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Alternate Dispute Resolution for Neighbour Tree Conflicts and the Role of Local Government

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Contents

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2. EXECUTIVE SUMMARY

Trees provide many functions that benefit people and the environment, and they form a major component of the character, well-being and culture of the urban landscape. The public value of trees are significant and quantifiable. However, they are one of the most common causes of conflict between neighbours which imposes a significant economic burden on the resources of the community.

The Trees Act 2006 was established following a recommendation made by the NSW Law Reform Commission in its *Neighbour and Neighbour Relations Report* to hear tree-related disputes. Over 1000 case judgements have been made in the NSW Land and Environment Court under the Trees Act 2006 since its enactment. This represents a vast body of published findings which can be used to guide future neighbour tree disputes.

This Research Project involves the analysis of these judgements. The top four most frequently cited cases were identified and all subsequent cases which refer to these four cases were examined. Relevant (but less frequently cited) pertinent cases and others supplementary to established precedence were also reviewed. The results identified a number issues which led to the dismissal of most applications. This is important in the context of future disputes as the issues raised in these cases are likely to reoccur, and future guidance on how they can be dealt with using alternate path to Court is available.

Local Government Organisations have substantial legal powers regarding the management of amenity trees in urban areas and there is an expectation within the community that local government will provide some level of assistance and guidance in resolving tree disputes. However, there is no formal mechanism for local government to play a leading role in the resolution of neighbour tree disputes.

Alternate Dispute Resolution describes a broad range of dispute resolution techniques and involves an independent person assisting to resolve the matter without the need for Court involvement. Neutral Evaluation is a type of Alternate Dispute Resolution where the evaluator has expertise in the disputed matter which can be particularly useful in disputes involving technical issues as the evaluator will have a good understanding of the technical aspects.

Council tree managers are suited as evaluators in a Neutral Evaluation program for neighbour tree disputes. Advice given by a Council tree manager would be objective and based primarily on technical merits with some consideration given to relevant legal points. This process is similar to that already undertaken by Council tree managers in their role in the environmental planning system. That is, they are neutral in their assessment of applications and experts in urban tree issues.

This research developed an Evaluation Criteria based on the Guidance Decisions, Tree Planning Principles and other key findings within the historical case judgements made under the Trees Act 2006. This Evaluation Criteria would be used by a Council evaluator to support a Neutral Evaluation process and provides local government and the community with a preliminary, structured, evidence-based and consistent approach in resolving some neighbour tree disputes.

Interviews were undertaken with three Council tree managers each with a minimum of 10 years public service experience. This provided an opportunity to obtain early feedback as to the feasibility and acceptability of Council taking a more proactive role in tree neighbour disputes. The interviewed industry experts already use the findings of Court to guide their decisions in tree planning matters and agree that the Evaluation Criteria would be essential in a program of Neutral Evaluation. However, concern was raised about the role of Council in what has traditionally been considered as a civil matter.

Local government has an obligation to be flexible, continually improve and strengthen the public value of their role as the service delivery organisation of the urban forest. This research has identified that the long standing and traditional reluctance for Councils to assist and give guidance to the community in tree disputes could be remedied with specialist dispute resolution training supported with formal policies and guidelines.

3. GLOSSARY

Alternative Dispute Resolution
A variety of different processes in which an impartial practitioner helps people to resolve their disputes.

Applicant
The party who commences proceedings in Classes 1- 4 of the Court's jurisdiction. The applicant is the owner or occupier of the land that adjoins the land on which the tree is growing.

Application dismissed
The Court does not support the applicant's proposal.

Application upheld
The Court does supports the applicant's proposal.

Application up held in part
The Court does not support the applicant's proposal in full and/or alternative orders are made.

Court Orders
Court orders made under the *Trees (Disputes Between Neighbours) Act 2006* include any works to remedy, restrain or prevent damage to property or to prevent injury to any person or to prevent the severe obstruction of sunlight or view. Court orders may include tree removal, pruning, repair of damaged property, and or payment of compensation The Court orders are final and binding on the parties. The *Trees (Disputes Between Neighbours) Act 2006* also permits the Court to order compensation for or rectification of damage to the applicant's property caused by a tree.

Evaluation Criteria (EC)
Developed as part of this research project and based on the Guidance Decisions, Tree Planning Principles, other key findings and analysis of the judgements made under the Trees Act 2006. To be used by a Council evaluator in a program of Neutral Evaluation.

Key Findings
Developed as part of this research project. A key finding is a pertinent factor in a judgement and had been frequently cited in subsequent judgements.

Neutral Evaluation
A program of Alternative Dispute Resolution where an impartial evaluator, who is an expert in the subject matter, seeks to identify the issues of fact and law in dispute. The evaluator provides advice on a resolution or an opinion on the likely outcome if the matter were to proceed to Court.

NSW LEC Guidance Decisions
Guidance Decisions are established from cases where the Court has made a decision on whether or not the facts of an application fall within the definitions (or jurisdiction) under the *Trees (Disputes Between Neighbours) Act 2006*. The Court can only proceed with an application where the facts meet the requirements (or match the definitions) of the *Trees (Disputes Between Neighbours) Act 2006*.

Respondent
The party who has proceedings commenced against them in Classes 1-4 of the Court's jurisdiction.

Tree Dispute Principles
Tree Dispute Principles are established from cases where the Court provides guidance on how the decision-making process might be applied to the facts and circumstances of a particular type of case or issue.

4. INTRODUCTION

4.1 Background

Trees are one of the most common causes of conflict between neighbours. In New South Wales there have been over 1000 judgements made under the *Trees (Disputes Between Neighbours) Act 2006 No 126* (Trees Act) (Lexis Nexis 2018) since its establishment in 2006. The Trees Act is administered by the NSW Land and Environment Court (LEC). Tree disputes impose a significant economic burden on the resources of the community including local government, the police and the Courts (NSW Law Reform Commission 1998). Local Government Organisations (LGOs) have substantial legal powers regarding the management of amenity trees in urban areas. However, currently there are no formal mechanisms for LGOs to play a leading role in the resolution of neighbour tree disputes.

