

# **NORTHERN TERRITORY LAW REFORM COMMITTEE**

## **REPORT ON TREE-RELATED DISPUTES BETWEEN NEIGHBOURS**

**Report No 45**

**August 2019**

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# TERMS OF REFERENCE

On 14 November 2018, the Attorney-General and Minister for Justice, NATASHA KATE FYLES, asked the Northern Territory Law Reform Committee (the Committee) to investigate, examine and report on possible law reform in relation to tree related disputes. The request raised the following matters.

## **Matters for the Northern Territory Law Reform Committee to Consider:**

1. Whether the current application of the common law remedies of nuisance, negligence and abatement adequately cater for disputes arising between adjoining land owners/occupiers, or a landowner/occupier and a third party, in relation to:
  - a. property damage;
  - b. personal injury;
  - c. nuisance; or
  - d. other unreasonable interference with a person's enjoyment of property; and
2. Whether the resolution of disputes might be improved through statutory intervention and, if so, the extent to which statutory intervention might be appropriate.

In undertaking this reference, the Committee should consult with relevant professionals and agencies in both the Northern Territory and in other jurisdictions. The Committee should consider the legislative and policy approaches taken in other jurisdictions but have regard to the unique Northern Territory context in making recommendations. The Committee should also have general regard to the cost implications of recommendations.

The Attorney-General requested the Committee present a completed report by 31 May 2019. Due to the need to consult with various stakeholders and the significance of issues to be considered, on 29 May 2019, the Committee was granted an extension to 31 August 2019 to complete its Report.

## RECOMMENDATIONS

**Recommendation 1** – The Northern Territory Government should implement a statutory regime which addresses neighbour to neighbour tree-related disputes.

**Recommendation 2** – The Northern Territory Government should amend the *Fences Act 1972* to include provisions relating to tree-related disputes.

**Recommendation 3** – Subject to Recommendation 4, the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) should be used as the template for the amendment of the *Fences Act 1972* to include provisions relating to tree-related disputes.

**Recommendation 4** – The amendments to the *Fences Act 1972* referred to in Recommendation 3 should include the following modifications to the provisions based on the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld):

- (a) Provisions relating to the removal of overhanging branches should not be dealt with in a separate Part of the Act;
- (b) Where a landlord refuses to initiate proceedings the tenant, as the occupier of the land, should have standing to bring an Initiating Application in the Northern Territory Civil and Administrative Tribunal regarding a tree-related dispute;
- (c) Obstruction of sunlight to solar panels and solar hot water systems should be included in the matters which may give rise to a tree-related dispute within the meaning of the statutory provisions, provided the obstruction was not in existence when the solar panels or solar hot water system was installed;
- (d) The NT Department of Attorney-General and Justice should establish a searchable electronic register of orders made pursuant to the amendments to the *Fences Act 1972*;
- (e) To encourage settlement by the parties before the filing of proceedings in the Northern Territory Civil and Administrative Tribunal, a provision based on s 19 of the *Neighbourhood Disputes about Plants Act 2017* (Tas) should be included;
- (f) The NT Department of Attorney-General and Justice should develop and publish guidance on individual rights and obligations under the Act and alternate dispute resolution processes for resolving tree-related disputes;
- (g) When defining the word 'tree', a definition similar to the word 'plant' in the *Neighbourhood Disputes about Plants Act 2017* (Tas), s 4(2), should be used.

I never saw a discontented tree. They grip the ground as though they liked it, and though fast rooted they travel about as far as we do. They go wandering forth in all directions with every wind, going and coming like ourselves, traveling with us around the sun two million miles a day, and through space heaven knows how fast and far!

John Muir, *A Thousand-Mile Walk to the Gulf* (1916)

## CHAPTER ONE – SCOPE OF THE INQUIRY

### [1.1] Introduction

While the author and environmentalist John Muir never saw a discontented tree, the Northern Territory Law Reform Committee ('Committee'), in this inquiry, did hear many a story of discontented neighbours. Those fast roots and wandering branches, so admired by Muir, often give rise to disputes between neighbours when the roots sprinted into a neighbour's pipes or cracked the neighbour's footpath, or when the branches wandered over the fence or shaded recently installed solar panels. It also may be that Muir did not see a tree fighting to stay upright in a category 2 cyclone, at which time the discontent of the tree and the neighbour were aligned.

By Terms of Reference ('T of R') dated 14 November 2018, the Honourable Natasha Fyles, Attorney-General and Minister for Justice, requested that the Committee investigate, examine and report on possible law reform pertaining to tree related disputes. In particular, the T of R directed the Committee to consider:

1. Whether the current application of the common law remedies of nuisance, negligence and abatement adequately cater for disputes arising between adjoining land owners/occupiers, or a landowner/occupier and a third party, in relation to:
  - a. property damage;
  - b. personal injury;
  - c. nuisance; or
  - d. other unreasonable interference with a person's enjoyment of property; and
2. Whether the resolution of disputes might be improved through statutory intervention and, if so, the extent to which statutory intervention might be appropriate.

While the Committee was to report by 31 May 2019, the time for completion of the report was extended to 30 August 2019. This extension of time allowed the Committee to consult more extensively with relevant stakeholders.

### [1.2] Tree-related disputes: common issues

In its publication, *Neighbourhood Tree Disputes: Consultation Paper*,<sup>1</sup> the Victorian Law Reform Commission ('VLRC') noted at [1.4]:

Common issues that may lead to disputes between neighbours about trees include:

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<sup>1</sup> Available at: <https://lawreform.vic.gov.au/content/neighbourhood-tree-disputes-consultation-paper-html> (accessed 24 June 2019).

- branches hanging over boundary lines
- roots causing damage to foundations, drainage and sewer pipelines
- the spread of weeds and creeping plants
- leaf litter causing damage or creating hazards (eg slippery pathways or clogged gutters)
- unsafe trees and branches creating hazards (eg poisonous fruit or leaves, or insecure branches)
- trees impeding a view and/or blocking sunlight, and/or affecting the neighbour's ability to use solar panels.

In the Northern Territory ('NT'), the damage to homes, outbuildings, fences and grounds from trees falling as a result of cyclonic winds can be added to the list. Given the significant damage to trees on both private and public land following Cyclone Marcus's visit to the NT in March 2018, it is unsurprising that this issue was raised by most stakeholders consulted in this inquiry.

### **[1.3] Current law pertaining to tree-related disputes**

In the NT, the law pertaining to neighbour to neighbour tree-related disputes is largely governed by the common law; in particular, the law of nuisance, negligence and abatement. Statutory intervention in such disputes has, to date, been relatively modest. The common law and statutory remedies currently available in the NT are discussed in detail in Chapter 2. In this regard, the law of the NT is closely aligned with that of the Australian Capital Territory ('ACT'), South Australia, Western Australia and Victoria. The common law approach to tree-related disputes is also followed in New Zealand, Singapore, Canada and the United States.<sup>2</sup>

New South Wales, Queensland and Tasmania have enacted statutory regimes to govern the resolution of tree-related disputes.<sup>3</sup> Such changes have followed careful consideration of this topic by the law reform bodies in each jurisdiction.<sup>4</sup> Victoria is currently considering whether to follow the legislative approach.<sup>5</sup> A final report of the Victorian Law Reform Commission ('VLRC') was delivered to the Victorian government in July 2019, but was not tabled in the Victorian Parliament before the submission of this report.

### **[1.4] The Law Reform Process**

The initial draft of Committee reports is prepared by a sub-committee of the full Committee. The sub-committee with responsibility for this reference consisted of the following members:

- Professor Les McCrimmon (President)
- Mr Peter Shoyer (NT Ombudsman)
- Ms Kellie Grainger (CEO Law Society Northern Territory)
- Ms Shelley Eder (Charles Darwin University)
- Ms Ros Vickers (Charles Darwin University).

<sup>2</sup> Generally see, Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [5.78]-[5.104] available at: <https://lawreform.vic.gov.au/content/neighbourhood-tree-disputes-consultation-paper-html> (accessed 24 June 2019).

<sup>3</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW); *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld); *Neighbourhood Disputes About Plants Act 2017* (Tas).

<sup>4</sup> New South Wales Law Reform Commission, *Neighbour and Neighbour Relations* (Report No 88, 1998); Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Report No 72, 2015); Tasmania Law Reform Institute, *Problem Trees and Hedges: Access to Sunlight and Views* (Final Report No 21, 2016).

<sup>5</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) available at: <https://lawreform.vic.gov.au/content/neighbourhood-tree-disputes-consultation-paper-html> (accessed 24 June 2019).



The report prepared by the sub-committee is then considered by all members of the Committee. Once all emendations have been made, the final report is provided to the full Committee for final approval before formal submission to the NT Attorney-General.

In all our inquiries, an attempt is made, within the constraints of our very limited resources, to consult with relevant stakeholders. In this inquiry, in addition to telephone consultations with a number of interested parties, the sub-committee met with representatives of the following:

- Alice Springs Town Council;
- Darwin City Council;
- Palmerston City Council;
- Real Estate Institute of the Northern Territory;
- Whittles Body Corporate Management Services; and
- Community Justice Centre.

Significant reliance is placed in this report on the excellent work done by the New South Wales Law Reform Commission, the Queensland Law Reform Commission, the Tasmanian Law Reform Institute and the VLRC. The Committee is made up of senior members of the private legal profession, judiciary and academy who volunteer their time to work on references made to the Committee by the NT Attorney-General. The ability of the Committee to refer to the detailed analysis of tree-related disputes made by other law reform bodies is invaluable.

### **[1.5] Organisation of this report**

This report is divided into four chapters. This chapter discusses the scope of the T of R, matters introductory to the inquiry, the current law pertaining to tree-related disputes, the outline of this report and the law reform process. Chapter 2 focuses on the law governing tree-related disputes in the NT, and, in particular, the efficacy of the common law in addressing such disputes. The question of whether reform of the current NT law is necessary also is addressed in Chapter 2. Chapter 3 considers the statutory remedies available in other jurisdictions to address tree-related disputes. In Chapter 4, recommendations for reform of the NT law are discussed, and four recommendations for reform are made.

