.
123 Ibid s 92.
124 Ibid s 92(3).
125 Ibid s 92; see also Heritage Victoria, *Policy Guideline for Heritage Permit Exemptions: Matters to be Considered in Determining Permit Exemptions under Section 92 and 49 of the Heritage Act 2017* (Document, 7 September 2017). See also Department of Environment, Land, Water and Planning (Vic), *Permits—Apply for a Permit* (Web Page, 15 March 2019) <https://www.heritage.vic.gov.au/permits/apply-for-a-permit>.
126 Consultation 16 (Heritage Victoria).
127 *Heritage Act 2017* (Vic) ss 109, 111.
128 *Aboriginal Heritage Act 2006* (Vic) ss 144, 145.
129 Aboriginal Victoria is also responsible for the implementation of the *Aboriginal Lands Act 1970.*
130 Consultation 13 (Aboriginal Victoria); See *Aboriginal Heritage Act 2006* (Vic) s 144.
131 There are currently 12 RAPs in Victoria that cover approximately 66% of Victoria's geographical location. See Aboriginal Victoria, *Registered Aboriginal Parties* (Web Page) <https://www.vic.gov.au/aboriginalvictoria/heritage/registered-aboriginal-parties.html>.
132 Other trees such as ring trees and birthing trees can be of cultural significance to Aboriginal people. These trees may have cultural significance, through natural or human processes, whereby branches have been fused and given a pattern.
133 *Aboriginal Heritage Act 2006* (Vic) s 4.
134 Consultation 13 (Aboriginal Victoria).

10.68 The Commission was informed that there may be approximately 3700 scarred trees on private land within Victoria, depending on the interpretation of available data.[135]

10.69 Pursuant to the Aboriginal Heritage Act, a landowner would need to apply for either a Cultural Heritage Permit or a Cultural Heritage Management Plan (CHMP) to carry out any works to a scarred tree.[136] A Protection Declaration may also apply to the tree.[137]

10.70 A CHMP is mandatory for high-impact works within areas of Aboriginal Cultural Heritage Sensitivity,[138] and this includes areas within 50 meters of a scarred tree.[139] Whether an area is of Aboriginal Cultural Heritage Sensitivity can be ascertained by using an online mapping tool.[140] This map is specific to individual parcels of land.

10.71 Permits or CHMPs are generally assessed by the relevant Registered Aboriginal Party (RAP)[141] or, if there is no RAP in the area, then Heritage Officers at Aboriginal Victoria.[142]

10.72 The Aboriginal Heritage Act provides VCAT with jurisdiction to determine disputes about CHMPs, cultural heritage permits and protection declarations.[143] However, most disputes are resolved on an informal basis including via mediation or negotiation.[144]

The Fences Act

10.73 The *Fences Act 1968* (Vic) provides the Magistrates' Court with jurisdiction to resolve disputes about fences.[145] The Act operates from the general principle that owners are liable to contribute in equal proportions to a dividing fence.[146]

10.74 Fences and trees are often located within close proximity to one another. Therefore, a tree may cause damage to a fence and activate the jurisdiction of both the Fences Act and the proposed Neighbourhood Tree Disputes Act.

10.75 While the Fences Act provides a remedy to rectify and repair fences damaged by a tree,[147] it does not assist with the management of trees that have caused or are likely to cause damage to fences, for example, through the making of orders for the pruning or removal of trees. If the fence itself is a 'hedge or similar vegetative barrier that encloses or bounds land',[148] then the Magistrates' Court may make orders for fencing works, which include 'the planting, replanting, repair or maintenance of a hedge or similar vegetative barrier that is the whole or part of a dividing fence'.[149] However, the Court cannot make orders for a tree that is independent of the fence.[150]

135 Consultation 13 (Aboriginal Victoria). Aboriginal Victoria calculated this figure from DELWP data layers and noted that the number would likely include some trees under lease or licence that are not in fact situated on private land within Victoria. Aboriginal Victoria noted that the *Aboriginal Heritage Act 2006* (Vic) does not distinguish between scarred trees situated on public land and those on private land. Aboriginal people caused scars on trees by removing bark for a variety of purposes. The scars vary in size and expose the sapwood on a tree: see Victorian Government, *'Aboriginal Scarred Trees', Aboriginal Victoria* (Brochure, June 2008) <https://w.www.vic.gov.au/aboriginalvictoria/heritage/aboriginal-cultural-heritage-of-victoria/aboriginal-places-objects-and-land-management.html>.
136 *Aboriginal Heritage Act 2006* (Vic) s 36; pt 4.
137 Ibid pt 7.
138 High-impact activities are categories of activity that are generally regarded as more likely to harm Aboriginal cultural heritage. Most high-impact activities provided for in the Regulations are subject to a requirement that the activity results in significant ground disturbance. The term 'significant ground disturbance' is defined in the Regulations. For more information, see Aboriginal Victoria, *Aboriginal Heritage Act 2006—Practice Note: Significant Ground Disturbance* <https://www.vic.gov.au/aboriginalvictoria/heritage/heritage-tools-and-publications/guides-forms-and-practice-notes-for-aboriginal-heritage-management.html>.
139 Consultation 13 (Aboriginal Victoria).
140 Aboriginal Victoria, *Heritage Tools* (Web Page) <https://www.vic.gov.au/aboriginalvictoria/heritage/heritage-tools-and-publications/heritage-tools.html>.
141 *Aboriginal Heritage Act 2006* (Vic) pt 10.
142 Consultation 13 (Aboriginal Victoria); see *Aboriginal Heritage Act 2006* (Vic) ss 40, 63, 65.
143 *Aboriginal Heritage Act 2006* (Vic) pt 8.
144 Consultation 13 (Aboriginal Victoria).
145 Under the Act, a fence includes a vegetative barrier that encloses or bounds land. It follows that fencing works include 'the planting, replanting, repair or maintenance of a hedge or similar vegetative barrier that is the whole or part of a dividing fence': *Fences Act 1968* (Vic) s 3 'Definitions'.
146 *Fences Act 1968* (Vic) s 7.
147 Ibid s 23.
148 Ibid s 4.
149 Ibid ss 4, 30C.
150 See, eg, *Fences Act 1968* (Vic) s 30C.

The Catchment and Land Protection Act

10.76 The proposed Neighbourhood Tree Disputes Act may interact with the *Catchment and Land Protection Act 1994* (Vic) (CLP Act) if the subject tree is a declared noxious weed that the landowner would otherwise be required to control or eradicate. Noxious weeds are generally exempt from the requirement to obtain a planning permit pursuant to the P&E Act.[151]

10.77 Landowners have responsibilities to manage specific weeds on their properties pursuant to the CLP Act. Under this Act, certain plants are declared as noxious weeds in Victoria. These plants have the potential to cause environmental or economic harm.[152] Accordingly, landowners may be issued with directions by the Secretary of the Department of Environment, Land, Water and Planning to prevent the growth or spread of state-prohibited weeds.[153]

10.78 In addition, 70B of the CLP Act provides that a landowner may be issued with a direction to take measures to control or eradicate certain categories of weeds on their land. Landowners have responsibility to take all reasonable steps to eradicate regionally prohibited weeds[154] and to prevent the growth and spread of regionally controlled weeds.[155] It is an offence to fail to comply with a directions notice.[156]

Other Victorian Acts

10.79 Other Acts also require landowners to maintain vegetation on their land:

- for fire prevention
- to minimise interference with powerlines
- to protect public health and wellbeing
- for conservation purposes.

10.80 The Acts discussed below are unlikely to affect the operation of the new Act recommended in this report. Rather, the Commission considers that the obligations placed on landowners under these Acts are likely to complement the new Act.

Country Fire Authority Act

10.81 This Act enables council Fire Prevention Officers to issue a Fire Prevention Notice to a landowner requiring the removal of vegetation fuel hazards in the 'country area of Victoria'.[157] These notices may be issued if the officer forms the view that is it necessary, or may become necessary, to remove vegetation to protect life or property from the threat of fire.[158] It is an offence for a person to fail to comply with a Fire Prevention Notice.[159] Councils may enter private lands to remove fire hazards if fire prevention notices are not complied with.[160]

151 This includes 'Vegetation that is a noxious weed subject of a declaration under the *Catchment and Land Protection Act 1994.* This exemption does not apply to Australian Dodder (Cuscuta australis).
152 Agriculture Victoria, *Invasive Plant Classifications* (Web Page, 5 December 2018) <http://agriculture.vic.gov.au/agriculture/pests-diseases-and-weeds/weeds/invasive-plant-classifications>.
153 *Catchment and Land Protection Act 1994* (Vic) s 70(1).
154 Regionally prohibited weeds are not widely distributed in a region but are capable of spreading further.
155 Ibid. Regionally controlled weeds are invasive plants and are usually widespread in a region. To prevent their spread, ongoing control measures are required.
156 *Catchment and Land Protection Act 1994* (Vic) s 70C.
157 *Country Fire Authority Act 1958* (Vic) s 41. The 'country area of Victoria' means that part of Victoria which lies outside the metropolitan district, but does not include any forest, national park or protected public land.
158 Ibid s 41(2)(a).
159 Ibid s 41D.
160 Country Fire Authority, *Who Does What* (Web Page, 2019) <https://www.cfa.vic.gov.au/about/who-does-what>.

Metropolitan Fire Brigades Act

10.82 This Act operates in the same way as the *Country Fire Authority Act 1958* (Vic) but it applies to the metropolitan fire district.[161]

Electrical Safety Act

10.83 This Act requires a landowner or occupier of land to keep private electric lines clear of vegetation.[162] Notices may be issued by Energy Safe Victoria or the relevant distribution company requiring a person to clear vegetation within a specified timeframe.[163]

10.84 If action is not taken within the given timeframe, works can be carried out by third parties to ensure that the tree is kept clear of the line.[164]

Transport legislation and road reserves

10.85 Legislation regulating public land in rail corridors and road reserves may require private landowners to maintain vegetation on their property.[165] For example, private landowners may be required to prune or remove a tree on their land if it poses a safety risk to railway users or road users.

10.86 Some local laws may also place obligations on private landowners to ensure vegetation on their land does not interfere with or obstruct public traffic, including pedestrian traffic.[166]

Public Health and Wellbeing Act

10.87 Under the Public Health and Wellbeing Act (PHW Act), councils have a duty to investigate and remedy all nuisances within the municipality wherever possible.[167] The PHW Act applies to nuisances which are dangerous to health or offensive.[168] It is possible for a tree to form a nuisance and therefore for the PWH Act to be used in managing tree disputes on private land.

10.88 Any person can contact their local council if they believe a nuisance exists.[169] The council can:

- issue an improvement notice or prohibition notice[170]
- initiate proceedings for an offence under the Act[171]
- enter the premises and abate the nuisance if the owner or occupier of the land cannot be found,[172] or
- advise the complainant of any options to settle the matter privately.[173]

10.89 If council fails to investigate the nuisance within a reasonable period of time, the complainant can commence proceedings in the Magistrates' Court.[174]

10.90 The Commission asked a number of councils whether the nuisance offence under the PHW Act applied to tree disputes on private land. All councils consulted with suggested that the PHW Act had not been used or had not played a role in resolving neighbourhood tree disputes.[175] It is more likely to be used 'to manage noise issues, odour issues and rodent infestations'.[176]

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161 *Metropolitan Fire Brigades Act 1958* (Vic) ss 87–92.
162 *Electricity Safety Act 1998* (Vic) s 84B.
163 Ibid s 86(1).
164 Ibid ss 86 (5)–(7). The third-party contractor is able to recover the costs of undertaking the works from the owner or occupier of land on which the tree is situated.
165 See, eg, *Road Management Act 2004* (Vic); *Rail Management Act 1996* (Vic) s 67A.
166 See, eg, *General Local Law 2017* (East Gippsland Shire Council) cl 28; *Local Law No 1 (Community Amenity) 2013* (City of Port Phillip) s 38.
167 *Public Health and Wellbeing Act 2008* (Vic) ss 60, 62(2).
168 Municipal Association of Victoria, *Public Health and Wellbeing Act 2008—Guidance Manual for Local Government Authorised Officers* (March 2010) 15–16. Offensive is defined as 'noxious or injurious to personal comfort'.
169 *Public Health and Wellbeing Act 2008* (Vic) s 62(1).
170 Ibid s 62(4)(b).
171 Ibid s 62(4)(c).
172 Ibid s 66.
173 Ibid s 62(3)(b).
174 Ibid s 63.
175 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
176 Consultation 9 (Nillumbik Shire Council).

Flora and Fauna Guarantee Act

10.91 This Act protects certain flora and fauna within Victoria.[177] It aims to conserve threatened native plants or communities of native plants and animals and manage processes that are potentially threatening to them.[178]

10.92 The obligation to obtain a permit or other authorisation under the Act does not generally apply to private landowners or occupiers of private land.[179] However, a permit is required to take flora from private land which is part of the critical habitat of that flora.[180] Under the Act a determination may be made that the whole or any part or parts of the habitat of flora is critical to the survival of that particular category of flora.[181] If such a determination is made, the landowner or occupier of land will be notified.[182] At the time of writing the Victorian Government has not used this mechanism to protect critical habitats.[183]

Victorian Conservation Trust Act

10.93 Native vegetation on private property can also be protected by a conservation covenant established under the *Victorian Conservation Trust Act 1972* (Vic).[184] Baw Baw Shire Council suggested that it has some of these covenants within its local government area.[185]

10.94 These agreements are legally binding, registered on title and are entered into voluntarily between the Trust for Nature and individual landowners.[186] Once agreed, the Trust assumes responsibility for monitoring the restrictions and rights agreed to through the Trust's Stewardship Program.

10.95 Each conservation covenant is approved by the Minister for Environment. The covenant is then registered on the Certificate of Title and remains there, binding current and future owners of the land to the terms and conditions of the covenant.[187]

10.96 All currently worded covenants are subject to responsible fire prevention, weed and pest control as well as acts that are outside the control of the owner, for example a natural disaster that may adversely affect protected habitats. Restrictions set out in this covenant, for example, disallowing tree removal, may also be waived to the extent necessary for:

- reasonable maintenance of fences, culverts, dams, bridges, watercourses, buildings, tracks, paths, roads and other services
- any act required under any law, rule or regulation of any government or government agency, executive or administrative order or act of general or particular application
- the proper management of the land as a protected environment for indigenous flora and fauna.[188]

177 The Flora and Fauna Guarantee Amendment Bill 2018 was introduced into Parliament in May 2018 to amend this Act but did not pass the Parliament before the final scheduled sitting day of the 58th Parliament of Victoria: see Department of Environment, Land, Water and Planning (Vic), 'Review of the Flora and Fauna Guarantee Act', *Engage Victoria* (Web Page) <https://engage.vic.gov.au/review-flora-and-fauna-guarantee-act-1988>.
178 *Flora and Fauna Guarantee Act 1988* (Vic) s 1.
179 Ibid ss 1, 47(2)(b)(c).
180 Ibid s 47(2)(b).
181 Ibid s 20(1).
182 Ibid s 20(2)(c).
183 Department of Environment, Land, Water and Planning (Vic), *Review of the Flora and Fauna Guarantee Act 1988: Consultation, Submission and Response Summary* (Report, 2017) 9 <https://engage.vic.gov.au/review-flora-and-fauna-guarantee-act-1988>; *Department of Environment, Land, Water and Planning* (Vic), 'Protected Flora Controls', *Conserving Threatened Species* (Web Page, 22 February 2019) <https://www.environment.vic.gov.au/conserving-threatened-species/flora-and-fauna-guarantee-act-1988/protected-flora-controls>.
184 See *Conservation Trusts Act 1972* (Vic) s 3(1)(b). The Trust website says that it has secured over 100,000 hectares of private land by working with land owners and others. This includes land protected by more than 1400 voluntary conservation covenants and 41 Trust for Nature reserves. *Trust for Nature Reserves* (Web Page, 2017) <https://www.trustfornature.org.au/>.
185 Consultation 10 (Baw Baw Shire Council).
186 Trust for Nature, *Conservation Covenants* (Web Page) <https://www.trustfornature.org.au/land-services>.
187 Trust for Nature, *What is a Conservation Covenant?* (Web Page, 2017) <https://www.trustfornature.org.au/landowner-support>.
188 Trust for Nature Covenant Deed (2019), clause 10. Other exemptions can be permitted by the Trust via a Letter of Approval. A Letter of Approval is not registered on the title. If a new landowner wants the same conditions as the previous landowner, they will need to apply for a new Letter of Approval: Trust for Nature, *What is a Conservation Covenant?* (Web Page, 2017) <https://www.trustfornature.org.au/landowner-support>.

- Only in 'extreme and highly unusual circumstances' will removal of a covenant be considered. The Trust and the Minister must agree to the removal.[189]

10.97 The current intention of the Trust is to ensure that the deeds of covenant do not impede covenantors (landowners) from complying with general laws, rules or regulations.[190] This means that a tree owner whose land is subject to a conservation covenant would need to comply with an order if a statutory scheme is implemented to resolve neighbourhood tree disputes.

10.98 Landowners are also able to enter into these agreements as an 'on-title security agreement' to establish native vegetation offset sites.[191] This means that once the agreement is signed and registered on title, native vegetation credits will be registered in the landowner's name and can be traded.[192] The nature of these agreements is varied and complex.

Conservation, Forests and Lands Act

10.99 Land management co-operative agreements can also be entered into under the Conservation, Forests and Lands Act between the Secretary to the Department of Environment, Land, Water and Planning and landowners. These agreements, known as 'section 69 agreements', can either:

- relate to the management, use, development, preservation or conservation of land in the possession of the landowner, or
- otherwise give effect to the object or purposes of a relevant law,[193] in relation to land in the possession of the landowner.[194]

10.100 Agreements may be binding on a landowner's successors in title.[195] For this to occur the Secretary must record the agreement on the Register of Titles.[196]

10.101 This Act may be used for agreements between the Secretary and the Trust for Nature.[197] However, the land to which these agreements apply must be managed as if it were Crown land.[198]

10.102 All agreements restrict the use of the land, with some agreements requiring more active land management than others. The landowner can receive funding to undertake actions to manage vegetation subject to the agreement.[199]

10.103 As discussed in relation to section 173 agreements and conservation covenants, landowners can use section 69 agreements as an 'on-title security agreement' to establish native vegetation offset sites.[200] This means that once the agreement is signed and registered on title, native vegetation credits will be registered in the landowner's name and, for section 69 agreements, can be traded.[201]

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189 *Victorian Conservation Trust Act 1972* (Vic) s 3A(3); Trust for Nature, *What is a Conservation Covenant?* (Web Page, (2017) <https://www.trustfornature.org.au/landowner-support>.

190 Information provided by the Trust for Nature to the Commission, March 2019.

191 See further Department of Environment, Land, Water and Planning (Vic), *I Need to Secure an Offset* (Web Page, 2019) <https://www.environment.vic.gov.au/native-vegetation/native-vegetation/offsets-for-the-removal-of-native-vegetation/i-need-to-secure-an-offset>.

192 Department of Environment, Land, Water and Planning (Vic), *Native Vegetation Credit Register: Process to Establish a Native Vegetation Credit Site on Private Land* (Register) <https://www.environment.vic.gov.au/native-vegetation/native-vegetation/offsets-for-the-removal-of-native-vegetation/i-want-to-establish-a-native-vegetation-credit-site>.

193 'Relevant law' means the *Conservation, Forests and Lands Act 1987* (Vic), the Regulations, an Act specified in schedule 1, the Regulations under an Act specified in schedule 1, and in part 9 (except sections 89, 97 and 98) includes an Act specified in schedule 1A and Regulations under any such Act.

194 *Conservation, Forests and Lands Act 1987* (Vic) s 69(1).

195 Ibid s 72.

196 Ibid s 72.

197 Ibid s 69(3).

198 Ibid s 70(1)(ma).

199 Ibid s 68; Department of Environment and Primary Industries (Vic), *Land Protection Under the Biodiversity Conservation Strategy—Melbourne Strategic Assessment* (Report, May 2014) 4.

200 Serer further Department of Environment, Land, Water and Planning (Vic), *I Need to Secure an Offset* (Web Page, 2019) <https://www.environment.vic.gov.au/native-vegetation/native-vegetation/offsets-for-the-removal-of-native-vegetation/i-need-to-secure-an-offset>.

201 Department of Environment, Land, Water and Planning (Vic), *Native Vegetation Credit Register: Process to Establish a Native Vegetation Credit Site on Private Land* (Register) <https://www.environment.vic.gov.au/native-vegetation/native-vegetation/offsets-for-the-removal-of-native-vegetation/i-want-to-establish-a-native-vegetation-credit-site>.

10.104 An agreement may be varied or terminated in a number of ways, including by agreement between the Secretary and the landowner or by a VCAT order.[202]

Commonwealth law: the Environment Protection and Biodiversity Conservation Act

10.105 The *Environment Protection and Biodiversity Act 1999* (Cth) (EPBC Act) provides a legal framework to protect and promote the recovery of threatened species and ecological communities and preserve significant places from decline. The Act regulates matters of national environmental significance including World Heritage property, listed threatened species and communities, and wetlands of international importance.[203]

10.106 A person must not take an action that has, will have or is likely to have a 'significant impact' on any of the matters of national environmental significance or other protected matters without approval.[204] If the proposed action meets the 'significant impact' test, it must be referred to the Commonwealth Department of Environment and Energy for assessment and approval by the Minister.[205]

10.107 The EPBC Act affects any group or individual, including landowners,[206] whose actions may have a significant impact on a matter of national environmental significance. An action is broadly defined and can include the clearance of vegetation.[207] Generally, a significant impact refers to an impact which is important, notable, or of consequence, having regard to its context or intensity.[208]

10.108 The regular permit process under Part 4 of the P&E Act is one of the accredited assessment processes under a bilateral agreement between the Commonwealth and Victoria.[209] This means that once the Commonwealth has determined an action is a 'controlled action', it can be assessed by a responsible authority under the permit application process. The relevant Victorian Minister must assess the action in parallel with the related assessment undertaken by the relevant authority. The assessment process invites the public to comment on the proposed action and an assessment report must be prepared by the Victorian Minister.[210]

10.109 An order under the new Act may in theory have a significant impact on a matter of national environmental significance, for example listed threatened species and communities or migratory species.[211] If a private landowner wishes to clear native vegetation on their property which is listed as a threatened species or part of a threatened ecological community, the requirements of this legislation will only apply if the clearance meets the significant impact test. While it is highly unlikely that the removal of one or two trees on a suburban block would meet this test, it might apply on a larger property outside Melbourne.

202 *Conservation, Forests and Lands Act 1987* (Vic) s 76(1).
203 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 1(a); see also Department of the Environment and Energy (Cth), *EPBC Act—Frequently Asked Questions* (Web Page, 2013) <http://www.environment.gov.au/epbc/publications/factsheet-epbc-act-frequently-asked-questions>.
204 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 11–12, 15B, 16, 18, 20, 21, 23, 24B, 24D; see also Department of the Environment (Cth), *EPBC Act—Frequently Asked Questions* (Web Page, 2013) <http://www.environment.gov.au/epbc/publications/factsheet-epbc-act-frequently-asked-questions>.
205 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 66; see also Department of the Environment and Energy (Cth), *Controlled Actions—What Next?* (Web Page) <http://www.environment.gov.au/heritage/management/referrals/controlled-actions>.
206 Landholders are defined to include an owner, lessee or occupier of the area of land: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 496A.
207 Department of Environment and Energy (Cth), *Significant Impact Guidelines 1.1—Matters of National Significance* (2013) <http://www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance>.
208 Whether an impact is significant will depend on a number of factors, including the quality of the environment affected and the intensity, duration, magnitude and geographic extent of the impacts: Department of the Environment and Energy (Cth), *Significant Impact Guidelines 1.1 —Matters of National Environmental Significance* (2013) 2 <http://www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance>.
209 Department of the Environment and Energy (Cth), *Victorian Assessment Bilateral Agreement* (27 October 2014) <http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/vic>; Victoria has not yet entered into an 'approval bilateral' under which the state approval would also constitute the authorisation for the purposes of the EPBC Act: Stephen Rowley, *The Victorian Planning System—Practice, Problems and Prospects* (The Federation Press, 2017) 238.
210 See, eg, Department of Environment, Land, Water and Planning (Vic), *Environmental Assessment Bilateral Agreement* (Web Page, 10 April 2019) <https://www.planning.vic.gov.au/environment-assessment/environmental-assessment-bilateral-agreement>.
211 Department of the Environment (Cth), *EPBC Act—Frequently Asked Questions* (Web Page, 2013) <http://www.environment.gov.au/epbc/publications/factsheet-epbc-act-frequently-asked-questions>.

10.110 Routine vegetation management, for example to maintain existing facilities or roads, is not normally considered to have a significant impact on a matter of national environmental significance.[212] The clearing of vegetation for the creation of a new road, however, may require referral under the Act.[213]

10.111 As most tree disputes occur between neighbours living in the urban context where land has already been developed in accordance with assessment processes under the P&E Act, these scenarios would rarely be relevant to tree disputes and are more likely to arise in relation to larger development projects.[214]

Community responses—interaction of laws

Interaction of laws

10.112 The community has told the Commission that it finds the laws governing tree disputes unclear. One community member explained that navigating the existing 'multitude of legal considerations surrounding tree disputes' is 'extremely complex'.[215] A number of survey respondents also expressed dissatisfaction with the variation in laws that may apply to protect trees on private land.[216] For example, one survey respondent expressed the view that:

> the law or laws governing this area are spread over what seems to be a number of acts. The efficacy in understanding the implications of such laws then becomes quite cumbersome. It is not always obvious to neighbours when a tree enjoys 'extra' protective status, such as heritage status as deemed by council or other such bodies.[217]

10.113 The Law Institute of Victoria noted that 'conservation covenants have the potential to spark a dispute about trees or vegetation on private land'. Disputes may arise between neighbours about competing interests in land, for example:

10.114 a farmer may be concerned by the spread of weeds, or an increase in native fauna such as kangaroos, as a result of the conservation covenant, whereas the covenantor might be concerned with chemical spray drift, soil disturbance and noise, caused by farming operations.[218]

10.115 In the consultation paper, the community was asked how a new Act to govern neighbourhood tree disputes should interact with other Acts and laws. A range of responses were received to this question. A number of submissions were in favour of new tree dispute laws overriding existing local laws and other legislation.[219] Others suggested that only local laws, rather than other Acts of Parliament, should be interfered with.[220]

10.116 On the other hand, a number of responses supported an approach where orders made under a new tree disputes Act would work alongside existing local laws and other legislation.[221] Arborist Ben Kenyon suggested that many existing mechanisms, such as significant tree registers and planning permits, work well to protect vegetation and have adequately built-in exceptions for safety and damage.[222]

212 Department of Environment and Energy (Cth), *Significant Impact Guidelines 1.1— Matters of National Environmental Significance* (2013) <http://www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance>.
213 Ibid.
214 Confirmed by VCAT: Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
215 Confidential submission.
216 Survey Respondents 3, 19, 57, 83, 88, 110.
217 Survey Respondent 57.
218 Submission 30 (Law Institute of Victoria).
219 Submissions 23 (Name withheld), 27 (Name withheld), 29 (David Galwey).
220 Submissions 4 (Name withheld), 9 (Dr Karen Smith), 21 (Pointon Partners Lawyers), 25 (City of Boroondara), 33 (Annette Neville); Consultation 6 (Ben Kenyon).
221 Submissions 2 (Name withheld), 19 (Name withheld); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
222 Consultation 6 (Ben Kenyon).