The Trees Act s10 (1)(a) and s14E (1)(a) requires that the Court be satisfied that the applicant has made a reasonable effort to reach an agreement with the tree owner to resolve the dispute. The LEC advises that Neutral Evaluation (NE) is a suitable dispute resolution process for resolving tree disputes (NSW LEC 2015).

This Research Project involves the analysis of historical case judgements made within the LEC under the Trees Act. It includes the development of Evaluation Criteria based on key findings within these judgements, and provides an in-depth review of the structure, process and suitability of NE in tree disputes. This research is important in the context of local government as no other similar studies have been undertaken to date.

4.2 Rationale & Objectives

The objectives of the research are twofold. The first is to investigate if the key findings within the case judgements made under the Trees Act could be developed into a set of Evaluation Criteria to be used by Council tree managers to aid in the resolution of neighbour tree disputes.

The second objective is to determine if NE, with the support of the Evaluation Criteria, could be a suitable alternative to litigation, as preliminary step prior to Court proceedings or to give clarity to the parties by narrowing the issues in dispute. The intent of this research is not to replace the role of the LEC but to explore if local government could play a more useful role in the resolution of neighbour tree disputes.

5. LITERATURE REVIEW

5.1 Value of Amenity Trees

Trees provide many functions that benefit people and the environment, and they form a major component of the character, well-being and culture of the urban landscape (University of Sydney 2015). The public values of trees are significant and quantifiable. In the past, these benefits were mostly related to the individual tree owner (City of Sydney 2013). However, with the rise of 'urban forestry', the values of trees at the community level are now widely acknowledged.

Trees reduce air pollution, absorb greenhouse gas emissions and filter air-borne particulates. Trees remove carbon dioxide, carbon monoxide, sulphur dioxide, nitrous oxides and ozone from the atmosphere through the process of photosynthesis. Trees also improve the quality of water, significantly reduce stormwater runoff and contribute to ecological diversity and provide important wildlife habitat (Nowak 2002).

Trees with broad canopies are the most effective form of natural shade and large trees can reduce sun exposure to UV radiation by up to 75% and lower temperatures by two degrees Celsius (Parsons et al. 1998). Increasing the immediate canopy cover by 10% or strategically planting shade trees can reduce annual household heating and cooling costs by AU$50 to $90 (McPherson & Simpson 2003). People in buildings with little or no surrounding vegetation are at higher risk of heat-related death (Bi et al. 2011).

Treed neighbourhoods can increase property values by enhancing aesthetics. Property values have been estimated to be around 30% higher in tree-lined streets than those in streets without trees (Sander, Polasky & Haight 2010).

Trees have also been reported to have a positive effect on wellbeing and enhance community identity. Research undertaken in the Netherlands showed mental health issues were less widespread in areas with high percentage of green space and trees within a 1km radius (Maas et al. 2006). Research also suggests that a green environment may have a positive effect on individual health and learning by reducing stress, assisting concentration and reducing fatigue (Sullivan, Kuo & DePooter 2004). Trees located on private land act as 'social representatives', disseminating information about a resident's environmental attitudes, economic status, lifestyle, cultural identity and aesthetic inclination (Pearce, Davison & Kirkpatrick 2015).

Trees play an important role in human history as vessels of meaning, metaphor, symbology, tradition and place-making. The subjective dimensions of human–tree relations are highly relevant to the planning and management of future urban forests, and particularly to the management of the significant proportion of these forests that are under the management of private land owners (Pearce, Davison & Kirkpatrick 2015).

5.2 Origins of Tree Conflicts

Trees on private property are one of the most common causes of conflict between neighbours (NSW Law Reform Commission 1998). Disputes often arise between people with strongly opposing emotional, moral or spiritual attachments to a tree and those who see the tree as a functional or fiscal object (Victorian Law Reform Commission 2017). There is broad anecdotal evidence of the strong emotional reactions produced by trees, both negative and positive (Kirkpatrick et al. 2013). This has led to some legal practitioners having a preference for taking on family divorce cases in favour of neighbour tree disputes (Bonapart 2014).

Trees are living structures and have a high degree of interaction with people and the infrastructure of the urban environment (Kirkpatrick et al. 2013). Property owners have a strong conceptual delineation of physical space, ownership and control of their property (Head & Muir 2005). This, combined this with the differing and subjective tolerances to tree risk and perceptions of safety, can lead to volatile relationships (Smiley, Matheny & Lilly 2012).

Neighbours having disputes over trees is not a new concept. There is early documentary evidence showing that laws regarding trees and neighbours formed part of what are commonly known as the beginning of European Law in 455 BC (Victorian Law Reform Commission 2017). These laws were specifically established to deal with the following issues:

- The right to remove a neighbour's tree if that tree had fallen across a property boundary
- The right to prune a branch from a neighbour's tree if that branch causes injury or shade
- The payment of a fine for illegally cutting down a tree that belong to another person

The Victorian Law Reform Commission (2017) describes that in legal terms, tree disputes are a competition of rights between the tree owner's right to use and enjoy their land in a lawful manner, and the impacted property owner's right to enjoy their land without unreasonable interference.

5.3 The Role of Local Government

In NSW, the Local Government Act 1993 No 30 (NSW Government *1993*) provides the legal framework and sets out the responsibilities and powers Councils have in governing the community. The State government provides the planning instruments for the control of trees located on private property. In NSW the *NSW State Environmental Planning Policy (Vegetation in Non-Rural Areas)* 2017 (VNRA SEPP) provides the regulatory framework for tree preservation. The aims of the VNRA SEPP are to:

a) protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and

b) preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

The VNRA SEPP also provides Councils with the power to make a Development Control Plan (DCP) for the protection of trees on private property. By enacting a tree management DCP, Council has the ability to shape tree management controls which respond to the values, sentiment and attitudes of the community.

Part 9 of the VNRA SEPP allows each Council to define a prescribed (protected) tree and the circumstances in which consent is normally provided for tree works (prune or remove). DCPs are broad ranging and essentially provide a blanket protection to most species above specified dimensions. As the consent authority, Council has the ability to issue a permit or consent for tree works as part of an application made under the VNRA SEPP or within a Development Application under the NSW *Environmental Planning and Assessment Act 1979 No 203*. Council controls are generally considered to be permissive rather than coercive and commonly enable a tree owner to do something to their own tree. Without the agreement of the tree owner, Council controls generally provide little relief for aggrieved adjoining neighbours.