## **CHAPTER TWO – LAW GOVERNING TREE RELATED DISPUTES IN THE NORTHERN TERRITORY**

### **[2.1] Introduction**

There are many situations that may give rise to a tree related dispute. To name a few:

- Overhanging branches that crowd out a neighbour's yard or brush against a building or structure causing noise or damage to property;
- Overhanging branches that drop fruit or litter, polluting a pool or backyard, or damaging a roof or shade sails;
- Overhanging branches where birds perch, to the same effect as above;
- Encroaching roots that disrupt a neighbour's backyard, or damage a structure, fence or path;
- Trees/branches, overhanging or wholly on the tree owner's property, that might cause damage or injury if they fell or have fallen due to poor health, poor maintenance or bad weather;
- Trees/branches, overhanging or wholly on the tree owner's property, that allow the escape of some noxious or unwelcome substance onto the neighbour's property;
- Trees that do or may in future block sunlight coming onto the neighbour's property, limiting growth of a lawn, capacity of a solar power installation or simple enjoyment of the property;
- Trees that do or may in future block a view previously enjoyed by a neighbour or otherwise impact on the amenity of the neighbourhood.

From the above, it is clear that disputes may arise due to:

- concern at the risk that interference or harm may occur in the future;
- interference or harm that has actually happened due to a discrete event; or
- some ongoing interference or harm.

Alternatively, a neighbour may feel aggrieved about what a tree owner proposes to do with an existing tree on the tree owner's property. For example, a tree owner may decide to remove trees that provide a privacy shield between the two properties — or to remove a prominent copse of trees or line of trees that is or forms part of a local landmark.

It is necessary to consider the breadth of existing law in light of the breadth of potential disputes.

### **[2.2] Common law remedies for dealing with tree related disputes**

The common law recognises three torts that may be relevant in this context — nuisance, negligence and trespass.

The 2017 VLRC Consultation Paper on *Neighbourhood Tree Disputes* provides detailed commentary on the relevance of those torts in the context of tree related disputes.<sup>6</sup> While the statutory position in Victoria discussed in that paper differs slightly from the NT, the commentary on the common law is pertinent to the position in the NT.

The VLRC Consultation Paper provides the following succinct summary of the torts that may be relevant to a tree-related dispute.<sup>7</sup>

<b>Tort</b>	<b>Circumstances that give rise to the tort</b>
Nuisance	Where there is or is likely to be unreasonable interference: (a) with the use and enjoyment of land, or
Negligence	Where damage, loss or injury results from a negligent act.
Trespass	Where an invasion of land has occurred.

It is necessary to consider the application of those torts in a Territory context so far as they relate to action that may be taken before the event to avoid negative impacts, and action taken after the event to remedy harm or injury.

### **Before the event**

#### ***Nuisance***

The common law recognises a range of ‘nuisances’ that may give rise to unreasonable interference with enjoyment of land. Nuisance will cover situations where a tree:

- encroaches on neighbouring land;
- causes physical damage to neighbouring land; or
- produces an interference that emanates over neighbouring land.<sup>8</sup>

A neighbour may threaten or commence court action based on nuisance to obtain an injunction requiring the tree owner to carry out or refrain from certain action; for example, to cut back or provide support for a rotting or diseased tree.

In considering a nuisance claim of this type, the court will have to balance the tree-owner’s right to enjoy and use their land as they see fit against the neighbour’s right to use and enjoy their property without unreasonable interference.<sup>9</sup>

The key is that the interference must be unreasonable. The tort recognises a reasonably robust level of give and take between neighbours. For interference to be unreasonable it must be substantial.

A number of examples of cases where overhanging branches or encroaching roots have founded a basis for action can be found in *Robson v Leischke* (2008) 72 NSWLR 98 (30 April 2008) at [59]-[60]:

<sup>6</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.17]-[3.26] and [3.91]-[3.230].

<sup>7</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.96].

<sup>8</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.100].

<sup>9</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.98].

Examples of cases where overhanging branches have been held to constitute an actionable private nuisance include where:

(a) branches of a yew tree, the leaves and branches of which were poisonous to stock, projected over the neighbour's land where they were eaten by the neighbour's horse, which later died from poisoning: *Crowhurst v Amersham Burial Board* (1878) 4 ExD 5 (but there was no nuisance where the branches of a yew tree did not overhang the neighbour's property and the neighbour's horse instead gained access to the tree wholly on the defendant's property and ate the leaves and died: *Ponting v Noakes* [1894] 2 QB 281 at 286, 288);

(b) branches of a tree overhanging the neighbour's land interfered with the growth of fruit trees on the neighbour's land, the injury being a natural consequence of the defendant's trees being allowed to overhang: *Smith v Giddy* [1904] 2 KB 448 at 450, 451;

(c) branches of trees projected to such an extent over the neighbour's land that they brushed against their house, so disturbing them in their sleep, and leaves from the overhanging branches blocked the downpipe on the house causing two rooms to be flooded: *Rose v Equity Boot Co Ltd and Hannafin* (1913) 32 NZLR 677; and

(d) branches of a row of pine trees, planted close to the boundary, overhung the neighbour's property and, by reason of the encroachment, deposited pine needles and rubbish on the neighbour's property which corrupted and poisoned the soil: *Mandeno v Brown and Wilkie* [1952] NZLR 447 and see also *Woodnorth v Holdgate* [1955] NZLR 552 at 554-555.

Examples of cases where encroaching roots have been held to constitute an actionable nuisance include where:

(a) roots encroached into the neighbour's property extracting moisture from the ground, causing shrinkage of the soil, undermining the foundations, and/or causing cracking or subsidence of the buildings on the neighbour's land: *Butler v Standard Telephones & Cables Limited* [1940] 1 KB 399, [1940] 1 All ER 121; *McCombe v Read* [1955] 2 QB 429, [1955] 2 All ER 458; *Davey v Harrow Corporation* [1958] 1 QB 60, [1957] 2 All ER 305; *King v Taylor* (1976) 238 EG 265; *Masters v Brent London Borough Council* [1978] QB 841; *Solloway v Hampshire County Council* (1981) 79 LGR 449; *Barton v Chibber* (1988) Aust Torts Reports 80-185, p 67,745; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478; *City of Richmond v Scantelbury* [1991] VicRp 44; [1991] 2 VR 38; *Hurst v Hampshire County Council* (1997) 96 LGR 27; *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55; [2002] 1 AC 321; *Valherie v Strata Corporation No 1841 & Ors* [2004] SASC 170 (9 June 2004), 234 LSJS 134; and *South Australia v Simionato* [2005] SASC 412; (2005) 143 LGERA 128;

(b) encroaching roots damaged storm water and sewerage drains: *Morgan v Khyatt* [1964] 1 WLR 475; *Peisley v Ashfield Municipal Council* (1970) 21 LGRA 243 (finding of actionable nuisance affirmed in *Peisley v Ashfield* (1971) 23 LGRA 166); *King v Taylor* (1976) 238 EG 265; and *Young v Wheeler* (1987) Aust Torts Reports 80-126, p 68,966 (potential threat of damage);

(c) encroaching roots damaged retaining walls: *Elliot v Islington London Borough Council* [1991] 10 EG 145, 7-06-1990 Times 839,417 (and even when the roots do not

encroach, but exert pressure behind a retaining wall on the common boundary, a nuisance might be caused: *Owners of Strata Plan No 13218 v Woollahra Municipal Council* [2002] NSWCA 92; (2002) 121 LGERA 117 at 129 [16], 132 [22] per Powell JA but contra at 135 [52], [53] per Young CJ in Eq;

(d) encroaching roots caused damage to a neighbour's lawn and patio and interfered with their enjoyment of their land: *Mendez v Palazzi* (1976) 68 DLR (3d) 582;

(e) encroaching roots caused substantial interference with a neighbour's gardening operations: *Woodnorth v Holdgate* [1955] NZLR 552; *Roud v Vincent* [1958] NZLR 794.

If there is only potential for damage rather than actual damage, it may be possible to obtain relief but only in limited circumstances. In *Robson v Leischke*, Preston CJ stated at [58]:

Furthermore, although actual damage is required to have a completed cause of action, a *quia timet* injunction might lie to restrain apprehended damage to the neighbour's property by encroaching tree branches or roots, but only if there is proof that the apprehended damage, first, is imminent or likely to occur in the near future and, secondly, is very substantial or almost irreparable: *Fletcher v Bealey* (1885) 28 ChD 688 at 698; *Hooper v Rogers* [1975] Ch 43 at 49-50; *Mendez v Palazzi* (1976) 68 DLR(3d) 582 at 590 and *Asman v MacLurcan* (1985) 3 BPR 9592 at 9594. The requirement of imminence is to indicate that the injunction ought not to be granted prematurely: *Hooper v Rogers* [1975] Ch 43 at 49, 50. The degree of probability of future damage required has been said to be "a real appreciable probability of irreparable damage": *Asman v MacLurcan* (1985) 3 BPR 9592 at 9594. However, it has also been noted that "the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the circumstances": *Hooper v Rogers* [1975] Ch 43 at 50.

The potential for grant of an injunction was also discussed by Slattery J in *Dimitrios Michos & Another v Council of the City of Botany Bay* [2012] 189 LGERA 25; NSWSC 625 (8 June 2012) at [82]-[86]:

The exercise of the Court's power to grant a mandatory injunction in cases of nuisance has been considered by judges of this Division in *Malliate v Sharpe* [2001] NSWSC 1057; *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11 and *Asman v MacLurcan* (1985) 3 BPR 9592. These three cases illustrate the range of considerations that assist the Court in moulding a remedy.

In *Malliate v Sharpe*, Campbell J was determining a dispute between two neighbours concerning a rubber tree that grew close to the common boundary. The plaintiff claimed that the roots from the rubber tree caused damage to the property and sought a mandatory injunction requiring the rubber tree to be killed by poisoning in such a way that the roots of the rubber tree also die. After considering the legal principles applicable to whether the rubber tree roots were causing a nuisance ([39]-[44]), Campbell J found that the continued presence of the rubber tree constituted a nuisance: [45]-[46]. Subsequently, Campbell J considered whether an injunction was an appropriate remedy and noted that even if the damage that had been caused by the rubber tree roots was repaired, so long as the rubber tree roots remained on the plaintiff's land and the rubber tree to which the roots were attached remained growing, there was a risk that the damage to the plaintiff's land would continually reoccur. That

reason was sufficient for the issue of an injunction for the purpose of restraining the nuisance.

Campbell J then considered the form of the injunction. His Honour noted the traditional formulation in the case of tree roots order by Harman J in *McCombe v Read* at 437: "...to restrain the defendants by themselves, their servants or agents from causing or permitting the roots of trees growing on their property to encroach on the property of the plaintiff so as to cause a nuisance". But, in circumstances where the defendant clearly indicated a disposition to do nothing about tree roots that were causing a nuisance, a mandatory injunction requiring the removal of the tree has been granted: *Morgan v Khyatt* [1964] UKPC 10; [1964] 1 WLR 475, *Morgan v Khyatt* [1962] NZLR 791 and *Khyatt v Morgan* [1961] NZLR 1020. Ultimately, Campbell J did not grant a mandatory injunction requiring the removal of the tree in that case but instead adopted "the traditional form of injunction to restrain a nuisance", being "that the defendants by themselves, their servants and agents be restrained from causing or permitting roots of the said *ficus elastica* tree to encroach on the property of the plaintiff so as to cause a nuisance" [64]-[65].