10.117 The Commission met with a number of local councils to discuss the possible interaction of a new Act with existing laws that are either administered by councils or where council is the responsible authority under other legislation for example in planning schemes. These councils generally supported an approach that would see the new Act working alongside existing local laws and other legislation.[223]

10.118 The City of Port Phillip thought that any new tree dispute scheme should not override planning schemes but rather complement them.[224] It was suggested that this approach would enable a broader range of issues to be to be heard by the same decision-making body, for example, VCAT.[225] Similarly, Nillumbik Shire Council stated 'any new scheme should align with planning controls and not erode them and Council should be given a place at the decision-making table'.[226]

10.119 Baw Baw Shire Council's preference is not to enable the new Act to override planning schemes or local laws. However, Baw Baw expressed the view that:

> The Queensland approach where an applicant was required to progress through local council policies and processes first before an order was made by QCAT may also be helpful.[227]

10.120 The City of Boroondara explained that:

> Planning schemes consider a broad spectrum of environmental and public policy matters which would not be considered in a civil case. It is therefore appropriate for a Planning Permit to continue to be required, to enable these matters to be considered even if an order [under a new Act] has been made.[228]

10.121 The City of Boroondara also raised concerns about an order under a new Act fettering council's ability to make its own decision under a local law.[229] Boroondara proposed a process whereby council would make a final determination about a protected tree following an order made under a new Act.[230]

10.122 Arborist Robert Mineo observed:

> Overriding the decisions made by councils under planning schemes and local laws could be problematic. However, there is merit in having a third party mediate serious tree disputes between neighbours. The NSW approach of providing councils with the opportunity to attend tree dispute hearings would provide some compromise and appeared to be a sensible approach.[231]

10.123 VCAT drew a distinction between the interaction of a new Act with decisions that are made under local laws and with decisions that are made pursuant to the P&E Act. VCAT commented that decisions made under local laws provide no external right of review and so are distinct from decisions made under the P&E Act.[232]

10.124 VCAT explained that planning schemes made pursuant to the P&E Act operate in a different context to inter-party neighbourhood tree disputes, for example:

- Overlay controls apply to land for purposes that relate to broader issues, such as soil stability, native vegetation, landscapes and biodiversity.
- In some cases where tree removal is authorised under a planning scheme, the responsible authority may require re-vegetation to offset any loss of vegetation.

223 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
224 Consultation 12 (City of Port Phillip).
225 Ibid.
226 Consultation 9 (Nillumbik Shire Council).
227 Consultation 10 (Baw Baw Shire Council).
228 Consultation 8 (City of Boroondara).
229 Ibid.
230 Ibid.
231 Consultation 14 (Robert Mineo).
232 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).

- Decisions made by the responsible authority pursuant to planning schemes enable third parties to seek an administrative review of the decision in VCAT.[233]

10.125 For these reasons VCAT did not support the new Act addressing both civil and planning law matters. The Tribunal was unsure about how the new Act could give effect to the often complex issues that arise as part of the planning scheme decision-making process.[234]

Bushfire protections

10.126 Some specific responses were received about the interaction of the new Act with bushfire protections under the P&E Act. Some submissions suggested that concerns can arise about trees located on adjoining land that may pose a risk of damage or harm in the event of a bushfire.[235]

10.127 The Law Institute of Victoria noted the obligations a bushfire management overlay imposes on landowners:

> Private owners whose land is affected by a Bushfire Management Overlay must undertake pre-emptive work to plan and prepare for bushfire, often including the removal of trees or vegetation, which may result in a dispute.[236]

10.128 Nillumbik Shire Council, much of it covered by a Bushfire Management Overlay, stated that any new scheme to resolve neighbourhood tree disputes should not interfere with the bushfire protection exemptions in place in planning schemes.[237]

Other jurisdictions—interaction of laws

10.129 Planning law frameworks in New South Wales, Queensland and Tasmania use different mechanisms to regulate vegetation on private land. However, planning permits for control of vegetation on private land in each jurisdiction are mainly administered at the local council level, either through planning scheme mechanisms or local laws. This is in keeping with the approach in Victoria.

10.130 New South Wales, Queensland and Tasmania all adopted a cautious approach to how their new tree dispute laws would interact with established planning laws and other regulations. Ultimately, they all allow orders to override local laws[238] provided certain safeguards are met. Some also allow state planning laws to be overridden in certain circumstances. The interstate schemes do not generally allow orders that are prohibited under other Acts.[239]

New South Wales

Regulation of trees on private land in NSW

10.131 In New South Wales, trees on private land may be managed by planning laws at the state level and requirements at the council level. These laws have recently undergone significant amendment.[240]

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233 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
234 Ibid.
235 Submissions 5 (Name withheld), 13 (Mandy Collins), 19 (Name withheld).
236 Submission 30 (Law Institute of Victoria).
237 Consultation 9 (Nillumbik Shire Council).
238 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (*Qld) s 67; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 14. The Commission's research suggests that local laws may not be relied upon to manage vegetation on private land in New South Wales as they are in Victoria. The Commission notes that the application of the Tasmanian Act is in its infancy and so there is currently no case law about how RMPAT have interpreted these specific provisions. The Commission is uncertain, for example, about how RMPAT orders may intersect with local tree protection laws in Tasmania. This is discussed in further detail below.
239 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 43, 67; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 14; *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 6(1), (2); cf *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 6(3).
240 The *Environmental Planning and Assessment Act 1979* (NSW) was updated following the passing of the *Environmental Planning and Assessment Amendment Act 2017* in November 2017. Most of the changes came into effect from 1 March 2018: Department of Planning and Environment (NSW), *Guide to the Updated Environmental Planning and Assessment Act 1979* (Web Page) <https://www.planning.nsw.gov.au/Policy-and-Legislation/Environmental-Planning-and-Assessment-Act-updated/Guide-to-the-updated-Environmental-Planning-and-Assessment-Act-1979>.

10.132 The NSW Government describes the planning system as having a hierarchical structure, with the *Environmental Planning and Assessment Act* 1979 (NSW) the primary piece of legislation. It sets up Environmental Planning Instruments (EPIs) comprising State Environmental Planning Policies (SEPPs) and Local Environmental Plans (LEPs).[241]State Environmental Planning Polices (SEPPs) cover issues of statewide importance.[242] One SEPP addresses vegetation in non-rural areas.[243] The aims of that policy are to:

- protect the biodiversity value of trees and other vegetation in nonrural areas of the state
- preserve the amenity of non-rural areas of the state through the preservation of trees and other vegetation.[244]

10.133 Each local government authority has a Local Environment Plan (LEP) to guide development, for example through applying zoning controls to land, and protect natural resources.[245] A Standard Instrument sets out compulsory and optional provisions for LEPs.[246]

10.134 Development Control Plans (DCPs) also fit within the framework of the Environmental Planning and Assessment Act. These plans are provided by councils and provide more detailed guidance about design and planning requirements in local areas.[247]

10.135 Prior to recent legislative amendments, Tree Preservation Orders were the main mechanism by which councils managed vegetation on private land. Tree preservation orders previously made under clauses 5.9 and 5.9AA of the Standard Instrument (Local Environmental Plans) have largely been replaced by the State Environment Planning Policy (Vegetation in NonRural areas)[248] but existing tree preservation orders will continue to have effect.[249]

10.136 The clearing of native vegetation in rural New South Wales is governed separately by the *Local Land Services Act 2013* (NSW) and the *Biodiversity Conservation Act 2016* (NSW).[250]

Trees (Disputes Between Neighbours) Act 2006 (NSW)

10.137 The *Trees (Disputes Between Neighbours) Act 2006* (NSW) (the NSW Act) provides that an order does not authorise or require a person to carry out work or engage in activity for which consent or other authorisation must be obtained under any other Act without that consent or authorisation.[251] However, a NSWLEC order has effect despite any requirement that would otherwise apply to obtain consent or authorisation under the *Environmental Planning and Assessment Act 1979* (NSW) or the *Heritage Act 1977* (NSW).[252] This exception is mitigated by two safeguards:

241 See Department of Planning and Environment (NSW), *The Planning System* (Web Page, 26 May 2018) <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Your-guide-to-the-DA-process/Getting-started/The-planning-system>.
242 Ibid.
243 See *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*. This policy was implemented to ensure that the clearing of native vegetation in urban areas is regulated. For example, Part 3 enables individual councils to declare in their development control plan that the removal of certain species of vegetation or vegetation of a particular size requires a permit or approval to be issued by council.
244 *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*, cl 3. For example, Part 4 does not enable people to clear native vegetation in urban areas that would exceed the biodiversity offsets scheme threshold under section 7.4 of the *Biodiversity Conservation Act 2016 without approval by the Native Vegetation Panel*.
245 See Department of Planning and Environment (NSW), *Local Planning and Zoning* (Web Page, 18 February 2019) <https://www.planning.nsw.gov.au/Plans-for-your-area/Local-Planning-and-Zoning>.
246 *Standard Instrument* (Local Environmental Plans) Order 2006.
247 See Department of Planning and Environment (NSW), *The Planning System* (Web Page, 26 May 2018) <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Your-guide-to-the-DA-process/Getting-started/The-planning-system>; See, eg, *Manly Development Control Plan 2013,* cl 3.3.2.1(b), 3.3.2.3.
248 This has substantially reproduced the effect of clauses 5.9 and 5.9AA, allowing councils to continue to regulate clearing of vegetation through their Development Control Plan (DCP): Office of Environment and Heritage (NSW), *Local Government Information and Resources* (Web Page, 23 November 2018) <https://www.environment.nsw.gov.au/biodiversity/localgovernment.htm>.
249 See further Office of Environment and Heritage (NSW), *Local Government Information and Resources* (Web Page, 23 November 2018) <https://www.environment.nsw.gov.au/biodiversity/localgovernment.htm>.
250 Office of Environment and Heritage (NSW), *Native Vegetation* (Web Page, 21 September 2018) <https://www.environment.nsw.gov.au/vegetation/>. *The Local Land Services Act 2013* (NSW) repealed the *Native Vegetation Act 2003* (NSW).
251 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 6(1)(a).
252 Ibid s 6(3).

- The NSWLEC must consider whether interference with the tree would normally require consent or authorisation under these Acts and if so whether it has been obtained.[253]
- A relevant authority, for example a council or heritage officer, is able to appear in proceedings.[254]

10.138 Tree Preservation Orders (TPOs) have been recognised as a hybrid statutory mechanism under the *Environmental Planning and Assessment Act 1979* (NSW) (the EPA Act).[255] An order made by the NSWLEC has effect despite a TPO or presumably a Vegetation SEPP[256] that might otherwise prevent or restrict interference with the tree.[257]

10.139 Where local council's authority or a permit would ordinarily be needed, the NSWLEC will consider the factors that the local council would ordinarily take into account in its decision-making process.[258] This includes matters concerning native vegetation and bushfire zones. The Court may also consider whether or not the permit was refused by local council where a prior application was made.[259]

10.140 The NSWLEC gives significant weight to consistently applied council policies relating to TPOs, for example policies about the management of trees including circumstances in which tree removal may be permitted.[260]

Queensland

Regulation of trees on private land

10.141 Queensland has also recently overhauled its planning system with the *Planning Act 2016* (Qld) commencing in 2017. It establishes state planning policies to identify issues of statewide importance.[261] One of the broad policy themes is environment and heritage, including the conservation of biodiversity and cultural heritage.[262]

10.142 Local planning instruments are made by local governments in consultation with the community. They consider local growth and development and take into account the state planning instruments. There are three local planning instruments: planning schemes; temporary local planning instruments and planning scheme policies.[263] Local planning schemes specify defined land uses and assessment requirements.[264]

253 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 12(b); see, eg, *Chapman v Harris [*2012] NSWLEC 1183 [12] (a council had previously given consent to interfere with the tree); *Todorovic v Mendham* [2019] NSWLEC 1088 [13], in which the Court would have given 'considerable weight to local government tree controls but the relevant council did not provide any submissions or appear at the tree dispute hearing'.

254 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 13. Applicants are requirement to inform the Court in the application form whether a tree preservation order applies to the tree subject to the dispute, or whether the tree is of heritage value. The Court also requires the applicant to notify any relevant authority that would be entitled to appear in proceedings in relation to the tree by providing the relevant authority with a copy of the application form and any order sought at least 21 days prior to the first hearing: *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 8.

255 See, eg, *Haindl v Daisch* [2011] NSWLEC 1145; see also Andrew H Kelly (2013) 'Tree Preservation Orders: A New Vision?' in S Kajewski, K Manley and K Hampson (eds), *Proceedings of the 19th CIB World Building Congress: Construction and Society* (Queensland University of Technology, 2013).

256 *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* 'Vegetation SEPP'. The Commission notes that clause 8(3) of the Vegetation SEPP provides that an authority is not required under this policy for the removal of vegetation that the council is satisfied is a risk to human life or property. The Commission notes that the legislative mechanisms used to protect vegetation on private land in New South Wales have recently changed and the implications of these changes for tree dispute hearings in the NSWLEC are not fully apparent at the time of writing this report.

257 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 6(3); see also Land and Environment of Court New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 6; see further *Ghazal v Vella (No. 2)* [2011] NSWLEC 1340.

258 See, eg, *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 12(b); Consultation 11 (Land and Environment Court of New South Wales).

259 Consultation 11 (Land and Environment Court of New South Wales).

260 *Haindl v Daisch* [2011] NSWLEC 1145. Note that this is not determinative weight.

261 Department of State Development, Manufacturing, Infrastructure and Planning (Qld), *State Planning Policy* (Web Page, 2019) <https://planning.dsdmip.qld.gov.au/planning/better-planning/state-planning/state-planning-policy-spp>.

262 Ibid.

263 Department of State Development, Manufacturing, Infrastructure and Planning (Qld), *The Framework: The 'What' of Planning– State and Local Planning Instruments* (Web Page, 2019) <https://planning.dsdmip.qld.gov.au/planning/our-planning-system/the-framework>.

264 See Department of State Development, Manufacturing, Infrastructure and Planning (Qld), *Queensland's New Planning System (Document, 2018)* <https://planning.dsdmip.qld.gov.au/planning/our-planning-system>; see, eg, City of Gold Coast, 'City Plan Version 6', *City Plan* (Web Page) cl 9.4.14.1-3.

10.143 In Queensland, trees can also be protected by local councils through Vegetation Protection Orders administered under local laws, created under the *Local Government Act 1993* (Qld).[265] For example under the *Natural Assets Local Law 2003* (Brisbane City Council), Council can protect significant vegetation by requiring a permit to be lodged for any proposed structure or works that may interfere with protected vegetation.[266] This includes significant native vegetation (from small ground covers and native grasses to large trees) and significant urban vegetation (both native and exotic vegetation on private property).[267]

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

10.144 The Queensland Civil and Administrative Tribunal (QCAT) cannot make an order under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (the Queensland Act) that would be unlawful under another Act.[268]

10.145 Section 43 further provides that the Queensland Act does not otherwise limit the operation of another law requiring consent or authorisation to be obtained before work to a tree can be carried out. QCAT confirmed it would not hear a matter if consent to intervene with the tree is required under another Act.[269]

10.146 This limitation is qualified in relation to local laws. Section 67 of the Queensland Act provides that if QCAT is satisfied there is a genuine dispute, it may make an order for a person to carry out works to a tree even though:

- consent is withheld by a local government or a tree-keeper under a vegetation protection order
- a local law requires consent or authorisation to be given before the work may be carried out, or
- the work is otherwise restricted or prohibited under a local law.[270]

10.147 The Queensland Act specifically provides that work carried out pursuant to this section is lawful despite a local law.[271] Section 65(b) also provides that QCAT may make an order if it is satisfied that the neighbour has taken all reasonable steps to resolve the issue under local law, a local government scheme or local government administrative process.

10.148 In Queensland, 'it is the specific intention of the Bill that QCAT can override a local law, particularly relating to vegetation protection orders, where it can be demonstrated that the tree is a nuisance'.[272]

10.149 If a council has local law which would allow concerns about a dangerous tree to be addressed, then the process under the local law should be used first to try to resolve the issue.[273]

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265 See, eg, Michelle Lensink, 'Tree Protection Laws in Australian States and Territories', *Treenet* (Web Page, 2017) <https://treenet.org/resources/tree-protection-laws-in-australian-states-and-territories/>.

266 *Natural Assets Local Law 2003* (Brisbane City Council) pt 3, s 19. The Commission notes that a person may interfere with protected vegetation without a permit under the local law if the interference constitutes 'removal of trees or parts of trees that are causing an immediate and significant threat to persons or property' as demonstrated by adequate photographic evidence and an arborist's report, if requested. Exemptions also apply to the removal of protected vegetation where the removal is essential for emergency access or emergency works or where the removal is immediately required in response to an accident or emergency; and pruning vegetation other than a significant landscape tree for the purpose of maintenance or hazard management, as long as no more than 20% of the live foliage volume of a tree or shrub is removed in any 12-month period and the part removed is distributed sufficiently evenly over the whole crown that the tree or shrub is not left lop-sided: *Natural Assets Local Law 2003* (Brisbane City Council) pt 7, s 44 'Exempt activities'.

267 See Brisbane City Council, *Types of Protected Vegetation* (Web Page, 24 January 2019) <https://www.brisbane.qld.gov.au/laws-permits/laws-permits-residents/protected-vegetation/types-protected-vegetation>.

268 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 43, 67 (3). For example, the Act does not override laws such as the *Queensland Heritage Act 1992* (Qld) which protects trees that have 'particular cultural heritage significance' or any other Act.

269 Consultation 15 (Queensland Civil and Administrative Tribunal).

270 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(1). See, eg, *Beriley Pty Ltd v Novadeck Pty Ltd* [2017] QCAT 29 [23].

271 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(2).

272 Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State (Qld), *Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process* (2010) 10 <https://cabinet.qld.gov.au/monthly.aspx?date=2010-Nov>.

273 Explanatory Notes, *Neighbourhood Dispute Resolution Bill 2010* (Qld) cl 65. In the case of *Inslay v Wilson* [2018] QCAT 79, QCAT examined the relevant local Council's website and could not identify a council process for resolving a dispute about a dangerous tree. It was therefore determined that an Order could be made under the QLD Act.

Tasmania

Regulation of trees on private land

10.150 In Tasmania, councils can protect vegetation under their individualised planning schemes established under the *Land Use Planning and Approvals Act 1993* (Tas), which also controls land use and vegetation.[274] The Tasmanian planning framework is undergoing significant change and now operates in a similar way to the planning schemes in New South Wales, Queensland and Victoria.[275] For example, the Tasmanian planning scheme consists of State Planning Provisions and Local Provisions Schedules for each municipal area.[276]

10.151 Planning schemes contain standardised codes that can apply to control and protect trees. The Local Historic Heritage Code enables local councils to recognise and protect significant trees so that they are not unnecessarily destroyed and are managed in a way that maintains their health, structural stability and appearance.[277] The pruning of a tree to improve its health or appearance is exempt from a permit application provided that 'its normal growth habit is not retarded'.[278]

10.152 Councils may also create local laws, known in Tasmania as by-laws, to protect trees.[279]

Neighbourhood Disputes About Plants Act 2017 (Tas)

10.153 Pursuant to section 14 of the *Neighbourhood Disputes About Plants Act 2017* (Tas) (the Tasmanian Act), RMPAT cannot make orders that would be unlawful under another Act or otherwise limit the operation of another law requiring a consent or authorisation to be obtained before work may be carried out on a plant.

10.154 The Tasmanian Act includes a number of mechanisms that enable parties to obtain the relevant consent or authorisation and to notify other authorities of an action under the Act:

- At the outset the applicant is required to identify the consent or approval that would ordinarily be required by a government body if the type of order sought was granted by RMPAT.[280] The applicant is required to notify any interested government party that it is entitled to appear in proceedings.[281] The Act authorises that government body to appear in proceedings if it wishes to do so.[282]
- In making an order, RMPAT must consider, among other factors, whether consent or other authorisation would normally be required under any other Act.[283]

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274 Michelle Lensink, 'Tree Protection Laws in Australian States and Territories', *Treenet* (Web Page, 2017) <https://treenet.org/resources/tree-protection-laws-in-australian-states-and-territories/>; Tasmanian Planning Commission, State Planning Provisions (Web Page) <https://www.planning.tas.gov.au/planning_our_future/state_planning_provisions>.

275 See, eg, Department of Justice (Tas), *Tasmanian Planning Reform—An Overview (Fact Sheet 1, December 2017)* <https://www.planningreform.tas.gov.au/>. The Land Use Planning and Approvals Amendment (Tasmanian Planning Polices and Miscellaneous Amendments) Bill 2018 amends the *Land Use Planning and Approvals Act 1993* (Tas) by establishing a mechanism to make and amend a suite of Tasmanian Planning Provisions to provide strategic direction on matters of state interest within Tasmania's land use planning system. It was introduced into Parliament on 18 October 2018 and commenced on 17 December 2018: Tasmanian Government, *Tasmanian Planning Reform—The Policies* (Web Page, 17 December 2018) <https://www.planningreform.tas.gov.au/policies>.

276 Tasmanian Planning Commission, *State Planning Provision* (Web Page) <https://www.planning.tas.gov.au/planning_our_future/state_planning_provisions>.

277 A significant tree means a tree that is listed and identified in the significant trees list in the relevant Local Provisions Schedule: *Tasmanian Planning Scheme—State Planning Provisions*, C6.1.1(b) 'Local Historic Heritage Code', C6.9 'Significant trees' <https://planningreform.tas.gov.au/scheme>. The Local Provisions Schedule indicates how State Planning Policies will apply in each local municipal area.

278 *Tasmanian Planning Scheme—State Planning Provisions,* Table C6.4.1 'Exempt development', C6.9.1 'Significant Trees'. Works requiring the removal or a listed tree or which may impact on the health, structural stability or appearance of a listed tree must demonstrate: (a) that there are no feasible alternatives which could be implemented to avoid impacting on the tree and the proposed methodology of the works incorporates measures to minimise and mitigate any damage to the tree; and (b) there are environmental, economic or safety reasons of greater value to the community than the cultural significance of the tree; or (c) the tree is determined to be dead or dying based on a written statement to that effect prepared by a suitably qualified person.

279 See, eg, *Health and Environmental Services By-law 3 of 2011* (Kingborough Council). Part 7 – Trees on Private Property provides that a person must not cut down, top, lop, remove, ringbark, injure or wilfully destroy any tree which: (a) has a trunk circumference of greater than 80cm at 1.5m or more about ground level, unless authorised by a permit to do so; or (b) is listed on a register of significant trees applicable to the municipal area, unless authorised by a permit to do so; or (c) is protected under an agreement under Part 5 of the *Land Use Planning and Approvals Act 1993* or covenant on the title: s 25(2).

280 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 23(5)(f).

281 Ibid s 27.

282 Ibid s 27.

283 Ibid s 30(g).

- Where a planning permit would ordinarily be required for the works to the tree, section 33(3)(a) allows RMPAT to defer its determination until the application for a planning permit is made or determined.
- Section 33(3)(b) allows RMPAT to make an order that the applicant can appeal a decision to grant a planning permit where they might otherwise be out of time under section 61(5) of the *Land Use Planning and Approvals Act 1993* (Tas). This process ensures that RMPAT has the best available information before it when determining its decision.
- Ultimately, section 33(3)(c) of the Tasmanian Act provides RMPAT with the power to amend a permit granted under the Land Use Planning and Approvals Act 1993.

10.155 The interaction between the Tasmanian Act and planning scheme permits was outlined by Minister Hidding in the Second Reading Speech:

> Parties who are seeking redress under the bill will be required to obtain the relevant permit from the planning authority in the first instance, or if the permit has not been obtained when the matter comes before the tribunal, the tribunal may put a stay on proceedings in order to enable the relevant permit to be obtained. In this way, the bill retains the current policy settings for decision-making under other legislative regimes, including notification and rights of appeal.[284]

10.156 The application of the Tasmanian Act is in its infancy and at the time of writing there is no case law about how these specific provisions have been interpreted by RMPAT. The Commission is therefore uncertain about how RMPAT orders may intersect with local tree protection laws in Tasmania.

The Commission's conclusions—interaction of laws

10.157 The Commission recommends a straightforward, accessible and timely statutory scheme to resolve neighbourhood tree disputes. A tree dispute should not be revisited by multiple decision makers, and the community should not have to navigate multiple dispute resolution frameworks to obtain a decision. Interaction with other laws should cause minimal disruption to existing legal processes and established policies.

The Planning and Environment Act

10.158 Neighbourhood tree disputes are essentially party–party civil disputes and generally involve factual interpretation rather than complex legal interpretation. Existing laws are underpinned by much broader, more complex policy considerations.

10.159 The Commission's recommendations therefore only sanction interference with planning instruments in limited situations and subject to safeguards. These are discussed in the following sections.

Tree protection overlays

10.160 If a tree on neighbouring land is protected under a planning scheme overlay, an affected neighbour would be required under planning law to obtain a permit from council to remove, destroy or lop the tree. Because the affected neighbour would not be the owner of the tree, they would need to persuade their neighbour to seek a permit or require the owner of land to sign the permit application form.[285] This is likely to be impractical in a situation in which neighbours are in disagreement. Alternatively, the affected neighbour would need to declare that they had notified the owner of the application. There is no need for the owner of the land to consent to the application being made.[286]

284 Tasmania, *Parliamentary Debates, House of Assembly,* 4 April 2017, 6 (Rene Hidding).
285 *Planning and Environment Act 1987* (Vic) s 48(1).
286 Ibid s 48; see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 45.

10.161 The question arises as to who would bear the costs of the planning application and the works to the tree. It would be unfair to place all of this burden on the affected neighbour.

10.162 Further, if the council decided not to grant a permit to the affected neighbour to interfere with a protected tree, this decision would be reviewable by VCAT pursuant to the P&E Act.[287] Alternatively, if council decided to grant the permit, the owner of land may be entitled to object to the grant of permit and possibly seek review of the decision in VCAT.[288] The tree dispute could potentially be the subject of multiple VCAT applications if a new Act is implemented.

10.163 Requiring affected neighbours to apply for a permit to interfere with protected trees on neighbouring land would duplicate application processes and be burdensome. It would also frustrate the objective of a quick, inexpensive resolution process for trees disputes.

10.164 Even if the affected neighbour is able to obtain a planning permit to interfere with the tree on adjoining land, the remedies available would not provide for ongoing maintenance of the tree or compensation for damage caused by the tree.[289]

10.165 It makes sense to streamline this process.

The Commission's conclusions—a new exemption to the VPPs to cover tree disputes

10.166 A more streamlined approach would involve expanding the exemptions in the Victoria Planning Provisions (VPPs) to cover tree works ordered by VCAT under the new Act. This exemption would apply to both the regular permit process and the VicSmart permit process.