Variation in tree management policies between Councils has been blamed for the often negative perceptions from tree professionals about the effectiveness and appropriateness of legislative and regulatory mechanisms of trees. Their concerns stem from the diversity of tree protection policies and procedures adopted across different local government jurisdictions which varies from laissez-faire to rigorous (Kirkpatrick et al. 2013).

When a tree dispute between neighbours occurs, LGOs traditionally avoid being involved in what is regarded as a private dispute (NSW Law Reform Commission 1998). When the Trees Act was being considered, Councils and their representatives put forward submissions as part of the consultation process that they should not be involved in neighbour tree disputes due to insufficient resources and lack of expertise in conflict resolution (Fakes 2007). This position is exemplified in the Woollahra Municipal Council (2018) website which outlines *that Council does not mediate disputes between neighbours regarding trees. Conflict over the management of private trees in neighbouring properties is the responsibility of both neighbours to resolve.*

Studies have found that communities have a preference for local government (over state or federal agencies) to fund and have control over the urban forest (Yaoqi Zhang et al. 2007). There is an expectation within the community that local government will provide some level of assistance and guidance in resolving tree disputes (Richards 2016). However, there is no formal mechanism for local government to play a leading role in the resolution of neighbour tree disputes.

Of interest, prior to the commencement of the Trees Act, the NSW Law Reform Commission (1998) highlighted that there was a need for Councils to play a role in preventing a tree causing damage to property. The Commission considered that the most appropriate mechanism to achieve this was through Councils making an order to prevent a tree causing damage under the *NSW Local Government Act* (*1993*). Nevertheless, this recommendation was not adopted because of objections by Councils on the basis of resources and lack of expertise.

In Australia, LGOs describe themselves as the democratic decision-making bodies “closest to the people” and use this to argue for greater power and influence over decisions affecting the lives of the community (Wills & Nash 2012). In this regard, LGOs have substantial powers for the management of amenity trees in urban areas. They are the consent authority for the majority of tree works and have the ability to shape tree management controls and policies.

Place-shaping is defined as the *creative use of powers and influence to promote the general well-being of a community and its citizens* (Lyons 2007). As outlined above, trees contribute significantly to the social, economic and environmental aspects of the local community. The role of local government in managing the urban forest can be directly related to Reid's (2012) description of place-shaping in that Councils build and shape local identity through understanding the local needs and preferences of the community.

5.4 Public Value and Trees

Public value is a measure of the benefits a local government organisation provides to the community to those functions and services cared about most (Wolf 2004). It is a process of continual improvement by enabling managers the flexibility to play an active role in delivering relevant programs (Grant et al. 2014). To maximise public value, an organisation needs to address three critical elements including *operational capabilities*, *legitimacy* and *value* (Grant et al. 2014).

In the context of local government tree management, Councils have the o*perational capacity* by way of expertise and an administrative structure to provide this service. Secondly, the NSW state government, through the VNRA SEPP, provides Councils with the *legitimacy* as the consent authority for the majority of tree works in urban areas. Finally, trees in the urban setting provide social, environmental and economic *value* and also contribute strongly to the sense of place for communities.

5.5 Trees (Disputes between Neighbours) Act 2006

In NSW, the Trees Act was introduced to specifically deal with neighbour tree disputes. The Trees Act was originally established in 2006 following a recommendation made by the NSW Law Reform Commission in its *Neighbour and Neighbour Relations Report* to hear tree-related disputes (NSW Law Reform Commission 1998). An underlying reason for enacting the Trees Act was to provide a relatively inexpensive mechanism and framework to resolve tree disputes, which is more efficient and less costly than commencing actions through the common law process in Civil Courts. Since its enactment over 1000 cases have been determined. Applications made under the Trees Act are heard by Commissioners who have specialist arboricultural expertise and the process has been highly regarded by tree professionals (Kirkpatrick et al. 2013). The Local Government Tree Resources Association in their submission to the *Review of the Trees Act (2009)* outlined that '*The LEC's employment of expert arboricultural Acting Commissioners has ensured that specialised assessments, using current industry methodologies, are consistent and appropriate'.*

The Trees Act encompasses two parts which allows an applicant to apply to the Court to make orders for trees situated wholly or principally on adjoining land (s4). Part 2 considers property damage or injury which has been caused or could be caused in the future by a tree. Part 2A considers obstruction of views or sunlight as a consequence of trees which have been planted as a hedge.

The Trees Act (s9 and s14D) gives the Court a wide range of coercive powers to make orders as it deems fit in the circumstances. Orders can be made to remedy, restrain or prevent damage to property, or to prevent injury to any person. Orders can also be made to prevent the severe obstruction of sunlight or view loss.

There are a number of matters which the Court must be satisfied of (or tests which need to be reached) before they can make an order. The Court has no jurisdiction (or is unable) to make an order if the applicant has not satisfied these tests.

For applications of damage or injury made under Part 2, the tests are outlined in s10 and state:

(1)(a) That applicant has made a reasonable effort to reach an agreement with the tree owner.

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

(2)(b) That the tree is likely to cause injury to any person.

For applications of severe obstruction of sunlight or view loss made under Part 2A, the tests are outlined in s14E and state:

(1)(a) That the applicant has made a reasonable effort to reach an agreement with the tree owner.

(2)(a)(i) That the trees are severely obstructing sunlight to a window of a dwelling on the applicant's property

(2)(a)(ii) That the trees are severely obstructing a view from the applicant's dwelling.

Sections 13 and 14G prescribe that a representative from Council may appear before the Court if the tree subject to the application is covered within that Council's DCP. There is no provision compelling the participation of Council.