In *Yared v Glenhurst Gardens Pty Ltd* the nuisance was caused by the collapse of a retaining wall between neighbouring properties. Austin J noted that the granting of a mandatory injunction is always a discretionary matter: at [109]. His Honour relied on the fact that the making of a mandatory order to compel the defendant to carry out remedial work wholly at the defendant's expense would disproportionately enrich the plaintiff, such that His Honour declined to order the specific relief sought by the plaintiff.

*Asman v MaClurcan*, a decision of Young J (as his Honour then was) was another neighbourhood tree dispute - a dispute between two neighbours concerning two Jacaranda trees and a Mulberry tree that grew close to the common boundary. The plaintiff sought a mandatory injunction requiring the defendant to remove the three trees. In *Asman v MaClurcan* there was no damage to ground a cause of action. A *quia timet* mandatory injunction was not ordered because there was no real appreciable probability of irreparable damage being caused to the plaintiff because of the three trees. In so deciding, Young J noted that: because an injunction is a special remedy to be given when damages are inadequate and because much could happen in the future, equity would not grant a mandatory injunction where there were many things that could happen in the future.

The case law shows that there is scope to take pro-active action in nuisance where the prospect of harm is clear and imminent. However, such action will be costly and will rely on compelling evidence that the tree presents a nuisance or potential nuisance.

If a neighbour is concerned that a tree is rotting or unstable and in danger of falling over, it may be difficult for them to justify their concern in the absence of expert evidence – evidence they cannot obtain because they cannot access the tree owner's property.

## **Abatement**

The common law has long recognised the validity of ‘self-help’ or ‘abatement’ of nuisance in the case of branches or roots that physically encroach on a property.<sup>10</sup> For example, an owner may take action to trim branches that overhang his or her property. In *Robson v Leischke*, Preston CJ stated at [57]:

However, even though actual damage has not yet occurred, the neighbour has a right to abate by cutting away at the boundary so much of the branches and/or roots that encroach: *Lemmon v Webb* [1894] 3 Ch 1 at 13-14, 17-18, 24; *Smith v Giddy* [1904] 2 KB 448 at 451; *Mills v Brooker* [1919] 1 KB 555 at 557-558; *Butler v Standard Telephones & Cables Limited* [1940] 1 All ER 121 at 130; *Mandeno v Brown and Wilkie* [1952] NZLR 447 at 450-451; *Young v Wheeler* (1987) Aust Torts Reports 80-126, p 68,966 at 68,970. There is no right to cut away branches or roots growing between the tree and the boundary, for to do so would be a trespass: *Gazzard v Hutchesson* [1995] SASC 5068; (1995) Aust Torts Reports 81-337, p 62,352 at 62,360. As the overhanging branches or encroaching roots are still part of the property of the owner of the land on which the tree grows, the neighbour who cuts away the branches or roots should return them to the tree owner to avoid liability for conversion of the tree owner’s property: *Mills v Brooker* [1919] 1 KB 555 at 558.

As can be seen from the above discussion, there are limitations on a neighbour relying on abatement. They include:

- the neighbour may not trim back the branches on the tree owner’s side of the fence in anticipation of further growth;
- a neighbour who enters the tree owner’s property may themselves be committing trespass;
- there may be a legal requirement to return trimmed branches and fruit to the tree owner;
- there is no capacity to recover the cost of the work from the tree owner; and
- there may be liability issues if substantial trimming of a tree or roots creates an unstable environment for the tree, actually leading to an unbalanced or unhealthy tree and even contributing to damage or injury if it subsequently moves or falls over.

A neighbour may be able to enter a property to carry out work in an emergency, where entry is necessary to save life or protect property from real and imminent harm.<sup>11</sup> However, taking such a step, even if it could be later shown as legally justified, or throwing branches back over the fence into the tree owner’s yard, is likely to breed dispute and animosity.

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<sup>10</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.17]–[3.26].

<sup>11</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.218].

### **Other torts**

There is little scope for an action for negligence before harm is suffered. Negligence is discussed further in the section, *After the event*, below.

Trespass is relevant to limitations on a neighbour taking action to prevent a nuisance. There is little prospect of its use by a neighbour to remedy encroaching branches or roots.<sup>12</sup>

In short, abatement provides a basis for action in relation to overhanging branches but rests all financial responsibility on the neighbour, raises some uncertainty due to lack of clarity in its application and is likely to contribute to, rather than resolve disputes between neighbours.

An action for nuisance provides a broader potential to address tree-related issues before harm occurs but is likely to be expensive for all parties, carries evidentiary problems for the neighbour, and is again likely to escalate any dispute.

### **After the event**

An action for negligence may be open when a neighbour suffers damage (through personal injury or property damage). A neighbour would need to establish that the tree owner owed him or her a duty of care, that the tree owner breached that duty, that the breach resulted in harm and that the harm was reasonably foreseeable.<sup>13</sup>

There is no automatic assumption that a tree falling or a branch breaking creates a liability in a tree owner. Storms and cyclones occur. Branches break and trees fall over in the course of those events. Sometimes they break or fall in the absence of such events. The elements discussed above must be proven in the particular circumstances of the case. A fall or break that genuinely comes 'out of the blue' may not give rise to any liability in negligence.

An action for nuisance may also be utilised to recover damages but, again, usually only where there is some fault or omission on the part of the tree owner. Both actions involve considerable complexity, a degree of uncertainty and invariably take substantial time to resolve.

In the interim, all parties must rely on their own resources. For the neighbour, this may involve not only remedying the harm done, for example, paying for repairs to damaged property, but also paying the costs of the legal action. In many cases, individuals may simply not have the resources to pursue their rights.

If the neighbour has insurance, many of these issues are likely to be addressed by the insurer. In the absence of an insurer, the neighbour will usually have to meet the costs of removal of the offending tree or branch and rectification, at least initially. In the event of a general emergency such as a cyclone, a neighbour may be able to obtain assistance from government, local authorities and public-spirited community members but there is no general legal right to such assistance.

## **[2.3] Existing statutory remedies**

There is currently no general statutory remedy in the NT that covers all tree related disputes. There is legislation that may be relevant in particular disputes.

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<sup>12</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.204]-[3.226] (for a discussion of Trespass).

<sup>13</sup> Victorian Law Reform Commission, *Neighbourhood Tree Disputes: Consultation Paper* (2017) at [3.164]-[3.203] (for a discussion of Negligence).



For example, the *Fences Act 1972* covers situations where a fence is damaged by a falling tree or branch and potentially by encroachment of roots.

The general rule is that neighbours share the costs of repair or replacement equally unless otherwise agreed.<sup>14</sup> However, the Northern Territory Civil and Administrative Tribunal ('NTCAT') can order a different apportionment of costs.<sup>15</sup> Failure to properly care for a tree, particularly if concerns were previously raised about it by the neighbour,<sup>16</sup> would no doubt be a factor considered by the NTCAT in such a case.

There is also potential for self-help action. A neighbour can take action to repair a fence and recover the cost from the tree owner if the tree owner fails to comply with an agreement or order of the Tribunal.<sup>17</sup>

This self-help approach is facilitated by the service of notices to fence<sup>18</sup> or repair.<sup>19</sup> If, following service of a notice, no agreement is reached, the neighbour may repair and recover half the cost of repair.

A neighbour may act immediately to repair a fence damaged or destroyed by flood, storm, lightning or tempest, or by fire or accident if they do not seek to apportion blame to the tree owner and only seek to recover half the reasonable costs of repair.<sup>20</sup> Alternatively, for other acts or events that occurred on the tree owner's land, a neighbour may, after one month, repair or reinstate and recover the reasonable costs of doing so from the tree owner.<sup>21</sup> Of course, the tree owner may deny liability or the reasonableness of the costs and refuse to pay, giving rise to a further dispute.

While the *Fences Act 1972* provides some options for action it applies only in relation to repair of fences, just one of many possible causes for dispute in this area.

Other NT legislation may require that action be taken in relation to trees or bushes in certain circumstances, for example:

- trees may have to be trimmed or removed to establish or maintain a firebreak or comply with a property fire management plan in a fire protection zone under the *Bushfires Management Act 2016*;<sup>22</sup>
- local government councils may make a regulatory order requiring a land owner or occupier to take specified action to get rid of or reduce the impact of visual pollution;<sup>23</sup>
- local government councils are also authorised to make a regulatory order requiring an owner or occupier to remove or mitigate a hazard or nuisance (stated examples include cutting back overhanging vegetation and clearing away objects or materials that could prove hazardous during a cyclone);<sup>24</sup>

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<sup>14</sup> *Fences Act 1972*, s 14(1).

<sup>15</sup> *Fences Act 1972*, s 14(2).

<sup>16</sup> While the terminology of tree-owner and neighbour is not used in legislation, it will be maintained in this report for the sake of consistency.

<sup>17</sup> *Fences Act 1972*, ss 9, 13, 14(1).

<sup>18</sup> *Fences Act 1972*, s 7.

<sup>19</sup> *Fences Act 1972*, s 15.

<sup>20</sup> *Fences Act 1972*, s 15(4).

<sup>21</sup> *Fences Act 1972*, s 15(5).

<sup>22</sup> Sections 68-70.

<sup>23</sup> *Local Government Act 2008*, s 193.

<sup>24</sup> *Local Government Act 2008*, s 194. Councils may also have By-laws that require trees and shrubs that overhang public land causing inconvenience or obstruction to be trimmed or removed at the direction of the Council. See, for example, *Coomalie Community Government By-laws 1998*, cl 16.

- vegetation, including trees, may be required to be managed or removed under the *Weeds Management Act 2001*;
- particular vegetation might constitute a public health nuisance under the *Public and Environmental Health Act 2011*.

These provisions are likely to be applicable in only a small number of cases involving a private dispute between neighbours but might be relied on as a basis for seeking support or action from a government authority in those cases.

Other NT legislation may limit the capacity to take action in a particular case, for example:

- a tree or a place with trees on it may be an archaeological place or an Aboriginal or Macassan archaeological place declared as a heritage place under the *Heritage Act 2011*,<sup>25</sup>
- a tree or a site with trees on may be registered as an aboriginal sacred site under the *Northern Territory Aboriginal Sacred Sites Act 1984*;
- approval may be required to clear land of vegetation under the *Planning Act 1999* (freehold land) or the *Pastoral Land Act 1992* (pastoral leases).<sup>26</sup>

#### **[2.4] Problems with the current law**

Existing statutory provisions may provide some assistance in very limited cases but they do not provide a general remedy for the broad range of potential tree-related disputes.

