

Trees Causing Damage – What can you do?

It is not uncommon for owners corporations to have to deal with damage caused by a tree, being their own, or a neighbours tree. This can include damage to:

- o Common property;
- o Lot property;
- o Retaining walls; or
- o Neighbours property.

These issues are now primarily dealt with under the Tree (Disputes Between Neighbours) Act 2006 (NSW) (“TDA”), though there are circumstances where the TDA will not be applicable.

Process under the Tree (Disputes Between Neighbours) Act 2006 (NSW)

The TDA contains a process where a person whose property is damaged by a tree on “adjoining land” can seek redress for that damage, which includes Court orders if the parties do not reach agreement. Whilst proceeding to Court may be involved, the process under the TDA is designed to be a low cost and user friendly method, even if resorting to Court becomes necessary. This is now handled by the Land and Environment Court (“LEC”) through this simplified process rather than more complex and costly actions through other Courts.

The process is generally as follows:

1. Notice

The affected person must give 21 days’ notice to the owner of the “adjoining land” on which the tree is located (“Tree Owner”). The notice must detail the orders that will be sought if the matter needs to proceed to the LEC. This notice may also need to be given to the local municipal council and/or the Heritage Council in certain circumstances.

2. Period to reach agreement

During the notice period, it is open to the Tree Owner to contact you to advise that they agree to the proposed terms, or to attempt to reach some other agreement to resolve the matter. If this process succeeds, it may not be necessary to proceed with the next steps.

3. Application to Land and Environment Court

If the Tree Owner and you have not reached an agreement, then after the notice period has expired you may make an application to the LEC for orders to resolve the matter.



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4. Land and Environment Court process

The LEC will give notice to the parties. A hearing under the TDA is less formal and costly than many other court proceedings.

The TDA sets out a range of matters that the LEC must be satisfied of before making orders, including that you have made a reasonable effort to reach agreement with the Tree Owner, and that the tree has caused damage or is likely to cause damage.

The TDA also sets out a range of matters that the LEC must consider before making orders. These largely relate to the relevant circumstances, important considerations, and options for resolving the dispute.

Orders the LEC can grant include for certain actions to be taken (such as for the tree to be removed, pruned, etc.), and for the payment of costs and/or compensation.

Additional points to note:

1. Exclusions

The TDA details which lands it applies to, which is generally urban land.

The TDA contains exclusions in relation to certain trees it does not apply to, which include:

- Trees on Council land; and
- Trees that may be prescribed to be excluded by regulations under the TDA.

There are also other exclusions, such as trees on Crown land in certain circumstances.

2. No action in nuisance

If the TDA applies to a tree, then you cannot make a claim under the common-law action of nuisance in relation to damage caused by that tree. It is intended that the matter should be dealt with under the simplified process under the TDA.

3. Meaning of “adjoining land”

Judges have held that the term “adjoining land” may apply even in certain circumstances where the land on which the damage occurred, and the land on which the tree is principally located are not contiguous. For example, it may apply where the two lands are separated by a public roadway.

4. Tree on a property boundary

What happens if the tree is partly on your land, and partly on the neighbours’ land?

You can make an application in relation to a tree that is “principally” on adjoining land. If the tree is on the property boundary, then it needs to be determined on which land the tree is “principally” located. This may require a report from a surveyor. The owner of the land(s) on which the tree is not “principally” located, can then use this process under the TDA against the owner of the land

on which the tree is “principally” located even though the tree may also be partially on their own land.

If you own the land on which the tree is “principally” located, you cannot make an application under the TDA, even if your neighbour is refusing to agree to have the tree removed.

5. Action against your local Council

As discussed above, the TDA does not apply to trees on Council land. However, this means that the restriction on bringing an action in nuisance does not apply. You may also consider an action in negligence against Council.

However, there are significant limitations on bringing actions against Councils, meaning that in some circumstances you cannot bring an action against Council even though you would be able to do so against a private person in the same circumstances.

If you can't reach an agreement with Council and have a basis to make a claim, you would then be faced with abandoning your claim, or having to use the standard litigation process which tends to be more costly and complex.

A word of caution:

Whilst the process under the TDA is a simplified process, you can't go back for a second chance just because you are not happy with the outcome. Therefore, you need to make sure you put your best case forward the first time around. Even with this simplified process it is wise to get legal advice if you want to achieve the best results.

Prepared by Bannermans Lawyers

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