5.6 Planning Principles

A Planning Principle is a statement of a desirable outcome based on a list of appropriate matters and reasoning which is considered in making a planning decision (NSW LEC Court 2018). The Court uses Planning Principles to provide guidance on how the decision-making process might be applied to the facts and circumstances of a particular type of case or issue. Planning Principles are developed by a process through the Court dealing with an abstract issue rather than the merits of a particular case (Moore 2009).

Planning Principles are initiated by Commissioners of the Court as they come across issues that have general application (Roseth 2005). The majority of Planning Principles are process-based which means they are written to provide guidance on how an assessor should go about considering an issue covered by that Principle (Moore 2013). Once published, a Planning Principle obliges Commissioners when dealing with similar issues to, at least, consider the Principle in the current matter. However, they have no obligation to adopt that Principle in their recommendation. Planning Principles are not indisputable and they do not carry any statutory weight, that is, they do not supersede Councils' DCPs and policies. In this regard, Planning Principles are evolutionary and can change or grow as circumstances and the merits of specific cases require (Moore 2009).

5.7 Tree Dispute Principles

Similarly, the LEC has published three Tree Dispute Principles which are used by the Court, local government and practitioners. These principles are used to guide the Court and practitioners in the same way as a Planning Principle.

The three published Tree Dispute Principles are:

- *Claims of structural damage to property* - (*Fang v Li & anor - [2017] NSWLEC 1503 (19 September 2017)*). This Tree Dispute Principle provides guidance where applications are made that include claims for rectification of, or compensation for, structural damage to property caused by roots of a tree. This principle provides a framework to guide experts (including tree managers) in carrying out an investigation that would assist the Court in their determination.

- *The tree was there first – Black v Johnson (No 2) [2007] NSWLEC 513*. This Tree Dispute Principle is applied when determining who is responsible for the payment of works or tree removal in claims of compensation. The principle focuses on the type of tree planted and the suitability of the location in which it has been planted. It also requires that the expert takes into account whether the choice of location for the structure was unnecessary or avoidable and if the existence of the tree would have been an unreasonable imposition on the development of the site (Preston 2007).

- *Urban trees and ordinary maintenance issues – Barker v Kyriakides [2007] NSWLEC 292*. This Tree Dispute Principle describes that that the dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.

5.8 Guidance Decisions

Guidance Decisions are cases which provide guidance on certain matters and assist the Court to determine if the application falls within their jurisdiction (NSW LEC 2018). The Court's jurisdiction is defined and limited by the wording of the Trees Act and the Court can only make an order if the circumstances of the matter are as described in the Act. These decisions have been published by the Court to give guidance on matters such as where the tree is positioned, what damage to property is (and isn't) and making a connection between the tree and the damage. The Court has published four Guidance decisions which have been outlined below.

- Robson v Leischke [2008] NSWLEC 152 –A comprehensive Guidance Decision was made on the requirements of the various matters the Court might need to consider for applications seeking orders for compensation for property damage under the Trees Act. Other cases dealing with similar matters are able to use the this case as guidance.

- *Yang v Scerri [2007] NSWLEC 592* – A Guidance Decision was established to provide clarity to the meaning of "in the near future" in Section 10(2)(a) of the Trees Act. This is the timeframe used when assessing the potential of property damage by trees for applications made under Part 2 of the Act. As a result, the Court adopted a 12 month rule of thumb period whereby the tree would need to be likely to cause damage to property within this timeframe from the date of determination of the application.

- *Dooley & Anor v Nevell [2007] NSWLEC 715* - A Guidance Decision was established that '*damage'* (as outlined in Section 10(2) of the Act) caused by animals, birds or insect is not damage caused by the tree which the animal, bird or insect lives in or is attracted to. That is, the Court has no jurisdiction to make an order on a tree if an animal has caused the damage.

- *P. Baer Investments Pty Ltd v University of New South Wales [2007] NSWLEC 128* – A Guidance Decision was established that trees *'situated on adjoining land'* (as outlined in Section 7 of the Act) include trees positioned on adjoining land which is separated by a public road.

5.9 Alternate Dispute Resolution

Alternate Dispute Resolution (ADR) describes a broad range of dispute resolution techniques and involves an independent person assisting to resolve the matter without the need for Court involvement (Stone-molloy & Rubenstein 2000). ADR is flexible and can be used for almost any kind of dispute (National Alternate Dispute Resolution Council 2012). The NSW Government Justice Department (2016) describes ADR *as a variety of different processes in which an impartial practitioner helps people to resolve their disputes*.

The NSW Law Reform Commission (2014) lists three reasons why ADR is advantageous over litigation. Firstly, the ADR process maintains privacy between the parties rather than being exposed in a public hearing. Secondly, the ADR models provide more flexible outcomes than court or tribunal orders can necessarily achieve. Finally, the ADR processes can achieve a fast and more satisfying resolution by being less stressful and preserving, repairing or improving ongoing relationships.

Relevant to neighbour disputes, there is an advantage for Councils to have powers to order parties to attend some form of ADR. If ADR was compulsory it would give the parties an opportunity to gain an understanding and better inform a solution based on the interests of both parties. If more private disputes are able to be resolved at mediation without the need for enforcement action by Councils, the demands on Councils' and ratepayers' resources would be reduced (Richards 2016).

5.10 Models of Alternate Dispute Resolution

There are a number of ADR models including Negotiation, Mediation, Neutral Evaluation and Arbitration. These models are best visualised along a continuum which represents the varying type and degree of input from an impartial third person, and the focus on the relationship and weight of technical and legal aspects in the outcome (Ireland Law Reform Commission 2008). At one end of the continuum, there is a strong focus on the relationship of the parties and the technical and legal aspects of the matter are given less weight. Moving along the continuum, the input of the impartial person increases and so too does the focus on the technical and legal aspects with less consideration to the relationship of the parties. Refer to Figure 1.

