

Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [10.08 a.m.]: I move:

That this bill be now agreed to in principle.

The Trees (Disputes Between Neighbours) Amendment Bill 2010 amends the Trees (Disputes Between Neighbours) Act 2006, which was introduced by this Government in 2006. The Act aims to provide a simple, inexpensive and accessible process for resolving neighbour disputes about trees. Specifically, the Act established a new procedure in the Land and Environment Court for resolving disputes about urban trees which are causing damage to property or which pose a risk of injury. Previously, disputes of this kind could only be resolved by suing in the tort of nuisance either in the Local Court, District Court or Supreme Court.

In accordance with section 23 of the Act, the Act was reviewed two years after its assent. The aim of this review was to determine, firstly, whether the policy objectives of the Act remain valid and, secondly, whether the terms of the Act remain appropriate for securing those objectives. The review received more than 230 submissions from residents, community groups, professional associations, councils and government agencies. The review found that the policy objectives of the Act remained valid. However, recommendations were made to improve the operation of the Act. The Government accepted all of the recommendations of the review. The aim of this bill is to implement recommendations arising out of that review.

I will now outline the key provisions of the bill. The bill gives the Land and Environment Court a new jurisdiction to hear disputes about high hedges that severely block sunlight to a window of a dwelling on adjoining land, or views from such a dwelling. Currently, the Trees Act only permits the Land and Environment Court to make orders in relation to trees that have caused, are causing, or are likely to cause, damage to the applicant's property or which are likely to cause injury to a person. More than half the submissions to the review requested that the Trees Act be expanded to cover trees that block sunlight and views. The most frequent and most serious concerns raised in submissions related to high, dense hedges on immediately adjoining private properties, which severely obstruct sunlight to windows, and views from dwellings.

In accordance with the recommendation made by the review, this bill will give the Land and Environment Court a new, strictly limited jurisdiction in relation to these hedges. To this end the bill inserts a new part 2A into the Trees Act. The object of this part is to create a mechanism by which neighbour disputes about high hedges can be heard and disposed of in a proportionate way, which, firstly, balances the competing rights of neighbours to enjoy their property and, secondly, ensures that the existence and health of urban trees can be maintained. Given the environmental and other benefits of urban vegetation, and the fact that this is a new procedure, the circumstances in which a person can apply for orders in relation to trees that block sunlight and views will be limited to the most serious cases. People will not be able to make an application in relation to a single tree; rather, the new part applies to groups of two or more trees that are planted to form a hedge and rise to a height of at least 2.5 metres.

The new part will enable people to apply to the Land and Environment Court for relief where these high hedges, on private adjoining land, severely obstruct sunlight to a window of their dwelling, or a view from such a dwelling. The court will be able to make any orders it sees fit to remedy, restrain or prevent such an obstruction of sunlight or views caused by the hedge, excluding financial compensation. Before making an order, the court must be satisfied that the applicant has made a reasonable effort to resolve the matter with the owner of the land on which the hedge is situated. As with part 2 of the Act, the intention is to ensure that wherever possible, people attempt to resolve these kinds of disputes without resorting to court action—for example, through discussions with their neighbours, or mediation.

The court must also be satisfied that the severity and nature of the obstruction is such that the applicant's interest in having the obstruction addressed outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees. Proposed section 14F sets out a range of specific factors the court will be required to consider before determining an application, including, firstly, any contribution of the trees to the natural landscape and the scenic value of the land or locality; secondly, any impact of the trees on soil stability, the water table or other natural features of the land or locality; and, thirdly, any contribution of the trees to privacy, landscaping, garden design, heritage values, and protection from the sun, wind, noise, smells or smoke, or the amenity of the land on which they are situated.

These provisions recognise the numerous environmental and community benefits that trees provide. They recognise also that there are many legitimate reasons a person may wish to plant or preserve trees in the form of hedges. The court, therefore, will have to undertake a balancing exercise before it makes an order to remedy, restrain or prevent any obstruction of sunlight or views caused by a high hedge. Proposed section 14F also requires the court to consider whether the trees existed prior to the applicant's dwelling, and whether the trees grew to a height of 2.5 metres or more while the applicant owned or occupied the land. As with part 2 of the Act,

a relevant authority, such as a council or the Heritage Council, will have a right of appearance in any proceedings where the consent or authorisation of the authority to interfere with the trees would, in the absence of the Trees Act, otherwise be required.

The bill provides for a review of this new part of the Act after its first two years of operation. This review will consider whether the policy objectives of the part remain valid, and whether the terms of the part remain appropriate for securing those objectives. The Government considers this an important mechanism to ensure that the new provisions operate as intended and, if not, to address any concerns that might arise in practice. The bill also extends the operation of part 2 of the Trees Act to trees on land that is zoned rural-residential. At present the Trees Act only applies to urban land, such as land zoned residential, township or industrial. When the Act was before Parliament in 2006 it was noted that the restricted application of the new scheme to these zonings would be reconsidered as part of the statutory review.

