



Neighbours' Hedges as Barriers to Sunlight and a View

Tasmania Law Reform Institute Issues Paper No 19

Response from the Local Government Association of Tasmania

May 2014

Contact:

Katrena Stephenson

GPO Box 1521, Hobart 7001

Ph: 03 6233 5973

Introduction

The Local Government Association of Tasmania (LGAT) is the representative body of Local Government in Tasmania. Established in 1911, the LGAT is incorporated under the *Local Government Act 1993 with membership comprising 28 of the 29 Tasmanian councils.*

The objectives of the Association are:-

- To promote the efficient administration and operation of Local Government in the State of Tasmania;
- To watch over and protect the interests, rights and privileges of municipal councils in the State of Tasmania;
- To foster and promote relationships between Local Government in the State of Tasmania with both the Government of Tasmania and the Government of the Commonwealth of Australia;
- To represent the interests of the members of the Association generally, and in such particular matters as may be referred to the Association by its members; and
- To provide such support services to the members of the Association as the Association may by resolution in meeting determine.

General Comments

This submission has been developed following consultation with member councils and focuses on a number of shared comments. Some councils have also made direct submissions, with varying levels of detail. Any omission of comments that councils have made directly should not be viewed as lack of support by the Association for that specific issue.

The Association appreciates the level of consultation provided by the Tasmanian Law Reform Institute on this issue including forums for council officers.

It is easy to summarise the main feedback from councils. There is strong opposition to this matter being regulated by Local Government. This is related to the ability (or lack of) to resource such regulation.

Appendix One outlines preliminary feedback provided to the TLRI ahead of preparing the discussion paper and is included as much of it is still relevant.

Question 1:

What evidence is there that hedges blocking access to sunlight and/or to a view is a significant issue in Tasmania?

Response:

LGAT was surprised at the number of cases raised through the Institute's survey process which related to hedges and to sunlight. A number of councils reported 6-12 inquiries a year which could be broadly related but complaints have tended to focus on trees rather than hedges and relate more to perceived safety and/or droppage than sunlight, although there have been some cases where view has been the issue. This does not mean it is not an issue and there is support in the sector for granting improved rights to address such issues.

Question 2:

Should there be additional remedies for property owners who are aggrieved by another property owner's high hedge that is blocking access to sunlight and/or a view or is the current law sufficient?

Response:

Yes, (see above) although generally councils focused on the issue of sunlight rather than view. Our experience of representations based on views in the planning system suggest this would be a highly fraught area and difficult to regulate. There are no rights to a view enshrined in the planning legislation as opposed to sunlight and privacy considerations and the appearance of a development on the impact of the streetscape.

Question 3:

Should the Victorian model of dispute resolution be adopted and if so:

- (a) What range of matters should it deal with; and*
- (b) What key features should it possess?*

Response:

No. The Victorian model relies on voluntary dispute resolution and, as the issue paper notes, if neighbours are unable to resolve the issue through assisted dispute resolution they can still access other legal remedies, *limited as they are*. If the problem is to be properly addressed, the aggrieved party must have access to a legal remedy and no such legal remedy currently exists in Tasmania.

In attempting to implement a dispute resolution process in Tasmania in partnership with the EPA – the Environmental Dispute Mediation Project – LGAT found that there was negligible take up, largely because of an unwillingness of parties to enter voluntary mediation. A similar risk would underlie any voluntary dispute processes established.

Question 4:

If a statutory remedy is provided, which model should be adopted:

- (a) A model with a local council as the initial decision making authority with appeal rights to the Resource Management and Planning Tribunal;*
- (b) A model with a local council as the initial decision making authority with appeal rights to the Administrative Appeals Division of the Magistrates' courts of Tasmania;*
- (c) A model where application is made directly to the Court; or*
- (d) A variant model?*

Response:

There is no support from Local Government for any model that includes Council as a decision-making authority. The resources simply do not exist, particularly in smaller municipalities. It would be unlikely a fair system could be established that would ensure adequate cost recovery to individual councils because the complaints are likely to be spread thin and wide. Such matters can be extremely resource-intensive. A centralized mechanism for resolution is suggested as necessary to achieve economy of scale.

There was some support from LGAT Members for a model where application is made direct to a Court but with evidence that the applicant has made all reasonable attempts to resolve the issue with the neighbour.

Question 5:

Should the legislation include a requirement that an applicant makes all reasonable attempts to resolve the issue before recourse to the statutory remedy?

Response:

Yes, see above.

Question 6:

How should the degree of obstruction be defined:

- (a) By reference to its severity; and/or*
- (b) By reference to the owners' use and enjoyment of the land; and/or*
- (c) By reference to a "reasonable" person's use and enjoyment of the land; and/or*
- (d) Otherwise?*

Response:

Generally councils supported defining the degree of obstruction using a) and c).

Question 7:

Should the obstruction of sunlight only relate to the dwelling or extend to the land itself?

Response:

There was no consensus on this question.