10.167 The current table of exemptions in the VPPs is reasonably broad and covers a wide variety of circumstances to allow the removal of vegetation to comply with requirements in other Acts. They include, for example, the removal of vegetation that presents an immediate risk of personal injury or damage to property.[290] For the risk to be considered immediate, the only option to manage the risk must be to remove the vegetation within a shorter timeframe than it would take to apply for and be issued with a permit for its removal. Only that part of vegetation that presents the risk may be removed, destroyed or lopped.[291]

10.168 Moreover, and as discussed earlier, councils have created additional exemptions within schedules to overlays, often relaxing the permit requirement for the pruning of a tree. This is consistent with recommendations made in the Cutting Red Tape in Planning report to 'rewrite overlays so that only matters linked to the purpose of the control need planning approval', citing 'tree pruning' as a matter that could benefit from full or partial removal.[292]

10.169 Expanding the exemptions in the VPPs would mean that an affected neighbour would not need to obtain a permit under the P&E Act, prior to applying to VCAT for a remedy under the new Act if the jurisdictional requirements of the new Act are satisfied. See Chapter 5.

10.170 The suggested amendment to the existing VPP exemption would not lead to major changes in policy or produce a different or new land use or development outcome, as:

287 *Planning and Environment Act 1987* (Vic) s 77.
288 Ibid ss 57, 82, 82B.
289 Remedies under the proposed Act are considered in Ch 9.
290 See, eg, Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019) cl 42.01-3, 42.02-3, 42.03-3, 43.01-1, 52.17-7. See also Department of Environment, Land, Water and Planning (Vic), *Exemptions from Requiring a Planning Permit to Remove, Destroy or Lop Native Vegetation* (Guidance Document, December 2017).
291 See, eg, Department of Environment, Land, Water and Planning (Vic), *Exemptions from Requiring a Planning Permit to Remove, Destroy or Lop Native Vegetation* (Guidance Document, December 2017)10. In comparison, a shorter timeframe for the regular permit process is less than 60 days. A shorter timeframe for the VicSmart permit process is less than 10 days.
292 Department of Sustainability and Environment, *Cutting Red Tape In Planning—15 Recommendations For a Better Victorian Planning System* (Report, August 2006) 16–17.

- Protected vegetation will only be interfered with on the basis of damage caused or damage or harm likely to be caused within the next 12 months as determined by a suitably qualified arborist and when ordered by VCAT. Leaf litter and maintenance issues as well as concerns about perceived risks posed by a tree will not fall within the scope of the new Act.
- Decisions to interfere with protected vegetation will be based on comprehensive decision-making principles in the new Act that take into account broader planning policy objectives.

10.171 Further, because the proposed change is based on exemption to the VPPs, the broader notification requirements that apply to permits under the P&E Act would not apply. Instead, it would only be necessary to notify the parties to the dispute and any other party specified in the new Act. In addition, most tree disputes would invoke the VicSmart permit process, designed to streamline straightforward and low-impact planning permit applications where only one tree is involved. Under this process, there are no notification requirements providing third parties with an opportunity to object to or to seek review of the decision made and decisions are made at the officer level in Council. It is therefore envisioned that the new Act will not commonly remove any review rights that would otherwise be available to third parties under the P&E Act.

10.172 The Commission acknowledges VCAT's concerns about a new Act not being able to account fully for the complex, broader issues that come into play under the P&E Act. However, some of the issues underpinning neighbourhood tree disputes do intersect with planning and environment law. For example, a tree's contribution to amenity and other broader environmental benefits are important considerations in the context of private tree disputes. Other considerations, including whether the tree was first in time and landscaping plan requirements, may also be relevant.

10.173 The Commission is persuaded by community responses that overwhelmingly favour a clear and simple legislative pathway for the resolution of neighbourhood tree disputes. As one community member explained: 'there should be a single, clear Act that sets out neighbours' rights and duties and explains where to go for information and support'.[293]

10.174 The Commission acknowledges that expanding the VPP exemptions is not a straightforward process. An amendment should not seek to change the planning scheme in a manner that conflicts with the State Policy Planning Framework.[294] The Minister[295] can prepare an amendment to a VPP at any time and this may involve a small change to one provision, or major changes or additions.[296] The VPP amendment process has similar requirements to those outlined for the amendment of planning schemes.[297] Strict notification requirements apply.[298] However, there are exemptions to the notice and advertising requirements if the Minister considers that they are not warranted, or that the interests of Victoria or any part of Victoria make such an exemption appropriate.[299]

293 Consultation 1 (Aldo Taranto).
294 Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [2.3.3] <www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.
295 The Minister may authorise any other Minister or any public authority or municipal council to prepare an amendment to the Victoria Planning Provisions: *Planning and Environment Act 1987* (Vic) s 4B(2).
296 *Planning and Environment Act 1987* (Vic) s 4B(1); see also Department of Environment, Land, Water and Planning (Vic), *Using Victoria's Planning System* (Guide, 28 May 2015) [2.15] <www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.
297 *Planning and Environment Act 1987* (Vic) s 4B(3), (4). Unlike planning scheme amendments, the Minister or the body or person authorised to prepare the amendment can receive and consider submissions which seek a change to the terms of a state standard provision. The change may be made or the submissions may be referred to a panel for consideration. The panel can recommend that an amendment be adopted with changes to the terms of the VPP: see Department of Environment Land, Water and Planning (Vic), *Using Victoria's Planning System (Guide,* 28 May 2015) [2.15.1] <www.planning.vic.gov.au/guide-home/using-victorias-planning-system>.
298 See *Planning and Environment Act 1987* (Vic) ss 17(1)(a), 18, 19, 21.
299 Ibid s 20(2),(4).

10.175 If an amendment is approved, notice of the approval must be published in the Government Gazette.[300] The amendment comes into operation when the notice is published in the Gazette, or on any later day or days specified in the notice.[301] An amendment to provisions of a VPP can also amend specified planning schemes that include those provisions. When the amendment to the VPP is approved, the amendment to the planning scheme is also approved.[302]

10.176 On balance the Commission is persuaded that broadening the exemption in the VPPs will lead to a streamlined approach that will be easier for parties to navigate. The Commission recommends safeguards to ensure that the broader policy considerations raised by VCAT are considered where relevant by the decision maker under the new Act.

Safeguards

10.177 The Commission recommends that safeguards should apply, namely:

- The affected neighbour should provide information in the application form detailing any application of planning scheme overlays or other applicable provisions. This recommendation is discussed in Chapter 5.
- The relevant responsible authority should be notified of applications and invited to participate in tree dispute hearings.
- VCAT should consider factors that the responsible authority would have been required to take into account, such as the relevant planning scheme, the objectives of planning in Victoria and any decisions or comments by the responsible authority.[303]

10.178 These safeguards are similar to those in the NSW Act. They aim to ensure the broader policy considerations behind planning laws are considered in the decision-making process for tree disputes. The relevant authority's views will be heard in the decision-making process, and the factors which that authority would have considered under existing laws will be taken into account when an order is made.

Bushfire overlays

10.179 The new Act should not interfere with bushfire policies and provisions in Victorian planning schemes, which are comprehensive and intended to protect human life. If a person is concerned about the bushfire risk posed by a tree on neighbouring property, they should use existing legislative measures to address those concerns.

Native vegetation particular provisions

10.180 An order made under a new Act is unlikely to impact upon existing native vegetation particular provisions due to the permit exemptions that currently apply for those provisions. A permit is not required for:

- sites of less than 0.4 hectares
- the pruning or lopping of trees for maintenance, provided no more than 1/3 of the foliage is removed
- removing, destroying or lopping native vegetation in an emergency or where it presents an immediate risk of personal injury or damage to property
- the construction or maintenance of a fence.[304]

300 *Planning and Environment Act 1987* (Vic) s 4D.
301 Ibid s 4E.
302 Ibid s 4J.
303 See, eg, *Planning and Environment Act 1987* (Vic) s 60.
304 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 52.17-7.

10.181 However, there may be circumstances where the existing permit exemptions do not apply.[305] For this reason, the Commission recommends that the general exemption recommended for overlays where an order is made under the new Act, also apply to native vegetation particular provisions. Where this occurs, the decision maker should have regard to the assessment pathways detailed in the Guidelines for the Removal, Destruction or Lopping of Native Vegetation.[306]

Recommendations

39 The Commission recommends exemptions in the Victoria Planning Provisions be expanded to enable an order made under the Act to have effect despite any requirement to obtain a permit in a Victorian Planning Scheme to remove, lop or destroy vegetation under a:

(a) Significant Landscape Overlay

(b) Environmental Significance Overlay

(c) Vegetation Protection Overlay

(d) Heritage Overlay

(e) Native Vegetation Particular Provision.

40 Where an exemption referred to in Recommendation 39 applies, the following safeguards should apply:

(a) the relevant responsible authority must be notified of the application and invited to participate in hearings

(b) the Victorian Civil and Administrative Tribunal must consider the factors that the responsible authority would have been required to consider in determining a matter under the *Planning and Environment Act 1987* (Vic) such as:

i. the objectives of planning in Victoria

ii. the provisions of the relevant planning scheme that apply to the land the subject of the application, including decision-making guidelines in planning schemes

iii. information provided by the responsible authority.

305 For example, the permit exemptions may not apply to the removal of a large tree protected on a lot size of 0.4 hectares or more under cl 52.17.

306 See Department of Environment, Land, Water and Planning (Vic), *Guidelines for the Removal, Destruction or Lopping of Native Vegetation* (Practice Document, December 2017) 18–23. This document is incorporated into all planning schemes pursuant to s 6(2)(j) of the P&E Act: See Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 72.04 'Documents Incorporated in This Planning Scheme'.

The Commission's conclusions—further consideration of trees planted or maintained as a condition of existing planning permits

10.182 In recognition of the benefits of retaining trees, councils are increasingly incorporating endorsed landscape plans into planning permits.[307] This means that it may become more common for trees to be planted and maintained as a requirement of planning permits. These permit requirements may operate to facilitate the resolution of tree disputes, for example by compelling a landowner to comply with landscaping maintenance conditions. Alternatively, they may limit the ability of an affected neighbour to obtain a remedy if an amendment to an existing permit is needed.

Enforcing permit conditions

10.183 Section 114 of the P&E Act enables VCAT to issue an 'enforcement order' on the application of any person if a use or development of land contravenes or has contravened, or unless prevented by the enforcement order, will contravene:

- the P&E Act
- a planning scheme
- a condition of a permit, or
- an agreement made under section 173.

10.184 Parties can pursue the enforcement of planning permit conditions through the relevant authority and, if need be, under the P&E Act at VCAT**.** Many disputes about landscape plans may be able to be resolved through the local council if they are solely about a tree owner not properly maintaining a tree where a landscaping plan requires them to do so.

10.185 Section 49 of the P&E Act requires the responsible authority to keep a register 'of all applications for permits and all decisions and determinations relating to permits' and this register must be made available to any member of the public to inspect free of charge. Affected neighbours would therefore be able to confirm with their local council whether an endorsed landscaping plan applies to the tree in dispute.

10.186 In situations where the affected neighbour is unaware of the permit and therefore unable to provide VCAT with this information in their application form (see Chapter 5), it is likely that this will be brought to VCAT's attention by the tree owner. For example, QCAT advised that trees planted as a condition of development are almost always brought to the attention of the Tribunal by the tree owner as a factor in their favour.[308]

Amending permit conditions

10.187 To resolve a tree dispute an affected neighbour may need an existing planning permit amended. This may arise, for example, where the affected neighbour seeks to:

- remove a tree that was required to be planted pursuant to a planning permit condition
- vary vegetation maintenance conditions so that a tree is pruned more frequently
- replace an existing tree with a different variety of tree that is more suited to the nature or use of the land.

10.188 As discussed earlier it is very difficult for a third party to amend an existing planning permit under the P&E Act.

307 See, eg, City of Stonnington, *New Tree Protection Process* (Web Page, 14 June 2018) <https://www.stonnington.vic.gov.au/Development/Planning/Planning-News/New-Tree-Protection-Process>; City of Whitehorse, Whitehorse Landscape Guidelines: How to Prepare A Landscape Plan (July 2012) 7; City of Boroondara, *Landscape Plan Guidelines* (Web Page, 2019) <https://www.boroondara.vic.gov.au/planning-building/planning-permit-applications/landscape-plan-guidelines>.

308 Consultation 15 (Queensland Civil and Administrative Tribunal).

10.189 In contrast to the recommendation above to expand the VPP exemptions for permits not yet granted, the position in relation to existing permits is much more complex. The P&E Act provides very little recourse for third parties who are not permit holders to amend or vary a permit. Affected neighbours who were not entitled to object to the permit application, for example neighbours who moved next to the development site months or years after the development, would not be able to apply to VCAT to amend or cancel the permit. Even if affected neighbours did object to the permit or would have been entitled to object, there are many other hurdles for these individuals to overcome prior to having a permit amended pursuant to the P&E Act.

10.190 In addition, the P&E Act provides that the responsible authority may be required to pay compensation for wasted expenditure as a result of a permit amendment.[309]

10.191 The Commission concludes that because of the complex policy considerations involved, further consultation is needed on this issue. It would not be appropriate to provide VCAT with the power to amend an existing planning permit without Government further consulting with VCAT, the Department of Environment, Land, Water and Planning and Victorian councils on this issue.

10.192 The Queensland Act does not apply to trees planted or maintained as a condition of development approval.[310] The Second Reading Speech introducing this Act explained the aim of this approach was to ensure that 'developers do not use the provisions of this legislation to escape the responsibilities that might be imposed upon them in terms of vegetation or other issues as part of that development approval'.[311]The Commission raises this as a further policy issue that needs to be addressed in this context.

10.193 In New South Wales orders have effect despite 'any requirement that would otherwise apply for a consent or authorisation in relation to the tree concerned to be obtained under the *Environmental Planning and Assessment Act 1979* (NSW)'.[312] This is a more straightforward approach. However, because of the complexity of existing planning provisions in Victoria and the aim to cause minimal disruption to existing laws, the Commission considers that the NSW approach would require extensive consultation by Government.

Further considerations for Government

10.194 The Commission has considered some further issues that may arise if the new Act allows existing planning permits to be amended. These are:

- Payment of compensation
- Protecting the intent of a landscaping plan

10.195 It may not be appropriate for the responsible authority to be required to pay compensation as is possible under the P&E Act[313] for any wasted expenditure as a result of the permit amendment. These provisions mainly apply in situations where serious consequences flow from the amendment of a permit, for example an amendment to delete three levels from a proposed apartment building.[314]

10.196 The Commission envisages that most permit amendments would require tree maintenance rather than removal, resulting in no net loss of expenditure on the planting and maintenance of the tree as part of the endorsed landscaping plan. The Commission further notes that the 'proximate effect' of section 94 of the P&E Act is for responsible

309 *Planning and Environment Act 1987* (Vic) s 94.These provisions mainly apply in situations where serious consequences flow from the amendment of a permit, for example an amendment to delete three levels from a proposed apartment building: see, eg, The Secretary to the *Department of Health and Human Services v Melbourne* CC [2017] VCAT 2139.
310 *Neighbourhood Disputes (Dividing Fences and Trees) Act* (Qld) s 42(4)(c).
311 Queensland, *Parliamentary Debates,* 2 August 2011, 3204 (Lucas).
312 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 6(3).
313 *Planning and Environment Act 1987* (Vic) s 94.
314 See, eg, *The Secretary to the Department of Health and Human Services v Melbourne CC* [2017] VCAT 2139.

authorities to pay compensation only 'in some circumstances' when they have made an error in granting the permit'.[315]

10.197 Safeguards may be necessary to ensure that the policy objectives of the P&E Act are considered and to also make sure that developers of land do not use the new Act to remove or destroy vegetation that is planted and maintained as part of an endorsed landscaping plan—for example, through contrived applications under the new Act where no genuine dispute exists.

10.198 The following safeguards may be appropriate:

- all relevant parties should be invited to appear at the tree dispute hearing in accordance with section 90(1) of the P&E Act
- the planning scheme, planning permit and objectives of planning in Victoria should be taken into account as part of the decision-making process—for example to what extent did the permit holder comply with the conditions to plant and maintain the species of tree required by the responsible authority in the endorsed landscape plan[316]
- tree removal or destruction will only be ordered as a last resort, if no lesser impact on the tree would be sufficient.

The Commission's conclusions—further consideration of Section 173 agreements

10.199 It is difficult to amend or cancel a section 173 agreement. Legislative amendments in 2013 attempted to address this difficulty by introducing a process for amending or removing agreements where the amendment or removal has the support of council.[317] However, these changes do not assist where council does not support the amendment or removal of the agreement.

10.200 The Commission does not recommend that the new Act interfere with section 173 agreements because these agreements are unable to be reviewed by VCAT without the approval of the relevant council.

10.201 Section 173 agreements are also complex. Agreements are made between council, landowners and in some cases third parties such as referral authorities. Neighbours on adjoining lots of land are not parties to these agreements and they do not have the ability to interfere with the protected vegetation. Moreover, the agreements appear on land title certificates and bind any future owner/s of land.

10.202 A template agreement recommended for use by councils pursuant to section 173 of the P&E Act enables a landowner to remove, destroy or lop native vegetation to the minimum extent necessary to mitigate an immediate risk of personal injury or damage to property.[318] While this clause may not provide a remedy for an affected neighbour, it does enable tree owners to prune or remove vegetation that does pose an imminent risk to people or property.

10.203 Affected neighbours may have some recourse under section 114 of the P&E Act if land is not maintained pursuant to any of the conditions set out in section 173 agreements, discussed above.

315 See Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 151; Victorian Civil and Administrative Tribunal, *Planning and Environment List Guidelines for Cancellation & Amendment of Permits* (Sections 87 & 89 Planning and Environment Act 1987) (Practice Document, 20 July 2016) 4–5 <https://www.vcat.vic.gov.au/get-started/planning-and-environment/apply-to-cancel-or-amend-a-permit>.

316 See *Planning and Environment Act 1987* (Vic) s 84B.

317 *Planning and Environment Amendment (General) Act 2013* (Vic).

318 Department of Environment, Land, Water and Planning (Vic), *Agreement Under Section 173 of the Planning and Environment Act 1987* (Vic) cl 10.1.1(c) <https://www.environment.vic.gov.au/__data/assets/word_doc/0025/329461/Final-S.173-Template-Offset-Agreement.docx+&cd=1&hl=en&ct=clnk&gl=au>.

10.204 Given the complex nature of these agreements, Government should consider further consultation with councils about how these agreements operate and the way they would interact with the new Act.

The Commission's conclusions—local tree protection laws

10.205 Final decisions made under local laws are not reviewable in VCAT. Further complicating this scenario is the likelihood that the affected neighbour will be unable to apply for a permit under local laws because they often allow only the owner of a tree to apply for a permit or require the owner's written consent to be submitted with the application.[319]

10.206 In the Commission's view, this outcome would be unsatisfactory and would limit the ability of a new Act to resolve a large number of neighbourhood tree disputes. As well as being impractical in many situations, requiring an affected neighbour to obtain an additional permit would add unnecessary costs and increase the administrative burden on applicants.

10.207 Local laws can be overridden in Queensland. In New South Wales vegetation in urban areas is protected under planning legislation and relevant council policies rather than local laws. However, the Commission is of the view that the interaction of the NSW Act with these lower level planning instruments is a good guide for the new Act. The NSWLEC advised:

> Where local council's authority or a permit would ordinarily be needed, the Court will look to the factors that the local council would ordinarily take into account. The Court may also consider whether or not the permit was refused by local council where a prior application was made.[320]

10.208 The Commission notes that the NSWLEC gives significant weight to tree preservation orders and relevant council polices in the decision-making process.[321] For example, in the case of *Haindl v Daisch*[322] the relevant council submitted information to the Court, including applications that had been previously made under the council's tree preservation order. The material was referred to and discussed by the Court. In particular, the Court focused on the council's policy of not permitting the removal of trees in the particular circumstances of the case. This policy was given significant weight in the decision-making process even though the Court decided that the removal of the trees would not be appropriate for a range of other reasons.

10.209 An appropriate balance could be achieved by adopting the approach taken by the NSWLEC in relation to the planning policies of local councils. This approach would enable a decision-making body to override local laws cautiously and on a case-by-case basis through adoption of the following safeguards:

- affording 'significant weight' to local laws and policies in place to protect vegetation
- notifying local councils of applications made
- enabling local council to appear at tree dispute hearings.

10.210 This approach is appropriate given the nature of local laws: decisions are generally made at the council officer level, there are no appeal rights and no advertising requirements under local laws. It would also respond to council concerns that the interaction of laws not limit its decision-making authority by involving them in the process if they so wished. The approach is generally consistent with the submissions received in relation to this inquiry.

319 See, eg, *Tree Protection Local Law 2016 (City of Boroondara)* s 11(1), (2).
320 Consultation 11 (Land and Environment Court of New South Wales).
321 *Haindl v Daisch* [2011] NSWLEC 1145.
322 [2011] NSWLEC 1145.

10.211 In Chapter 5 it was recommended that the initiating VCAT application form should require an applicant to provide information about any requirements affecting the management of the tree under other laws, including local laws. This will assist VCAT to identify issues involving local laws early.

Recommendations

41 Orders under the Act should have effect regardless of requirements for consent or authorisation under local tree protection laws made under the *Local Government Act 1989* (Vic).

42 Where Recommendation 41 applies, the following safeguards should apply:

(a) the Victorian Civil and Administrative Tribunal must afford the relevant council tree protection laws significant but not determinative weight in the decision-making process

(b) the Tribunal should invite council to appear at a tree dispute hearing or to provide a written submission.

The Commission's conclusions—the Heritage Act

10.212 It is rare for the Heritage Act to protect individual trees on private land within Victoria. However, trees that form part of the significance of a heritage place are more commonly listed on the Heritage Register. For proposed maintenance works to registered trees, Heritage Victoria will generally issue a permit exemption.[323]

10.213 For example, a permit exemption may be issued for the removal of dead, diseased or dangerous trees. An arborist report must be submitted verifying the condition of the tree, unless considered inappropriate by the Executive Director.[324] Heritage Victoria stated that 'the bulk of tree removals and planting are done by way of permit exemptions'.[325] The key consideration is that the proposed works will not harm the cultural significance of the place or object.[326]

10.214 A tree owner must make a formal application seeking a permit exemption. Section 92(3) of the Heritage Act only allows only an owner to apply for a permit exemption or another individual who has obtained the owner's written consent of the owner. Therefore, an affected neighbour would not be able to apply for a permit exemption to undertake works to a heritage- listed tree on adjoining land.

10.215 Heritage-listed trees have been assessed by the Heritage Council as of importance to the history of Victoria.[327] In these circumstances it would not be appropriate for a new Act to interfere with heritage-listed trees, except in emergency situations.

10.216 If there is an emergency situation and the tree poses a danger to life or property, the new Act should provide a remedy to an affected neighbour where the tree is declared dangerous by VCAT. If the new Act does not operate in this way the affected neighbour cannot remedy the situation or resolve the dispute.

323 Consultation 16 (Heritage Victoria); Permit exemptions are generally issued by the Executive Director of Heritage Victoria: *Heritage Act 2017* (Vic) s 92(3); see also section 102 for the granting of permits.
324 Heritage Victoria, *Policy Guideline for Heritage Permit Exemptions: Matters to be Considered in Determining Permit Exemptions under Section 92 and 49 of the Heritage Act 2017* (Practice Document, 7 September 2017).
325 Consultation 16 (Heritage Victoria).
326 'The Heritage Council or the Executive Director must not make a determination in relation to any works or activities if they consider the works or activities may harm the cultural heritage significance of the registered place or registered object.': *Heritage Act 2017* (Vic) s 92(5).
327 Heritage Council Victoria, *The Victorian Heritage Register* (2019) <https://heritagecouncil.vic.gov.au/heritage-protection/levels-of-protection/>.

10.217 The Heritage Act is limited by an emergency order under the *Building Act 1993* (Vic) relating to the securing, pulling down or removal of dangerous buildings if a municipal building surveyor is of the opinion that the order is necessary because of a danger to life or property.[328] Section 86 of the Heritage Act should be expanded to encompass circumstances where an emergency order is made under the new Act to remove a dangerous tree/s where VCAT has decided that there is an imminent danger to life or property. An arborist's assessment should be obtained in these circumstances to properly assess risk. However, this would ultimately be a decision for VCAT.

10.218 The Commission recommends that safeguards should apply to enable Heritage Victoria, and the National Trust of Australia (Victoria),[329] to participate in tree dispute hearings. The application form should also seek information about whether Heritage laws might apply to the management of the tree. See Chapter 5.

10.219 Where a decision is made to interfere with a tree for which authorisation would ordinarily be required by Heritage Victoria, the Commission recommends that the VCAT decision maker consider the factors that Heritage Victoria would be required to consider under the Heritage Act. Further, where a heritage-listed tree is removed, it recommends that the decision maker consider requiring a replacement tree to be planted as occurs in Heritage Victoria decision-making process.[330]

Recommendations

43 Section 86 of the *Heritage Act 2017* (Vic) should be amended to provide that the operation of the Heritage Act is subject to any order under the new Act where the Victorian Civil and Administrative Tribunal determines that a registered tree or a tree situated in a heritage place poses an imminent danger to life or property.

44 Where Recommendation 43 applies, the following safeguards should apply:

(a) Heritage Victoria must be notified of the application and be invited to participate in the hearing

(b) the Victorian Civil and Administrative Tribunal should consider the factors that Heritage Victoria would have been required to take into account pursuant to the *Heritage Act 2017* (Vic) and any information provided by Heritage Victoria.

45 Where a registered tree under the *Heritage Act 2017* (Vic) or a tree in a heritage-listed place is ordered to be removed by the Victorian Civil and Administrative Tribunal under the Act, the Tribunal should have regard to any replanting requirements that Heritage Victoria may consider necessary to maintain the heritage value of the landscape.

328 *Heritage Act 2017* (Vic) s 86(2). See also *Building Act 1993* (Vic) s 102.
329 Although the National Trust Register is not legally binding, many of the trees in the National Trust Register are reflected in the Heritage Victoria Register: Consultation 16 (Heritage Victoria).
330 Consultation 16 (Heritage Victoria).

The Commission's conclusions—the Aboriginal Heritage Act

10.220 Under the Aboriginal Heritage Act a person does not commit an offence if 'the harm is the result of doing an act that is necessary because of an emergency'.[331] This provides some scope for an affected neighbour to interfere with a scarred tree in the case of an emergency.

10.221 If the situation is not an emergency and an affected neighbour is seeking to carry out works to a scarred tree on adjoining land, they can apply for an Aboriginal heritage permit because these applications are not restricted to the owner of the land.[332] This is because one of the key principles underpinning the Aboriginal Heritage Act recognises that as far as practicable Aboriginal Cultural Heritage should be owned by traditional owners.[333]

10.222 This means that there is sufficient scope in the Aboriginal Heritage Act to allow an affected neighbour to apply for a permit to carry out works to a protected tree. For these reasons, a new Tree Disputes Act should not amend the Aboriginal Heritage Act and decisions about works to trees protected under the Aboriginal Heritage Act should continue to be determined by Registered Aboriginal Parties or Aboriginal Victoria.