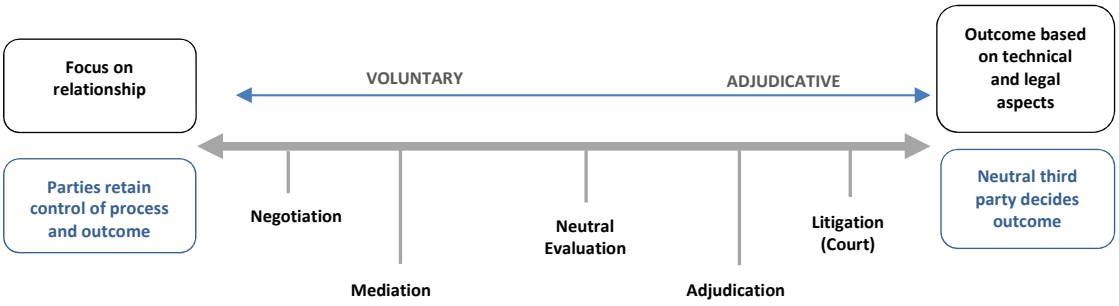

Figure 1: ADR Continuum *Source:* Author

5.11 Negotiation and Mediation

Negotiation is a type of ADR which is used where saving a relationship or enhancing trust of the parties is important (Ireland Law Reform Commission 2008). The focus of negotiation is on reaching an agreement when the parties have interests that are shared and some which are opposed (Ury 1991). Technical and legal matters are generally not central to the conversation.

Mediation is the most well know technique of ADR and is a facilitative processes involving a neutral and independent third party (facilitator/mediator). The mediator creates an environment for negotiation and coaches the parties through the process with a strong focus on the relationship (Spencer & Hardy 2014). The mediator is not an expert in the disputed matter and they do not play an advisory or determinative role. They are however skilled communicators as they guide the parties to a mutually agreed outcome (Spencer & Altobelli 2014). Areas such as family, community and neighbour disputes have seen a significant growth in the use of mediation in recent years (Pearce & Stubbs 2000).

The NSW Community Justice Centre (CJC) provides a free mediation service which hears a range of disputes involving family, the work place, neighbours and business. The most common dispute types (53%) involved neighbours and one of the most frequent issues raised concerned trees (Community Justice Centres Year in Review Report 2011/2012). Similarly, the Northern Territory CJC notes that in 2013/14 trees were one of the most common dispute types involving 11% of the cases. In the NT jurisdiction, agreement was reached in about 80% of tree disputes however they state that certain types of disputes are not suited to mediation (Northern Territory CJC Annual Report 2013/14).

This is reinforced by the NSW Law Reform Commission (1998) who state that during the development of the Trees Act, the submissions and consultations demonstrate that mediation doesn't work in a significant number of cases including where the level of hostility between the parties may be too high, the disputed issues may be too complex or if the mediated outcome is not based on any legal or technical merits.

5.12 Neutral Evaluation

The LEC (2015) describes NE as *a process of evaluation of a dispute in which an impartial evaluator seeks to identify and reduce the issues of fact and law. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages*. Importantly, the Court also identifies NE as a suitable model of ADR for resolving neighbour tree disputes.

When considered on the ADR continuum, NE is positioned midway between mediation and arbitration. NE is voluntary, non-binding and the parties are free to accept or reject the outcome (Canada Department of Justice 2015). It is a short and cost effective process compared to litigation (Ireland Law Reform Commission 2008).

The main steps for the evaluator are to:

- Identifying the legal and evidentiary nucleus of the matter
- Developing an evaluation of the merits of the circumstances (Brazil 2007)
- Guiding both parties on how the matter can be resolved or provide an opinion on a likely determination be a court (Canada Department of Justice 2015)

A key feature of this model, and the main difference from mediation, is that the evaluator has expertise in the disputed matter and has a high level of involvement and intervention. Expert determinations can be particularly useful in disputes involving technical issues as the evaluator will have a good understanding of the technical aspects and relevant law (Brazil 2007).

The parties present to the evaluator their best evidence and argument available to support their position. The evaluator then reviews both sides of the dispute, including their desired outcomes, and provides both parties with an opportunity to view the position of the other party (National Alternate Dispute Resolution Adivsory Council 2012; Rosenbaum 2017).

The evaluator makes an assessment of the merits or adequacy of the supplied information and then provides an evidenced-based opinion on the technical aspects of the matter with consideration to relevant legal factors (Gurran 2011). The evaluator offers an informed and considered opinion on the key issues and the most effective means of resolving the dispute (*National Alternate Dispute Resolution Adivsory Council* 2012). This may be through guidance (to both parties) on how the matter can be resolved or by providing an opinion on what determination a Court may come to.

The objective assessment made by the evaluator obliges all parties to confront their respective position (Canada Department of Justice 2015). Ideally, the outcome of the NE process is to discuss and achieve a settlement. This is done through the use of the evaluators opinion to the parties to help identify pertinent issues, and then develop a focused plan for investigating evidence that is likely to be most useful for predicting an outcome (Brazil 2007). In this regard, the broad purpose is for the parties to use the evaluator's opinion to contribute to the development of the case with the aim of settlement (Canada Department of Justice 2015). Although the NE process may not result in an avoidance of litigation, it will give clarity to the parties by narrowing the issues in dispute (NSW Law Reform Commission 2014).

Before a decision is made on the resolution process (Court or ADR), the parties need to consider the most efficient and effective means of resolving the conflict that are in the best interests of the parties (Ireland Law Reform Commission 2008). It is important to note that any ADR process (including NE) is not always suitable or appropriate for resolving all disputed matters.

The decision to proceed with the ADR process is fundamentally based on the existing relationship of the parties and their desire (or not) to preserve their relationship. ADR is not appropriate where the relationship is so fractured that one or either of the parties has no desire to maintain the relationship (Ireland Law Reform Commission 2008). Not all parties want to resolve their disputes in such an informal manner which lacks an enforceable outcome (Pearce & Stubbs 2000).

A conflict may become serious to a point whereby the parties are not in a mindset to accept the intervention of an alternate third party option. There comes a point where one or both of the parties want vindication and protection of their rights as they see them. In the scenario where ADR is not suitable, the Court system will remain central and essential to resolving such disputes (Merry & Silbey 1984).

ADR will also not be suitable where there is a power imbalance between the parties such as financial or personality (Spencer & Hardy 2014). This imbalance may place one of the parties on an unequal footing resulting in undue pressure and for one parties to accept an unreasonable solution (Ireland Law Reform Commission 2008).

