



NSW Legislative Council Hansard Trees (Disputes Between Neighbours) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 22 November 2006.

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [10.00 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have my second reading speech incorporated in *Hansard*.

Leave granted.

The Trees (Disputes Between Neighbours) Bill 2006 is designed to provide a simple, inexpensive and accessible process for the resolution of disputes about trees between neighbours.

The bill establishes a separate statutory scheme giving the Land and Environment Court jurisdiction to make orders to remedy, restrain or prevent damage to property or prevent injury to any person as a result of a tree on adjoining land.

Honourable members may be aware that there is some background to this matter. The issue of disputes about trees in the urban environment was originally considered by the New South Wales Law Reform Commission in its report entitled "Neighbour and Neighbour Relations", Report No. 88, published in 1998.

The Law Reform Commission's report concluded that the common law of nuisance and abatement, which currently governs disputes between private parties about trees, does not provide an adequate dispute resolution process for people living in closely settled communities.

The bill draws upon the work undertaken by the Law Reform Commission, but adopts a different approach to that contained in a number of the commission's recommendations. The proposed legislation also reflects changes to the planning laws and other legislation that have occurred since the publication of the commission's report.

An exposure draft of the bill was released earlier this year for public comment and a number of changes have been made to the bill as a result of submissions received during this process.

I will now outline the principal provisions of the bill.

The proposed legislation limits the application of the common law of nuisance. An application for an order where a tree on adjoining land is causing damage or poses a danger may only be brought in the Land and Environment Court.

As an award of compensation may be ordered under the legislation, the appropriate jurisdiction for matters under the legislation is a court.

The Land and Environment Court, which is a specialist environmental jurisdiction, is the most appropriate forum for such disputes. The court's judges and commissioners have extensive experience with trees and vegetation and are regularly required to address provisions of legislation covering native vegetation, national parks and wildlife as well considering local planning instruments.

Commissioners of the Court hold relevant qualifications and experience. The court has recently advertised for acting commissioners with qualifications in arboriculture, ecology, heritage and engineering, all of which may be relevant to a dispute involving a tree.

When dealing with applications under the proposed legislation commissioners will sit alone or with other commissioners with relevant expertise. The court may also engage arborists as court appointed experts in certain circumstances.

As is the case with conflicts about dividing fences, the great majority of tree disputes will occur in built up metropolitan areas. The legislation therefore applies to trees situated in areas with certain zonings, such as areas designated as residential, township, industrial and business under an environmental planning instrument. This approach will ensure that vegetation covered by legislation relating to national parks, catchments, land

clearing, native vegetation and other such matters is not caught by the provisions of the bill.

Certain other trees will not be covered by the legislation. The Crown Lands Act 1989 provides that the Minister may refer any matter arising out of the administration of the Act to a local land board for inquiry and report. Accordingly, if the tree situated on Crown land is causing problems, the Minister may refer the matter to the local land board.

Where a matter has been referred to a local land board under either the Crown Lands Act or the Western Lands Act 1901, the Land and Environment Court must not make an order unless the process provided for under the Crown lands legislation has been completed.

Trees on council land are also exempt from the operation of the legislation but only in the short term. It is appreciated that some councils have limited resources and that many already spend considerable time and money dealing with tree disputes.

However, local government should expect to be covered by the scheme in two years time, when a review of the legislation will take place. Unless the review reveals compelling reasons in support of an ongoing exemption, it is anticipated that local government will then be included.

In terms of the more practical aspects of the legislation, the bill requires an applicant to give notice of an application to certain persons, including the tree owner and any relevant authority that would be entitled to appear in the proceedings. The court may waive the requirement to give notice.

The bill provides that a relevant authority, such as a council or the Heritage Council, has a right of appearance before the court in any proceedings where the consent or authorisation of the authority would, in the absence of the legislation, otherwise be required.

Where the court is satisfied that the tree which is the subject of the application has, is, or is likely to cause damage in the near future or poses a risk of injury to a person, the court has jurisdiction to make a range of orders. These orders are designed to remedy or prevent damage, or prevent injury to a person, and may involve the trimming or removal of the tree, installation of root barriers and other such action.

The court may make orders, including:

- payment of costs associated with such orders;
- payment of compensation for damage to property;
- replacement of a tree; and
- authorising entry onto land for the purpose of carrying out an order.

Failure to comply with an order of the court may result in a maximum penalty of \$110,000. The level of penalty recognises that more than one tree may be involved.

When deciding to make an order under the proposed legislation, the court must consider a number of factors, including:

- whether interference with the tree would usually require any consent or authorisation under the Environmental Planning and Assessment Act 1979 or the Heritage Act 1977 and, if so, whether such consent or authorisation has been obtained;
- any environmental, historical, cultural, social or scientific value the tree may have;
- any contribution of the tree to the natural landscape and scenic value of the land on which it is situated or the locality concerned;
- any impact of the tree on soil stability, the water table or other natural features of the land or locality;
- factors that may have contributed to the damage (such as the neighbour's own tree roots);
- any steps the tree owner has taken to prevent damage to property or injury to a person; and
- such other matters as the court considers relevant.

The provisions that require the court to consider environmental factors prior to making an order are in recognition of the importance of urban trees as an environmental asset.

Urban trees play a proven environmental role in every urban society. They provide energy savings through lower cooling costs, reduce stormwater run-off, help reduce salinity and provide aesthetic and social benefits associated with being in proximity to nature.

The bill therefore recognises the environmental contribution of urban trees as a factor that the court must take into consideration in determining applications.

A number of submissions relating to the exposure draft bill raised concerns relating to trees blocking light and views.

The Government appreciates these issues are important to some members of the community. However, the Government is mindful that the proposed legislation pioneers new ground and at this stage does not consider it appropriate to address such concerns. They will be kept under review.

Other provisions in the bill give councils a discretion to carry out the work ordered by the court where the tree owner has not complied with the order. Where councils take such action they will be able to recoup reasonable costs associated with such work.

Orders made by the court relating to work to be carried out in relation to the tree that was the subject of the application will "run with the land". That is, where a person sells the land but has not carried out the orders and the applicant has given the new owner a copy of order, the purchaser of the property will be required to carry out the work.

The bill amends the Conveyancing (Sale of Land) Regulation 2005 to require a vendor to give a warranty regarding an application or order requiring work to be carried out in compliance with the Trees (Disputes Between Neighbours) Bill. The bill also amends the Environmental Planning and Assessment Act 1979 to provide for the inclusion of information regarding court orders made under the legislation on section 149 planning certificates.

The legislation will be commenced early in 2007 once the Land and Environment Court has established appropriate procedures.

I commend the bill to the House.