Question 8:

If legislation is enacted to respond to the issue of high hedges blocking sunlight or a view, should that legislation incorporate a requirement that:

- (a) There needs to be malicious intent in the planting of a hedge or non-maintenance to obstruct sunlight or a view before a remedy is provided, or*
- (b) There needs to be malicious intent in the planting of a hedge or non-maintenance to obstruct sunlight or a view, and in resolving the issue the court must balance rights of property owners to legally plant or do anything on their land that they desire; or*
- (c) That in resolving the issue the court must balance the rights of the property owner to plant or do anything on their land that they desire but that the legislation not require any consideration of whether a hedge was planted or not maintained for malicious reasons.*

Response:

There was no consensus on this question but more councils leant towards C.

Question 9:

If a statutory scheme is adopted should it seek to remedy an obstruction to sunlight, an obstruction to a view, or both?

Response:

There was no consensus on this question but there seemed to be a stronger level of support for addressing sunlight issues rather than view. See response to Question 2.

Question 10:

What minimum height should apply to vegetation before a complaint can be brought and what justification is there for this?

Response:

There was limited feedback on this question but the proposal put forward by Glenorchy of 2.5m would likely be supported.

Question 11:

Should the legislation apply only to vegetation that is planted so as to form a hedge-like structure or should it apply equally to single trees?

Response:

Councils were generally agreed that any legislation should only apply to vegetation that is planted so as to form a hedge-like structure as this is akin to a wall of a building and its impacts can be

assessed in a similar way. Individual trees should not be considered at this point as there would be a far greater degree of subjectivity involved.

Under the current planning controls there are restrictions on buildings, fences and similar developments that impact on amenity and solar access but there is nothing to prevent the planting of vegetation that can have exactly the same effect. It is not uncommon for Council to receive complaints in relation to encroachments from vegetation but Council has little effective option but to advise civil action.

Question 12:

Should there be any restriction regarding the zoning of property to which legislation applies?

Response:

No.

Question 13:

Should there be any requirement limiting applications to the owners of adjoining properties?

Response:

In general, limiting applications to adjoining properties was supported but this could be owners or lessors.

Question 14:

Should the decision maker be required to consider whether a hedge existed before the complainant acquired the land?

Response:

Yes.

Question 15:

Should an order requiring action by an existing property owner in relation to a hedge/tree be binding on successors in title and if so, to what extent?

Response:

Yes.

Question 16:

How should the burden of costs resulting from an application be apportioned?

Response:

In general, it was felt that if an application is successful then the costs should be borne by the owner against whom the order has been made. However, if the application is unsuccessful, then the costs should be borne by the applicant. This proposed arrangement is likely to have the advantage of discouraging vexatious applications and the advantage of motivating both parties to settle the matter by mediation.

Question 17:

How should legislation deal with the potential conflict between orders to remedy barriers to sunlight/a view and other laws, regulations or by-laws such as tree preservation orders, heritage orders or where a hedge/tree provides a habitat for birds and/or wildlife?

Response:

As outlined by Glenorchy City Council LGAT members feel that any legislation should require the Court, once an application is made, to request the relevant local Council to furnish it with formal advice that the property which is the subject of the application is or isn't affected by a heritage listing, tree preservation order, threatened species habitat or any other matter that, in the Council's opinion, believes may be of relevance to the Court's determination of the application.

Question 18:

If a local government model is adopted should the new legislation be developed or should provisions be incorporated in the abatement notice provisions of the Local Government Act 1993?

Response:

LGAT does not support any legislation that would make Council responsible for the administration and enforcement of that legislation. The Local Government sector is however, willing to be a place

where people may obtain information on the issue of high hedges and on the legislation that applies to dispute resolution in much the same way as it currently provides information of the *Boundary Fences Act 1908*.

Question 19:

Is there an alternative or hybrid model that should be considered?

Response:

During the Local Government forums a number of alternatives or hybrids were discussed with agreement that there should be a legal remedy available to any home owner regardless of where they live. It was also agreed that the legal remedy should be a last resort, having first exhausted options such as mediation. There must be some form of threshold test and awarding of costs to the unsuccessful party.

It was also suggested that if any reform is made that it include the form of granting rights to trim vegetation on or within a distance of the boundary down to a certain height, perhaps a similar process to that under the Boundary Fences Act where people can serve notice on their neighbour that they intend to do so, and that this process be separate and independent of involvement of Council. Disputes under the Boundary Fences Act are dealt with in the Magistrates Court Civil Division where there is a tried and true mediation/conciliation process which can often deal with the matters without trial or hearing and with minimised cost. Any other disputes of nuisance etc that are not directly Boundary Fences Act can also fall within the jurisdiction of that Court and be dealt with through the Court case management process.

Consequently a number of councils commented on the opportunity to link into the review of the Boundary Fences Act and dispute resolution mechanisms proposed there and include these issues in any new Act.

Appendix One: Preliminary Feedback from Councils provided to the TLRI.