Abatement action under the common law provides some basis for self-help action in relation to encroaching roots and branches, but the application of its general principles in a particular case can give rise to some uncertainty for the neighbour and the tree-owner.

The potential for self-help to lead to further argument in the absence of clear understanding of rights and responsibilities and grey areas surrounding return of fruits and branches and maintenance of support places limits on its utility.

In considering common law remedies like nuisance and negligence, it is important to note that the law develops over time, often in an *ad hoc* fashion based on particular cases, and often at significant cost to individual parties. The application of the law to particular situations often only becomes clear in the final determination of the court.

Taking court action to secure an injunction based on nuisance presents evidentiary problems for a neighbour and will inevitably take considerable time and prove costly even if a costs order is eventually made in their favour.

Post event, action to recover damages based on an action for nuisance or negligence may ultimately provide an adequate remedy but again takes time and money. However, these concerns will be substantially diminished if the neighbour is covered by insurance. In such cases, immediate or at least timely action can be taken to recover and repair, with the insurer taking on responsibility for ultimate cost recovery.

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<sup>25</sup> See definition of 'place', in *Heritage Act 2011*, s 5, including examples, "2. A plant or animal community" and "4. A park or garden".

<sup>26</sup> The application process is described at <https://nt.gov.au/property/land-clearing/information-and-factsheets/application-process-and-legislation> . See also *Planning Act 1999*, s 75A.

## **[2.5] Is reform of the current law in the Northern Territory necessary?**

### **Consultation**

The Committee undertook consultation with a range of stakeholders to get a sense, from a practical point of view, of the number and scale of issues that might be arising in the NT in the absence of a legislative scheme for managing tree-related disputes. Some of these consultations involved lengthy and detailed face-to-face meetings, while others were briefer telephone discussions.

The latter included brief consultations with a selection of Electorate offices/MLAs in various centres around the NT, to establish the type and level of complaints and concerns involving tree related disputes that offices had dealt with in recent years. For some, there had been few or no relevant complaints. Others noted an average of several relevant complaints each year. A number pointed to a rise in complaints after Cyclone Marcus, with some Cyclone-related but others arising from an increase in general awareness and concern following the Cyclone.

Some brief examples of situations identified in those discussions are:

- Leaves and debris causing issues;
- Roots damaging a neighbour's pool;
- Overhanging branches;
- Issues around potential spread of citrus canker;
- A young family with large tree in their yard were happy to have it removed but didn't have the money to do it;
- A senior couple had a tree blow into their yard due to a storm. They were unsure what to do;
- Damage to a fence from a tree falling due to Cyclone Marcus. Their insurer ultimately covered the costs;
- Clearing debris from verges after Cyclone Marcus. Seniors needed help;
- Fallen trees and footpath damage due to Cyclone Marcus.

Local government councils generally identified a small number of complaints either relating to interactions involving council and private property or between private neighbours. However, they indicated that they would not necessarily be the first point of contact for people involved in a private dispute.

Other stakeholders identified disputes over damage to fences as arising frequently. They also mentioned disputes involving damage to underground pipes and sewage lines, allowing rodents to access rooftops, providing roosting places for bats and fouling or damaging common areas.

The Community Justice Centre (CJC) advised that they had dealt with a number of mediations which concerned or involved tree related disputes. They indicated that tree related issues are a major cause of neighbourhood disputes that come before the CJC, and that enquiries rose after Cyclone Marcus.

The CJC provided information about the nature of neighbourhood disputes that came to it in 2017/18 and 2018/19 (attached as Appendix 1 to this report). That information showed that around 16-20% of matters coming before it involved neighbourhood tree disputes. It also showed that 22% of those cases escalated to court action. This is perhaps the best evidence of a significant number of disputes and of the potential for tree related matters to escalate into serious disputes that engage substantial levels of private and public resources.

### **Need for reform**

Overall, the Committee identified a steady stream of disputes of this nature, with disputes arising more commonly in established urban areas. It is also clear that the potential for disputes escalates following a significant weather event like a cyclone or major storm.

This is an area where disputes over relatively minor matters can give rise to friction and rapidly build into substantial conflict. Neighbours are in close proximity on an ongoing basis and often in regular contact. This is not a situation where time — and time apart — is likely to minimise differences.

This type of conflict can disrupt communities and, in some cases, has the potential to tend towards or escalate to physical violence if not adequately addressed. The community has a clear interest in providing effective mechanisms for resolution.

Current legislation only operates in a small portion of instances that give rise to tree related disputes.

Current common law remedies provide some assistance in specific situations but are themselves subject to a level of uncertainty in their application to particular cases and can be limited by evidentiary issues and cost implications. They do, however, provide suitable mechanisms for pursuing damages in respect of substantial property damage or personal injury.

There is, therefore, justification for considering introduction of a legislative scheme that will clarify and simplify the resolution for disputes of this nature in the NT. Key elements of the scheme should include:

- empowering neighbours to resolve disputes by:
  - providing, as far as possible, settled and detailed guidance as to the expectations, rights and obligations of neighbours in relevant situations;
  - providing settled mechanisms for neighbours to approach one another as a means to resolve tree-related issues;
  - providing publicly available information to support neighbours through the process of resolving issues;
  - providing a mechanism for one-on-one advice to neighbours about the process;
  - providing ‘self-help’ options if that is likely to effectively resolve disputes;
  - promoting attempted mediation of any dispute before it can progress to a more formal resolution stage; and
- establishing a binding mechanism for final resolution of disputes through an appropriate forum, that:

- emphasises timely, informal and inexpensive resolution;
- encourages neighbours to represent themselves;
- adopts processes that facilitate and support self-representation;
- has a sufficiently broad jurisdiction to deal with the breadth of issues that can arise;
- has sufficient powers to ensure the parties can access all necessary evidence; and
- has flexibility to reach a resolution that will be in the interests of justice and promote lasting resolution of neighbour to neighbour disputes.

In Chapter 3, legislative schemes adopted or proposed in other Australian jurisdictions are canvassed. Recommendations for reform are considered in Chapter 4.

## CHAPTER THREE – STATUTORY FRAMEWORKS ELSEWHERE

### [3.1] Introduction

As noted in Chapter 1, three Australian jurisdictions have already moved to introduce a statutory framework for dealing with tree-related disputes. The types of trees, landowners and tree-related disputes caught by these frameworks differ between the jurisdictions. The processes for attempting to resolve disputes between neighbours have some similarities. In two of these jurisdictions, it is a Tribunal that is ultimately tasked with determining disputes that are not able to be resolved more amicably.

New South Wales was the first jurisdiction to initiate reform with a statutory scheme to deal with neighbourhood disputes about trees. The *Trees (Disputes Between Neighbours) Act 2006* (NSW) came into effect on 2 February 2007.

Queensland followed and, on 9 August 2011, repealed its *Dividing Fences Act 1953* (Qld) and replaced it with the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld). The latter Act included a new chapter to comprehensively deal with tree related disputes. Queensland is the only jurisdiction to have developed one piece of legislation to address different types of neighbourhood disputes – fences and trees. There may be some benefits to this approach because it avoids the conflict of two pieces of legislation dealing with disputes that may emerge from a hedge that constitutes a boundary fence.

In January 2016, the Tasmanian Law Reform Institute released its Final Report No 21, *Problem Trees and Hedges: Access to Sunlight and Views*, which resulted in the *Neighbourhood Disputes about Plants Act 2017* (Tas) coming into effect on 1 December 2017.

Finally, as has been noted in earlier chapters, the VLRC is also looking into tree-related disputes. The Committee has been advised by the VLRC that its final report is currently being considered by the Victorian Government and has not yet been released publicly.

Each jurisdiction's statutory framework is considered in turn below.

### [3.2] New South Wales

In New South Wales, tree related disputes are governed by the *Trees (Disputes Between Neighbours) Act 2006* (NSW) and matters arising under this legislation are dealt with by the Land and Environment Court.<sup>27</sup> The Act defines a tree as “any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by regulations”<sup>28</sup> and the Act only applies to trees situated within certain council zoned land.<sup>29</sup> Trees situated on council managed land are excluded from the legislation, and there is capacity to exclude other areas via regulation.<sup>30</sup> The legislation broadly deals with two types of issues: trees that cause, or are likely to cause damage or injury, and the obstruction of sunlight or views by high hedges. In regards to the latter, the Court is empowered to make orders in regards to obstruction by hedges only; the Act does not allow for orders to be made in relation to obstruction by a tree,

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<sup>27</sup> ss 7 and 14B.

<sup>28</sup> s 3.

<sup>29</sup> That being ‘residential’, ‘rural-residential’, ‘village’, ‘township’, ‘industrial’ or ‘business’, or having the ‘substantial character’ of these zones – s 4.

<sup>30</sup> s 4(2)(a), (b).

only for obstruction by a 'hedge'.<sup>31</sup> There is no specific provision in the Act in regards to the blocking of light to solar panels, and the legislation bars any action in nuisance for the obstruction of light to windows and the blocking of views by trees.<sup>32</sup> Other actionable rights at law, however, are maintained.<sup>33</sup> The Act covers both owners and occupiers of land.<sup>34</sup>

### *The decision-making process*

Before a Court will make an order under this legislation, it needs to be satisfied that the applicant has made a reasonable effort to reach an agreement with the other party.<sup>35</sup> An applicant for any order under the Act needs to give 21 days' notice to the owner of the land and any other interested parties,<sup>36</sup> and the Court is empowered to direct a notice to be provided, or to waive this requirement.<sup>37</sup> If authorisation for tree removal is required by another council, or the Heritage Council, these authorities have the right to appear in the proceedings and are to be provided with a copy of any orders made.<sup>38</sup>

Applications under the Act will either be "to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree to which this Act applies that is situated on adjoining land",<sup>39</sup> or "to remedy, restrain or prevent a severe obstruction" by hedges of light to a window or a view from a dwelling.<sup>40</sup> In addition to the general power to consider any matters relevant to the circumstances,<sup>41</sup> the Court is to have regard to whether approval would be required under another Act,<sup>42</sup> the impact on the tree,<sup>43</sup> whether the tree has any historical, cultural, social, or scientific value,<sup>44</sup> and the contribution of the tree to the environment.<sup>45</sup> For tree damage disputes, the Court should also consider whether other steps may be taken to rectify the risk or damage.<sup>46</sup> For hedge obstruction, the Court needs to also consider whether the hedges pre-date the affected dwelling or any affected alterations, when they grew to a height in excess of 2.5 meters,<sup>47</sup> any relevant development consent,<sup>48</sup> the amount of hours of sunlight obstruction,<sup>49</sup> the type of tree and whether it loses its leaves,<sup>50</sup> and the nature of the view obstructed.<sup>51</sup> Initial decisions are decided by a commissioner of the Land and Environment Court and appeals are to be made on a point of law only and are decided by a Judge of the same court.<sup>52</sup>

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<sup>31</sup> s 14A. A 'hedge' is defined as a group 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)".