10.223 If an affected neighbour seeks a remedy under a new Act that impacts on a tree that is of Aboriginal cultural significance, this should be identified in the VCAT application form. See Chapter 5.

The Commission's conclusions—the Fences Act

10.224 If a tree is found to be causing damage or likely to cause damage to a fence, VCAT should have jurisdiction to make orders in relation to both the tree and the fence.

10.225 This is the approach taken in New South Wales. The NSWLEC informed the Commission that allowing the Court to determine tree disputes involving fences is 'working well' and is generally 'very straightforward'.[334]

10.226 The NSWLEC has jurisdiction under the NSW Act to hear matters and make orders under the *Dividing Fences Act 1991* (NSW). Section 13A of the *Dividing Fences* Act gives jurisdiction to the NSWLEC to hear and determine matters arising under that Act if:

- the application for the exercise of the jurisdiction is made in relation to proceedings under section 7 of the *Trees (Disputes Between Neighbours) Act 2006* that have been commenced but not determined, and
- the tree that is the subject of those proceedings:
  - has caused, is causing, or is likely in the near future to cause damage to a dividing fence, or
  - is part of a dividing fence and has caused, is causing, or is likely in the near future to cause damage to the applicant's property or is likely to cause injury to any person.

10.227 QCAT has jurisdiction to hear neighbourhood disputes about trees and dividing fences with reference to a single Act.[335] In Tasmania, the provisions of the Act will apply if trees are causing or are likely to cause serious damage to a fence.[336]

331 *Aboriginal Heritage Act 2006* (Vic) s 29(c).
332 Ibid s 36.
333 Ibid s 12(1)(a).
334 Consultation 11 (Land and Environment Court of New South Wales). The Court acknowledged that some fence matters can be complicated and require different expertise. The Court can make orders that require parties to obtain further evidence where it is needed.
335 See, eg, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).
336 *Neighbourhood Disputes About Plants 2017* (Tas).

10.228 Where a tree has caused damage to a fence or a tree is part of a fence that has caused, is causing or is likely to cause damage to property or harm to any person, it would be prudent for orders to be made in relation to the tree and the damaged fence at the same time.

Recommendations

46 Section 30C of the *Fences Act 1968* (Vic) should be amended to provide the Victorian Civil and Administrative Tribunal with jurisdiction to make orders under the Fences Act where a tree:

(a) has caused, is causing, or is likely in the next 12 months to cause damage to a dividing fence, or

(b) forms part of the fence that has caused, is causing, or is likely in the next 12 months to cause damage to property or harm to any person.

The Commission's conclusions—noxious weeds

10.229 It has been suggested to the Commission that noxious weeds should be excluded from the scope of a proposed Act.[337] However, most community responses are supportive of a broad definition of vegetation, including environmental weeds.[338]

10.230 Noxious weeds can cause disputes between neighbours for which a remedy under a proposed Act may be appropriate.[339] Baw Baw Shire Council noted that 'environmental weeds can become an issue'.[340] Arborist Robert Mineo suggested that a new scheme should not discriminate between tree species. For example, a common weed tree, the pittosporum, is viewed as a valuable tree by some individuals despite its categorisation as a weed.[341]

10.231 All interstate Acts encompass noxious weeds where the jurisdictional tests are otherwise met—that is, the weed has caused, is causing, or is likely in the near future to cause damage to the applicant's property or is likely to cause harm to any person. The NSWLEC held that the NSW Act does not specify particular species of plants, and the jurisdiction of the Court may be engaged whether the plant is or is not a declared weed.[342]

10.232 In the Queensland case of *Sowden v Winzar*,[343] QCAT heard a tree dispute concerning a tree of a species defined as a weed. However, the only basis for the application to remove the tree was its status as a weed. The Tribunal held:

> The fact that the umbrella tree is a weed species is the only basis for its removal. There is no evidence that the tree is posing a threat of serious injury to person or property. There is no evidence to suggest that it is causing substantial, ongoing or unreasonable interference with Mr Sowden's land. Therefore, there is no reason to make an order about the umbrella tree.[344]

337 Submissions 2 (Name withheld), 27 (Name withheld).
338 Submissions 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 23 (Name withheld), 21 (Pointon Partners Lawyers); Consultations 8 (City of Boroondara), 10 (Baw Baw Shire Council), 14 (Robert Mineo).
339 Consultation 10 (Baw Baw Shire Council).
340 Ibid.
341 Consultation 14 (Robert Mineo).
342 See, eg, *Sultana v Micallef* [2012] NSWLEC 1078.
343 [2014] QCAT 68.
344 *Sowden v Winzar* [2014] QCAT 68, [10].

10.233 The new Act should apply to noxious weeds if the weed has caused, is causing or is likely to cause damage to property or harm to individuals. Excluding noxious weeds from the definition of vegetation would unnecessarily prevent a number of tree disputes from being resolved under a new statutory scheme.

10.234 Whether a tree is a declared weed is something that VCAT should consider as part of the decision-making process under a proposed new Act. This would enable the VCAT member to turn their mind to any past actions taken by the landowner with respect to the weed, for example whether or not the landowner was issued with a directions notice and failed to comply with this notice.

10.235 Vegetation declared as a noxious weed[345] is exempt from the permit requirements to remove, destroy or lop vegetation pursuant to most of the tree protection overlays under the P&E Act, namely the Significant Landscape Overlay, Environmental Significance Overlay and Vegetation Protection Overlay.[346] There is also an exemption to remove, destroy or lop weeds listed in a schedule to the native vegetation particular provision but this is limited to 15 native trees[347] over a five-year period.[348]

Recommendation

47 The Act should apply to recognised weeds provided that the weed is a 'tree' and has caused, is causing or is likely to cause damage to property or land or harm to people in the next 12 months.

The Commission's conclusions—the Environment Protection and Biodiversity Conservation Act

10.236 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) is a Commonwealth Act. Therefore, the new Act cannot override it and will be invalid to the extent that is inconsistent with it. If tree works are likely to have a significant impact on a matter of National Environmental Significance or other protected matter then the tree dispute hearing should be vacated and the applicant should work through the Commonwealth assessment and approval process under the EPBC Act.

10.237 Even if an exemption currently applies under a VPP and the EPBC Act is triggered, consent would still need to be sought from the Commonwealth Government.[349]

The Commission's conclusions—further consultation required on some other Acts

Victorian Conservation Trust Act 1972 (Vic)

10.238 The current wording of conservation covenants requires landowners who are subject to these agreements to comply with existing requirements under other Acts and laws. This suggests that tree owners would need to comply with orders made under the new Act.

10.239 However, the Commission cautions that this may differ for older existing conservation covenants and the specific provisions of each covenant would need to be considered.

345 *Catchment and Land Protection Act 1994* (Vic) ss 58, 58A. This exemption does not apply to Australian Dodder (Cuscuta australis).
346 Department of Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions* (11 April 2019), cl 42.01-3, 42.02-3, 42.03-3.
347 These trees must have a trunk diameter of less than 20 centimetres at a height of 1.3 metres above ground level.
348 Ibid, cl 52.17-7.
349 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal); see also Stephen Rowley, *The Victorian Planning System: Practice, Problems and Prospects* (The Federation Press, 2017) 238.

10.240 Given the unique, varied and complex nature of conservation covenants Government should consult more broadly with the Trust for Nature as well as landowners subject to these agreements to determine the practical effect of these covenants and the extent to which they may intersect with the resolution of neighbourhood tree disputes under the new Act. It may be necessary to consider whether the Trust would need to be notified of any proceedings under the new Act involving land that is subject to a Trust for Nature Covenant.

Conservation, Forests and Lands Act 1987 (Vic)

10.241 Land management co-operative agreements made pursuant to section 69 of the *Conservation, Forests and Lands Act 1987* (Vic) (the CFL Act) are complex vegetation conservation and protection management arrangements that require landowners to protect and conserve land. They do so by enabling the government to pay landowners to carry out land management and conservation activities. Agreements vary in nature depending on the environmental matters that are protected.

10.242 At this stage the Commission does not think it would be appropriate for the new Act to limit the operation of section 69 agreements under the CFL Act. This is in keeping with the Commission's approach to Trust for Nature Covenants and section 173 agreements under the P&E Act.

10.243 The Commission is of the view that the Government should also undertake further consultation with the Department of Environment, Land, Water and Planning and landowners subject to land management cooperative agreements to determine whether and to what extent these agreements may intersect with the operation of the new Act.

11

New owners of land and neighbourhood tree disputes

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11. New owners of land and neighbourhood tree disputes

Introduction

11.1 Tree disputes and associated issues can continue after the sale of the land of the tree owner or the affected neighbour. Acts in New South Wales, Queensland and Tasmania set out the legal position when land that is the subject of a tree dispute is sold. They shift the responsibility and benefits of tree dispute orders to new owners. The way that this is done differs in each State

11.2 This chapter describes key elements of the interstate Acts. It then considers community responses to the questions posed in the consultation paper. It concludes with recommendations about how rights and obligations that arise in pre-existing disputes should apply where land is bought and sold; and concludes that a searchable database of orders is not required in Victoria.

New South Wales

Affected neighbour must inform new tree owners

11.3 In New South Wales a new tree owner will be bound by pre-existing orders after title to the land has passed to them, provided that the affected neighbour (applicant) gave them a copy of the orders.[1]

11.4 The Land and Environment Court of New South Wales (the Court) provides the affected neighbour with information about how to notify new tree owners of orders. Copies of orders are sent to the affected neighbour 'with a standard letter advising the applicant of the provisions … and, as a consequence, the steps that the [affected neighbour] must take to ensure that the orders remain in force if the tree owner sells the property on which the tree is located'.[2]

11.5 The NSW Act does not state whether the affected neighbour is required to give the new tree owner a copy of the order before transfer of land (or settlement) occurs.[3] Any timelines in the orders re-commence when a copy of the order is given to the new tree owner.[4]

1 *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 16(1)–(2).
2 Land and Environment Court of New South Wales, *Annotated Trees (Disputes Between Neighbours) Act 2006* (January 2013) 39.
3 See, eg, *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16(2).
4 *Trees (Disputes Between Neighbours) Act 2006 (*NSW) s 16(3); However, orders for any payments of compensation may remain with the original tree owner. See, eg, *Joaquim v Adamson* [2009] NSWLEC 1312 in which Senior Commissioner Moore and Acting Commissioner Fakes stated: "The orders concerning direct payment of monies by the respondents to the applicants as compensation for damage to the applicants' property will continue to bind the respondents notwithstanding the sale of their property" [108].

How are purchasers informed?

11.6 One way that the New South Wales Act seeks to inform purchasers of land about orders is through local Council planning certificates, which can be inspected by purchasers during the sale of land process.[5] The *Environmental Planning and Assessment Regulations 2000* (NSW) require planning certificates to state whether an order has been made under the NSW Act but only where the local council has been notified.[6] This is likely to occur because the NSW Act states that the Court must provide a copy of an order to 'the council of the local government area in which the tree is situated'.[7] The 2009 statutory review of the NSW Act found this to be an 'appropriate safeguard for potential buyers of the property'.[8]

11.7 The NSW Act does not provide penalties for failure to provide notice to purchasers about the existence of litigation or orders.[9]

Sale of affected neighbour's land

11.8 If the affected neighbour's land is sold the new affected neighbour is entitled to the same benefits under the orders.[10] This benefit only extends to the immediate successor in title. Orders for ongoing maintenance can last for the total duration of the new affected neighbours' ownership but typically they are for a period of 12–18 months.[11]

Change of ownership during tree dispute hearing

11.9 If a Court matter is still in progress when the land is sold, then the Court may make orders that take the change of ownership into account, such as requiring the original tree owner 'to advise the new owners of the need to provide any necessary access for the purpose of quoting and undertaking the works'.[12]

Joinder of parties

11.10 If a property has changed ownership 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.[13]

Queensland

Tree owner must inform new tree owners

11.11 The relevant provisions of the Queensland Act apply to land on which a tree the subject of an application or order is situated (the tree owner's land).[14] Therefore, the Queensland Act places an onus on the tree owner to ensure that the purchaser of their land is notified of an application or orders before they enter into a contract of sale.[15] This shifts the burden of carrying out any orders onto the new tree owner once transfer of land occurs.[16]

5 See *Environmental Planning and Assessment Act 1979* (NSW) s 10.7.
6 *Environmental Planning and Assessment Regulation 2000* (NSW) sch 4, cl 13.
7 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14(a).
8 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 22.
9 See generally, *Trees (Disputes Between Neighbours) Act 2006* (NSW).
10 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16A.
11 Consultation 11 (Land and Environment Court of New South Wales).
12 See, eg, *Kennedy v Hayes* [2014] NSWLEC 1114 [30].
13 See *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29; *Cincotta v Huang* [2011] NSWLEC 1086 cited in Land and Environment Court of New South Wales, *Annotated Trees Act January 2013* (1 September 2016) 9. The Court may join a party if the joinder is proper or necessary: see, eg, *Uniform Civil Procedure Rules 2005* (NSW) reg 6.24.
14 The provisions of Part 7 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) refer to the sale of 'land affected by an application or order' which 'means land on which a tree the subject of an application or order is situated': ss 82, 83.
15 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83. The Seller's disclosure obligation under s 83 of the Act is contained in REIQ Contracts: Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) [3.585].
16 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 85. Consultation 15 (Queensland and Civil Administrative Tribunal).

11.12 When a purchaser is given a copy of the application and then enters into a contract of sale, they are joined as a party to the QCAT proceeding.[17] QCAT suggested that joinder does not happen automatically on entry into a contract of sale; the purchaser must be first put on notice.[18]

11.13 Any period of time mentioned in the orders for carrying out the required work begins from the date of the transfer of land.[19] Any ongoing maintenance orders lapse after 10 years.[20]

11.14 The Queensland Act does not state what happens if the affected neighbour sells their land.

Failure to provide notice

11.15 A tree owner who fails to give copies of the application or orders to a purchaser before they enter into a contract of sale can incur a maximum penalty of 500 penalty units ($65,275).[21] In addition, the purchaser will have the right to terminate the contract of sale and recover their deposit.[22] If transfer of land occurs without the purchaser being given this information, then the original tree owner will remain liable to carry out the orders despite the change in ownership.[23] These are significant incentives to provide notice to purchasers.

Notice to local councils

11.16 QCAT must give a copy of any order to the local government in the area in which the tree is situated as well as any government authority that appeared in proceedings.[24]

Searchable database of orders

11.17 QCAT also administers a searchable tree orders register which is freely available. Any person, including prospective buyers, can search a property by its address or a party's name to see if any tree on the land is subject to an order.[25]

Tasmania

Both the tree owner and affected neighbour must inform purchasers

11.18 Prima facie the Tasmanian Act places the onus on both the tree owner and affected neighbour to inform purchasers of their respective land about any legal action taking place or orders made.[26]

17 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 84. Joinder means that a party who is not named in the original application but is believed to have a role in the matter and is joined ether as an applicant, a respondent or only as a joined party. Joiner brings together, before the court, all the matters in the contest between all the relevant parties. Joinder serves in the interests of administrative convenience as well as finality: Trischa Mann, *Oxford Australian Law Dictionary* (Oxford University Press, 2010).The consequence of not joining purchasers and title passing hands during the trial could be a mistrial. See, eg, *PGC Holdings Pty Ltd v Jalfire Pty Ltd* [2018] QCAT 29 and *PGC Holdings Pty Ltd v Jalfire Pty Ltd (No. 2)* [2018] QCAT 363.

18 Consultation 15 (Queensland Civil and Administrative Tribunal).

19 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 85(b).

20 Ibid s 78(1).

21 Ibid s 83; The penalty unit value in Queensland is currently $130.55 (from 1 July 2018): Queensland Government, *Sentencing Fines and Penalties for Offences* (Web Page, 5 July 2018) <https://www.qld.gov.au/law/fines-and-penalties/types-of-fines/sentencing-fines-and-penalties-for-offences>.

22 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 86(2), 86(4). However, if an application is commenced after the purchaser has entered into a contract of sale then the Act imposes no obligation on the tree owner to notify the purchaser about the proceedings. If a dispute arises between the tree owner and purchaser, then this can be dealt with as a contractual matter: Consultation 15 (Queensland Civil and Administrative Tribunal); see also Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015) [3.586]–[3.587], [3.593]–[3.595].

23 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 87(2).

24 Ibid s 76.

25 Queensland Civil and Administrative Tribunal, *Tree Orders Register* (Database, 21 February 2019) <www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>.

26 The provisions in Division 2 of the *Neighbourhood Disputes About Plants Act 2017* (Tas) refer broadly to 'An owner of land to which an application or an order relates'. The Commission notes that this provision has not been formally interpreted by the Tribunal.

Joinder of parties

11.19 If either party decides to sell their land while a matter is in progress, they must give the purchaser a copy of the application and any information filed with the Resource Management and Planning Appeal Tribunal (RMPAT) or the order before the purchaser enters into a contract of sale.[27] The Tasmanian Act provides that any person who is provided with notice is joined as a party when they enter into a contract for sale, and orders are binding on them.[28]

11.20 On the day of settlement the purchaser is then bound by the orders as if they were the original land owner, to the extent the orders have not been carried out.[29] Any period of time mentioned in the orders for carrying out the required work begins on the day of settlement.[30]

11.21 A seller must notify RMPAT after a contract of sale has been entered into that the purchaser is joined as a party.[31]

11.22 The Tasmanian Government has developed template forms to help vendors make the required disclosures.[32] These can be downloaded from the Tasmanian Department of Justice's webpage on tree disputes.[33]

Notice to local councils

11.23 In Tasmania, local councils must be informed of any orders made by RMPAT pursuant to the Tasmanian Act.[34] Information certificates provided by local councils to prospective purchasers under section 337 of the *Local Government Act 1993* (Tas) provide details about any orders made.[35] As explained in the Second Reading Speech to the Tasmanian Act:

> These provisions will ensure that prospective purchasers of land on which problem plants are situated are aware that matters relating to plants may need to be dealt with in the future. This will also ensure that landholders who are affected by a plant will not, in most cases, be required to seek fresh orders if the owner of the plant fails to fulfil his or her obligations under the order before selling the property.[36]

Failure to provide notice

11.24 Failure to provide copies of the application or orders to a purchaser before they enter into a contract of sale will result in a maximum penalty of 200 penalty units ($32, 600).[37] In addition, the purchaser will have the right to terminate the contract of sale and recover their deposit before settlement.[38] Where orders are not provided before the contract of sale is signed and those orders are not complied with before the transfer of land occurs, the original owner will remain liable for carrying out the orders, despite the fact that they no longer own the property.[39] The Act allows the original owner access to the land to carry out this work.[40]

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27 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 16(1)(a).
28 Ibid s 34(2); see, eg, *Fuller v Estate of Nelder Josephine Hunt* [2018] TASRMPAT 28 [48].
29 Ibid s 34(2).
30 Ibid.
31 Ibid s 16(2).
32 See Department of Justice (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.
33 Ibid.
34 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 34(3)(a).
35 See further *Local Government (General) Regulations 2015* (Tas) r 45, sch 6, No 11A.
36 Tasmania, *Parliamentary Debates, House of Assembly,* 4 April 2017, 8 (Rene Hidding).
37 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 16(1). The penalty unit value in Tasmania is currently $163 (from 1 July 2018): Department of Justice (Tas), *Value of Indexed Amounts in Legislation* (Web Page) <https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation>.
38 *Neighbourhood Disputes About Plants Act 2017* (Tas) ss 17(2)–(3).
39 Ibid s 18.
40 Ibid s 18(3).

Searchable database of orders

11.25 The Tasmanian Act provides for a publicly 'searchable register of tree or hedge orders', maintained by RMPAT.

11.26 This information includes 'the terms of the order, when the order takes effect, when any work is required to be carried out and who is required to carry out the work'.[41] However access to this database is more limited than in Queensland. Although any member of the community can search the database, they must submit an application to RMPAT and pay a fee and the search criteria is narrower.[42]

Community responses—new owners of land

11.27 The consultation paper asked how a new Act should respond when land affected by a tree dispute application or order is bought and sold. Community responses generally supported:

- ensuring that purchasers are fully informed about existing disputes before they commit to buying the land
- ensuring that orders are able to be fulfilled after title changes to prevent relitigation of the same issues.

New affected neighbours

11.28 Issues may arise involving a new affected neighbour where:

- an order has not been fully complied with by the tree owner
- where there is an order for ongoing maintenance
- where an order stipulates shared responsibility for any tree works or maintenance.

11.29 The majority of people who provided responses supported binding a new affected neighbour to the outcome of pre-existing legal action.[43] It was suggested that this would prevent the same dispute arising again and would promote closure.[44]

11.30 Others emphasised the importance of notification. It was suggested that new affected neighbours should be bound only if they have been made aware of legal action and any orders prior to purchasing, such as through a real estate agent, or a Section 32 Vendor Statement under the *Sale of Land Act 1962* (Vic)[45]

11.31 One submission noted that there should be scope for new land owners to 'bring in new ideas' about how the tree could be managed despite existing orders. They suggested that a tree dispute with the original owner may have had interpersonal dimensions, so the introduction of new owners may bring interpersonal conflict to an end.[46]Another suggestion was that compliance with an order should be optional because a new affected neighbour may not need it:

> The new owner of a site for which the previous owners successfully achieved a determination as a response to dispute action may in turn appreciate the presence of the tree, and not wish to remove or jeopardise its future potential. It should be optional.[47]

41 Tasmania, *Parliamentary Debates, House of Assembly*, 4 April 2017, 8 (Rene Hidding).
42 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 37(4); Resource Management and Planning Appeal Tribunal, *Practice Direction No 18 — Applications under the Neighbourhood Disputes About Plants Act 2017* (19 November 2018) [18.5.1]. It costs individuals $23.70 to search the database pursuant to s 37(4) of the *Neighbourhood Disputes About Plants Act 2017* (Tas): Resource Management & Planning Appeal Tribunal, *Table of Fees* (effective from 1 July 2018) <https://www.rmpat.tas.gov.au/fees>.
43 Submissions 2 (Name withheld), 4 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton), 11 (Name withheld), 19 (Name withheld), 23 (Name withheld).
44 Submissions 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton).
45 See for eg Submissions 2 (Name withheld).
46 Confidential submission.
47 Confidential submission.

11.32 A small number of people thought new owners should not be bound by the outcome of legal action because they considered it would 'be difficult to implement'[48] and lead to unfairness.[49]

New tree owners

11.33 A new tree owner may be affected by a pre-existing order requiring tree works or ongoing maintenance. The majority of responses to the consultation paper supported binding a new tree owner to the outcome of pre-existing legal action about trees on their land.[50]

11.34 Arborist Dr Karen Smith thought that this was important because otherwise 'legal action is wasted'.[51] A tree disputes consultant in New South Wales supported binding new owners in this way:

> By being bound by the outcome of legal action, consistency is maintained as is fairness to the original parties in the dispute. Additionally, as land is purchased by successors in title, so is the tree that is the subject of the dispute. I consider the success of the proposed statutory scheme to be its adjudicative nature and as such, any outcome of legal action should remain and run with the land. Unlike mediation, Court orders are enforceable, and the gravitas of the statutory scheme ensured…[52]

11.35 One submission observed that the approach of binding new tree owners is consistent with planning law, where responsibility for complying with decisions or orders 'runs with the land'.[53] It was further noted that having orders that run with the land may be beneficial in urgent situations where time does not allow for fresh legal proceedings.[54]

11.36 The Victorian Civil and Administrative Tribunal (VCAT) supported binding new owners of land to carry out existing orders. However, VCAT noted that it should not be required to play a role in implementing this process. VCAT also suggested that consideration be given to whether the order attaches to the land or the landowner. VCAT noted that if an order is to attach to the land to bind every subsequent owner or occupier, like section 124 of the *Planning and Environment Act 1987* (Vic),[55] this would need to be reflected in the *Sale of Land Act 1962* (Vic).[56]

11.37 Another submission stated that new tree owners should be bound only if they are made aware of any orders before buying the land, such as through information provided by a real estate agent.[57] Some people suggested that if a new owner is able to come to a new arrangement with an affected neighbour[58] or alter the original order with the affected neighbour's cooperation,[59] they should not be bound.

11.38 A small number of submissions stated that new tree owners should not be bound by legal action.[60] One reason was that it would be too difficult to implement fairly.[61]

48 Submission 21 (Pointon Partners Lawyers).
49 Submissions 5 (Name withheld), 21 (Pointon Partners Lawyers).
50 Submissions 4 (Name withheld), 7 (Ben Kenyon), 8 (Victoria Thieberger), 9 (Dr Karen Smith), 10 (Professor Phillip Hamilton), 11 (Name withheld), 19 (Name withheld), 20 (Name withheld), 23 (Name withheld), 27 (Name withheld).
51 Submission 9 (Dr Karen Smith).
52 Submission 20 (Name withheld).
53 'Run with the land' means an interest or burden that passes with the transfer of land, binding subsequent owners: Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis/Butterworths, 3rd ed, 2004) 'run with the land'.
54 Confidential submission.
55 *Planning and Environment Act 1987* (Vic) s 124: 'Any enforcement Order or interim enforcement Order served on an owner or occupier of land is binding on every subsequent owner or occupier to the same extent as if the Order had been served on that subsequent owner or occupier.'
56 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
57 Submission 2 (Name withheld).
58 Confidential submission
59 Confidential submission.
60 Submissions 5 (Name withheld), 21 (Pointon Partner Lawyers).
61 Submission 21 (Pointon Partners Lawyers).

When should the burden and benefit of orders pass to purchasers?

11.39 Community responses were mixed. Some stated that purchasers should only be bound at the point of transfer of title (or settlement).[62] Others said this should occur when a contract for sale is entered into.[63] A smaller number made alternative suggestions such after one year;[64] following a 'grace period' after transfer of title;[65] or once possession of the property is taken.[66]

Informing potential purchasers

11.40 There was overwhelming support for a process to inform potential purchasers about legal action or orders before a sale is formally finalised.[67]

11.41 Drawing on experience enforcing local laws and planning schemes, a number of local councils reported that notification is important so that purchasers are not surprised by obligations that pass to them with ownership.[68]

11.42 Nillumbik Shire Council stated that it would be useful for purchasers of land to be made aware of any orders that put a positive obligation on them to carry out maintenance of vegetation on their land.[69]

11.43 One community member stressed that proceedings underway at the time of sale must be disclosed because 'purchasers need to know what they are buying into'.[70] Another community member agreed that new owners 'should be made aware as soon as possible [of] what[']s going on…'[71]

11.44 Another suggested that if the purchaser does not wish to be responsible for carrying out any one-off orders that have not been complied with, then they should ensure the original owners carry out the works completely before transfer of title occurs.[72]

How should notice be provided?