5.13 Arbitration

Arbitration lies at the end of the ADR continuum because it is the most formal and has the most third party intervention. The National Alternate Dispute Resolution Advisory Council (2003) describes arbitration as *a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.*

The parties select (or accept) the arbitrator who upon reviewing the facts hands down a rights based determination (or award) (Spencer & Hardy 2014). The parties generally agree prior to the hearing that the arbitrator's decision is final and binding (National Alternate Dispute Resolution Adivsory Council 2012). The decision carries as much weight and is enforceable in the same manner as a Court judgement. The parties are bound by the award which can only be appealed on a point of law. Arbitration is governed by a statutory framework, in NSW this is the *NSW Commercial Arbitration Act 2010 No 61 2010*. The arbitration process is not voluntary and the arbitrator takes no consideration of the relationship of the parties. In NSW, the Trees Act is arbitrated by a Judge or Commissioner of the LEC.

5.14 Environmental Planning and the Use of ADR

According to Devine (2000) and Munoz (1998) ADR is a proven method for Councils to successfully resolve environmental planning disputes because it:

- Avoids litigation
- Encourages community involvement
- Reduces the volume of referrals to Council committees
- Encourages communication and problem solving
- Allows parties to resolve issues themselves

ADR also encourages communication between the parties and enables them to take more control of the outcome (Munoz 1998). Devine (2000) recommended that Councils adopt an environmental disputes management policy and strategies which are managed by an experienced resolution expert. Similarly, Shepley (1997) suggests that if mediation is to become widespread in the planning process, it needs to be introduced into the system in a more recognisable fashion. Further, the Australian Government Productivity Commission (2014) has recommended that Councils adopt dispute management plans and employ ADR processes more extensively.

Councils currently use mediation and conciliation processes in environmental planning disputes within the jurisdiction of the LEC of NSW (Richards 2016). In the *Land and Environment Court of NSW Annual Review (2011)* it was noted that 59% of matters were resolved by ADR processes and negotiated settlement was made without the need for a Court hearing. In 2017, 74% of matters were settled by mediation. As such, ADR programs are being sort by administrators of the NSW LEC to address the strain on the Court system (Stubbs 1996).

There are a number of advantages and short-comings with the use of ADR in planning dispute matters. ADR is quick and relatively inexpensive compared to a formal Court hearing as there is no requirement for extensive preparation. Once the independent third party has reviewed the information and given an opinion, the parties are left to make a decision of acceptance or not (Shepley 1997).

The process is informal and flexible in that options to resolve the conflict are encouraged to be explored to resolve the conflict. This creates a relaxed environment which is more likely to lead to a lasting solution and one which the parties will be committed to (Pearce & Stubbs 2000). The informal setting decreases the level of anxiety, animosity and misunderstanding between the parties. The parties have the ability to shape the outcome. Importantly, either party can withdraw at any stage without affecting their right to a formal hearing (Shepley 1997).

On the other hand, an informal face-to-face approach may be inappropriate and anxiety-provoking when a relationship has completely broken down. The process is voluntary and one or both of the parties may wish to dissolve their right to an informal process and pass the responsibility of the final decision on to a formal authority (Court). Other researchers have claimed that the cost savings for mediated disputes could be minimal and even less economical in the long run (Pearce & Stubbs 2000). They state that this is one of the critical factors in the success of the ADR process.

5.15 Local Government Tree Managers

Council tree managers have formal qualifications in arboriculture which is the science and culture of the growth, planning, management, care and maintenance of trees for amenity and utility purposes (Draper & Richards 2009). Arboricultural qualifications provide technical skill in arboriculture techniques, business operations, work health and safety and industry best practice (Ryde TAFE 2018). However, there is no formal training in conflict resolution or dispute management. Nevertheless, Richards (2016) notes that Councils could assist disputing neighbours by providing Council officers with specialist ADR training on third-party facilitation between disputing neighbours.

It has been reported that Council technical staff (which include tree managers) are well placed to apply the methods of ADR as their inherent roles often require skills in negotiation and conflict resolution techniques (Susskind & Ozawa 1984). Technical staff often have informally developed skills essential for ADR as their main objective is seeking viable and practical solutions that will satisfy the interests of several stakeholders (Forester 2006). Council tree managers are inherently neutral in their assessment as they must also look beyond individual preferences and take into account broad public considerations when making tree management decisions (NSW Justice and Attorney General 2009). This is reinforced by Shepley (1997) who notes that in practice, mediation already occurs in a variety of ways by Council technical staff in environmental planning issues. Planners and other technical staff are required to assist conflicting parties in reaching agreement as part of their role however this is rarely recognised in a formal ADR program.

6. METHODOLOGY

6.1 Approach to the Research

This research used an evaluation approach following the pragmatist paradigm. The pragmatic paradigm makes the research central to the problem and uses mixed methods of data collection to develop understanding (Creswell 2003). A problematic situation exists whereby local government has no mechanism to take a leading role to help resolve neighbour tree disputes. The research enquiry is based on the interrogation of 9 case judgements made under the Trees Act to explore if consistent reoccurring themes can be used in a program of NE.

A "four P" framework (practical, pluralistic, participatory and provisional) developed by (Brendel 2006) and supported by Shields (2008) for the application in public policy is used. The *practical* aim is to develop a program which can be used by local government to assist in resolving tree conflicts within the community. The *plurality* of the study is evident when considering the influence of both state and local tiers of government, and also the varying and inconsistent tree management policies between LGOs (Kirkpatrick et al. 2013). The research will have effect on a range of *participants* including local government staff, the community and NSW state government. Moreover, the *provisional* nature of scientific enquiry insists that an open mind was maintained and that there is possibility of a different approach to any developed program of dispute resolution in the future or that the results could be used in an alternate manner.

6.2 Data Gathering and Analysis

Consistent with the pragmatist philosophy, a mixture of quantitative and qualitative data collection and interpretation methods was used (Creswell 2003). In doing so, a deductive approach was used to explore if the known concept of the NE process is a useful form of ADR for local government to use in this context (Bhattacherjee 2012). This was done by searching literature, predominantly sourced from governmental websites and the UTS library database. The search engines which were most useful in providing relevant information include; *Taylor & Francis Journals, HeinOnline Law Journal Library* and *EBSCOhost Academic Search Complete*.