<sup>32</sup> s 5.

<sup>33</sup> s 18.

<sup>34</sup> s 3.

<sup>35</sup> s 10(1)(a).

<sup>36</sup> For example, organisations with legal authority or others affected.

<sup>37</sup> See ss 8(1)(a), (b) and (c) and 8(2) and (3) for trees that may cause damage or injury and s 14C(1)(a), (b) and (c) and 14C(2) and (3) for hedges that obstruct sunlight and views.

<sup>38</sup> ss 13 and 14.

<sup>39</sup> s 7.

<sup>40</sup> s 14B.

<sup>41</sup> s 12(j), s 14F(s).

<sup>42</sup> s 12(b), (b1), s 14F(d).

<sup>43</sup> s 12(b2), s 14F(k).

<sup>44</sup> s 12(c), s 14F(f).

<sup>45</sup> s 12(d), (e), (f), (g), s 14F(g), (h), (j), (l).

<sup>46</sup> s 12(h), (i).

<sup>47</sup> s 14F(b) and (c).

<sup>48</sup> s 14F(d) and (e).

<sup>49</sup> s 14F(o).

<sup>50</sup> s 14F(p).

<sup>51</sup> s 14F(q), (r).

<sup>52</sup> *Land and Environment Court Act 1979* (NSW), s 56A.

## Remedies

Powers to make orders under this Act are broad and general,<sup>53</sup> and include requiring a person to undertake any action to remedy, restrain or prevent damage to property or to prevent injury to any person,<sup>54</sup> or authorising the applicant to take such steps.<sup>55</sup> Orders will bind successors in title of the property if the applicant provides them with a copy of the order,<sup>56</sup> and the applicant's orders may also pass to their own successors.<sup>57</sup> Costs and compensation can also be awarded.<sup>58</sup> If the applicant is a council, an order for costs and compensation may be registered as a charge on affected land.<sup>59</sup> There is also provision for ordering the removal or replacement of trees.<sup>60</sup> If entry to property is required by a local council, there is provision under the Act to order an authorised person to enter property.<sup>61</sup> The Act provides a penalty for non-compliance with an order.<sup>62</sup>

### [3.3] Queensland

Chapter 3 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) contains the statutory scheme in Queensland. Matters arising under this legislation are dealt with by the Queensland Civil and Administrative Tribunal ('QCAT'). The Act applies to trees which are defined as 'any woody perennial plant, any plant resembling a tree in form and size, a vine' or a plant prescribed by regulation.<sup>63</sup> A tree is deemed to be situated on land if the 'base of the tree trunk is, or was previously, situated wholly or mainly on the land'.<sup>64</sup> Trees on rural land, land more than four hectares in size or local government owned land used for public parks are excluded from the ambit of the Act,<sup>65</sup> with a further power to exclude its application to stated local government areas by regulation.<sup>66</sup> Trees planted for commercial purposes, under an order of a Court or tribunal or as a development approval condition are also excluded from the legislation.<sup>67</sup>

Responsibilities are imposed on a tree-keeper to remove overhanging branches and to ensure a tree does not affect land.<sup>68</sup> Aside from overhanging branches, adjoining land is considered to be affected by a tree if it causes, or is likely to cause within 12 months, serious injury or damage to a person on the land or 'substantial, ongoing and unreasonable' interference with enjoyment of the land.<sup>69</sup> The Act uses the terminology of 'tree-keeper' and 'neighbour' to describe the parties to tree disputes. The legal owner or holder of rights under a lease or licence or particular types of permits, along with the body corporate (for common property for strata titled and common titled land) are those prescribed as responsible for trees.<sup>70</sup> The occupier of land affected by a tree enjoys the benefits of the statutory scheme, save that a

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<sup>53</sup> s 9(1).

<sup>54</sup> s 9(2)(a), (b), (c).

<sup>55</sup> s 9(e), (f).

<sup>56</sup> s 16.

<sup>57</sup> s 16A.

<sup>58</sup> s 9(2)(h), (i).

<sup>59</sup> s 17A.

<sup>60</sup> s 9(2)(j).

<sup>61</sup> s 17(1) (to ascertain whether the ordered work has been carried out in accordance with the order, or to carry out the work if needed).

<sup>62</sup> s 15.

<sup>63</sup> s 45.

<sup>64</sup> s 47.

<sup>65</sup> s 42(3).

<sup>66</sup> s 42(2).

<sup>67</sup> s 42(4).

<sup>68</sup> s 52(1), (2).

<sup>69</sup> s 46.

<sup>70</sup> s 48 – by virtue of their definition as a tree-keeper.



tenant is unable to utilise the particular mechanism for dealing with low overhanging branches under Part 4.<sup>71</sup>

No civil causes of action are created by a breach of the Act<sup>72</sup> and common law rights for actions in abatement are preserved as an alternative to the statutory scheme,<sup>73</sup> with clarification that the neighbour has the option of returning the removed portion of the branch.<sup>74</sup>

The Act encourages parties to endeavour to resolve disputes about trees informally and amicably and provides two different mechanisms to determine the issue if the parties are unable to resolve their dispute – one for overhanging branches under a certain height and one for all other tree disputes captured by the legislation.

#### *Low overhanging branches*

For branches that are less than 2.5 metres above the ground and overhang the boundary by 50 centimetres or more a neighbour can utilise a notice process. After giving at least 30 days written notice requiring the tree-keeper to cut and remove the branches,<sup>75</sup> the neighbour may do this work and recover from the tree-keeper as a debt the costs of removing the branches, to a maximum amount of \$300.<sup>76</sup> The written notice must contain permission for the tree-keeper or their contractor to enter onto the neighbour's land<sup>77</sup> and be accompanied by at least one quote for the estimated cost of the work and a copy of the relevant Part of the Act.<sup>78</sup> This mechanism can only be invoked once in each 12 month period<sup>79</sup> and cannot be invoked by tenants occupying the land, only the landowner. This arises due to the exclusion of a tenant from the definition of 'neighbour' for the purposes of this Part of the Act.<sup>80</sup>

#### *Commencement of action*

For all other unresolved disputes regarding land affected by a tree an application can be brought by the neighbour in QCAT for orders to resolve the dispute, provided that an occupier can only initiate proceedings if the landowner has refused to do so.<sup>81</sup> Notice of the hearing in QCAT must be given to affected parties such as the tree-keeper and any government authority, at least 21 days prior, although QCAT can waive or reduce this required notice period.<sup>82</sup> Certain pre-requisites are prescribed by the Act before QCAT can invoke its jurisdiction and these include satisfaction the neighbour has made a reasonable effort to resolve the dispute with the tree-keeper, branches overhang by more than 50 centimetres but it cannot be resolved under the process described above and copies of the application have been served on the affected parties (unless this requirement has otherwise been waived).<sup>83</sup>

#### *Remedies*

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<sup>71</sup> s 49 – by virtue of the definition of neighbour in s 49(1)(a). A tenant is an occupier of land under s 49(1)(a)(ii), however s 49(2) provides that the sub-section does not apply for the purposes of Part 4 which is the specific mechanism for low overhanging branches.

<sup>72</sup> s 52(3).

<sup>73</sup> s 54(1).

<sup>74</sup> s 54(2).

<sup>75</sup> s 57(1) and (2)(a), (b).

<sup>76</sup> s 58.

<sup>77</sup> s 57(3)(c).

<sup>78</sup> s 57(3)(d).

<sup>79</sup> s 57(5).

<sup>80</sup> Whilst a tenant is included in the definition of neighbour in s 49(1)(a)(ii), s49(2) provides that particular sub-section does not apply for the purpose of Part 4 which contains the self-help mechanism described above under *Low overhanging branches* and confirmed in the notes under s55 that Part 4 does not apply to neighbours who are not the registered owner of the affected freehold lot.

<sup>81</sup> ss 61 and 62.

<sup>82</sup> s 63.

<sup>83</sup> s 65.

QCAT has broad powers to make orders it considers appropriate to remedy the effect a tree has on the neighbour's land. These include powers to require a tree-keeper or neighbour to undertake works on a one-off or ongoing basis,<sup>84</sup> authorising entry to land to carry out work,<sup>85</sup> compensation to be paid by the tree-keeper for damage to the neighbour's land or property,<sup>86</sup> a party to pay the costs associated with carrying out an order of QCAT,<sup>87</sup> as well as for investigative matters such as obtaining a survey of the tree's location<sup>88</sup> or an arborist's report.<sup>89</sup> QCAT can only make orders for interference to enjoyment arising from obstruction of sunlight or a view caused by a tree more than 2.5 metres tall and if it is a severe obstruction of light to a window or the roof of the neighbour's dwelling or of a view that existed when the neighbour first took possession of their land.<sup>90</sup> The definition of 'window' for the purpose of the section includes skylights<sup>91</sup> but no specific reference is made in the Act to obstruction of sunlight to solar panels.

QCAT still has the power to make orders about a tree that has been removed except if the tree-keeper has sold the land since the damage was caused by the tree.<sup>92</sup> In addition to ordering the removal of a tree, QCAT can also require that the tree be replaced and stipulate the type or maturity of the replacement tree as well as the location for the planting of the replacement tree.<sup>93</sup>

### *The decision-making process*

In making any decision the Act prescribes that safety is paramount<sup>94</sup> and removal of a living tree is a measure of last resort.<sup>95</sup>

When determining the appropriate orders, QCAT must consider the location of the tree on the land,<sup>96</sup> if consent would be required under another Act to carry out any work,<sup>97</sup> any historical, cultural, social or scientific value of the tree,<sup>98</sup> any contribution by the tree to the ecosystem and biodiversity,<sup>99</sup> public amenity<sup>100</sup> or amenity to the land on which it stands,<sup>101</sup> risks associated with the tree in the event of a cyclone or other extreme weather event,<sup>102</sup> likely impact of pruning on the tree,<sup>103</sup> and the type of tree.<sup>104</sup> If it is alleged the tree has or may cause damage, QCAT may consider other contributing factors including those arising from the neighbour's action or inaction and steps taken by either party to prevent or rectify the damage.<sup>105</sup> Those considerations may be taken into account if substantial, ongoing or unreasonable interference is alleged, along with additional considerations in relation to the size of the land, if the tree existed before the neighbour acquired the land or contribution of

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<sup>84</sup> s 66(5)(a).

