Worried about a tree causing damage? Do something about it!

Introduction

Trees on neighbouring land can, in some instances, present a real risk of damage to property or injury to people, such as through falling branches, roots uplifting ground, or large roots exposed above-ground causing a trip-hazard.

Often, property owners subject to such risks will only take action once damage or an injury has occurred, though the Trees (Disputes Between Neighbours) Act 2006 (NSW*)* (**TDA**) allows for preventative steps to be taken through an application to the Land and Environment Court (**LEC**).

Provided that all preliminary requirements in making an application to the LEC are met, the LEC's jurisdiction to make an order under the TDA is enlivened under Section 10(2) in circumstances where the LEC is satisfied that the tree concerned:

(a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or

(b) is likely to cause injury to any person.

Orders made by the LEC may include removal or maintenance requirements for the tree, such as regular pruning, or an order for costs or compensation – though any order made is required to be proportionate to the hazard posed, damage inflicted and any consequential costs incurred.

In seeking to mitigate risks of damage or injury, the primary takeaways from the provisions under Section 10(2) of the TDA are the terms *"likely in the near future"*" and *"likely to cause"*.

Near Future

The term 'near future' was defined in the matter of *Yang v Scerri [2007] NSWLEC 592* to mean *"as a rule of thumb"* a period of 12 months. This definition has generally been accepted throughout subsequent decisions of the LEC in respect of the TDA.

The effect of this definition is that, provided that a tree presents a risk of damage to property that can reasonably be foreseen to occur within that period, the LEC will be empowered to make an order. Conversely, where the risk of damage is not expected to be present for a period in excess of 12 months, e.g. for a number of years, the LEC is not likely to have this jurisdiction.

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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Likelihood of Damage

The likelihood of damage occurring to property is not determined arbitrarily and would need to be substantiated with evidence of say, past or current damage to property; records of falling branches; or wounds on trees where branches had previously been present.

As discussed in *Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29* at [62]:

> *"something more than a theoretical possibility is required in order to engage the power under the Trees (Disputes Between Neighbours) Act to make an order to remedy, restrain or prevent damage as a consequence of a tree."*

Note that in matters such as *Granger v Owners Corporation SP 18494 [2012] NSWLEC 1285* and *Garbutt v Nichols [2025] NSWLEC 1035* (**Garbutt**) it was found that even relatively minor damage, such as branches striking or rubbing against a property, would be sufficient to enliven the LEC's jurisdiction. It follows that the real risk of even such minor damage occurring would have the same effect.

Likelihood of Injury

In respect of likelihood of injury, the decision in *McPherson & anor V Lake & anor [2017] NSWLEC 1081* provided a guiding principle at [10]:

> *" ... In regards to injury, the Court considers the risk posed by a tree in the foreseeable future based on the characteristics of the tree/s, the history of any failures, any other relevant evidence, and the circumstances of the site apparent at the time of the hearing."*

The requisite threshold of risk to enliven Section 10(2)(b) was discussed in *Toulson v Kuan [2025] NSWLEC 1072* at [48]:

> *"Generally, for risk of injury to be considered more than 'low' risk, at least moderately serious consequences must be likely, in this case from falling "tree parts""*

And where it was found that the risk was low, at [54]:

> *"... the risk of injury is low to very low, which is insufficient risk of injury to persons to engage s 10(2)(b) of the Act."*

Note however the decision in *Johnson v Kaushik [2024] NSWLEC 1374*, in which it was held that even where the risk of injury contemplated by Section 10(2)(b) was relatively low, the tree could still be seen to unreasonably impact an applicant's use of their land.

Caution

Many applications to the LEC for an order under the TDA are brought in circumstances where a tree does not present a hazard to property or people, but instead is the source of nuisance.

Where such matters are raised, the LEC has consistently followed the guiding 'Tree Dispute Principle' published in *Barker v Kyriakides [2007] NSWLEC 292* which states:

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> *"For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis."*
>
> *"The dropping of leaves, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering the removal of or intervention with an urban tree."*

Note that this principle has been adhered to even in circumstances where the debris dropped by trees was substantial, leading the applicants to submit that they would comprise a hazard to people, as in the matter of Garbutt.

Separately, prospective applicants should be aware of unique circumstances which may lead the LEC to hold the applicant responsible for maintenance (and associated costs) in respect of a tree, as occurred in the matters of *Fu v Leung [2025] NSWLEC 1067* and Garbutt.

Next Steps

If you believe that a tree on neighbouring property is likely to cause damage to your property, or is likely to cause injury to any person, we suggest that you:

1. contact the owner of the tree to raise and attempt to resolve the issue; and

2. consider obtaining an arborists report to determine whether any risk is, or may be posed by the tree, including within the forthcoming 12-month period.

Bannermans Lawyers are well placed to guide you through every step of this process and assist you in an application to the LEC where appropriate. This process is also detailed in our article *Trees Causing Damage – What Can You Do?.*

Key takeaways

- The Trees (Disputes Between Neighbours) Act 2006 (NSW) allows property owners to take preventative action against tree-related risks.
- The term 'near future' is generally defined as a period of 12 months for assessing tree damage risks.
- Evidence of past damage is necessary to substantiate claims of potential tree damage.
- Even minor damage from trees can justify legal action under the TDA.
- The risk of injury from trees must be assessed based on their characteristics and history of failures.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Prepared by Bannermans Lawyers
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BANNERMANS LAWYERS
T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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