A quantitative and qualitative exploration was also made to test whether the case judgement precedence in the LEC can be applied in the NE program. In doing so, the Australian Legal Information Institute (AustLII) website was the primary source of data collection. AusLII is a database which publishes all public legal information including the decisions the LEC made under the Trees Act. The information is contemporary in its listing of judgements and provides an up-to-date cited case frequency count in proceeding cases. This database also provide lists and links to the cases which have used the cited case.

An initial search was made into the cases which have been most frequently cited within the Trees Act. The AusLII sorts the results in order of frequency and the top four highest cited cases were interrogated as these are the ones which are most likely to recur in future cases and therefore the established precedent will be applicable in the NE program.

A secondary qualitative review of the top four cases was undertaken to explore and interpret the firsthand written explanations of the judgements (Schutt 2011). For example, *Barker v Kryiakides* was the second most cited case in the Trees Act being referred to in 239 cases. In this case, "*The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree"* was the Tree Dispute Principle relied upon by the Court in the 239 times the case was cited.

Each of these 239 cases which made a reference to the leaf drop etc element of the *Barker v Kryiakides* was further explored to capture the experience within the cases (Kaplan 2014). An analysis was made on what influence this Tree Dispute Principle had on the outcome of each of the 239 cases. It should be noted that the Tree Dispute Principle may have only been one element of the application and the final orders may not have dealt specifically with that key finding.

The following data was recorded for each case:

- Name of case referring to *Barker v Kryiakides*
- Focal elements of the case
- Orders made by the court, e.g.
    - Dismissed
    - Upheld
    - Partly upheld
- The reason for the determination relevant to key Finding

A number of pertinent supplementary cases emerged as part of the review. These cases didn't necessarily have a high frequency of being cited in other cases nevertheless they have been included as they are considered to be useful to Council in contributing to the resolution of neighbour tree disputes.

6.3 Development of the Neutral Evaluation Model

A NE Model was developed as part of this research. The model is based on the Neutral Evaluation Process by the Australian Administrative Appeals Tribunal (2018) and adapted for use by Council tree managers.

6.4 Evaluation Criteria

An Evaluation Criteria were developed for use by Council tree managers. The Evaluation Criteria are based Tree Dispute Principles, Guidance Decisions and other key findings within the Trees Act.

6.5 Limitations to Collection of Data

Only those factors which are within the expertise, experience and delegated capacity (or jurisdiction) of a Council tree manger to make a decision on have been reviewed. A number of cases were not examined in detail due to their complexity and tendency to involve issues outside the expertise of a Council tree manager such as:

- Payment of compensation - the circumstances around the payment of compensation can vary significantly and the determinant factors can be complex and include matters which are outside the expertise of a Council tree manager
- Matters involving orders for rectification of property which are outside the delegated authority of a tree manager
- The meaning of a view and whether the trees are obstructing that view
- Assessment of severity of loss of sunlight or view

It is also important to note that it is not the intent of this research to provide post-judgment critique on the circumstances or outcome of individual cases as the full facts and circumstances of each matter are not necessarily detailed within the judgement. Data collection did not include information that could identify the Commissioner, applicant, respondent and their legal and expert representatives. The LGO which the matter took place have also been omitted.

6.6 Interviews

Interviews were undertaken with three Council tree managers with at least 10 years' experience in the management of urban trees and property owners. A brief of the project including the analysis of the case judgements, NE model and interview questions was sent to the interviewees a week prior to the interview. The outcome of the case judgement analysis informed several of the interview questions. As such, the structure of the interview question was in keeping with the pragmatic paradigm approach and was provisionally dependent on the results of the case reviews.

The interviews were conducted in a semi-structured way by posing open-ended questions to prompt reasoning and explanation and so the participants could express their views (Creswell 2003). Interview questions are included in Section 11.

7. ANALYSIS

7.1 Analysis of Judgements

Over 1000 case judgements have been made in the LEC under the Trees Act. This represents a vast body of published findings which can be utilised as evidence-based guidance in a program of NE. The top four most frequently cited cases under the Trees Act were identified. An analysis of all subsequent cases which refer to these four cases is provided below. Relevant (but less frequently cited) pertinent cases and others supplementary to established precedence are also extrapolated and an interpretation of the analysis of data is given below.

The majority of the most commonly cited cases relate to applications made under Part 2 of the Trees Act which deals with the risk of property damage or injury. The other cases involve applications under Part 2A and deal with the obstruction of sunlight and or views as a consequence of trees planted so as to form a hedge.

The results identified a number of issues which led to the dismissal of most applications. This is important in the context of future disputes as the issues raised in these cases are likely to reoccur, and future guidance on how they can be dealt with using alternate path to Court is available.

These issues are:

- The meaning of 'the near future'
- Dropping of leaves, fruit and other debris
- Damage or injury caused by animals which live on or use trees
- The need for probative evidence as opposed to hypothetical damage or injury
- In Part 2A applications, whether the trees were planted so as to form a hedge

Yang v Scerri (2007) NSWLEC 592 is the most frequently cited case made under the Trees Act and was subsequently cited in 292 cases. A Guidance Decision was established by the Court as part of this judgement as to the meaning of "*in the near future"* (Section 10{2}(a & b)). The details of this case involved an application to remove a large Eucalyptus tree located on an adjoining property because of a claim of damage caused by the tree from falling branches. The respondent provided an expert report by an arborist who made an assessment that there were no signs the tree was in decline or of any structural problems which warranted it to be removed. The Court agreed with this assessment.

In making a judgement one of the matters which the Court must consider is whether the tree could cause property damage "*in the near future"* (Section 10{2}(a & b)). The interpretation of this timeframe was an ongoing issue and the Court chose to use this case to provide the following Guidance Decision:

> *The adoption of a 12 month rule of thumb period means that in order to satisfy the third test in (Section 10{2}(a & b) the tree concerned would need to be likely to cause damage to property within a period of 12 months after the date of determination of the application*.