<sup>85</sup> s 66(5)(d).

<sup>86</sup> s 66(5)(f).

<sup>87</sup> s 66(5)(e).

<sup>88</sup> s 66(5)(b).

<sup>89</sup> s 66(5)(g).

<sup>90</sup> s 66(3).

<sup>91</sup> s 66(6).

<sup>92</sup> s 68.

<sup>93</sup> s 69.

<sup>94</sup> s 71.

<sup>95</sup> s 72.

<sup>96</sup> s 73(1)(a).

<sup>97</sup> s 73(1)(b).

<sup>98</sup> s 73(1)(c).

<sup>99</sup> s 73(1)(d).

<sup>100</sup> s 73(1)(f).

<sup>101</sup> s 73(1)(g).

<sup>102</sup> s 73(1)(i).

<sup>103</sup> s 73(1)(j).

<sup>104</sup> s 73(1)(k).

<sup>105</sup> s 74(1).

the tree to preserving waterways or foreshore if the interference is obstruction of sunlight or view.<sup>106</sup>

Non-compliance with an order, without reasonable excuse, attracts a monetary penalty.<sup>107</sup> QCAT orders lapse after 10 years, unless an earlier end date is provided for in the order or it is revoked on the application of a party or by QCAT's own initiative.<sup>108</sup>

A searchable electronic register of all orders made must be kept by QCAT<sup>109</sup> and any person can search the register with no fee payable either for the search or obtaining a certified copy of information contained in the register.<sup>110</sup>

A person selling land subject to an application or a QCAT order must give notice thereof to a buyer before they sign a contract of sale.<sup>111</sup> In the event of giving the buyer a copy of an application they become a party to the QCAT proceedings<sup>112</sup> and for an order the buyer is obliged to carry out any work required by the order which has not been completed by the seller.<sup>113</sup> Failure to give a buyer a copy of an application or order gives rise to a right of termination for the buyer and a full refund of any deposit if the buyer exercises that right at any time prior to settlement.<sup>114</sup>

The Queensland legislation affords a local government authority (LGA) the option to give effect to an order of QCAT, if seven days after the stipulated period for completion of the work the tree-keeper has not carried it out and the neighbour gives notice to the LGA.<sup>115</sup> The local government authority cannot be compelled to take any action<sup>116</sup> but the Act enables a person authorised by the LGA on seven days' notice<sup>117</sup> to enter the tree-keeper's land to inspect the tree or to carry out any uncompleted work.<sup>118</sup> Costs incurred by the LGA can be recovered as if they were unpaid amounts owing under the relevant legislation.<sup>119</sup>

### [3.4] Tasmania

In Tasmania, tree related disputes are governed by the *Neighbourhood Disputes about Plants Act 2017* (Tas) and matters arising under this legislation are dealt with by the Resource Management and Planning Appeal Tribunal.<sup>120</sup> The definition of 'plant' under this Act is very broad and includes: trees; hedges or a group of plants; fruits, seeds, leaves or flowers of a plant; a bare trunk; stumps rooted in the land; plant roots and dead plants.<sup>121</sup> A plant is situated on land if its base or the place where it connects to its roots is, or was, situated in whole or in part on the land.<sup>122</sup> Certain kinds of land are excluded from the operation of the Act,<sup>123</sup> and

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<sup>106</sup> s 75.

<sup>107</sup> s 77.

<sup>108</sup> s 78.

<sup>109</sup> s 79.

<sup>110</sup> s 81.

<sup>111</sup> s 83. A monetary penalty applies for non-compliance with this requirement.

<sup>112</sup> s 84.

<sup>113</sup> s 85.

<sup>114</sup> s 86.

<sup>115</sup> s 88(1).

<sup>116</sup> s 88(2).

<sup>117</sup> s 88(4).

<sup>118</sup> s 88(3), no advance notice is required in certain circumstances (s88(5)) although written notice of the entry must be given within 10 days after entry in those circumstances (s 88(5A)).

<sup>119</sup> s 88(7) – recoverable as unpaid amounts under s 95 of the *Local Government Act 2009* (Qld) or s 97 of the *City of Brisbane Act 2010* (Qld).

<sup>120</sup> s 3.

<sup>121</sup> s 4(2).

<sup>122</sup> s 4(4).

<sup>123</sup> s 5(a) including farms as per s 5(b).

plants that form a division between two properties are dealt with under the *Boundary Fences Act 1908*.<sup>124</sup>

The Act specifies that land will be affected by a plant if branches overhang the land, or if the plant “has caused, is causing or is likely within the next 12 months to cause” serious injury to a person on the affected land, serious damage to the affected land or property on the affected land, or substantial, ongoing and unreasonable interference with use and enjoyment of the affected land.<sup>125</sup> The latter may be made out if the tree obstructs light to windows, skylights or solar panels, and views.<sup>126</sup>

The common law right to abatement is retained, however, without the common law requirement on a person who exercises the right to return the parts of the plant removed. Such person may do so, but is not required to do so.<sup>127</sup> The Act further provides that land will only be affected by a plant if the plant’s trunk or stem is situated within 25 metres from the land.<sup>128</sup> The Act excludes certain land from being affected, including public parks and reserve areas and land under the *Forest Management Act 2013*.<sup>129</sup>

The Act sets out certain rights and responsibilities in regards to plants. An owner of land is responsible for removing any branches that overhang onto other property, and is responsible to ensure that the plant does not cause serious injury.<sup>130</sup> The Act provides that there is no civil remedy created based on a breach of these responsibilities.<sup>131</sup> If there is more than one landholder of the land on which a plant is situated, the owners are jointly and severally liable.<sup>132</sup> There is provision for a person to enter land held by another under the Act if notice is given or an order has been made.<sup>133</sup> The Act does not override laws under other Acts which require authorisation of certain works.<sup>134</sup>

#### *Commencement of action and the notification process*

Applications to the Tribunal may be commenced by a person who owns or occupies affected land. An occupier may only make an application if they have written to the owner asking for them to do so and they have not complied within 42 days.<sup>135</sup> The Tribunal may notify any interested parties of the application.<sup>136</sup> Before the Tribunal will hear a dispute under this Act, the parties are obliged to make reasonable attempts to resolve the matter.<sup>137</sup>

For overhanging branches, a fairly complicated written notification process is provided. Orders are only available under the Act if a branch is overhanging more than 50 centimetres on to the affected land and the tree is more than 2.5 meters in height.<sup>138</sup> Initially, an affected party may provide a *branch removal notice* which specifies, among other things, a day of not less than 30 days in the future by which the branches are to be removed by the owner on whose land the plant is situated, as well as permission for the owner to enter land for this purpose on the

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<sup>124</sup> s 5(2) also note- Plants grown for sale or under order of a court are also excluded- s5(3)(a) and (b).

<sup>125</sup> s 7(1).

<sup>126</sup> s 7(2), (3); NB views will only be obstructed if the plant is at least 2.5 meters high, the view is severely obstructed, and the view was not obstructed when the owner took possession of the property (s7(3)(a),(b), and (c)).

<sup>127</sup> s 12.

<sup>128</sup> s 7(4).

<sup>129</sup> s 7(5) and s 9.

<sup>130</sup> s 10(1), (2).

<sup>131</sup> s 10(3).

<sup>132</sup> s 11(a).

<sup>133</sup> s 13.

<sup>134</sup> s 14.

<sup>135</sup> s 23(1) and s 3(1), s 23(4)

<sup>136</sup> s 24(2), s 29

<sup>137</sup> s 19

<sup>138</sup> s 20

day specified.<sup>139</sup> The owner may then provide notice stating a third party will remove the branch and specifying a day for this to occur.<sup>140</sup> Alternatively, the parties may agree that the removal can be conducted without having to pay a third party.<sup>141</sup> To further complicate matters, an affected person may not provide a *branch removal notice* to an owner for the same plant in a 12 month period, unless the property has changed hands.<sup>142</sup> If a *branch removal notice* has not been complied with by the specified date, an owner *may* remove the branches and *may* return them to the property.<sup>143</sup> Reasonable expenses incurred in the process become the liability of the owner on whose land the plant is situated, however the Act prescribes a maximum amount that can be claimed.<sup>144</sup> An owner may dispute the cost, although curiously, not in the Tribunal but in the Local Court.<sup>145</sup>

For matters that deal with plants affecting land other than overhanging branches, the affected landholder is to provide notice to the owner of the other land outlining the problem and request a response and a date for response in writing of not less than 14 days.<sup>146</sup>

### *The decision-making process*

When making a decision in regards to a matter, the Tribunal is to have regard, inter alia, to any planning schemes and zoning under the *Land Use Planning and Approvals Act 1993*, the location of the plant, any risks associated with changes in the water table and soil instability resulting from proposed changes, and whether the risk was pre-existing when the affected landowner purchased the property.<sup>147</sup> For obstructions of sunlight and views, the Tribunal must consider the degree of the obstruction.<sup>148</sup> Further considerations include whether any work required to the plant would require consent under any other Act,<sup>149</sup> the type of plant,<sup>150</sup> the extent of the contribution of the plant to amenity,<sup>151</sup> storm risk,<sup>152</sup> and the likely effect of pruning the plant.<sup>153</sup> If there is serious injury or damage, or a risk of such, the Tribunal may consider other contributing factors as well as the steps the affected landholder has taken to mitigate the risk or damage.<sup>154</sup>

For matters relating to unreasonable interference, an action may arise if the applicant alleges the plant has caused, is causing or is likely to cause substantial, ongoing and unreasonable interference with their use and enjoyment of the land.<sup>155</sup> In such applications the Tribunal is empowered to consider a number of specific factors, but also has a general power to consider any relevant matter.<sup>156</sup> Appeals from a decision of the Tribunal are to the Supreme Court of Tasmania on a question of law only.<sup>157</sup>

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<sup>139</sup> s 20(2)

<sup>140</sup> s 20(2), (3), (4) and (5)

<sup>141</sup> s 20(7)

<sup>142</sup> s 20(9), (10)

<sup>143</sup> s 21(1)

<sup>144</sup> s 21(3), (4). Pursuant to cl 4 of the *Neighbourhood Disputes About Plants Regulations 2017* (Tas), the current prescribed amount is \$500.

<sup>145</sup> s 21(5)

<sup>146</sup> s 22

<sup>147</sup> s 30 (a), (b), (c) and (d).