11.45 Some responses suggested a disclosure process that informs purchasers through a real estate agent;[73] a signed disclosure statement[74] or a Section 32 Vendor Statement.[75] Baw Baw Shire Council suggested that a Section 32 Vendor Statement should include results of an arborist's risk assessment for the problem tree.[76]

11.46 A number of arborists at ArborCamp2018 supported an approach similar to that in the United Kingdom.[77] In the UK, a vendor must complete a Seller's Property Information Form on which they must provide detailed information about issues affecting their property, including historic, ongoing or likely disputes with neighbours.[78] If inaccurate or misleading information is provided, the purchaser may be able to make a claim for compensation or refuse to complete the purchase.[79]

62 Submissions 2 (Name withheld), 7 (Ben Kenyon), 19 (Name withheld), 20 (Name withheld).
63 Submissions 4 (Name withheld), 11 (Name withheld), 27 (Name withheld).
64 Confidential submission. It was not specified at what point this one year period should commence.
65 Confidential submission. The period of this suggested grace period was not specified.
66 Submission 23 (Name withheld).
67 Submissions 2 (Name withheld), 6 (Name withheld), 27 (Name withheld); Consultations 1 (Aldo Taranto), 3 (HVP Plantations), 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
68 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
69 Consultation 9 (Nillumbik Shire Council).
70 Submission 10 (Professor Phillip Hamilton).
71 Submission 6 (Name withheld).
72 Ibid.
73 Submission 2 (Name withheld).
74 Submission 27 (Name withheld).
75 Submission 10 (Professor Phillip Hamilton).
76 Consultation 10 (Baw Baw Shire Council).
77 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
78 The Law Society (United Kingdom), *Property Information Form (TA6)—Explanatory Notes for Sellers and Buyers* (2013), 5, questions 2.1–2.2.
79 Ibid 1; See, eg, *McMeekin v Long* [2003] All ER (D) 124 (4 October 2002).

Joining new parties to proceedings

11.47 The majority of community responses supported the idea of joining new owners to existing proceedings in VCAT. The Commission was told that the possibility of being joined as a party should be stated in the contract of sale.[80]

11.48 Two people stated that purchasers should be joined as a party at the time they enter into a contract of sale.[81] Another suggested that the purchaser should be joined when they take possession of the property.[82]

11.49 A smaller number stated that purchasers should not be joined to pre-existing disputes.[83] One alternative was that new tree owners sign an undertaking at sale and set aside a portion of the sale price to be held on trust to complete works in the order:

> the new owners should sign a declaration that they will accept the result of any action currently underway and, that if the action was to be found against the vendor, the vendor would pay all costs. The vendor should also sign such an agreement and a reasonable portion of the sale fee should be held in trust to complete works, should any be required by an order. The party bringing the action should be liable for any loss caused by a portion of the sale fee being held in trust, if their action fails …[84]

11.50 Pointon Partners stated that whether or not a new owner should be joined as a party to the hearing should be a matter for the parties to decide.[85]

11.51 QCAT reported that matters regarding the joinder of new owners do not arise frequently in Queensland. If a joinder cannot be made under the Queensland Act then it may be made under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) instead.[86] QCAT noted that purchasers tend to express annoyance when they are joined to proceedings.[87] QCAT also explained that it does not have jurisdiction to make orders in relation to a previous tree owner and can only make orders in relation to current tree owners.[88]

A searchable database

11.52 Most responses supported the establishment of a searchable database of orders.[89] The City of Boroondara Council stated it would also provide neighbours with a good resource for monitoring trees in their area.[90] The Land and Environment Court of New South Wales noted that a database could be a useful tool for notifying potential new owners of land about tree orders affecting their properties.[91] Nillumbik Shire Council stated that a database administered by the decision-making body could reduce the burden on local councils because residents would be able to find information themselves online.[92]

11.53 Responses were received about the broader benefits of a searchable database. A tree disputes consultant in New South Wales stated:

> A searchable database of Orders relating to trees and … judgments should be made available in Victoria. This would give potential disputants a means of building their knowledge before approaching the scheme and 'testing' their dispute scenario against a variety of outcomes.[93]

80 Submission 11 (Name withheld).
81 Submissions 23 (Name withheld) and Confidential submission.
82 Confidential submission.
83 Submissions 4 (Name withheld), 27 (Name withheld).
84 Submission 27 (Name withheld).
85 Submission 21 (Pointon Partners Lawyers).
86 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 42.
87 Consultation 15 (Queensland and Civil Administrative Tribunal).
88 Ibid. See also *PGC Holdings Pty Ltd v Jalfire Pty Ltd (No. 2)* [2018] QCAT 363 [51].
89 Submissions 4 (Name withheld), 5 (Name withheld), 6 (Name withheld), 7 (Ben Kenyon), 9 (Dr Karen Smith), 11 (Name withheld), 19 (Name withheld), 20 (Name withheld), 21 (Pointon Partners Lawyers), 23 (Name withheld), 27 (Name withheld), 33 (Annette Neville); Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council).
90 Consultation 8 (City of Boroondara).
91 Consultation 11 (Land and Environment Court of New South Wales).
92 Consultation 9 (Nillumbik Shire Council).
93 Submission 20 (Name withheld).

11.54 The City of Boroondara stated that the database could also assist people find determinations under planning schemes, which can be difficult to obtain.

11.55 Some people suggested limiting access to the database. One submission stated that a 'small fee' should apply for conducting a search of the database.[94] Another stated that the database should not be available to the public and should only be searchable with permission or via a legal representative.[95] Another observed that the database would likely be 'expensive'.[96]

11.56 Only one submission objected to the database:

> Given that the contest over tree-related disputes is potentially highly charged and emotive without external influence, I see no reason why further publication is appropriate for the well-being of those involved.[97]

The Commission's conclusions—new owners of land

11.57 The new Act should specify the rights and obligations of new tree owners and new affected neighbours towards trees that have been the subject of a formal tree dispute proceeding in VCAT. This will bring finality to the tree dispute, certainty to the parties and avoid duplication of legal proceedings.

11.58 However, the system should not allow tree owners to bypass obligations by selling their property. In addition, it would be unfair to create a system where a purchaser is left with a significant burden for a problem that they did not create.

11.59 To address these issues, the new Act should:

- require relevant matters to be disclosed to potential purchasers before they commit to sale;
- ensure new affected neighbours can continue to benefit from orders
- avoid making the sale of land process more complex.

Providing certainty

11.60 If the new Act does not shift the burden and benefit of orders to new purchasers of land then previous resolutions would be worthless. The same tree disputes could go back to VCAT with the same result. Any scheme that duplicates legal proceedings or prolongs a tree dispute would be the opposite of the policy objective: to resolve tree disputes efficiently and inexpensively. It would also be a waste of VCAT's resources.

11.61 The Commission concludes that new tree owners and new affected neighbours (new owners of land) should be bound by the outcomes of prior legal action. Most cases are likely to involve new affected neighbours seeking to benefit from orders. However, sometimes new affected neighbours may have to carry out pre-existing obligations, such as sharing the costs of maintenance.

11.62 Any Orders requiring payment of compensation should rest with the original owner. It would be unfair to shift responsibility for compensation to a new owner who was not involved. This is also the approach in New South Wales.

11.63 The right to benefit from orders should be limited to the immediate new affected neighbour (the applicant's successor in title).[98] The Commission is persuaded by the approach in New South Wales where the right is limited in this way so as not to burden

94 Confidential submission.
95 Submission 2 (Name withheld).
96 Submission 10 (Professor Phillip Hamilton).
97 Confidential submission.
98 This means those who first purchase from the tree owner or affected neighbour. It will not apply to subsequent purchasers.

'title to the land indefinitely, particularly in the case of orders relating to ongoing maintenance'.[99] Tree dispute orders should not run with the land.

11.64 The Commission acknowledges the concerns that new owners should not be bound by the outcome of legal action because they may view the tree differently from the original parties in dispute. For example, a new affected neighbour may wish to retain overhanging branches because they provide shade and greenery. However, because the new Act deals only with damage or likely future damage or harm, it is more likely that the same problem will impact a new owner. This may be different if more subjective issues were being considered, for example, access to sunlight and views or leaf litter not causing damage.[100] If new owners do not agree with a preexisting order then they should be able to apply to VCAT to vary or revoke them (see Chapter 9). This may also be needed where an original order provided access rights that need to be updated or modified.

Recommendations

48 The Act should state that new owners of land should be bound by and benefit from the outcome of legal action.

49 The Act should state that new owners are bound to the extent the original owner has not completed the order or has an ongoing obligation to carry out the Order.

50 Only immediate new owners may benefit from orders made in the original owner's favour.

When should new owners be bound?

11.65 New owners should be bound from the date of settlement, when the title to the land passes to the purchaser.[101]

11.66 Binding a purchaser earlier than settlement, such as from the date they enter into a contract of sale, or the time of auction, would not be appropriate. There are too many variables at this stage and the sale may fall through.

11.67 The date of settlement, which includes transfer and registration of title, is clear proof that ownership has now changed hands. It is also a point in the sale of land process that is clear and easy to identify. Other suggestions such as 'one year'; a grace period after transfer or title; or date of occupation, may be less clear.

11.68 For consistency and clarity, any timeframes stipulated in the orders should re-commence on the date of settlement.

99 Department of Justice and Attorney-General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (Report, 2009) 23; see *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 16A.
100 See Chapter 13 for a discussion of trees blocking access to sunlight or views.
101 Peter E Nygh and Peter Butt, *Butterworths Australian Property Law Dictionary* (Butterworths, 1997).

Recommendations

51 The Act should state that the date from which new owners will be bound and will benefit from the outcome of legal action is the date of settlement.

52 Any timeframes stipulated in the orders should re-commence on the date of settlement.

Who should inform purchasers?

11.69 Potential purchasers should be notified of existing disputes and orders before settlement so that they know about the scope of the problem and future obligations. This will help them to make informed decisions and encourage compliance if they buy. It may also empower a purchaser to require works pursuant to an order to be completed before settlement.

11.70 It should be the role of the original owner (both the original tree owner and original affected neighbour) to inform potential purchasers, using the processes outlined below under 'How should notice be provided?'

11.71 It should not be the sole duty of the affected neighbour to inform new owners of the tree, as is the case in New South Wales. The Commission agrees with QCAT's observation that it would be problematic for the neighbour to have to provide the new tree owner with a copy of any orders to ensure they are carried out.[102] The neighbour may not know that the land is being sold or who is buying it, so it would be unfair to put the onus on them to monitor ownership of their neighbour's land.[103]

What should be disclosed?

11.72 Disclosure should include providing relevant documentation, either a copy of the application or orders, to the purchaser. If the matter has not been settled then a copy of the application should be provided. If the matter has been determined then a copy of the Orders (if any) should be provided.

How should notice be provided?

11.73 Disclosure should not make the sale of land more complex or burden buyers by with additional enquiries during conveyance. Instead, notice of formal tree disputes or Orders should form part of the usual disclosure process of selling land in Victoria. This notice should be provided in the Due Diligence Checklist and in the Section 32 Vendor Statement.[104]

102 Consultation 15 (Queensland Civil and Administrative Tribunal).
103 Ibid.
104 The information it must contain is set out in section 32 of the *Sale of Land Act 1962.* The Section 32 statement contains information about the property's title, including: mortgages; covenants; easements; zoning; outgoings (for example, rates); and declaration if located in a bushfire-prone area. As it is a legal document, it must be factually accurate and complete. If it contains incorrect or insufficient information, a buyer may be able to withdraw from the sale or take legal action: Consumer Affairs Victoria, *Conveyancing and Contracts for Sellers* (Web Page, 1 April 2019) <https://www.consumer.vic.gov.au/housing/buying-and-selling-property/selling-property/conveyancing-and-contracts-for-sellers>.

Due Diligence Checklist

11.74 The *Sale of Land Act 1962* (Vic) mandates the provision of a Due Diligence Checklist. This Checklist is intended to help prospective buyers in 'identifying information they may wish to obtain in respect of the land for sale'.[105] It must be provided to prospective buyers by the vendor or an agent from the time the land is offered for sale,[106] in the form published by Consumer Affairs Victoria.[107] The Checklist contains general information about a range of issues that may affect the property and impose restrictions or obligations on them.[108] The checklist should be amended to include information about how the land may be affected by legal action and orders under the new Act.

Vendor Statement

11.75 The Section 32 of the Sale of Land Act requires a Vendor Statement to be provided to a purchaser.[109] The Section 32 Vendor Statement is a legal document and requires the vendor to disclose certain matters to the purchaser before they enter into a contract of sale.[110] Many of the matters in the Vendor's Statement elaborate on matters that appear in the Checklist. This means that potential purchasers could be provided with notice through both the Checklist and more thoroughly in the Vendor's Statement.

11.76 A Vendor Statement is not currently required to disclose matters relating to trees or vegetation on the land. It is recommended that the Sale of Land Act is amended to include a provision in Part 2 to expand the Section 32 provisions to require disclosure of ongoing legal action under the new Act at the time of sale, or if legal action has concluded, information about incomplete or ongoing orders. For clarity and transparency, copies of the application or orders should be provided to the purchaser. The Commission considers that this would be a straightforward amendment.

If purchasers are not informed

11.77 If a purchaser is not properly informed about legal action or orders, the purchaser may seek recourse under the Sale of Land Act.

11.78 The Queensland and Tasmanian Acts include penalties for failing to give purchasers notice of an application or order before they buy.[111]The Commission is of the view that existing penalties under the Sale of Land Act are satisfactory. If prospective purchasers are not given copies of the Due Diligence Checklist as required by the Sale of Land Act, a maximum penalty of 60 penalty units ($9,671.40) applies.[112]

11.79 The failure of the vendor to provide accurate information in a Section 32 Vendor Statement gives the purchaser the right to rescind the contract at any time before settlement or acceptance of title.[113] Knowingly or recklessly supplying false information to the purchaser is a criminal offence equating to a maximum of 60 penalty units ($9671.40).[114] There is also a general maximum penalty of 10 penalty units ($1611.90) for contravention of the Sale of Land Act.[115]

105 *Sale of Land Act 1962* (Vic) s 33A.
106 Ibid ss 33B(1),5).
107 Ibid ss 33B(2),(5).
108 Consumer Affairs Victoria, *Due Diligence Checklist - For Home and Residential Property Buyers* (15 January 2019) <https://www.consumer.vic.gov.au/housing/buying-and-selling-property/checklists/due-diligence>.
109 Consumer Affairs Victoria, *Conveyancing and Contracts for Sellers* (Web Page, 8 January 2019) <https://www.consumer.vic.gov.au/housing/buying-and-selling-property/selling-property/conveyancing-and-contracts-for-sellers>.
110 *Sale of Land Act 1962* (Vic) s 32(1)
111 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83; *Neighbourhood Disputes About Plants Act 2017 (*Tas) s 16(1).
112 *Sale of Land Act 1962* (Vic) ss 33B(1), (4). The current value of a penalty unit is $161.19 (as at 1 July 2018): Department of Justice and Community Safety (Vic), *Penalties and Values* (Web Page, 14 August 2018) <https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values>.
113 *Sale of Land Act 1962* (Vic) s 32K.
114 Ibid s 32L. Or, 300 penalty units in the case of a body corporate. The current value of a penalty unit is $161.19 (as at 1 July 2018): Department of Justice and Community Safety (Vic), *Penalties and Values* (Web Page, 14 August 2018) <https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values>.
115 *Sale of Land Act 1962* (Vic) s 16. This penalty may be applied 'where no other penalty is expressly provided'.

11.80 As the Sale of Land Act already provides penalties for failure to disclose the Commission does not support duplicating these penalties and provisions in the new Act.

Recommendations

53 The Act should state that purchasers should be notified of any legal action commenced or underway at the time of the sale, or orders made under the Act. The Act should further state that copies of the application or order must be provided with a Section 32 Vendor Statement.

54 The Due Diligence Checklist under Division 2A of the *Sale of Land Act 1962* (Vic) should be amended by Consumer Affairs Victoria to include information about the effect on new owners of legal action and orders made under the proposed Act.

55 The *Sale of Land Act 1962* (Vic) should be amended to include a provision under Section 32 that requires disclosure of legal action under the proposed Act at the time of sale, or if legal action has concluded, disclosure of incomplete or ongoing orders. The *Sale of Land Act 1962* (Vic) should also stipulate that copies of the application and order are to be provided.

Joining new parties to proceedings

11.81 There is potential for a mistrial[116] where the ownership of a tree changes part way through legal proceedings, resulting in the wrong party being sued. This occurred in a Queensland case where the tree owner, a corporation, sold its land to another corporation in the time between the commencement of the matter and the hearing. The original owner did not inform QCAT of the change in ownership. QCAT held there had been a mistrial and explained:

> The Tribunal … has jurisdiction to make orders only in respect of those matters which parliament has given it jurisdiction. In this case, it can make orders in relation to tree disputes, in essence between tree-keepers and neighbours…The Tribunal cannot proceed to make orders about the tree dispute in these circumstances as between [the two corporations] as though the transfer to [the new owner] had not occurred. It has no power to do so. [The new owner] is the tree-keeper and the proper respondent. Further, the sale and transfer of the property to [the new owner] and the failure…to disclose that sale and transfer raises issues affecting the substantial merits of the case.[117]

11.82 The Commission intends to limit the possibility of a mistrial in such circumstances. While this could be achieved through automatic joinder of the new parties—as occurs in Queensland and Tasmania—[118] this may cause problems:

a) A purchaser may resent having to become involved in legal proceedings when they buy a property. Indeed the prospect of being joined as a party may discourage the sale. It would probably require the purchaser to obtain additional legal advice, which would be costly.

b) The sale may fall through, making the legal action even more complex.

116 A trial that must be aborted and from which no valid outcome results: Trischa Mann, *Oxford Australian Law Dictionary* (Oxford University Press, 2010).
117 *PGC Holdings Pty Ltd v Jalfire Pty Ltd* [2018] QCAT 29 [17]–[18].
118 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 84; *Neighbourhood Disputes About Plants Act 2017* (Tas) s 34(2).

11.83 A better approach would be for the vendor to notify VCAT immediately after a contract of sale is fully executed as occurs in Tasmania.[119] VCAT should decide whether to join the parties depending on the facts of the case. The VCAT Act provides VCAT with the power to do this if it considers 'that the person ought to be bound by, or have the benefit of, an Order of the Tribunal in the proceeding; the person's interests are affected by the proceeding; or for any other reason it is desirable that the person be joined as a party'.[120]

11.84 When making an application to initiate a matter under the new Act, all parties involved in the dispute should be obliged to reveal whether they have entered into a contract of sale of land at the time. This should be one of the details included in the application form. See Chapter 5.

Recommendation

56 If a party to a tree dispute enters into a contract of sale of land while legal action under the Act is underway, the Act should require that party to notify the Victorian Civil and Administrative Tribunal about the sale as soon as possible after the contract of sale has been fully executed.

Not recommended: a searchable database of orders

11.85 Although there was considerable support for the idea of a searchable database of orders, its introduction in Victoria is not recommended as it may result in unnecessary duplication of information to be disclosed through a Section 32 Vendor Statement. The amended Vendor's Statement would provide sufficient notice and information to purchasers. Furthermore, unless the database is widely publicised and freely available,[121] it may not be used, and it would be costly to monitor and update.

11.86 Some responses favoured a searchable database because it might assist the members of the wider community who may have concerns about the tree. However, tree disputes do not typically impact people other than the parties involved and the Commission has not recommended that orders run with the land indefinitely. The decision-making principles in Chapter 8 should be enough to ensure that any wider benefits of the tree are considered. These principles reflect broader considerations in planning laws which have a broader community focus.

11.87 Notice of an application under the new Act will be provided to anyone who the applicant has reason to believe may be affected by the outcome of an order. Therefore, there is little benefit in allowing a searchable database of orders that other residents in the neighbourhood may inspect. Other databases already inform the community about matters relating to trees: the Victorian Heritage Database, the National Trust's Significant Tree Register, and significant tree registers of local councils.[122] The subject matter of those databases is in the wider public interest.

119 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 16(2).
120 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 60(1).
121 It costs individuals $23.70 to search the database pursuant to s 37(4) of the *Neighbourhood Disputes About Plants Act 2017* (Tas): Resource Management & Planning Appeal Tribunal, *Table of Fees* (Web Page, effective from 1 July 2018) <https://www.rmpat.tas.gov.au/fees>.
122 See, eg, Heritage Council Victoria, *Victoria's Significant Heritage Places and Objects* <https://vhd.heritagecouncil.vic.gov.au/>; National Trust, *Significant Tree Register* (Web Page, 2019) <https://www.nationaltrust.org.au/services/significant-tree-register/>; Bayside City Council, *Significant Tree Register* (Web Page, 2019) <https://www.bayside.vic.gov.au/significant-tree-register>.

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12. Community resources for neighbourhood tree disputes

Introduction

12.1 The resolution of tree disputes is hindered by a poor understanding of the law and a lack of supporting information. Community members must piece together information published by different government and community agencies to work out a possible resolution process. The Commission has also been told that the community does not have a good understanding of which experts can assist them. In particular, there is limited awareness of the role and qualifications of arborists.

12.2 This chapter considers what supporting material should be created to help the community to understand how the new Act works in practice and better prepare people to resolve their disputes both through the Victorian Civil and Administrative Tribunal (VCAT) and informally.

Current resources

12.3 There are already some information sources available to the community to help prevent tree disputes and to resolve them as they arise. These range from information about responsible tree planting to information that supports alternative dispute resolution. Not all of these resources are easy to find and they are not universally available across Victoria.

Responsible tree planting

12.4 It was widely recognised in responses to the Commission that appropriate planting of trees—by species and location—may minimise the occurrence of tree disputes.[1] Around Victoria some councils provide information to residents about sustainable planting and some provide helpful guidance about planting more generally.

12.5 Sustainable Gardening Australia (SGA) has produced comprehensive booklets on sustainable gardening for some local government areas within Victoria.[2] The booklets contain information on plant selection to suit local conditions of soil and climate.

12.6 For example, the City of Mildura Rural City Council SGA booklet classifies a range of plants according to their growing requirements (such as drought-tolerant), the origin of the plant (native or nonnative) and the growing habit of the plants (such as its anticipated

1 Submissions 1 (Ian Collier), 5 (Name withheld), 22 (Name withheld), 24 (Name withheld); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 10 (Baw Baw Shire Council), 11 (Land and Environment Court of New South Wales), 12 (City of Port Phillip); Survey Respondents 1, 3, 18, 20, 27, 51, 52, 59, 76, 93, 109, 111, 123.

2 Sustainable Gardening Australia, *Gardening Booklets for Local Areas* (Booklets, 2019) <https://www.sgaonline.org.au/sustainable-gardening-booklets/>. Sustainable Gardening Australia is a not-for-profit organisation promoting environmentally sustainable gardening. It offers gardening booklets for these local government areas: Brimbank, Casey, Darebin, East Gippsland and Wellington Shire, Frankston, Hobsons Bay, City of Melbourne, Hume, Melton, Mildura Region, Mitchell/Strathbogie, Moonee Valley, Moreland, Nillumbik, Stonnington, Whittlesea, Wyndham and the Yarra Ranges.

height and width).[3] It also lists plant species that are invasive in the Mildura area and should not be considered for planting.[4]

12.7 Some council nurseries are directly involved in sustainable planning programs in their communities. The Mornington Peninsula Shire nursery grows an extensive range of indigenous plants from locally collected seed for retail sale to the public.[5] The range includes groundcovers, grasses, wildflowers, shrubs and trees. Banyule City Council also encourages the planting of native tree species and provides a buy-one-get-one-free voucher as an incentive for residents to select native plants.[6] Vouchers can be redeemed at selected nurseries, with a link to the Victorian Indigenous Nurseries Cooperative provided on council's website.[7] In this way, council nurseries play a role in advising people about what species are appropriate to plant on their land.[8]

12.8 In addition, some councils have helpful information on their websites and in policy documents about which plant species are most suitable for the local environment.[9] For example, the City of Boroondara has a website dedicated to 'choosing suitable trees' and advises residents to take certain steps prior to selecting trees. These include considering:

- whether the tree will have enough space to grow healthily
- whether the size of the tree when fully grown could affect built structures on the land and on neighbouring land
- whether root growth could cause damage to underground pipes.[10]

Talking with your neighbour

12.9 Chapter 2 identifies that a break-down in communication between neighbours is an underlying factor that contributes to tree disputes in our community.

12.10 Some government and community organisations have published useful resources aimed at helping neighbours to resolve their tree disputes. Chapter 3 briefly canvassed some of the strategies promoted in these materials about how to negotiate effectively with your neighbour.

12.11 The Dispute Settlement Centre of Victoria (DSCV) has a section on its website about resolving tree disputes. It advises affected neighbours to engage a tree professional and obtain a quote about any proposed tree works prior to talking with the tree owner.[11] It suggests the following approach:

> Find out your neighbour's concerns over an informal chat. Ask yourself:
>
> "Have I really listened to them and tried to come up with a solution?"
>
> "What am I willing to negotiate over?"
>
> "Is there a different way to resolve this?"[12]

12.12 If an informal discussion does not resolve the issue and the parties have been unable to reach a solution on their own, DSCV recommends its free mediation services as a possible next step.

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3 Mildura Rural City Council and Sustainable Gardening Australia, *Sustainable Gardening in the Mildura Region* (Booklet, 2011) 21–31.
4 Ibid 33.
5 Morning Peninsula Shire, *Shire (Briars) Nursery* (Web Page, 2019) <https://www.mornpen.vic.gov.au/Activities/The-Briars/Shire-Nursery>.
6 Banyule City Council, *Native Plant Vouchers* (Web Page) <https://www.banyule.vic.gov.au/Council/Environment-and-Sustainability/Trees-and-Plants/Native-Plant-Vouchers>.
7 Ibid.
8 Consultation 10 (Baw Baw Shire Council).
9 See, eg, Moreland City Council, *Gardening with Indigenous Plants* (Web Page) <https://www.moreland.vic.gov.au/environment-bins/gardening-and-food/gardening-indigenous-plants/>; City of Casey and Cardinia Shire Council, *Indigenous Plant Guide* (Booklet) <https://www.casey.vic.gov.au/indigenous-plants>; City of Boroondara, *Choosing Suitable Trees* (Web Page, 2019) <https://www.boroondara.vic.gov.au/waste-environment/trees-and-naturestrips/choosing-suitable-trees>.
10 City of Boroondara, *Choosing Suitable Trees* (Web Page, 2019) <https://www.boroondara.vic.gov.au/waste-environment/trees-and-naturestrips/choosing-suitable-trees>.
11 Dispute Settlement Centre of Victoria, *Trees* (Web Page, 24 April 2019) <https://www.disputes.vic.gov.au/information-and-advice/trees-0>.
12 Ibid.