In the statutory review, submissions did raise concerns that the types of zoning to which the Trees Act applies are not sufficiently broad. In particular, examples were given of cases involving unsafe trees that had been dismissed in the Land and Environment Court because the tree was on land zoned rural-residential. To respond to these concerns the bill extends the application of the Act to trees on land that is zoned rural-residential, or an equivalent land use zone. This will only apply in relation to disputes about trees that have caused, are causing, or are likely to cause, damage to property or are likely to cause injury. It will not apply to the new high hedges jurisdiction.

The bill also makes changes to support the enforcement of court orders made under the Trees Act. Currently, if a person does not comply with a court order under the Trees Act, the other party can ask their local council to step in and do the work instead. If the council chooses to intervene, it can recover the cost of the work from the person who was subject to the order. The review of the Act found that councils have been reluctant to intervene in some matters. Councils currently only have a power to recover the "reasonable costs of undertaking the work". This may not compensate councils for the full costs to them of arranging for the work to be carried out, including insurances, and of the time spent trying to recover the debt from the owner of the trees. The bill therefore amends the Trees Act to, firstly, allow councils, if they elect to enforce a court order, to recover a prescribed administration fee, in addition to the costs of carrying out the work to satisfy the order; and, secondly, provide that any enforcement costs and fees payable to a council may be registered as a charge on the tree owner's land.

The intention is for the additional fee to act as an incentive for councils to intervene, and an additional incentive for tree owners to comply with court orders. The bill also allows an applicant's immediate successor in title to enforce certain orders made under the Trees Act. At present, a person who successfully applies for an order under the Trees Act can ensure that any new owner of the land on which the tree is situated is also bound by the order, by giving the new owner a copy of the order. However, the Act makes no provision for the applicant's successor to enforce an order if the applicant sells their land before the work is carried out. This bill provides a solution to this scenario. If the court makes an order under part 2 of the Act in relation to trees that have caused, are causing or are likely to cause damage or which pose a risk of injury to a person, the applicant's immediate successor will be entitled to the same rights and benefits as the applicant in respect of the order.

It is appropriate that the person who buys the applicant's land should have the ability to ensure that the current tree owner or any future tree owner is bound by that order, until the work is carried out. Schedule 2.1 to the bill gives the Land and Environment Court jurisdiction to hear and determine matters arising under the Dividing Fences Act 1991 in certain circumstances. The court will have this jurisdiction where an application has been made under the Trees Act in relation to a tree that has caused, is causing or is likely to cause damage to a dividing fence, or a tree is itself part of a dividing fence, and has caused, is causing or is likely to cause damage to the applicant's property, or is likely to cause injury to a person. These new provisions will mean that where dividing fences issues arise in tree proceedings before the Land and Environment Court parties will not have to make and pay for a separate application and attend a separate hearing before a Local Court or a local land board. It will be a simpler, more-efficient and cost-effective way of resolving disputes that raise issues under both Acts.

The bill also makes it clear that an application to the Land and Environment Court can still be made after the removal of a tree that has caused the damage or injury giving rise to the application under part 2 of the Act. In *Robson v Leischke* [2008] NSWLEC 152 the Land and Environment Court found on 1 May 2008 that it has no jurisdiction to make orders to remedy damage to property, or require payment for compensation for damage caused by a tree, if that tree has been wholly removed. That is because section 7 of the Trees Act uses the present tense when describing the location of the tree on adjoining land. It refers to "a tree ... that is situated on adjoining land".

A number of submissions to the review suggested that the Act should be amended to allow the Court jurisdiction where the tree has been wholly removed. The review found that it is preferable for all cases of damage caused by trees in eligible zonings to be dealt with by the Land and Environment Court under the Trees Act, rather than have those cases heard under the common law in other courts simply because the tree in question has been wholly removed. The bill therefore amends the Trees Act to apply to situations where the tree has been wholly

removed following the damage or injury giving rise to the application.

Finally, the bill amends the Trees (Disputes Between Neighbours) Regulation to prescribe vines as a tree for the purposes of the Act. Damage caused by vines was actionable in nuisance but is currently excluded from the Trees Act by the statutory definition of tree. There is no reason why neighbours who are in dispute regarding a vine that is causing damage or risk of injury should have to sue in nuisance, when there is a simple process available under the Trees Act to hear and determine the dispute. The bill makes amendments to improve the operation of the Trees (Disputes Between Neighbours) Act. It will respond to issues raised in the statutory review, to ensure that the Act continues to meet its policy objectives. I commend the bill to the House.