- On average, councils would receive 6-12 complaints a year.
- They would range from trivial types of matters such as branches over hanging fence lines etc. to the more complex ongoing neighbour disputes
- Issues raised include:
 - Safety issues like size of trees on the boundary and the possibility of tree falling down and doing damage or limbs falling over onto their property
 - Leaves from neighbours trees filling their gutters
 - Neighbour tree is shading their solar panels
- Councils generally advise it is a civil matter and refer them to their Solicitor for advice.
- Councils will only become involved where there are clear breaches of planning or building requirements and standards or a clear public nuisance is demonstrated. With respect to loss of sunlight – this is not a nuisance of a public nature.
- Some councils have tried to resolve through mediation. One particular example has been going for 10 years.
- Very rarely do public complaints provide specific evidence whereby Council has Statutory Power for enforcement procedures under the Building Act 2000, Water & Sewerage Act or Drainage Act for damage being caused to buildings and/or infrastructure by the infestation of tree roots. Most issues are generally associated with trees causing a loss of direct sunlight to a neighbouring residence or yard, dropping foliage onto adjoining properties, impacting on visual amenity or maintaining accessible fence lines.
- Should it be appropriate to consider implementation of further legislative control in relations to these types of matters, it may be appropriate to consider a standard within the Interim Planning Schemes which controls such matters as types and maximum height of trees in residential zones etc. It may also be appropriate for a general review and up-date of the Boundary Fences Act to include additional provisions for clarity and civil enforcement.
- Under the current planning controls there are restrictions on buildings, fences and similar developments that impact on amenity and solar access but there is nothing to prevent the planting of vegetation that can have exactly the same effect. It is not uncommon for councils to receive complaints in relation to encroachments from vegetation but Council has little effective option but to advise civil action. There is no certainty here and usually this is an expensive option for all parties with little guidance as to what might come from the action. Some simple rules may assist in overcoming a large percentage of these disputes.
- Having said that, councils would not really like to take on this as a new area of responsibility given how vexed and emotional it can be.
- As a matter of principle a council ought only be involved where a claim for nuisance has a broad impact upon the community at large (hence the use of the nuisance provisions in the *Local Government Act 1993* and other legislation) but it should not have any involvement (cost and resources) into private disputes.
- It is pointed out that some of the disputes can currently be dealt with under the *Boundary Fences Act 1908* (which is in clear need of update and could provide some further clarity and guidance on how to deal with these matters without having to involve a council). Where there are disputes under the Act this is dealt with in the Magistrates Court Civil Division for which there is a tried and true mediation/conciliation process which can often deal with the matters

without trial or hearing and minimised cost. Any other disputes of nuisance etc that are not directly boundary fences Act can also fall within the jurisdiction of that Court and be dealt with through the Court case management process. This is available and can often be done without the requirement for lawyers or costly process.

- Some councils have been providing a fact sheet – possibly developed by the Law Society – an example is attached.
- Any statutory controls need to be very carefully thought out. There are issues here that have some similarity to the conflict between residential amenity and rural activities where the urban sprawl reaches the edge of rural resource property where in many cases there are stands of existing large trees that pre-existed the neighbouring build.
- Our recent experience of offering a state-wide environmental dispute mediation service has demonstrated mediation is of limited use with parties reluctant to take it up.

When Trees Come Between Neighbours

Trees cause various problems between neighbours such, as overhanging, blocking sunlight, falling leaves and branches, or roots which break up paths or block drains.

The owner of a tree has no right to prevent a neighbour from cutting away the roots or branches of a tree, which projects over or onto the neighbour's land. While it is not necessary to give notice to the owner of the tree of the intention to prune, it is preferable to consult prior to taking any such action.

The remains of any branches or roots (including fruit on the branch) should be returned to the owner, as they remain their property, unless there is a mutual agreement.

The costs of removing branches or roots is usually borne by the party wishing to remove them, as attempts to recover costs will usually aggravate the situation between neighbours.

It is sensible for care to be taken so as not to cause unnecessary damage to the tree. Not only will this foster good relations with the neighbour, you can also be sued for damages if the tree is deliberately, recklessly or unnecessarily damaged while being pruned.

An adjoining landowner, however, is not entitled to lop a neighbour's tree as a precautionary measure before it overgrows his or her land and becomes a nuisance merely because they presume that in the course of the time it will overhand their land.

The problem of overhanging branches, fallen branches and root damage may be a legal "nuisance" which will allow the occupier to sue the neighbour for compensation or ask the court for an injunction to prevent the problem from continuing. Generally in order to sue successfully the plaintiff must be able to show they are entitled to the right of enjoyment of the land which is being affected by the trees.

Regardless of whether there is a legal nuisance the occupier is allowed to cut protruding branches or roots of the neighbour's tree back to the boundary of the adjoining block.

Remember also that if a branch falls from a tree damaging a neighbour's property the owner of the tree may be liable for any damage caused. If the fallen branch damages the dividing fence, the owner of the tree should repair the fence.

The Council has no power to compel a ratepayer to do anything unless the tree is affecting a service line or is a health hazard.

In most cases disputes should be sorted out between the neighbours, or through mediation. Legal action is a last resort.