12.13 The Fitzroy Legal Service's *Law Handbook* offers practical tips and encourages neighbours to resolve disputes informally:

> Clear and open communication between neighbours with the aim of working out a dispute in a cooperative and friendly way is more likely to bring about a long-term outcome that all parties are able to live with.[13]

12.14 The *Law Handbook* provides a brief overview of the common law action in nuisance as well as the self-help remedy of abatement.[14] People are encouraged to discuss any proposed branch removal with neighbours prior to undertaking the work.[15]

12.15 The Victorian Law Foundation has published a guide, Neighbours, the Law and You, on how to be a good neighbour, explaining individual rights and responsibilities in relation to common issues that arise such as overhanging tree branches or roots.[16] The guide provides information about how local councils may be able to help because actions could be dependent on local law and planning schemes. It also includes information about abatement, and provides links to DSCV and to the Magistrates' Court websites. The clearing of vegetation in rural areas is also addressed, with individuals advised to contact the Country Fire Authority or the Metropolitan Fire Brigade if they are concerned about vegetation on neighbouring land posing a bushfire risk.

12.16 Local council websites and customer service centres often provide a range of information and links, with significant variation in detail between councils. Individuals can find relevant information about their local council on a dedicated government website.[17]

Engaging an arborist

12.17 The City of Port Phillip noted that the community is generally unaware of how to obtain advice from a suitably qualified arborist.[18]

12.18 Many people work in the tree care industry and some have undertaken little or no training.[19] However, Dr Gregory Moore OAM noted that arborists in Victoria are generally well trained. He suggested that there are approximately 1000 arborists with qualifications of level 4 or above.[20]

12.19 ENSPEC noted that 'arboriculture is an unregulated profession, meaning that there is a wide variation in the quality of training, experience and up-to-date knowledge amongst practitioners. There is also no professional recourse to address unethical behaviour as there is in licenced professions.'[21] Arboriculture Australia, the national peak body for arborists, has introduced a voluntary industry licence to promote quality of practice.[22]

12.20 The City of Port Phillip advises the community to 'be aware of unsolicited door knockers' who are usually 'unqualified tree loppers who try to intimidate people … into removing healthy trees'.[23]

12.21 Arborist Robert Mineo commented that the community does not generally understand the different qualification levels of arborists.[24]

13 Peter Cotter, 'Neighbour Disputes' in Naomi Saligari (ed), *The Law Handbook 2019: Your Practical Guide to the Law in Victoria* (Fitzroy Legal Service, 41st ed, 2019) 539.
14 Ibid 542–3.
15 Ibid.
16 Victoria Law Foundation, *Neighbours, the Law and You: Your Guide to Neighbourhood Laws in Victoria, Victoria Legal Aid* (Brochure, March 2015) <https://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/neighbours-law-and-you>.
17 Victorian Government, *Know Your Council* (Web Page) <https://knowyourcouncil.vic.gov.au/home>.
18 Consultation 12 (City of Port Phillip).
19 Consultation 12 (City of Port Phillip). This is also recognised by Arboriculture Australia, *Australian Qualification Framework (AQF) and Australian Training Programs* (Web Page) <http://arboriculture.org.au/Qualification>.
20 Consultation 2 (Dr Gregory Moore OAM).
21 Submission 18 (ENSPEC).
22 Arboriculture Australia, *Australian Arborist Industry Licence* (Brochure, version 4, 2017) <http://arboriculture.org.au/License>.
23 Consultation 12 (City of Port Phillip); see also City of Port Phillip, *City Permits—Fact Sheet Significant Tree Permits* (29 November 2017) 2.
24 Consultation 14 (Robert Mineo).

12.22 Arboriculture Australia, the peak national organisation promoting and representing arborists, has established an online directory for consulting and practising arborists.[25] Arboriculture Australia distinguishes between practising and consulting arborists to help the community to understand arborist qualifications.[26]

Alternative dispute resolution

12.23 DSCV maintains a comprehensive and informative website which gives a general outline of the law, sets out answers to frequently asked questions about trees, and provides a step-by-step guide to seeking a reasonable resolution.[27] During consultations Baw Baw Shire Council commended DSCV's website, especially the case studies, as providing information that is clear, simple and helpful.[28]

12.24 A helpful case study of a mediation on DSCV's website steps the community through the process and explains what to expect.[29] It also includes information about community mediation more generally that covers determining whether a matter is suitable for mediation, what happens in mediation and the benefits of mediation.[30]

Court/Tribunal resources

12.25 VCAT has existing online resources to help parties to resolve their case in a timely, cost-effective and efficient way.[31] Resources include practice notes and factsheets, as well as application guides for particular types of dispute.[32] VCAT's website clearly outlines the 'Steps to Resolve Your Case' from lodging an application with VCAT through to what to expect at the final hearing.[33]

12.26 The website encourages applicants to represent themselves, discussing the resolution of cases by agreement and detailing the alternative dispute resolution services that are available at VCAT. Making an agreement legally binding via Consent Orders at VCAT is also canvassed.

12.27 Some people commented on the effectiveness of proceedings in the Magistrates' Court under the *Fences Act 1968* (Vic).[34] The Magistrates' Court provides helpful information for neighbours contemplating action under the Fences Act. A comprehensive Information Guide provides general information about the civil process for fencing disputes in the Court and outlines key definitions under the Fences *Act.*[35] The guide strongly advises people to seek advice or mediation through DSCV and also outlines how to commence a proceeding.[36]

12.28 These resources provide a useful foundation for the development of specific materials to underpin the new Act.

25 Arboriculture Australia, *Directory Listing* (Online Directory) <http://arboriculture.org.au/listings.aspx>. Arboriculture Australia arborists are qualified to at least AQF Level 3 and are required to continually update their knowledge on the latest arboricultural techniques.
26 Consultation 8 (City of Boroondara). Practising arborists are able to undertake practical operations in tree care, for example to carry out tree pruning. Consulting arborists have the skills, experience and educational backgrounds to provide specialised arboricultural services, such as tree hazard and risk assessments: Arboriculture Australia, *Directory Listing* (Online Directory) <http://arboriculture.org.au/listings.aspx>.
27 Dispute Settlement Centre of Victoria, *Trees* (Web Page, 6 June 2019) <https://www.disputes.vic.gov.au/information-and-advice/trees-0>.
28 Consultation 10 (Baw Baw Shire Council).
29 Dispute Settlement Centre of Victoria, *Case study—Tree Dispute* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/information-and-advice/trees/case-study-tree-dispute>.
30 Dispute Settlement Centre of Victoria, *Mediation* (Web Page, 3 June 2019) <https://www.disputes.vic.gov.au/about-us/mediation-0>.
31 Victorian Civil and Administrative Tribunal, *Forms, Guides and Resources* (Web Page) <https://www.vcat.vic.gov.au/resources>.
32 Ibid.
33 Victorian Civil and Administrative Tribunal, *Steps to Resolve Your Case* (Web Page) <https://www.vcat.vic.gov.au/steps-to-resolve-your-case>.
34 Submissions 21 (Pointon Partners Lawyers); Consultation 3 (HVP Plantations).
35 Magistrates' Court of Victoria, *Fencing Disputes Information Guide* (9 January 2019) <https://mcv.vic.gov.au/news-and-resources/publications/fencing-disputes-information-guide>.
36 Ibid.

Other jurisdictions—community resources

12.29 Interstate jurisdictions that have enacted specific tree dispute Acts have produced a range of very helpful material to assist the community.

New South Wales

12.30 Community Justice Centres (CJCs) provide free mediation services and encourage parties to resolve their dispute before taking the matter to court. The Community Justice Centre website provides information about resolving neighbourhood disputes, including talking to your neighbour, asking a third party for help and contacting the CJC to arrange a mediation.[37] The website refers people to a NSW State Library-published guide to neighbours and the law which covers tree issues.[38]

12.31 The NSW Act is supported by a wide range of useful resources for the community. The Commission has been impressed by this information and found it particularly helpful in its preliminary research for this inquiry.

12.32 First, the NSWLEC maintains a comprehensive website dedicated to the resolution of neighbourhood tree disputes.[39] Helpful materials include:

- a detailed step-by-step Plain English guide to understanding the application of the NSW Act
- an annotated version of the NSW Act[40]
- tree dispute principles which guide the community on the interpretation of the Act[41]
- case studies
- a Practice Note
- court forms and fees.

12.33 The NSWLEC emphasised the usefulness of its step-by-step Plain English guide,[42] which explains the requirements and process at each stage of the Court proceedings, helping parties to be better prepared for their court appearances.[43]

12.34 The annotated version of the NSW Act available on the NSWLEC website outlines key cases to elaborate on sections of the NSW Act and explains how the law applies to particular fact scenarios. A 2009 review of the NSW Act undertaken by the NSW Department of Justice and Attorney General found:

> Generally, annotated legislation is published in textbook or looseleaf format, and is not available for free. It is highly unusual – if not unique – for a Court to have developed, published and maintained such a valuable resource, and made it available without charge.[44]

37 Department of Justice (NSW), *Neighbours* (Web Page, 5 June 2018) <http://www.cjc.justice.nsw.gov.au/Pages/cjc_whatis_mediation/com_justice_neighbours.aspx>.
38 Nadine Behan, *Neighbours and The Law* (LIAC, State Library of New South Wales, 2nd ed, 2017) <https://legalanswers.sl.nsw.gov.au/neighbours-and-law>.
39 Land and Environment Court of New South Wales, *Helpful Materials* (Web Page 22 November 2018) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/Trees-hedge-disputes-process/Treedisputes-helpfulmaterials/treedisputes_helpfulmaterial.aspx#Legislation>.
40 Land and Environment Court of New South Wales, *Annotated Trees (Disputes Between Neighbours) Act 2006* (14 January 2013) 24.
41 The NSWLEC website states that a tree dispute principle is 'a statement of a probable outcome from a chain of reasoning aimed at reaching a list of appropriate matters to be considered in making a decision concerning an application which has been made pursuant to s 7 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW)': Land and Environment Court of New South Wales, *Tree Dispute Principles* (Web Page, 25 September 2017) <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/tree_principles.aspx>.
42 Land and Environment Court of New South Wales, *Tree Disputes: Understanding the Law* (Information Sheet) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/trees_and_hedges.aspx>
43 Consultation 11 (Land and Environment Court of New South Wales).
44 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (Report, 2009) 12.

12.35 In a submission to that review, the Law Society of NSW commented:

> The level of information and assistance provided to applicants, tree owners and Local Councils contributes greatly to the Court being able to deliver a simple and low cost dispute resolution system.[45]

12.36 In terms of educating the community about the NSW Act, the NSWLEC has run seminars in conjunction with professional bodies, such as the Law Society of NSW.[46] Commissioners have also given speeches to tertiary institutions and professional arboricultural associations. A journal article was also published detailing the background and operation of the Act.[47]

Queensland

12.37 QCAT has a website dedicated to tree dispute hearings.[48] It has links to various resources, including:

- an information guide about the Queensland Act
- an application checklist
- a fact sheet on overhanging branches and debt recovery
- a list of frequently asked questions
- a list of tree professionals at the Queensland Arboricultural Association
- a tree order register
- a neighbourhood mediation kit
- tips on how to manage conflict.

12.38 The application checklist requires applicants to ensure upfront that their tree dispute falls within QCAT's jurisdiction. It also informs them about fees and provides links to relevant Tribunal forms.[49]

12.39 The neighbourhood mediation kit contains information about the mediation process at a Dispute Resolution Centre within Queensland and contains a workbook for individuals to fill out in preparation for mediation. The workbook helps people to organise their thoughts and think about how and what they may wish to say during the mediation.[50]

12.40 The tree order register enables individuals to search for a tree order made by QCAT, either by location or the name of the applicant or the respondent in the matter.[51] The register shows what land is affected by an order and includes who is responsible for carrying out the order and in what timeframe.[52]

12.41 QCAT has recently introduced a chatbot[53] on its website, known as SANDI. People can type in questions, or note issues such as 'overhanging branches' in a search box, and SANDI responds by providing information and links to the QCAT webpages and forms.[54]

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45 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)* (Report, 2009) 13.
46 Ibid.
47 The Hon Justice Brian J Preston and Commissioner Tim Moore, 'The Trees (Disputes Between Neighbours) Act 2006—Background and Operation' (2008) 14 Local Government Law Journal 84.
48 Queensland Civil and Administrative Tribunal, *Tree Disputes* (Web Page, 29 February 2019) <https://www.qcat.qld.gov.au/matter-types/tree-disputes>.
49 Queensland Civil and Administrative Tribunal, *Application Checklist: Tree Dispute Resolution* (Form, version 3, 3 March 2017) <http://www.qcat.qld.gov.au/matter-types/tree-disputes>.
50 Department of Justice and Attorney General (Qld), *Neighbourhood Mediation Kit* (19 May 2015) <https://publications.qld.gov.au/dataset/neighbourhood-mediation-kit/resource/050c6991-1e22-4933-b185-c92f770eb78a>.
51 Queensland Civil and Administrative Tribunal, *Tree Orders Register* (Database, 21 February 2019) <http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-orders-register>.
52 Ibid.
53 A Chatbot is a conversational agent that creates live conversational interaction between the chatbot and another user through voice commands or text: Joanna Goodman, 'Chatbot Pioneer Builds Free Tool for Law Firms' (17 October 2016) *The Law Society Gazette* (Online) <https://www.lawgazette.co.uk/news/chatbot-pioneer-builds-free-tool-for-law-firms/5058339.article>.
54 Queensland Civil and Administrative Tribunal, *QCAT Welcomes SANDI to the Team!* (Web Page, 12 February 2019) <https://www.qcat.qld.gov.au/about-qcat/sandi>.

12.42 QCAT told the Commission that the range of resources currently available to the community is working effectively to help people to resolve their disputes.[55]

12.43 The Queensland Government also has a webpage about resolving disputes about fences, trees and buildings.[56] It contains information about avoiding tree disputes, for example, by keeping on good terms with neighbours and putting some thought into appropriate planting. A step-by-step guide to resolving tree disputes provides information about mediation through dispute resolution bodies, and explains how tree disputes can be resolved at QCAT.

12.44 The Queensland Government website directs users to resources to resolve particular types of neighbourhood dispute, including problems with next-door-neighbours about trees.[57] This website aims to make services easier to find and use.[58]

12.45 The Queensland Government website has also introduced a chatbot, named MANDI, which provides information about common neighbourhood issues, including trees.[59]

Tasmania

12.46 A Practice Direction published by RMPAT in September 2018 is available on RMPAT's website.[60] It provides a guide to completing the application forms and information about the tribunal process.[61] A link is also provided to the Tasmanian Government Department of Justice website where there is a detailed overview of the Tasmanian Act and information about how to resolve tree disputes informally.[62]

12.47 A database containing details of orders and applications has been established by RMPAT. People can search the database by submitting an application and paying the prescribed fee.[63] Information in the database includes: the terms of the order, when it takes effect, when any work is to be carried out and by whom.[64]

Community responses—community resources

12.48 Chapter 2 canvassed community concerns about the lack of information and assistance available to help people resolve tree disputes in Victoria. DSCV highlighted that there is low awareness in the community about existing rights and obligations and that many people contact DSCV 'purely to enquire about their rights and obligations with regards to tree issues'.[65]

12.49 Specific suggestions from the community included:

- a dedicated website that promotes informal dispute resolution as a first step to resolving tree disputes[66]

55 Consultation 15 (Queensland Civil and Administrative Tribunal).
56 Queensland Government, *Ways to Approach Your Neighbour* (Web Page, 8 January 2019) <https://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings>.
57 Queensland Government, *How to Resolve Neighbourhood Disputes* (Web Page, 2 September 2015) <https://www.qld.gov.au/law/housing-and-neighbours/resolve-disputes>. This website was discussed as the key online tool for community members to use to resolve issues about trees: Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) 192.
58 Ibid.
59 Queensland Government, *Ways to Approach Your Neighbour* (Web Page, 8 January 2019) <https://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings>.
60 Resource Management and Planning Appeal Tribunal, *Practice Directions* (Web Page, 8 November 2018) <https://www.rmpat.tas.gov.au/practice_directions>.
61 Resource Management and Planning Appeal Tribunal, *Practice Direction No 18: Applications Under the Neighbourhood Disputes About Plants Act 2017* (Practice Document, 19 November 2018 <https://www.rmpat.tas.gov.au/>.
62 Department of Justice (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.
63 Resource Management and Planning Appeal Tribunal, *Neighbourhood Disputes About Plants Act 2017* (Web Page) <https://www.rmpat.tas.gov.au/neighbourhood-disputes-about-plants>. It costs individuals $23.70 to search the database pursuant to section 37(4) of the *Neighbourhood Disputes About Plants Act 2017* (Tas): Resource Management and Planning Appeal Tribunal, *Table of Fees* (effective from 1 July 2018) <https://www.rmpat.tas.gov.au/fees>.
64 Tasmania, *Parliamentary Debates, Legislative Council,* 22 June 2017 (Leonie Hiscutt).
65 Information provided by the Dispute Settlement Centre of Victoria as part of a data request from the Commission, August 2017 and clarification of data provided in May 2019.
66 Submission 4 (Name withheld); Consultation 8 (City of Boroondara); Survey Respondent 19.

- information about responsible tree planting, including types of species and suitable locations[67]
- information to help applicants fill out prescribed forms and navigate other processes under new laws[68]
- information about where to go for professional arboricultural advice[69]
- a tree order register or database.[70]

12.50 Pointon Partners emphasised that assisting the community to access relevant planning and local law controls would be of great assistance.[71] This view was echoed by Nillumbik Shire Council in relation to planning scheme provisions.[72]

12.51 The Commission met with some councils who provided information about ways to get information to the community. Nillumbik Shire Council and Baw Baw Shire Council suggested that they may be in a position to provide educational resources to support new laws.[73] The City of Port Phillip believed it could play a role recommending sensible tree planting guidelines to prevent tree disputes.[74]

12.52 Baw Baw Shire Council emphasised that planting guidelines about what people could plant in their backyards should complement new laws.[75]

12.53 Some arborists explained that they often educate neighbours about the law.[76] Arborists can help parties with tree disputes at multiple stages, from initially communicating with neighbours to providing expert evidence during the formal resolution of disputes. One arborist explained that he is usually called 'at the quoting stage' and can sometimes end up next door to talk to the other party about the tree, manage the dispute and effectively act as a mediator. The arborist estimated that he achieves good outcomes for both parties nine times out of ten.[77] It will be important that arborists understand the operation of the new Act, given their central role as information disseminators in the community.

12.54 Some arborists noted that contracts for sale of land should be required by law to contain information and guidelines about how to live with neighbours so that new owners understand their responsibilities about trees, fences, drainage, and other matters likely to be subject to neighbourhood disputes.[78]

The Commission's conclusions—community resources

A new tree disputes website

12.55 The Commission agrees with the community's views about the need for a website dedicated to the resolution of neighbourhood tree disputes. A website would ensure that information is widely available, including in regional areas.

12.56 The Commission recommends that this website be established and hosted by the Department of Justice and Community Safety. This department already hosts a helpful webpage about the Fences Act. Information about the new Neighbourhood Tree Disputes Act could be co-located with this.[79]

67 Submissions 1 (Ian Collier), 5 (Name withheld), 22 (Name withheld), 24 (Name withheld); Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 10 (Baw Baw Shire Council).
68 Submissions 19 (Name withheld), 20 (Name withheld); Survey Respondent 123.
69 Submissions 2 (Name withheld), 9 (Dr Karen Smith); Consultations 8 (City of Boroondara), 14 (Robert Mineo).
70 Consultation 9 (Nillumbik Shire Council).
71 Submission 21 (Pointon Partners Lawyers).
72 Consultation 9 (Nillumbik Shire Council).
73 Ibid, 10 (Baw Baw Shire Council).
74 Consultation 12 (City of Port Phillip).
75 Consultation 10 (Baw Baw Shire Council).
76 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
77 Ibid.
78 Ibid.
79 Department of Justice and Community Safety, *Fencing Law in Victoria* (Web Page, 31 January 2019) <https://www.justice.vic.gov.au/justice-system/laws-and-regulation/civil-law/fencing-law-in-victoria>.

12.57 The website should include the following key information:

- guidance on how to negotiate with your neighbour, including a sample standard letter which affected neighbours can use to communicate with the tree owner about a problem tree
- information about informal resolution options, including abatement
- detailed information on alternative dispute resolution (ADR) and a link to the DSCV website highlighting that DSCV provides a free service to the community outside of the VCAT hearing process
- guidance on engaging appropriately qualified arborists to help resolve tree disputes, with a link to the online directory maintained by Aboriculture Australia
- a step-by-step overview of the law
- information to help people decide whether they can commence proceedings under the new Act and how to go about doing this, with links to the VCAT webpage containing application forms and prescribed fees
- information about how to identify their local council, and the zone of the property.
- other laws (planning scheme overlays and local, environmental or heritage laws) that may apply to the problem tree and links to relevant government authorities such as the Department of Environment, Land, Water and Planning, Heritage Victoria and Aboriginal Victoria.

12.58 The Department of Environment, Land, Water and Planning has a website where property reports can be generated free of charge.[80] A 'Basic Property Report' identifies the relevant council, the planning zone, the application of any planning overlays, whether the area is of Aboriginal Cultural Heritage Sensitivity, and whether the property is in a designated bushfire prone area. There is also a downloadable PlanningVIC app for Apple and android phones.[81]

12.59 The recommended website could prompt people to ask their councils whether local tree protection laws apply to the land that the tree is situated on or the tree itself.

12.60 The recommended sample letter for communicating with neighbours could be similar in format to the letter published by Community Legal Centres Queensland, suggesting affected neighbours:

- identify themselves, their address and the problem tree (this may include a sketch plan showing the location of the tree)
- outline how the problem tree is affecting their land or property on their land
- ask the tree owner if they would be willing to set aside a time to discuss the issue to determine whether the issue can be resolved.[82]

12.61 Another useful guide for material to include in a standard letter is contained in the prescribed notice under section 22 of the Tasmanian Act. This notice can be used when a formal branch removal notice cannot be issued under the Tasmanian Act.[83] The Commission notes that this prescribed notice is more formal than that envisaged for the new Act but it asks for useful information such as how the plant affects the neighbour's land and what actions the affected neighbour would like the tree owner to take to resolve the issue.

80 Department of Environment, Water, Land and Planning (Vic), *Land.vic.gov.au* (Database, 2017) <https://services.land.vic.gov.au/landchannel/content/addressSearch>.

81 Department of Environment, Land, Water and Planning (Vic), *PlanningVIC: Planning Property Report Mobile App* (27 April 2018) <https://www.planning.vic.gov.au/schemes-and-amendments/get-information-about-your-planning-scheme/planningvic-planning-property-report-mobile-app>.

82 See, eg, Community Legal Centres Queensland, *Writing to Your Neighbour* (Letter Template) <https://www.qldneighbourhoods.com/writing-to-your-neighbour.html>.

83 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 22; see also *Department of Justice* (Tas), *Neighbourhood Disputes About Plants* (Web Page) <https://www.justice.tas.gov.au/mediation_and_dispute_resolution/neighbourhood-disputes-about-plants>.

Information provided by VCAT

12.62 The VCAT Practice Note for matters in the Planning and Environment List is helpful and outlines general procedures and timeframes for matters in that list.[84] The Commission considers that a more detailed guide, similar in format to the guide developed by the Magistrates' Court for fencing disputes, would greatly assist applicants in matters under the new Act.

12.63 A further consideration is making the reasoning behind tree dispute outcomes public. This would enable people to understand how and why tree disputes decisions have been made and help them to anticipate how their matters might be resolved. It would also give the community information about how the law applies.

12.64 It is VCAT's current practice to publish all written decisions on the Australian Legal Information Institute website (AustLII). VCAT also publishes high-profile decisions on its website.[85] Decisions that are handed down orally are not always published, but a party can request written reasons for final orders under section 117 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Currently, under clause 4J of schedule 1 to the VCAT Act, a request for written reasons in a small claim proceeding must be made before or at the time of the hearing. Under the Justice Legislation Amendment (Access to Justice) Act 2018 clause 4J will be repealed thereby allowing parties to request written reasons for decisions for small claims within 14 days of the hearing in accordance with s 117. This reform is expected to commence by 1 July 2019.[86] It was suggested that proposed changes could lead to fewer oral decisions being made at VCAT.[87]

12.65 The Commission has been informed that NSWLEC's an annotated version of the NSW Act is 'very helpful to community members' and it is of the view that such a resource would assist both informal and formal dispute resolution processes.[88] VCAT advised the Commission that it has prepared annotated Acts for Owners Corporations and Residential Tenancies legislation which are published by ANSTAT. ANSTAT then publishes and maintains the electronic versions of these Acts for VCAT. The Commission observes that free public access to an annotated Act is important. Any cost associated with its use may limit its usefulness to professionals.

12.66 In Chapter 8 it was recommended that VCAT develop a specific Practice Note about the need for a causal link between the tree and any harm that is the subject of an application. It was also recommended that VCAT's Practice Note about expert evidence be modified to include additional requirements for tree disputes. The Commission considers that information about the new Act on VCAT's website should include a link to the recommended Practice Note about establishing harm and to other relevant Practice Notes, including those about expert evidence[89] and ADR.[90] Reminding parties about VCAT's powers to refer parties to mediation and other ADR processes may encourage them to use community-based mediation before initiating an application.

84 Victorian Civil and Administrative Tribunal, *Practice Note PNPE1: Planning and Environment List General Procedures*, 31 December 2018 <https://www.vcat.vic.gov.au/resources/practice-note-pnpe1-planning-and-environment-list-general-procedures>.
85 Victorian Civil and Administrative Tribunal, *Decisions* (Web Page) <https://www.vcat.vic.gov.au/decisions>.
86 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
87 Ibid.
88 Consultation 11 (Land and Environment Court of New South Wales).
89 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT2: Expert Evidence, 1 October 2014*.
90 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT4: Alternative Dispute Resolution* (ADR), 19 December 2018.

Improving awareness of DSCV

12.67 DSCV receives a large number of enquiries about tree disputes.[91] However, the Commission was told that its services are not widely known to arborists[92] or some councils.[93] This should be addressed because arborists often act as intermediaries between disputing neighbours[94] and often play a pivotal role in helping to resolve disputes. It would therefore be beneficial for arborists to refer parties to DSCV.

12.68 DSCV undertakes community education workshops including sessions about the services offered by DSCV.[95] Arborists and councils should be targeted for such information sessions about the services offered by DSCV to assist with the resolution of neighbourhood tree disputes.

Local council resources

12.69 The Commission is cautious about recommending that councils take on additional responsibilities given that public land is outside the scope of the new Act. However, some councils have advised that they are often contacted for advice from residents about private disputes and are therefore in a good position to direct parties towards practical information that may prevent these disputes arising, or ensure that they are resolved swiftly.[96] The Commission's recommendations below are within the scope of activities that councils currently perform. The Commission also notes that a continuing role for councils is contemplated in the recommendations that consider the overlap between the new Act and existing local laws in Chapter 10.

Responsible planting

12.70 Supporting new laws with information about responsible planting would help prevent tree disputes occurring. This information should include guidance about what species would be sensible to plant and where to plant these in relation to neighbouring land. This information will encourage property owners to think more carefully about how particular plants grow and whether they are likely to drop fruit and leaves. It will also encourage people to think about the longterm consequences of planting particular species on their properties.