<sup>148</sup> s 30(e), (f) and for views it must be considered which part of the dwelling is affected - s30(f)(ii).

<sup>149</sup> s 30(g).

<sup>150</sup> s 30(h).

<sup>151</sup> s 30(i).

<sup>152</sup> s 30(j).

<sup>153</sup> s 30(k).

<sup>154</sup> s 31(1) considerations in making an order to destroy a plant under this provision are broad - s31(2).

<sup>155</sup> s 32(a).

<sup>156</sup> s 32 - including steps taken by the applicant to minimise the interference, the size of the land on which the plant exists, whether the plant pre-dates the occupation of the premises by the applicant, and the contribution the plant makes to the environment.

<sup>157</sup> *Resource Management and Planning Appeal Tribunal Act 1993* (Tas), s 25(1). See also RMPAT Practice Direction 18, [18.3.9].

## *Remedies*

The Tribunal has wide general powers under the Act to make orders to prevent, restrain or reduce the damage or interference established in the cause of action.<sup>158</sup> If a plant is an immediate risk, the Tribunal may make interim orders,<sup>159</sup> and removal or destruction of a plant is an option of last resort.<sup>160</sup> Specific powers in the Act, not limiting the general power, include the ability to order work be carried out by a landholder or other person, entry to land to carry out such work, and the order of compensation to pay costs of such work.<sup>161</sup> The Tribunal may also order an arborist's report.<sup>162</sup> A land owner who is subject to an application or order must give a copy of these to a buyer of the property before any contract is entered into, and if the matter is ongoing, advise the Tribunal.<sup>163</sup> Any proceedings and obligations will then transfer to the subsequent owner.<sup>164</sup>

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<sup>158</sup> s 33(2) 'orders appropriate' to rectify the situation.

<sup>159</sup> s 33(4).

<sup>160</sup> s 33(5).

<sup>161</sup> s 33(6).

<sup>162</sup> s 33(6)(g).

<sup>163</sup> s 16(1)(a), (b). Penalties apply in relation to this, and it may also affect the sale (s17).

<sup>164</sup> s 18 and s 34.

## CHAPTER FOUR – RECOMMENDATIONS FOR REFORM

### [4.1] Introduction

While the common law provides remedies for tree-related disputes that may arise between neighbours, in practice such remedies are not well understood, often require the assistance of lawyers to bring the appropriate court action, and obtaining a remedy is often expensive. Such action may be warranted in cases of serious damage to persons or property occasioned by a tree but are ill-suited to the vast majority of neighbour to neighbour tree-related disputes. Further, existing legislation in the NT, as was noted in Chapter 2, covers only a small portion of the tree related disputes that arise.

Based on the consultations conducted, and the research undertaken, the Committee has concluded that statutory reform is warranted in the NT. The question to be addressed, therefore, was what form such statutory regime should take. We are fortunate that other jurisdictions have already instituted reforms. The challenge for the Committee, therefore, was to determine which aspects of the various models would work in a NT context.

**Recommendation 1** – The Northern Territory Government should implement a statutory regime which addresses neighbour to neighbour tree-related disputes.

### [4.2] New Act or amendment to an existing Act

Having determined that a statutory regime which addresses neighbour to neighbour tree-related disputes should be implemented, a question arises as to whether such regime should be embodied in a new Act or included as an amendment to an existing Act. As was noted in Chapter 3, New South Wales ('NSW') and Tasmania enacted new Acts, whereas Queensland included its regime in its legislation governing boundary fences.

It is the Committee's view that the Queensland approach is to be preferred. The existing NT Act that should be amended to include the tree-related dispute provisions is the *Fences Act 1972*. In coming to this conclusion, the following matters influenced the Committee's decision.

First, one of the objectives of legislation governing tree-related disputes is to ensure that such disputes are resolved in a timely manner with as little formality and cost as possible. The dispute resolution body in the NT most equipped to achieve such objectives is the Northern Territory Civil and Administrative Tribunal ('NTCAT'). The Committee notes that NTCAT already has jurisdiction under the *Fences Act 1972*.

Secondly, NTCAT's processes are structured to facilitate and support self-representation. The *Northern Territory Civil and Administrative Tribunal Act 2014* ('NTCAT Act') also allows for alternate dispute resolution and settlement,<sup>165</sup> which are an integral part of a scheme to deal with tree-related disputes. In particular, NTCAT's ability to require parties to attend a

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<sup>165</sup> *Northern Territory Civil and Administrative Tribunal Act 2014*, Pt 4, Div 4.

compulsory conference, which in practice takes place soon after an Initiating Application has been filed with NTCAT, promotes the settlement of a dispute before it progresses to a hearing.

Finally, there will be instances where the tree-related dispute involves the replacement or repair of a boundary fence, either because the boundary fence is itself a plant, or because a tree has fallen on the fence thus instigating the need for repair. In such circumstances, it is less confusing to the parties if the provisions relating to such dispute are contained in one Act.

**Recommendation 2** – The Northern Territory Government should amend the *Fences Act 1972* to include provisions relating to tree-related disputes.

#### **[4.3] Content of the statutory regime**

There is no need to reinvent the wheel when drafting provisions relating to tree-related disputes. Based on the Committee's analysis, discussed in Chapter 3, and subject to some modifications discussed below, the Committee's view is that the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) should be used as the template for the amendment of the *Fences Act 1972*. In the Committee's view, the *Trees (Disputes Between Neighbours) Act 2006* (NSW) is too narrow in scope. For example, the NSW Act only empowers the Land and Environment Court to make orders regarding obstruction by hedges but not in relation to obstruction by trees.

The Committee notes that the legislative regimes in place in Queensland and Tasmania are quite similar, and there are aspects of the *Neighbourhood Disputes about Plants Act 2017* (Tas) that should be included in the amendments to the *Fences Act 1972*. These provisions are discussed in greater detail below.

**Recommendation 3** – Subject to Recommendation 4, the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) should be used as the template for the amendment of the *Fences Act 1972* to include provisions relating to tree-related disputes.

#### ***Aspects of the Queensland legislation that should not be included in the amendments to the Fences Act 1972***

In the Committee's view, the provisions of Chapter 3 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) that require amendment or modification before being included as amendments to the *Fences Act 1972* are noted below.

1. Separating the removal of overhanging branches<sup>166</sup> from other aspects of the statutory regime is unnecessary. As has been discussed in Chapter 3, the regime for overhanging branches in the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), Ch 3, Pt 4, only applies to branches 2.5 metres or less from the ground, only applies to costs of removal totalling no more than \$300, provides for a somewhat

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<sup>166</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), Ch 3, Pt 4.



convoluted notice mechanism and specifically excludes reliance on other redress provisions in the Act. While the inclusion of a self-help mechanism that provides for recompense to the neighbour appears simple, it is unlikely to work in practice. In consultation with stakeholders it was noted that, generally, the removal of low overhanging branches and the payment of any attendant cost is negotiated between neighbours. It is only when such negotiations break down, or the tree-keeper refuses to negotiate, that recourse to either the common law remedies or a statutory scheme becomes necessary. If settlement could not be reached for the removal of the branches, it is unlikely that a tree-keeper will pay the neighbour's costs incurred. To recover the costs under the Queensland scheme, the neighbour would have to initiate proceedings under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). It is the Committee's view that a better approach for the NT is to provide a single statutory mechanism for dealing with tree-related disputes, regardless of the height of the offending branches or the cost of removal.

2. Further, excluding tenants occupying land from bringing an action to address concerns arising from low overhanging branches from a tree on the tree-keeper's land also is unnecessary; particularly if the tenant is bringing the application because the landlord has refused to act. While it can be anticipated that an application to deal with low hanging branches usually will be brought by the landlord at the instigation of the tenant, or the managing agent of the property, there may be circumstances where the landlord has refused to initiate proceedings. In such circumstances the tenant, as occupier of the land and the party most directly affected by the low hanging branches, should have standing to bring an application in NTCAT.
3. The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) also does not make specific reference to the obstruction of sunlight to solar panels or a solar hot water system. In this regard, a provision similar in scope to s 7(2)(b) of the *Neighbourhood Disputes about Plants Act 2017* (Tas) should be included in the amendments to the *Fences Act 1972*. Such a provision should apply only to an obstruction that was not in existence when the neighbour installed the solar panels or hot water system.
4. The Queensland legislation requires that a searchable electronic register be kept by QCAT of all orders made under Chapter 5 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).<sup>167</sup> It is the Committee's view that such a register should be established, however, its establishment and maintenance would have significant cost implications. It was brought to the Committee's attention in our consultation with NTCAT that there is no other category of NTCAT order for which NTCAT is required to keep a register. Given that the likely number of orders under the amendments to the *Fences Act 1972* would be modest, at least in the context of NTCAT's overall jurisdiction, such a requirement would involve a significant cost burden on NTCAT.

Whether the register should be the responsibility of NTCAT, the Department of Attorney-General and Justice or some other entity such as the Land Titles Office, is a matter best left to the Department. Consequently, our recommendation notes simply that the Department should establish such a register and leaves it to the Department to determine responsibility for its establishment and maintenance.

5. Section 65 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) requires the neighbour to make a reasonable effort to reach agreement with the tree-

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<sup>167</sup> The *Neighbourhood Disputes About Plants Act 2017* (Tas), s 37, contains a similar provision.

keeper (s 65(a)) and to take all reasonable steps to resolve the matter under any relevant local law, local government scheme or local government administrative process (s 65(b)). QCAT must be satisfied that such pre-requisites are met before any order under the Part 5 of the Act can be made. The *Neighbourhood Disputes about Plants Act 2017* (Tas) contains a similar provision (s 19), however the provision is not expressed as a pre-requisite to the making of an order by the relevant tribunal.

While encouraging the parties to attempt to resolve the dispute without recourse to NTCAT is desirable, it is the Committee's view that such attempts should not be a pre-requisite to NTCAT's exercise of its jurisdiction. It can be anticipated that NTCAT proceedings under the amendments to the *Fences Act 1972* could be bogged down in submissions that the applicant has not satisfied the pre-requisites to the granting of an order under the Act. Further, as has been mentioned above, NTCAT generally requires the parties to attend a compulsory conference soon after the Initiating Application is lodged. Options for settlement can be explored at the conference, and a party's unreasonable refusal to settle can be taken into consideration on the question of costs should the matter proceed to hearing.<sup>168</sup>

It is the Committee's view that the better way to promote settlement discussions between neighbours without impacting on NTCAT's procedures is to include in the amendments to the *Fences Act 1972* a provision such as s 19 of the *Neighbourhood Disputes about Plants Act 2017* (Tas). That section provides:

- (1) A landholder of land that is affected by a plant situated on another area of land may request the owner of the other land, verbally or in writing, to take action to ensure that the affected land ceases to be affected by the plant.
- (2) Both –
  - (a) a landholder of land that is affected by a plant; and
  - (b) the owner of the land on which the plant is situated –are to make reasonable attempts to prevent the affected land being affected by the plant, or to minimise the degree to which the affected land is being, or will be, affected by the plant.

