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Property Law e-alert

Changes to the law regarding disputes between neighbours over hedges and trees

In September 2009 the NSW Government announced that by way of an amendment to the *Trees (Disputes Between Neighbours) Act 2006* the Land and Environment Court would be given the power to resolve disputes between neighbours over **high, dense hedges that severely affected views and sunlight**.

The amendments have now commenced, giving the Land and Environment Court a new but strictly limited jurisdiction to make orders to remedy a situation where the Court finds that a hedge on adjoining land is severely obstructing

- (a) sunlight to a window of a dwelling, or
- (b) any view from a dwelling.

A 'window' includes a glass sliding door, a door with a window, a skylight and any other similar thing.

This new power can be used only in respect of multiple trees which satisfy the **definition of hedge**: a group of 2 or more trees that

- (a) are planted (whether in the ground or otherwise) so as to form a hedge and
- (b) rise to a height of at least 2.5 metres above existing ground level.

The 2010 amendments do not give the Court the power to make orders against single trees which block views or sunlight and nor does the new hedges jurisdiction apply to trees situated on Crown land or on any land within a zone designated "rural-residential".

If an owner or occupier of land is concerned about trees on an adjacent property, they have an initial obligation to make 'reasonable effort' to reach agreement with the owner of the land on which trees are located. The legislation is expressly intended to ensure that, wherever possible, neighbours attempt to resolve hedge disputes through discussions or mediation. The Court cannot make an order if it is not satisfied that the applicant has made a reasonable effort to resolve the dispute. Failing resolution by negotiation or mediation, an owner or occupier of land is entitled to apply to the Land and Environment Court for an **order to remedy, restrain or prevent a severe obstruction to sunlight or a view**. An applicant must give at least 21 days notice of the lodging of the application and the terms of any order sought to the owner of the land on which the trees are situated and to any other person the applicant has reason to believe will be affected by the order.

The Land and Environment Court must conduct a balancing exercise to determine whether the applicant's interest in having the situation remedied outweighs any countervailing interest in not disturbing the hedge. The legislation provides a non-exhaustive list of eighteen matters for the Court to take into account in determining an application, including the environmental and community benefits of urban trees, the nature and extent of the view obstructed and the part of the dwelling from which the view is obstructed. What constitutes a view, and whether if there is a view is it seriously obstructed, will be matters for the Court's determination on the facts of the case.

Among the orders which the Court may make are orders requiring the taking of action to maintain trees at a certain height, width or shape and orders requiring the removal of a tree or trees and their replacement with a different species. The Court may authorise land to be entered for the purpose of carrying out its orders, including obtaining quotations for the carrying out of an order.

This new 'hedge' jurisdiction operates in addition to the Land and Environment Court's 'tree' jurisdiction under the *Trees (Disputes Between Neighbours) Act 2006*. That jurisdiction applies to single trees and allows a person to apply to the Court for an order where a tree on property adjacent to theirs has caused, is causing or is likely in the near future to cause damage to the applicant's property or where it is likely that the tree will cause injury to a person. The Court has a broad power to make orders to remedy, restrain and prevent damage or injury to any person and has associated enforcement powers.

Orders can be made under the Act regarding trees located wholly or principally on urban land, such as land zoned residential, township or industrial. The Act does apply to trees on Crown land but does not apply to trees on land owned or managed by a

Council. As a consequence of the 2010 amendments, the 'tree' jurisdiction now *includes* trees on land zoned 'rural-residential' or equivalent.

A 'tree' is defined as 'any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations'. The *Trees (Disputes Between Neighbours) Regulation 2007* declares that bamboo is a tree and the 2010 amendments provide that a vine is also a tree. The 2010 amendments also make clear that the Court does have jurisdiction to hear disputes over a tree which caused damage but has been removed.

As with the hedge jurisdiction, the court cannot make an order unless it is satisfied that the applicant has made a reasonable effort to resolve the matter with the owner of the land on which the tree is situated via negotiation or mediation.

The 2010 amendments also give the Land and Environment Court jurisdiction to hear and determine matters arising under the *Dividing Fences Act 1991* (NSW) where an application has been made under the *Trees (Disputes Between Neighbours) Act 2006* in relation to a tree that has caused, is causing or is likely to cause damage to a dividing fence, or where 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.

If a person fails to comply with any requirement imposed by an order of the Court, the Court may impose a fine and the other party may ask their local council to intervene to perform the work in accordance with the Order. Councils which choose to intervene may now recover not only the 'reasonable costs of undertaking the work', but also a prescribed administration fee which may be registered as a charge on the tree-owner's land. The Act permits the Court to order compensation for rectification of damage caused by a tree, payment of the cost of any work and/or replacement of any trees which the Court orders to be removed. Additionally, a person who fails to comply with a Court Order may have criminal or contempt proceedings brought against them.

If you are concerned with possible damage arising from a tree on an adjacent property, if a hedge is blocking your views or access to sunlight, or if you are named as a Respondent in proceedings commenced under the *Trees (Disputes Between Neighbours) Act 2006*, our environment and planning law team may be able to assist you.

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