12.71 Councils should be encouraged to develop tree planting guidelines to disseminate to the local community. As noted earlier, some councils already do this. This information should be more broadly available across our communities. For neighbourhoods with little vegetation, guidance could simply consist of advice about which types of trees may not be suited to urban spaces or fence lines. Councils may also provide useful information about tree height relevant to the size of the land.[97]

More accessible information about local laws

12.72 Chapter 10 identified that it would be helpful for the community to have better access to information about the local laws that apply to trees in council areas and how these laws work. There is confusion in the community about how and when local laws may apply to trees on private land. This was also recognised as an issue in the review of the Queensland Act.[98]

91 Consultation 7 (Dispute Settlement Centre of Victoria). See Ch 2 for more information.
92 Consultation 4 (Participants at facilitated discussion at VITO ArborCamp 2018).
93 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018); 7 (Dispute Settlement Centre of Victoria).
94 Consultations 4 (Participants in facilitated discussion at VTIO ArborCamp2018), 6 (Ben Kenyon).
95 Dispute Settlement Centre of Victoria, *Community Engagement Workshops* (Web Page, 21 March 2019) <https://www.disputes.vic.gov.au/training-and-room-hire/community-engagement-workshops>.
96 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).
97 Consultation 12 (City of Port Phillip).
98 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) [3.126].

12.73 Councils with local tree protection laws should ensure there is publicly accessible information about these laws on council websites. This information, even when available on websites, is often hard to find. The City of Port Phillip has published a factsheet about local tree protection laws. This is a good example of the information that should be more widely available.[99]

Guidance about hiring an arborist

12.74 The Commission was told that councils regularly employ arborists to protect, maintain and plant new trees on public land.[100] Councils are well placed to give local residents information about what to look for in an arborist; how arborists can help with disputes; and arborists' qualification levels. Some councils already provide good information and this could be supplemented with a link to Arboriculture Australia that could provide easily accessible information about qualification levels.

Further community education

12.75 The proposed Act will not only impact the parties to a dispute but also professional bodies, in particular arborists. For example, the new Act will modify abatement and outline decision-making principles to guide the resolution of tree disputes in VCAT and include requirements for expert evidence. Given that arborists are often involved early on in tree disputes, it is vital that they have access to information about the operation of the new Act.

12.76 To that end the Commission is of the view that educational sessions should occur for arboricultural groups, councils, DSCV and other interested organisation or bodies that are likely to be involved in, or contacted for information about, the new Act.

Recommendations

57 A website should be established by the Department of Justice and Community Safety which would provide:

(a) guidance on how to negotiate with your neighbour, including a sample standard letter that affected neighbours can use to communicate with the tree owner about a problem tree

(b) information about informal dispute resolution mechanisms

(c) detailed information on alternative dispute resolution and a link to the Dispute Settlement Centre of Victoria website

(d) guidance on engaging appropriately qualified arborists

(e) a step-by-step overview of the Act

(f) information on how to commence proceedings

(g) guidance about how to seek information about other laws that may apply from government authorities and local councils.

99 See, eg, City of Port Phillip, *City Permits—Fact Sheet Significant Tree Permits* (29 November 2017) <http://www.portphillip.vic.gov.au/significant-tree-permit.htm>.

100 Consultations 8 (City of Boroondara), 9 (Nillumbik Shire Council), 10 (Baw Baw Shire Council), 12 (City of Port Phillip).

Recommendations

58 The Victorian Civil and Administrative Tribunal should provide supporting information for parties about the operation of the Act and Tribunal processes. Resources could include:

(a) a detailed information guide, similar in format to the guide developed by the Magistrates' Court for fencing disputes

(b) information about key decisions made under the Act

(c) an annotated version of the Act outlining how the Tribunal has interpreted particular provisions and highlighting key cases

(d) a link to the Dispute Settlement Centre of Victoria website

(e) key Practice Notes relevant to tree disputes, for example, about the provision of expert evidence and alternative dispute resolution.

59 The services of the Dispute Settlement Centre of Victoria should be promoted more broadly. Community engagement workshops could be conducted for the arboricultural industry and other interested organisations and professional bodies.

60 Local councils should continue to provide resources to the community relevant to tree disputes. These resources could include:

(a) tree planting guidelines suited to local areas

(b) fact sheets on the application of local tree protection laws

(c) information about engaging appropriately qualified arborists.

61 The arboricultural industry should provide information to the community about how people can identify and engage appropriately qualified arborists.

13

Other matters and conclusions

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13. Other matters and conclusions

Introduction

13.1 This chapter looks at a range of final issues. It examines online dispute resolution (ODR) and how it could be used to aid the resolution of tree disputes. It also considers community suggestions for reform that were different to those raised for discussion in the consultation paper.

13.2 Some issues that were raised in responses but are outside the Commission's terms of reference for this inquiry are also identified. These issues are likely to require consideration if the new Act is implemented. Preliminary views on these issues are provided.

13.3 The chapter concludes with a recommendation for review of the new Act after it has been operational for five years to ensure that it is meeting its objectives.

Online dispute resolution

13.4 ODR is a general term, describing a range of technology-assisted forms of dispute resolution. The styles of ODR are outlined in the *Access to Justice* Review:

> Online dispute resolution techniques range from methods where parties have full control of the procedure, such as in an online negotiation, to methods where a neutral third party is in control of both the process and the outcome, such as online arbitration. In online dispute resolution, the information management role is often carried out not by physical persons, but by computers and software.[1]

13.5 There is no one format of ODR. It makes use of a range of tools in combination with traditional legal dispute resolution tools.[2] The Victorian Civil and Administrative Tribunal's (VCAT) Residential Tenancies Hub enables tenants and landlords with a renting dispute to use an online system to apply to have their matter heard in VCAT. Registered users are able to pay their application fee online, receive their hearing date, and even create notices relating to requests for housing repairs or ending the tenancy.[3] In other online platforms, for example in Canada, agreements reached via the use of ODR tools can be converted into formal orders or transferred to a court/tribunal hearing when they cannot be resolved.[4]

13.6 ODR is generally used for smaller, simpler disputes, which can be 'triaged' with threshold questions, and potentially resolved using good quality information and tools. Some of the benefits of ODR methods may include:

1 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 272; see also Pablo Cortes, 'Online Dispute Resolution Services: A Selected Number of Case Studies' (2014) 6 *Computer and Telecommunications Law Review* 172.

2 See, eg, Nussen Ainsworth and Meghann Clark, 'Technology in Mediation' (1 April 2016), 90(4) *Law Institute Journal 38–40* <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/April-2016/Technology-in-mediation>.

3 Victorian Civil and Administrative Tribunal, *Online Tool to Help Tenants and Landlords at VCAT* (Web Page, 17 November 2015) <https://www.vcat.vic.gov.au/news/online-tool-to-help-tenants-and-landlords-at-vcat>.

4 See, eg, Civil Resolution Tribunal, *How the Dispute Resolution Process Ends* (Web Page, 2019) <https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-the-decision>.

- Accessibility. People in non-metro areas, or without access to a physical court or tribunal may find it easier to interact with online tools and processes. ODR tools may also be available around the clock, meaning that parties need not be in the same place at the same time to participate in resolving their dispute.
- Physical separation of parties. In some cases, being in a room together can exacerbate the problem. In ODR, there is no need to meet or speak with the other party.
- Lower cost. The cost to the user (parties) is generally much lower than in traditional adjudication processes. The successful resolution of matters with ODR prior to hearing may also represent significant savings in costs.
- Ease of use. Assuming a certain level of technological literacy, ODR systems are generally simple and user-friendly.
- Secure and documented communications. Conducting negotiations online provides better opportunities to accurately record and document each stage of the process.[5]

Other jurisdictions and pilot programs

13.7 An ODR pilot program was conducted in the NSW Civil and Administrative Tribunal (NCAT) in 2014. The pilot focused on selected, single-issue consumer disputes under the value of $5000.[6] Analysis of the uptake of matters included in the pilot showed an increase in finalisations before hearing, an increase in resolutions at hearing, a reduction of adjournments at hearing, and an overall projected saving of 12 hearing days per month.[7]

13.8 ODR is currently in use in Victoria for resolving some Worksafe disputes.[8] For example, the Accident Compensation Conciliation Service[9] (ACCS) acts as a first step online conciliator for injured workers and their employers to resolve disputes.[10] The ACCS uses ODR to 'encourage workers and employers participation where those participants would otherwise not be able to be involved in the conference'.[11] ODR is generally seen to supplement rather than replace face-to-face conferencing.[12]

13.9 In 2017, following the *Access to Justice* Review, the Victorian Government pledged nearly $800,000 to establish an online dispute resolution pilot led by the Department of Justice and Regulation Victoria and a $1.98 million investment to help the courts improve their websites.[13] The aim of the pilot program was to gauge the suitability of the broader introduction of ODR in Victoria.[14] The review also recommended the establishment of an online dispute resolution advisory panel.

13.10 VCAT has recently concluded its ODR pilot for small civil claims.[15] The pilot ran for four weeks from September 2018 and tested whether ODR was suitable for people involved in disputes about goods and services under $10,000.[16] VCAT heard 65 cases using ODR technology, with 71 parties participating in online hearings. A total of 21 cases

5 See generally Michael Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27(4) *Australasian Dispute Resolution Journal* 227–35; see also National Alternative Dispute Resolution Advisory Council, *On-line ADR Background Paper* (January 2001) <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx>.
6 NSW Civil and Administrative Tribunal, *Annual Report 2014–2015* (Report, 2015) 79.
7 Louise Clegg, 'Achieving Efficiency—NCAT Online Dispute Resolution Pilot' (Speech, COAT National Conference, 4–5 June 2015) <https://coat.asn.au/events/2015-coat-national-conference/>.
8 Accident Compensation Conciliation Service, *Online Dispute Resolution* (Web Page, 2013) <https://www.conciliation.vic.gov.au/conciliation-process/conferences/online-dispute-resolution>.
9 The ACCS is an independent statutory body corporate established under section 52A of the *Accident Compensation Act 1985* and continues in force under section 519 of the *Workplace Injury Rehabilitation and Compensation Act 2013* to provide conciliation services for worker's compensation disputes in Victoria.
10 Accident Compensation Conciliation Service, *Guide to Conciliation—Video* (Web Page, 2013) <https://www.conciliation.vic.gov.au/about-us/preparing-for-conciliation>.
11 Accident Compensation Conciliation Service, *Online Dispute Resolution* (Web Page, 2013) <https://www.conciliation.vic.gov.au/conciliation-process/conferences/online-dispute-resolution>.
12 Ibid.
13 Now the Department of Justice and Community Safety. Victorian Civil and Administrative Tribunal, *Access to Justice Funding to Enhance Services* (Web Page, 24 May 2017) <https://www.vcat.vic.gov.au/news/access-to-justice-funding-to-enhance-services>.
14 Department of Justice and Regulation (Vic), *Access to Justice Review Report and Recommendations* (2016) vol 1, 277.
15 The pilot was funded by the then Department of Justice and Regulation and delivered on a recommendation from the Access to Justice Review.
16 Information provided by VCAT to the Commission, 26 March 2019.

settled beforehand, demonstrating the 'indirect result of online dispute resolution case management'.[17] The ODR pilot shows 'exciting potential benefits' for the Victorian community.[18]

13.11 VCAT explained that ODR requires VCAT members or the Registry to administer the process behind the online platform to ensure parties progress through the system. VCAT notes that establishing ODR at the Tribunal would require significant resourcing.[19]

13.12 One of the most successful examples of ODR is the Civil Resolution Tribunal (CRT) in British Columbia, Canada, which deals with matters including debts, personal property disputes, strata title disputes, and some personal injury disputes.[20] The CRT uses a cumulative model of ODR, offering different levels of support if disputes cannot be resolved.[21] This program has been successful because of the user-friendly nature of CRT's online services and the professionalism of CRT staff to assist with dispute resolution.

Community responses—online dispute resolution

13.13 The consultation paper asked the community whether an online dispute resolution platform dedicated to neighbourhood tree disputes should be introduced in Victoria. If so, community members were asked to comment on what tools should be made available on this platform and who should administer it.

13.14 A large number of responses were received on this issue, with most people supportive of introducing an ODR platform in Victoria to help resolve neighbourhood tree disputes.[22] Some community members questioned whether ODR platforms would have the capacity to adjudicate disputes in the same way as faceto-face dispute resolution forums.[23]

13.15 Overall, community members suggested that the platform should be administered through councils,[24] VCAT[25] or DSCV.[26] One community member suggested that 'tools should include a facility to present photographs of troublesome trees'.[27]

13.16 DSCV has also been considering how the use of ODR could increase accessibility and efficiency for some types of dispute.[28]

The Commission's conclusions—online dispute resolution

13.17 The Commission is generally supportive of the use of ODR to help resolve neighbourhood tree disputes. ODR is likely to provide parties with greater flexibility about how they participate in negotiations, provide targeted advice about resolution options and establish a seamless way of communicating formally with the Tribunal. ODR may also improve regional access to VCAT processes. ODR may also assist VCAT to deliver affordable and efficient justice and to make the most efficient use of its resources. To this end, Justice Michelle Quigley, VCAT President, is 'determined to champion the online revolution that

17 Ibid.
18 Ibid.
19 Supplementary Consultation 1 (Victorian Civil and Administrative Tribunal).
20 Civil Resolution Tribunal, *What Kinds of Disputes Can the CRT Help With?* (Web Page, 2019) <https://civilresolutionbc.ca/resources/crt-jurisdiction/#what-types-of-disputes-cant-be-taken-to-the-crt>; see also Civil Resolution Tribunal, *Participant Satisfaction Survey—January 2019* <https://civilresolutionbc.ca/participant-satisfaction-survey-january-2019/>.
21 The CRT process can be divided into four main stages: 1) Solution Explorer: self-help tools to help parties understand their rights and obligations and to explore solutions before hearing; 2) Negotiations: tools and guidance for party-to-party negotiations; 3) Case management: a CRT case manager facilitates negotiation between the parties. Agreements can then be referred to a Tribunal member to be converted into a binding order of the CRT; 4) Adjudication: if a matter has not resolved it can be transferred to hearing (usually on the papers) by a tribunal member with relevant specialist expertise: See Civil Resolution Tribunal, *How the CRT Works* (Web Page, 2019) <https://civilresolutionbc.ca/how-the-crt-works/>.
22 Submissions 4 (Name withheld), 5 (Name withheld), 9 (Dr Karen Smith), 11 (Name withheld), 19 (Name withheld), 21 (Pointon Partners Lawyers), 23 (Name withheld), 27 (Name withheld).
23 Submissions 6 (Name withheld), 20 (Name withheld).
24 Submission 4 (Name withheld).
25 Submission 23 (Name withheld).
26 Submissions 11 (Name withheld), 23 (Name withheld).
27 Submission 19 (Name withheld).
28 Information provided by DSCV as part of a data request from the Commission, November 2018 and clarification of data provided in May 2019.

has started at the tribunal'.[29] ODR tools could make use of the new website and public information sources recommended in Chapter 12.

13.18 While ODR provides some clear benefits for tree disputes, it may not be appropriate for all cases or for all steps in the VCAT adjudication process. The remote nature of the ODR hearing process and the distance this creates between the parties will be helpful in emotive disputes. However, some disputes will be better suited to face-to-face resolution. Face-to-face negotiation may encourage parties to negotiate a solution that they can all 'live with' because of the proximity of neighbours and their ongoing relationship. This is important.

13.19 Chapter 7 identified the important role that on-site final hearings play in the resolution of tree disputes in New South Wales and in the success of the NSW scheme. The Commission has heard that physically viewing the tree and the problem in context greatly assists the court to deliver practical and robust solutions to the problem. It was recommended that VCAT conduct on-site final hearings for tree disputes or on-site inspections modelled on the Queensland approach. End-to-end ODR may be better suited to less hostile and less complex tree disputes. In other cases it will be important that on-site hearings or inspections are able to feed into any future ODR framework for tree disputes.

Other options for law reform

13.20 The community was invited to propose alternative options for reform to those proposed by the Commission in the consultation paper. Ideas were received about:

- addressing problems with local laws and increasing councils' role in the management of vegetation on private land[30]
- the creation of binding obligations about significant trees that run with the land[31]
- valuing trees to recognise them as community assets[32] and providing rate deductions to property owners to compensate them for tree-related maintenance expenses.[33]

13.21 The Commission acknowledges the contribution of those who submitted alternative options for reform. Each of them gave thoughtful consideration to how neighbourhood tree disputes may be resolved in simpler, clearer and fairer ways.

Improving local laws and a greater role for councils

13.22 Several reform ideas were proposed about improving the operation of local tree protection laws by:

- increasing penalties for damage or harm caused to trees in breach of local tree protection laws[34]
- enabling applicants to appeal decisions made under local laws to an external body (that is, independent of the responsible authority administering the local law).[35]

13.23 Chapter 10 makes recommendations about how the new Act should interact with local law permit requirements. The Commission concludes that the new Act should limit the operation of local laws subject to safeguards designed to mirror processes contained in local laws. It is outside the scope of the current inquiry to review and make recommendations about the broader utility of local laws.

29 Victorian Civil and Administrative Tribunal, *Annual Report 2017–2018* (Report, 2018).
30 Submissions 5 (Name withheld), 6 (Name withheld), 17 (Name withheld), 37 (Ian Hundley), 38 (L. Barry Wollmer); Survey Respondents 3, 19, 57, 83, 88, 108, 110, 118.
31 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
32 Submission 12 (Dr Gregory Moore OAM); Consultation 6 (Ben Kenyon); Survey Respondents 2, 13, 55, 89.
33 Submission 12 (Dr Gregory Moore OAM).
34 Submission 37 (Ian Hundley).
35 Submission 17 (Name withheld); Survey Respondents 83, 108.

13.24 The Commission acknowledges the concerns raised by community members about not having any external right of review under local laws. An internal review process may be available to applicants who are aggrieved by the initial decision made by council. For example, the City of Boroondara advised 'it is not uncommon for appeals to result in different outcomes to the original decision, especially in cases where the applicant has provided more comprehensive evidence'.[36]

13.25 The Commission observes that penalties imposed under local laws have remained the same since 1991 and as a consequence are likely to be inadequate as a deterrent.[37] The *Local Government Act 1989* (Vic) has recently undergone an extensive review process, including consideration of the value of penalty units under local laws, with Local Government Victoria finding 'there are grounds for considering indexation of penalty units if breaches of local laws are to be rigorously enforced'.[38] This was reflected in the Local Government Bill 2018, now lapsed, which put forward consequential amendments to the *Sentencing Act 1991* (Vic).[39] These amendments would have dispensed with the fixed penalty amount of $100 in favour of annual determinations to be made by the Treasurer under the *Monetary Units Act 2004* (Vic). However, the Bill has now lapsed and the *Local Government Act 1989* (Vic) continues to form the basis of the legal framework for Victorian councils.

13.26 The Commission has been informed that the application of local tree protection laws adds complexity to the resolution of tree disputes and it is not always clear how these laws apply.[40] Chapter 12 recommends that councils provide clear and accessible information about local laws applying to vegetation on private land in council areas. This should include information about how these laws operate.

13.27 Another reform proposal was the introduction of council-approved tree contractors to help residents to understand council vegetation policies and objectives and to help them to manage vegetation on private land.[41] The Commission is cautious about recommending that councils take on additional responsibilities when the new Act will not apply to public land. The Commission is aware, however, that Whitehorse City Council, as an example, has a Tree Education Program to raise awareness of the benefits of trees in an urban environment and to educate the community about trees.[42] The Commission is supportive of such programs but is also mindful of resourcing limitations. Recommendations in Chapter 12 encourage local councils to develop tree planting guidelines to disseminate to residents to help to avoid tree disputes arising.

Greater recognition of the benefits of trees

13.28 In Chapter 2 the Commission identified that the community is becoming increasingly aware of the importance of vegetation and the need to retain it. Another source outlining the benefits of trees to the community can be found in the thesis of Andrew Simpson.[43]

36 Consultation 8 (City of Boroondara).
37 Submission 37 (Ian Hundley). They are governed by both the *Sentencing Act 1991* (Vic) and the *Local Government Act 1989* (Vic). Penalty units for local laws have been capped at $100 per unit since 1991 (*Sentencing Act 1991* (Vic) s 110(2)). The maximum penalty under a local law is 20 penalty units ($2000): *Local Government Act 1989* (Vic) s 115. The Commission also understand that councils can elect to prosecute an offence under local law in the Magistrates' Court; this is an infringement offence within the meaning of the *Infringements Act 2006* (Vic): *Local Government Act 1989* (Vic) s 117(1A).
38 See, eg, Department of Environment, Land, Water and Planning (Vic), *Act for The Future: Directions for a New Local Government Act* (Paper, 2016) <https://www.localgovernment.vic.gov.au/council-governance/local-government-act-review>. Local Government Victoria, part of the Department of Environment, Land, Water and Planning (Vic), has carried out a comprehensive review of the *Local Government Act 1989* (Vic), with contributions from councils and the community. The review resulted in the Local Government Bill 2018 being introduced into Parliament on 23 May 2018. However, the Bill has now lapsed and the *Local Government Act 1989* (Vic) continues to form the basis of the legal framework for Victorian councils.
39 Explanatory Memorandum, Local Government Bill 2018 (Vic) cl 74 sch 1 item 92.
40 Survey Respondents 3, 19, 57, 83, 88, 110.
41 Confidential submission.
42 City of Whitehorse, *Whitehorse Tree Education Program* (Web Page) <http://www.whitehorse.vic.gov.au/Tree-Education-Program.html>.
43 Andrew Simpson, 'Alternate Dispute Resolution for Neighbour Tree Conflicts and the Role of Local Government' (Masters Thesis, University of Technology Sydney, 2018).

13.29 Another reform idea was to legally recognise the significance of trees in a way that runs with the land to bind future owners. It was also emphasised that there needs to be a more holistic approach to resolving tree disputes where the law and aboriculture work together to protect significant trees that may live through multiple owners.[44]

13.30 The current law provides some scope for trees to be regulated into the future through section 173 Agreements, Trust for Nature covenants or land management agreements under section 69 of the *Conservation, Forests and Land Act 1984* (Vic).[45] These are discussed in Chapter 10. Recommendations to bind future purchasers of land to the legal outcomes of tree dispute hearings subject to certain safeguards are discussed in Chapter 11. The aim is to provide certainty about the management of trees that cause damage or are likely to cause damage or harm.

13.31 Some community members suggested that a new Act should provide more protection for trees by recognising trees as community assets.[46] One survey respondent stated 'trees are an essential part of the urban environment and their value is underestimated in most cases'.[47] Another community member informed the Commission that there should be an industry-accepted standard to place a monetary value on trees.[48] Arborist Ben Kenyon noted that:

> because trees are not viewed as assets, many people believe they can deal with them however they like and view their protection as cumbersome or unnecessary.[49]

13.32 In addition to the environmental and amenity benefits of trees, the Commission has learnt that there are numerous tree valuation methodologies based on amenity that are used worldwide.[50] For example, Dr Gregory Moore OAM advised that in Germany the Koch method of calculating the monetary value of ornamental trees is a common and universally recognised method.[51] Dr Moore commented that this simplifies the process, reduces the elements in dispute and lowers costs.[52] Applying a dollar amount to trees can discourage interference with trees of high retention value while enabling tree works to be undertaken on trees of low retention value.[53]

13.33 However, there is no consensus on a standard method to assess the monetary value of trees within Australia.[54] Therefore, the Commission does not recommend placing a monetary amount on trees as part of the decision-making process under the new Act. This approach is reflected in the explanatory notes preceding the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld):

> No financial value or carbon trading value may be placed on a tree. The process for valuing trees in the urban environment is unsettled and subject to varied and controversial valuing methods. This clause ensures that the object of the Bill, to provide a statutory remedy for a nuisance caused by trees growing in the neighbourhood, is not affected or frustrated by unsettled methods of calculating the monetary value of trees for natural asset purposes or carbon trading.[55]

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44 Consultation 4 (Participants in facilitated discussion at VTIO ArborCamp2018).
45 See *Planning and Environment Act 1987* (Vic) s 173; *Victorian Conservation Trust Act 1972* (Vic) s 3A; *Conservation, Forests and Lands Act 1969* (Vic). These Acts are discussed in Ch 10.
46 Submission 12 (Dr Gregory Moore OAM); Consultation 6 (Ben Kenyon); Survey Respondents 2, 13, 55, 89.
47 Survey Respondent 2.
48 Survey Respondent 55.
49 Consultation 6 (Ben Kenyon).
50 See, eg, Gary Watson, 'Comparing Formula Methods of Tree Appraisal' (2002) 28(1) *Journal of Aboriculture* 14.
51 Submission 12 (Dr Gregory Moore OAM). The Koch method is often employed in cases of 'destruction, damage or expropriation' of trees and is 'based on interest paid on costs invested in woody plants growing up to their maturity stage minus deductions for age, defects and damage incurred prior to the determining event: P. Bulí, 'Testing of Koch Method Applied For Evaluation of Ornamental Trees in The Czech Republic' (2009) 36(4) *Horticultural Science* (Prague) 154–61, 154.
52 Submission 12 (Dr Gregory Moore OAM).
53 Ibid.
54 Submission 12 (Dr Gregory Moore OAM). Different methods will produce varying results, and different practitioners applying the same method will also produce varying results: Gary Watson, 'Comparing Formula Methods of Tree Appraisal' (2002) 28(1) *Journal of Aboriculture* 14.
55 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) cl 73.

13.34 Dr Gregory Moore OAM also suggested a scheme to offer rate remissions or tax deductions for tree-related expenses to ensure that owners were more invested in the management and maintenance of trees and in recognition of the benefit that trees provide to the community. Dr Moore explained:

> There is an issue that trees provide community benefits to all, but costs are borne by the owner of the tree. If the community benefits are of such significance then there needs to be some community contribution to costs. While subsidies or grants are often suggested, I tend to prefer some sort of concession over the longer term such as a remission in rates or tax deductibility for tree related expenses. This would allow proper maintenance of the tree over the longer term of its lifespan and give the owner a greater stake in its proper management. In short the tree becomes recognised as the asset that it is.[56]

13.35 The Commission acknowledges Dr Moore's suggestion but notes that it is beyond the scope of the review to report more broadly about the protection of vegetation in our communities. These broader considerations are included in planning schemes in the Victorian community and environmental protection legislation at the state and Commonwealth level.[57]

13.36 Chapter 8 recommends that VCAT consider the broader benefits of the tree, including its historical, cultural, social or scientific value, as well as the value of the tree as a benefit to the community when determining a private tree dispute. Other recommendations aim to ensure that VCAT decisions are underpinned by evidence-based decision-making that draws on the experience of arborists.