6. Further, to encourage settlement before a dispute results in an Initiating Application filed in NTCAT, the NT Department of Attorney-General and Justice (the Agency that currently has administrative responsibility for the *Fences Act 1972*) should develop and publish detailed guidance on individual rights and obligations under the Act and on alternate dispute resolution processes. For example, reference could be made in the guidelines to alternative approaches to resolving disputes (eg, mutual engagement of an arborist to assess a tree) and the services provided by organisations such as the Community Justice Centre (NT) in mediating such disputes.<sup>169</sup>

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<sup>168</sup> *Northern Territory Civil and Administrative Tribunal Act 2014*, s 132.

<sup>169</sup> Given the demonstrable benefits in informal neighbour-to-neighbour resolution, the Department should also establish a published contact point for enquirers to clarify the application of the Act and discuss options for further action. This could be done by one or more of a contact phone line or a text/online query function.

7. It is the Committee's view that the definition of 'tree' under the amendments to the *Fences Act 1972* should be as broad as possible to avoid the rejection of claims as falling outside the definition. In this regard, the definition of 'plant' in the *Neighbourhood Disputes about Plants Act 2017* (Tas), s 4(2), is preferable to the narrower definition of 'tree' in *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 45.

**Recommendation 4** – The amendments to the *Fences Act 1972* referred to in Recommendation 3 should include the following modifications to the provisions based on the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld):

- (a) Provisions relating to the removal of overhanging branches should not be dealt with in a separate Part of the Act;
- (b) Where a landlord refuses to initiate proceedings the tenant, as the occupier of the land, should have standing to bring an Initiating Application in the Northern Territory Civil and Administrative Tribunal regarding a tree-related dispute;
- (c) Obstruction of sunlight to solar panels and solar hot water systems should be included in the matters which may give rise to a tree-related dispute within the meaning of the statutory provisions, provided the obstruction was not in existence when the solar panels or solar hot water system was installed;
- (d) The NT Department of Attorney-General and Justice should establish a searchable electronic register of orders made pursuant to the amendments to the *Fences Act 1972*;
- (e) To encourage settlement by the parties before the filing of proceedings in the Northern Territory Civil and Administrative Tribunal, a provision based on s 19 of the *Neighbourhood Disputes about Plants Act 2017* (Tas) should be included;
- (f) The NT Department of Attorney-General and Justice should develop and publish guidance on individual rights and obligations under the Act and alternate dispute resolution processes for resolving tree-related disputes;
- (g) When defining the word 'tree', a definition similar to the word 'plant' in the *Neighbourhood Disputes about Plants Act 2017* (Tas), s 4(2), should be used.

#### [4.4] Continued application of common law remedies

The objective of a statutory regime to resolve tree-related disputes arising between neighbours is to provide an easily understandable, low cost method of resolving such disputes. The provisions are designed to cover matters which would have been dealt with under the common law remedies of nuisance and abatement, however, they are not designed to abrogate such common law remedies. The exception is the requirement under the law of abatement to return parts of trees removed by a neighbour to the tree-keeper. In this regard, a provision such as s 54 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) should be included in the amended *Fences Act 1972*.<sup>170</sup>

The recommended amendments to the *Fences Act 1972* also are not designed to address serious injury or death to persons or serious damage to property arising from the negligence of the tree-keeper. It is anticipated that such matters will continue to be dealt with by the courts.

<sup>170</sup> A recommendation has not been made in this regard because the Committee's view is that the matter is covered by Recommendation 3 above.

#### **[4.5] Aftermath of cyclones and major storms**

In making this reference, the Attorney-General and Minister for Justice noted the many challenges that arose from damage to vegetation that occurred during Cyclone Marcus. The recommended statutory scheme would go a considerable way to reducing the scope for such damage by making it easier for neighbours to address obvious concerns and risks prior to future events of this nature.

Even so, any major weather event brings with it the risk of falling branches and trees and consequent damage and disruption. Some of these incidents may be foreseeable but many will be the unpredictable result of the brute force of nature. The immediate response to widespread calamitous weather events often relies on self-help and a mix of goodwill and positive action from local councils, the Northern Territory Government, insurers and public-spirited Territorians.

Government can take steps to plan and prepare for such events, engaging with stakeholders to involve the community as far as possible with co-ordinated clean-up efforts. There may also be potential for Government to allocate resources to provide assistance to residents who most need help to prepare for such events or to recover from less widespread events. However, initiatives of that type are more in the nature of administrative action tailored to particular circumstances and are not necessarily apt for inclusion in general legislation.

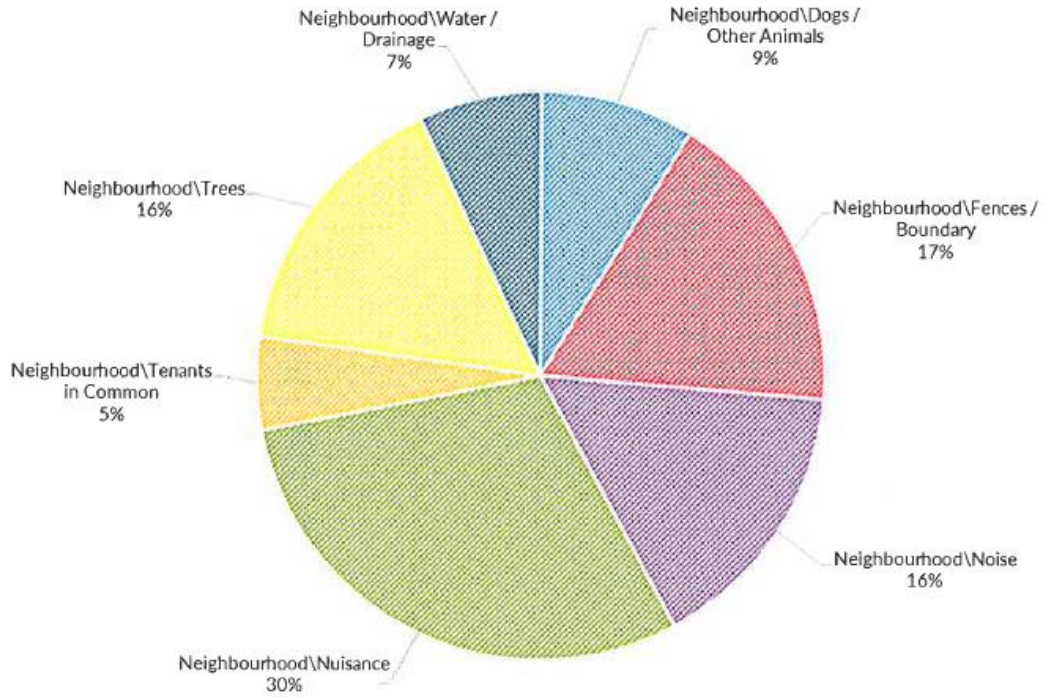
#### **[4.6] Conclusion**

When there is comity between neighbours, social harmony in a community is enhanced. Promoting early settlement of tree-related disputes between neighbours helps to foster such harmony. When the dispute, or the neighbour, is intractable, an aggrieved party should have recourse to NTCAT to resolve the dispute in an efficient and cost-effective way. Implementation of the recommendations contained in this report will provide neighbours with an easily understandable roadmap to resolve their tree-related disputes.

# APPENDIX 1

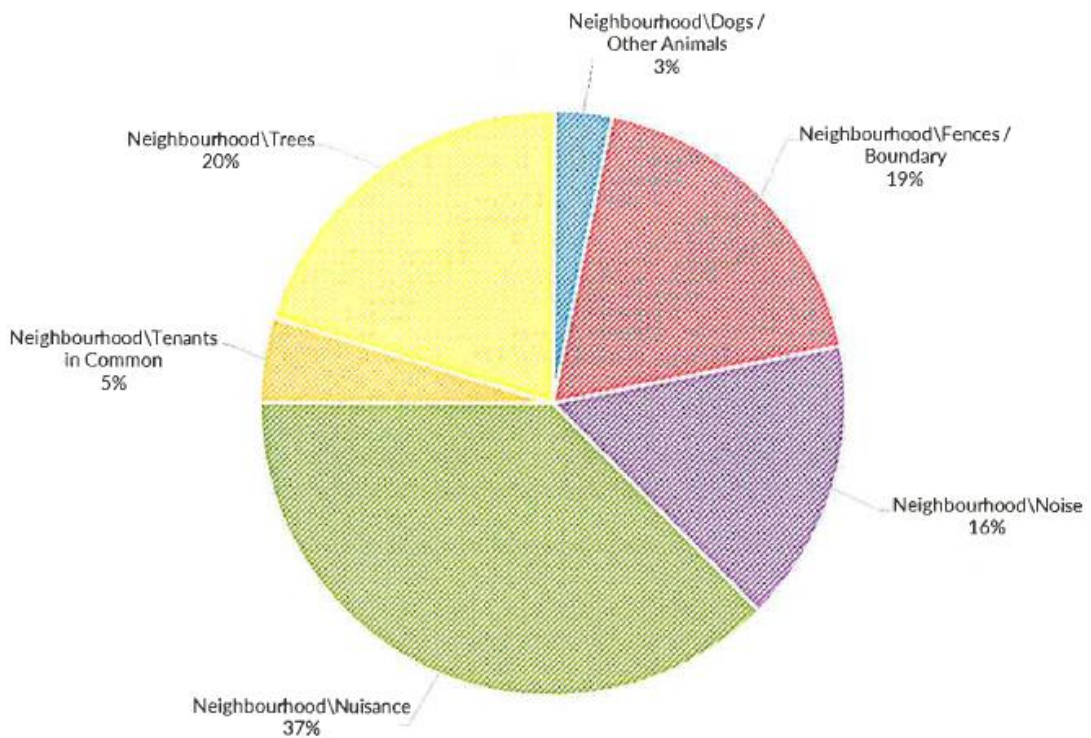
## NEIGHBOURHOOD DISPUTE CASES

(01/07/2018 - 07/05/2019)



## NEIGHBOURHOOD DISPUTE CASES

(01/07/2017 - 30/06/2018)



# ESCALATING NEIGHBOURHOOD DISPUTES

01/07/2017 - 07/05/2019