13.37 The Commission observes that councils are increasingly leading the way with modern and evolving urban forest policies. For example, the City of Greater Bendigo has a significant tree register and an Urban Tree Management Policy that states 'the protection of existing trees and enhancement of Bendigo's urban forest is pivotal to … realising its vision: 'Greater Bendigo – creating the world's most liveable community'.[58] The City of Stonnington has developed an Urban Forest Strategy 2017–2022 to 'help enable the protection and enhancement of the urban forest in the face of many challenges that affect urban trees'.[59]

13.38 The City of Ballarat has adopted an Exceptional Tree Register that lists trees on public and private land within the municipality because these trees are 'an important and integral community and heritage asset to Ballarat'.[60] Moreover, South Gippsland Shire Council has a Tree Management Plan in recognition of the fact that 'trees are a significant asset that are of high value to the community and contribute greatly to the amenity of built environments within the Shire'.[61]

13.39 HVP Plantations suggested that where rural land is subdivided so that a remaining rural land holder has many new neighbours and potentially new obligations to maintain trees on boundary lines and associated costs 'it would be just for a rural landowner to be able to claim compensation from a developer for the imposition of these costs as a lump sum at the time of subdivision'.[62] This is a matter that is outside the scope of this inquiry and could be considered when the Act is reviewed as recommended later in this Chapter.

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56 Submission 12 (Dr Gregory Moore OAM).

57 See, eg, *Planning and Environment Act 1987* (Vic); *Victorian Conservation Trust Act 1972* (Vic) s 3B; *Conservation, Forests and Lands Act 1987* (Vic); *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Commission notes that if the preservation of land subject to a conservation covenant is not economically feasible and preservation is thereby endangered, the Minister may remit the whole or any part of the tax payable by the owner under the *Land Tax Act 1958* (Vic) that is attributable to the land concerned: *Victorian Conservation Trust Act 1972* (Vic) s 3B.

58 City of Greater Bendigo, *Urban Tree Management Policy* (16 August 2017) 4; see also City of Melbourne, *Urban Forest Strategy—Making a Great City Greener 2012–2032* <https://www.melbourne.vic.gov.au/community/parks-open-spaces/urban-forest/Pages/urban-forest-strategy.aspx>.

59 City of Stonnington, *Urban Forest Strategy 2017–2022* (June 2017) 4 <https://www.stonnington.vic.gov.au/Live/Urban-Forest/Urban-Forest-Strategy>.

60 City of Ballarat, 'Exceptional Tree Register', *Tree Management* (Web Page, 2019) <http://www.ballarat.vic.gov.au/city/parks-and-outdoors/tree-management>.

61 South Gippsland Shire Council, *Tree Management Plan 2017* (26 July 2017) 4.

62 Submission 28 (HVP Plantations).

Issues beyond the scope of this inquiry

13.40 In performing its functions in relation to this inquiry, the Commission has not considered other matters that have been identified by members of the community including:

- trees located on public land[63] (for example, trees on a nature strip or reserve);
- trees blocking access to sunlight and views (including high hedges)
- the illegal removal of vegetation.

13.41 These issues are beyond the scope of the Terms of Reference that govern this inquiry. Nonetheless, preliminary views on these issues are provided because they will be important considerations if the new Act is implemented.

Trees on public land

13.42 Disputes involving trees on public land are beyond the scope of this inquiry.

13.43 Disputes about trees on public land trigger a separate resolution process.[64] For example, councils have a duty of care to all members of the public on land vested in or owned by them. Councils can therefore be found liable under the common law if a tree causes damage to property or injury to persons on land owned or managed by council.[65]

13.44 The NSW Act does not apply to any land that is vested in, or managed by, a council.[66] The Department of Justice and Attorney General review of the NSW Act did not recommend an expansion on the Act to cover disputes about trees on council land. This conclusion was reached because 'of the significant resource and risk-management implications of such a change' and 'the fact that Councils (unlike private landholders) employ professional tree management staff and already have procedures in place to respond to concerns about trees'.[67]

13.45 Similar to New South Wales, neither the Queensland nor Tasmanian Acts captures trees situated on council-managed land. In the statutory review of the Queensland Act, the Queensland Law Reform Commission (QLRC) recommended that the Act not be extended to encompass trees on land controlled by the state and local governments. It expressed concern about the significant impact on local government if it became responsible for all trees adjoining and overhanging the boundaries of all the land under its control.[68] Similarly, the Tasmanian scheme excludes land that is owned or managed by a council and is used as a public park or garden, or a reserve or public open space or for the purposes of conservation.[69]

13.46 The Municipal Association of Victoria considered it 'important that trees on public land not be included' in this inquiry because it could impede the responsibilities of councils in relation their responsibilities under other Acts.[70]

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63 Public land is not defined in the Victoria Planning Provisions or the *Planning and Environment Act 1987* (Vic), but it is commonly accepted that public land comprises: Crown land; land vested in or owned by a Minister, government department, public authority or municipal council; land otherwise used for a public purpose: Department of Environment, Land, Water and Planning (Vic), *A Practitioner's Guide to Victorian Planning Schemes* (Version 1.1, October 2018) 31–3; See also Department of Environment, *Land, Water and Planning* (Vic), Planning Practice Note 2: Public Land Zones (Practice Document, January 2018) <https://www.planning.vic.gov.au/resource-library/planning-practice-notes>.

64 For, eg, the role of local councils in tree management is particularly complicated. Their obligations in a particular case will be affected in part by where the tree is located—for example on a road, council property and Crown land—and which laws apply in each case, whether it be the *Local Government Act 1989* (Vic), the *Crown Land (Reserves) Act 1978* (Vic) , the *Road Management Act 2004* (Vic), the *Country Fire Authority Act 1958* (Vic) (where an emergency has occurred) and/or the common law duty of care: Department of Environment, Land, Water and Planning (Vic) *Review of the Local Government Act* (Discussion Paper, 2015) 113.

65 See, eg, *Timbs v Shoalhaven City Council* (2004) 132 LGERA 397—this case illustrates how death may be caused by falling trees, although it is not a neighbourhood dispute as defined by the terms of reference of this inquiry. In this case, a subject tree protected by council fell on the tree owner's own land, killing him in the process. See also Coroners Court of New South Wales, *Finding into Death with Inquest of Bridget Wright* (2014/56521) (20 November 2015) and Coroners Court of Victoria, *Finding into Death with Inquest of Patiya May Schreiber*, (2013/6032) (10 September 2015), where the deceased persons were each killed by a falling branch.

66 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(2)(a).

67 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 3.

68 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) 77–8.

69 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 9(a).

70 See, eg, *Road Management Act 2004* (Vic); Submission 32 (Municipal Association of Victoria).

13.47 Although there are many trees on public land that may potentially cause damage or harm, the Commission is of the view that it would place an undue administrative and cost burden on local councils to incorporate public land into the new Act. The Commission is mindful of the QLRC's comments that there is confusion in the Queensland community about whether the Queensland Act applies to public land or not and the QLRC's recommendation that this should be remedied by including a provision in the Queensland Act that states that it does not apply to public land.[71] This approach may also be helpful for the new Act.

Access to sunlight and views

13.48 Some community members suggested that a new Act should consider trees that block access to sunlight and views.[72] One submission and two survey respondents specifically addressed the issue of trees blocking sunlight to solar panels.[73] One submission raised the issue of cypress hedges blocking sunlight.[74] Another survey respondent pointed out that there was no legislation to govern disputes about high hedges and recommended legislative reform in this area.[75]

13.49 Trees blocking access to sunlight and views are covered in different ways under the interstate statutory schemes discussed throughout this report. Jurisdictions in the United Kingdom[76] and New Zealand[77] also have legislation in place to resolve disputes about high hedges.

13.50 The NSW Act allows an affected neighbour to bring legal action in relation to high hedges that severely obstruct sunlight or views.[78] The Act is concerned with the obstruction of sunlight to a window of a dwelling and the obstruction of views from a dwelling. The NSW scheme was expanded to allow the NSWLEC to make orders to interfere with trees on the sole ground of access to light and view following statutory review of the Act in 2009 by the NSW Department of Justice and Attorney General.[79] It concluded:

> the most frequent and most serious concerns raised in submissions to the review related to high, dense hedges on immediately adjoining private properties, where the hedge is wall-like, and severely obstructs solar access to, or views from, a dwelling.
>
> It appears feasible to create a strictly limited avenue in the Land and Environment Court for seeking orders in relation to such hedges. This would be consistent with the accepted practice of regulating the height of fences and other built barriers between neighbours.[80]

13.51 The 2009 review by the NSW Act noted that it was not appropriate for views or solar access to override privacy and other concerns of the hedge-owner, or the broader community benefits of maintaining the hedge.[81] It follows that the NSWLEC is unable to make an order with respect to a hedge unless it is satisfied that the obstruction is severe and outweighs 'any undesirability of disturbing or interfering with the trees'.[82]

71 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) Recommendation 3-3.
72 Submissions 19 (Name withheld); Survey Respondents 43, 72, 111.
73 Submission 22 (Name withheld); Survey Respondents 43, 72.
74 Submission 19 (Name withheld).
75 Survey Respondent 75.
76 *Anti-social Behaviour Act 2003* (UK) c 38. pt 8; *High Hedges (Scotland) Act 2013* (Scot) asp 6; *High Hedges Act (Northern Ireland)* 2011(NI) c 21.
77 *Property Law Act 2007* (NZ) ss 332–338.
78 *Trees (Disputes Between Neighbours) Act 2006* (NSW) pt 2A. This part applies only to groups of two or more trees that: (a) are planted (whether in the ground or otherwise) so as to form a hedge, and (b) rise to a height of at least 2.5 metres (above existing ground level). The Act also allows an affected neighbour to bring action for obstruction of sunlight to a window of a dwelling and views from a dwelling: s 14B. NB: Not obstruction of sunlight to a roof of a dwelling.
79 Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009). This review received 127 submissions concerned about high hedges, 125 of which argued that trees that block light should be covered, and 115 of which argued that a blocked view should also be a ground for interfering with a tree.
80 Ibid 34.
81 Ibid 37.
82 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14E(2)(b).

13.52 The high hedges provisions were reviewed in 2013.[83] The review concluded that Part 2A of the NSW scheme was a 'limited but effective' jurisdiction in the NSWLEC to hear hedge disputes.[84] The 2013 review concluded that there was insufficient evidence to support a significant policy shift to broaden the existing provisions to cover solar access.[85] Thirty-two per cent of tree disputes finalised in the NSWLEC in 2017 were applications concerning a hedge severely obstructing sunlight or views.[86]

13.53 The Queensland scheme differs from the NSW scheme as it includes severe obstruction of sunlight to a roof of a dwelling. It enables QCAT to make orders in relation to a tree that causes substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.[87] This applies to interference that is an obstruction of sunlight or a view only if:

- the tree rises at least 2.5m above the ground, and
- the obstruction is—
  - i) severe obstruction of sunlight to a window or roof of a dwelling on the neighbour's land, or
  - ii) severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land.[88]

13.54 Unreasonable interference may include blocking of sunlight to solar panelling, blocking of light which causes mould growth in the home, or interruption to satellite reception.[89]

13.55 The 2015 statutory review of the Queensland Act recommended that the Act be amended to limit its scope to sunlight that existed when the neighbour took possession of the land, as is now provided for in section 66(3)(ii) of the Act. It also recommended placing a time limit of six years on an applicant to remedy the obstruction of sunlight or views.[90] These recommendations were in response to concerns raised by QCAT, namely:

> a neighbour should not be able to install solar panels and be entitled to apply to QCAT to have trees removed that shaded the roof at the time the neighbour installed the panels.[91]

13.56 QCAT informed the Commission that the obstruction of sunlight and view is one of the most common reasons for tree disputes brought in QCAT.[92]

13.57 Similarly, in Tasmania, substantial, ongoing and unreasonable interference with the use and enjoyment of land captures sunlight being severely obstructed from reaching:

- a window (including a window in a door) of a building on the affected land, or
- a solar photovoltaic panel, a solar collector for a solar hot water system, or a skylight, situated on a roof of a building on the affected land.[93]

13.58 This legislative reform arose from the Tasmania Law Reform Institute's examination of the dispute resolution mechanisms available to neighbours who have issues with high hedges as well as hazardous trees.[94] The Institute agreed with the majority of submissions that any legislative scheme implemented to deal with problem trees or hedges should include obstruction of both sunlight and views.[95] The submissions to the Institute confirmed that

83 Department of Attorney General and Justice (NSW), *Review of Part 2A of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (High Hedge Provisions) (Report, 2013).
84 Ibid 10.
85 Ibid 16.
86 Land and Environment Court of New South Wales, *Class 2: Tree Disputes and Local Government Appeals* (Web Page, 22 November 2018) <http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_2/class_2.aspx>.
87 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(ii).
88 Ibid s 66(3).
89 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) cl 61.
90 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015) 143.
91 Ibid 139, 143.
92 Consultation 15 (Queensland Civil and Administrative Tribunal).
93 *Neighbourhood Disputes About Plants Act 2017* (Tas) s 7(2).
94 Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Report No 21, January 2016) 2.
95 Ibid 50.

both sunlight and views are important amenity considerations for many people in the community and that their obstruction can significantly affect a person's enjoyment of their property.[96]

13.59 Disputes about access to sunlight and vegetation are not uncommon within Victoria[97] and may increase as more suburban dwellings acquire roof-top solar panels.[98] These disputes can be particularly contentious and emotive because they can affect the property value of homes.[99] They can involve the illegal removal of vegetation without an owners' permission (sometimes through poison) and involve trespass.[100] While these issues are beyond the scope of this inquiry, the Commission believes that further consultation on these issues and detailed consideration by Government may be needed at the five-year review recommended later in this chapter (as occurred in the NSW Act).

13.60 The Commission also notes that the Victoria Planning Provisions and all planning schemes have been recently amended to require new developments to consider their impact on any existing solar energy facility mounted on the roof of an adjoining dwelling.[101] Moreover, a home owners guide encourages landowners to carefully consider overshadowing risks at the surrounding site, including the existence of tall trees planted on adjoining lots of land and their growth potential, prior to installing roof solar systems.[102] It advises 'where shading from trees is likely, examine alternative locations for solar system placement'.[103]

Illegal removal of vegetation

13.61 The City of Boroondara expressed concern about a new Act providing scope for trees to be removed to facilitate development on neighbouring land.[104] Other community members also raised concern about the illegal removal of vegetation by developers or neighbours on adjoining land,[105] with community members suggesting that the current penalties for such actions were not acting as a deterrent.[106]

13.62 The new Act is not intended to facilitate tree removal for the development of land. As discussed in Chapter 5, only trees that have caused, are causing or are likely to cause damage or harm to neighbouring property, land or people will fall within the scope of a new Act. In addition, the Commission has recommended that the decision maker consider whether a tree should be replanted in cases where tree removal is considered necessary. The Commission is of the view that VCAT's existing experience in planning matters will assist it to identify and appropriately manage any applications that seek to use the new Act to circumvent existing legal obligations to retain vegetation.

96 Ibid.
97 Information provided by DSCV as part of a data request from the Commission, November 2018 and clarification of data provided in May 2019.
98 As of April 2017, 1.6 million properties around Australia had photovoltaic solar panels and new figures from the Australian Photovoltaic Institute show the country's solar power capacity is expected to double over the next few years: Damien Carrick and Tegan Osborne, 'Solar Panels and The Law: Can You Stop Your Neighbour From Blocking Your Sunlight?', *The Law Report* (ABC Radio National, 18 May 2017) <https://www.abc.net.au/news/2017-05-16/solar-panels-and-the-law-is-there-a-right-to-sunlight/8526752>; see also Department of Premier and Cabinet (Vic), *Thousands of Victorian Homes Save Millions on Solar* (Web Page, 18 January 2019) <https://www.premier.vic.gov.au/thousands-of-victorian-homes-save-millions-on-solar/>.
99 See, eg, Gregory Moore, 'Economic Value of Trees', *Sustainable Gardening Australia* (Web Page) <https://www.sgaonline.org.au/economic-value-of-trees/>; see also Ram Pandit et al 'The Effect of Street Trees on Property Value in Perth, Western Australia' (2013) 110 *Landscape and Urban Planning* 134–42.
100 See, eg, Order of Magistrate J Lesser (Magistrates Court of Victoria, H13012408, 14 February 2018) referred to in Khaleda Rahman, 'Every Neighbour's Worst Nightmare: Family Comes Home to Find Beloved Trees Destroyed by Chainsaw Wielding Man', *Daily Mail Australia (*online,11 May 2017) <https://www.dailymail.co.uk/news/article-4494582/Family-returns-home-backyard-trees-CHOPPED-down.html>.
101 Department of Environment, Land, Water and Planning (Vic), *Protecting Residential Rooftop Dwellings* (Web Page, 11 October 2018) <https://www.planning.vic.gov.au/policy-and-strategy/reducing-overshadowing-on-rooftop-solar-panels>; See also Department of Environment, Land, Water and Planning (Vic), *Planning Practice Note 88: Planning Considerations for Existing Residential Rooftop Solar Energy Facilities,* October 2018 <https://www.planning.vic.gov.au/policy-and-strategy/reducing-overshadowing-on-rooftop-solar-panels>.
102 Department of Environment, Land, Water and Planning (Vic), *Managing Overshadowing Risk When Installing a Rooftop Solar System: A Home Owners Guide* (Document, October 2018) <https://www.planning.vic.gov.au/policy-and-strategy/reducing-overshadowing-on-rooftop-solar-panels>.
103 Ibid.
104 Submission 25 (City of Boroondara).
105 Submissions 12 (Dr Gregory Moore OAM), 37 (Ian Hundley); Consultation 6 (Ben Kenyon).
106 Submission 37 (Ian Hundley); Survey Respondent 83.

13.63 The native vegetation removal regulations[107] have recently been reviewed to ensure that native vegetation is being protected by better accounting for the environmental value of large scattered trees, endangered vegetation types and sensitive wetlands and coastal areas in decision making as well as improving monitoring and reporting on the implementation of native vegetation removal and offsets.[108] There are a range of enforcement responses available to authorities when native vegetation is removed without a permit, including 'requiring environmental rectification and remediation for unauthorised removal of native vegetation' or applying for an enforcement order through VCAT to achieve compliance.[109]

Review of the new Act

13.64 The NSW Act has an inbuilt statutory review mechanism in section 23, which required the Attorney General to review the Act two years from the date of its assent on 6 December 2006. The comprehensive statutory review was conducted by the NSW Department of Justice and Attorney General in November 2009.[110]

13.65 Similarly, the Queensland Act required a statutory review of the Act to be undertaken within three years of its commencement to determine whether the objects of the Act remained valid and whether the Act was meeting its objectives, and to investigate other issues.[111] The statutory review of the Act was published by the QLRC in December 2015.[112]

13.66 Under section 39(1) of the Tasmanian Act 'the Minister is to cause an independent review of the operation of this Act to be carried out as soon as practicable after the fourth anniversary of the commencement of this section'.[113]

13.67 All statutory reviews stipulate that a copy of the written review is to be tabled in Parliament.[114]

13.68 The Commission considers that the reviews conducted pursuant to the NSW and Queensland Acts have been valuable and in some cases have resulted in legislative amendments to better reflect community views and the evolving nature of tree disputes between neighbours.[115] The Commission is of the view that the new Act should also include a statutory review mechanism. This would ensure that the policy objectives of the new Act remain valid and that amendments can be made to improve the Act in a timely manner. It would be appropriate for this review to be conducted within five years of the date of commencement of the new Act.

13.69 A statutory review would also provide an opportunity to consider the matters discussed earlier in this report including:

- the effectiveness of the zoning provisions in the Act. At review Government should consult with farming and agricultural users of land to obtain specific input from rural communities about the application of the Act (see Chapter 5)

107 The native vegetation removal regulations govern the removal of native vegetation in Victoria. They require landholders to obtain a planning permit to remove, destroy or lop native vegetation. The 'Guidelines for the Removal, Destruction or Lopping of Native Vegetation' is now an incorporated document in all planning schemes in Victoria.

108 Department of Environment, Land, Water and Planning (Vic), *Review of The Native Vegetation Clearing Regulations* (Web Page) 29 October 2018) <https://www.environment.vic.gov.au/native-vegetation/review-of-native-vegetation-clearing-regulations>.

109 Department of Environment, Land, Water and Planning (Vic), *Native Vegetation Removal Regulations— Compliance and Enforcement Strategy* (December 2017) 15–17 <https://www.environment.vic.gov.au/native-vegetation/native-vegetation>.

110 Department of Justice & Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009) 9.

111 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 97.

112 Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, December 2015).

113 *Neighbourhood Disputes About Plants 2017* (Tas) 39(1).

114 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 23(3); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 97(4); *Neighbourhood Disputes About Plants Act 2017* (Tas) s 39(3).

115 For example, the NSW Act was expanded to allow NSWLEC to make orders to interfere with trees for access to sunlight and views: See Department of Justice and Attorney General (NSW), *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (Report, 2009).

- whether to expand the definition of adjoining land to include irregularly shaped parcels of land. Such an expansion could apply to neighbours who do not share a common boundary but are separated by no more than two metres of public land, or separated by an easement on public land. This distance allows some flexibility while being narrow enough to capture only immediate neighbours. At review Government should consult with Land Use Victoria (see Chapter 5)
- whether there is a need to include a formal branch removal notice process in the Act and how useful it would be to do so. Consultation should occur with the Queensland Government, dispute resolution centres, community legal centres and the Tasmanian Government (see Chapter 6)
- whether to expand the application of the Act to include trees blocking access to sunlight and views.

Recommendations

62 The Minister should review the Act after a period of five years from the date of commencement to determine whether the policy objectives of the Act remain valid and whether the legislation remains appropriate for securing those objectives. A report on the outcome of the review should be tabled in each House of Parliament within 12 months after the end of the review.

63 Matters that should be examined as part of the review include:

(a) the effectiveness of zoning provisions in the Act

(b) the effectiveness of the definition of adjoining land in the Act

(c) if there is a need for the Act to be expanded to include a formal branch removal notice process

(d) if there is a need to expand the scope of the Act to trees blocking access to sunlight and views (including high hedges).

A

Appendices

304 Appendix A: Submissions

306 Appendix B: Consultations

307 Appendix C: Online survey questions

Appendix A: Submissions

1	Ian Collier
2	Name withheld
3	Confidential
4	Name withheld
5	Name withheld
6	Name withheld
7	Ben Kenyon, Principal Consulting Arborist, Homewood Consulting Arborists
8	Victoria Thieberger
9	Dr Karen Smith
10	Professor Phillip Hamilton
11	Name withheld
12	Dr Gregory Moore OAM, Senior Research Associate, The University of Melbourne
13	Mandy Collins
14	Confidential
15	Confidential
16	Magistrates' Court Victoria
17	Name withheld
18	ENSPEC, Arboricultural and Environmental Consultants, Craig Hallam, Managing Director, and Craig Hinton, Senior Consultant
19	Name withheld
20	Name withheld
21	Pointon Partners Lawyers
22	Name withheld
23	Name withheld
24	Name withheld
25	City of Boroondara
26	Confidential
27	Name withheld

28	Warwick Williams, Corporate Counsel, HVP Plantations
29	David Galwey, Consulting Arborist, Tree Dimensions Pty Ltd, Acting Commissioner, Land and Environment Court of New South Wales
30	Law Institute of Victoria
31	Barwon Community Legal Service
32	Municipal Association of Victoria
33	Annette Neville
34	Allan Day
35	Confidential
36	Monique Onezime
37	Ian Hundley
38	L. Barry Wollmer

Appendix B: Consultations

1 Aldo Taranto
2 Dr Gregory Moore OAM, Senior Research Associate, The University of Melbourne
3 Warwick Williams, Corporate Counsel, HVP Plantations
4 Participants in facilitated discussion at VTIO ArborCamp 2018 (approximately 40 arborists)
5 Victorian Civil and Administrative Tribunal
6 Ben Kenyon, Principal Consulting Arborist, Homewood Consulting Arborists
7 Dispute Settlement Centre of Victoria
8 City of Boroondara
9 Nillumbik Shire Council
10 Baw Baw Shire Council
11 Land and Environment Court of New South Wales
12 City of Port Phillip
13 Aboriginal Victoria
14 Robert Mineo, Coordinator Arboriculture Services at Monash City Council
15 Queensland Civil and Administrative Tribunal
16 Heritage Victoria

Supplementary consultation

1 Victorian Civil and Administrative Tribunal

Appendix C: Online survey questions

1 Have you been involved in a tree dispute with a neighbour?

- ☐ Yes
- ☐ No

2 Did the dispute relate to a tree on your property, or on your neighbour's property?

- ☐ My tree
- ☐ My neighbour's tree
- ☐ Other (please specify)

3 What, in your view, were the main issues in dispute? Choose all options that apply.

- ☐ Branches encroaching over boundary lines
- ☐ Roots encroaching over boundary lines
- ☐ Falling trees
- ☐ The spread of weeds or creeping plants
- ☐ Damage to property (including drains, concrete and foundations)
- ☐ Leaf litter causing damage or creating a hazard
- ☐ Harm or injury to people
- ☐ Other (please specify)

4 Did you or your neighbour make attempts to resolve the dispute yourselves? Choose all options that apply.

- ☐ We trimmed back the tree/plant to the boundary line to remedy the issue (abatement)
- ☐ We negotiated informally: we discussed or corresponded about the problem
- ☐ We attended mediation through the Dispute Settlement Centre of Victoria
- ☐ We attended mediation with a private mediator
- ☐ We did not make any attempts to resolve the dispute ourselves

Comments (For example, who initiated these attempts, or any other details you think are relevant)

5 Were you able to successfully resolve the dispute yourselves?

- ☐ Yes
- ☐ No

In part (please explain)

6 What further support or information do you think would have made it possible to resolve the dispute between yourselves?

7 Did you go to court to resolve the dispute?

- ☐ No
- ☐ Yes

If yes, please provide any comments. You may wish to explain who initiated the legal action, the cause(s) of action that were pursued, which court you went to, whether you had legal representation or were self-represented, the outcome of the legal action and any orders made, and any comments about the court process including court-ordered mediation, etc

8 Was the dispute eventually resolved in another way (eg moving away, illegal action, change in ownership), or did the situation improve? If so, how?

- ☐ Yes
- ☐ No

Please provide any comments or information about your experience.

9 Would further support or information have made it possible to resolve the dispute or improve the outcome?

- ☐ No
- ☐ Yes

Please provide any comments (eg, you can specify the types of support or information you would have found helpful or explain why they would not have improved the outcome)

10 Did the court resolve the dispute effectively (regardless of whether you won or lost)?

- ☐ No
- ☐ Yes

Please provide any comments about your experience in court.

11 Have you ever assisted other people to resolve a tree dispute (in a professional capacity)?

- ☐ No
- ☐ Yes

If yes, what is/was your role and how did you assist? For example, as a legal representative, an ADR practitioner, a council officer or by directing to information resources.

12 **Do you think the current law and process for resolving tree disputes in Victoria is satisfactory as it is?**

- ☐ Yes
- ☐ No

If not, why not and what changes should be made?

13 **Is there anything else you would like to share about your experience or your views on the current law?**

14 **What is your post code?**

15 **If you are happy for us to contact you in relation to your responses, please provide your email address or other contact details below.**

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Neighbourhood Tree Disputes
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