The terminology *rule of thumb* gives the Court flexibility to adopt a longer or shorter time period in certain circumstances. The Court also has the discretion (depending on the evidence and circumstances) to make an order if the Commissioner finds that the tree is not likely to cause damage or injury within the 12 month rule of thumb period.

Of the 292 cases which cited *Yang v Scerri*, 274 or 94.59% of the cases were dismissed or only partly up-held because the circumstances did not meet the description required within the Trees Act. In essence, there is a requirement of evidence of imminent damage or injury as a consequence of the tree/s.

Barker v Kyriakides (2007) **NSWLEC 929** is the second most frequently cited case made under the Trees Act and was subsequently cited in 239 cases. A Tree Dispute Principle was established as part of this judgement. The details of this case involved an application seeking court orders for the removal of a large Eucalyptus tree positioned close to the property boundary shared by the applicant and respondent. The applicant's reason for wanting the tree removed was related to the falling of leaves and small pieces of deadwood into gutters and areas of open space within the property. The applicant also requested that compensation be paid for maintenance tasks associated with cleaning the tree debris.

Within the judgement, the Commissioners highlighted that similar issues have been raised in a number of past cases and the Court chose to use this case to establish the following Tree Planning Principle:

> *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, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.*

The proposal to remove the tree was not supported by the Court. Of the 239 times this case has been cited, there have been no examples where an applicant has persuaded the Court to deviate from this Principle. That is, the Court has not supported the pruning or removal of any tree for the dropping of leaves and flowers or dropping of small amounts of debris.

Senior Commissioner Moore (now Justice Moore) of the LEC stated in 2013 *the gratifyingly positive response to this principle from local Council tree officers who have used it as a basis for*

developing Council policies for Tree Preservation Order applications based on blocked gutters and the like. This is exemplified with the following LGOs having this principle embedded within their Development Control Plans or Tree Management Policies; Woollahra Municipal Council (2018), Waverly Council (2013), Hunters Hill Council (2013), Randwick Council (2018) and City of Sydney (2013).

Adamski v Betty (2007) **NSWLEC 200** is an example of a case in which *Barker v Kyriakides* was cited and a pertinent case to this research as it also deals with the natural process of falling parts of a tree. The details of this case involved a Bunya Pine located within the respondent's property. The applicant applied to the Court seeking orders to remove the tree and for compensation for property damage caused by falling cones. Bunya Pines produce large (200mm diameter) cones weighing up to 5kg which have the potential to cause serious property damage or injury. In making the determination the Court considered that *a properly carried out cone removal exercise for the Bunya Pine is a preferable course to be followed in lieu of requiring its removal.* As such, the Court ordered the regular removal of the cones from the tree. This judgement was subsequently cited in six cases, all of which have resulted in orders for the cones to be removed on a regular basis and no trees were ordered for removal.

Hendry & anor v Olsson & anor [2010] NSWLEC 1302 is another example which cites *Barker v Kyriakidis*. The details of this case involved a claim that trees on the adjoining property caused mould and slime which increased the risk of injury. The Court found that paved areas with slime or mould should be properly maintained as is the case with falling leaves and twigs.

This judgement was subsequently cited in 25 cases and there have been no examples where the Court had ordered any intervention (removal or pruning) to a tree due to slime or mould.

Robson v Leischke (2008) **NSWLEC 125** is the third most frequently cited case made under the Trees Act and was subsequently cited in 206 cases. The details of the case involved an application for compensation due to damage caused by a tree when it fell onto the neighbouring property in a storm.

This is an important case as the Chief Justice made two key findings through his detailed interpretation of the Trees Act. The first is concerned with annoyance or discomfort by a tree to the occupier of the adjoining land and the judgement states:

> *Annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind is not "damage to property on the land".*

Although the encroachment of branches and roots or the falling of leaves, fruits, seeds, twigs, bark and flowers of trees may be an annoyance or discomfort to a neighbour, they are not damaging the property. This key finding was subsequently referred to in 65 cases and 58 (89.23%) were either dismissed or up-held in part on this basis.

The second is a Guidance Decision concerning damage or injury caused by animals and the judgement states:

> *The specification of the tree as being a cause of damage to property or injury to any person excludes damage or injury directly caused by animals, such as mammals, birds, reptiles or insects, which may be attracted to a tree or use it for habitat.*

The Court found that damage must be caused by the tree itself and the fact that the tree might provide habitat to animals or insects which cause damage does not mean that the tree is *the cause* of damage. This judgement was subsequently cited in 85 cases and none were successful in persuading the Commissioner to make orders to prune or remove a tree due to animals.

Dooley & Anor v Nevell (2007) **NSWLEC 715** is an example of a case which cites the key finding in *Robson v Leischke* regarding the tree being the cause of damage. This case involved a claim that a tree should be removed due to damage caused by an animal. The judgement states:

> *The fact that an animal which has caused, is causing or is likely to cause in the near future damage to property on adjoining land, uses a tree as habitat, such as for feeding, roosting or nesting, does not result in the tree itself having caused, causing or being likely to cause in the near future damage to the applicant's property.*

This judgement was subsequently cited in 17 cases and none were able to convince the Court to intervene with a tree due to an animal damaging a property.

Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 is the fourth most frequently cited case and was subsequently cited in 143 cases. This case involved determining whether roots of a Eucalyptus tree were present under a dwelling footing, and if so, could they have exerted force capable of cracking the footings and walls of that dwelling. Investigations involved digging trenches to expose roots and footings, and also calculations of forces generated by the observed roots.

The three arborists involved in the hearing agreed that the roots exposed in the trenches were not responsible for the cracks. However, the applicant's arborist argued that other roots were likely to be found under the footing and (if present) would therefore be the cause of the damage. The Judge was not persuaded by this argument as it was based on a generalised hypothesis that did not make a reasonable consideration of the observations of the conditions within the exposed trench. The judgement stated in part that:

> *Something more than a theoretical possibility is required in order to engage the power of the court*.

That is, for the Court to make an order there must be a demonstrated probable connection between the tree and the damage rather than a mere theory.

Of the 143 cases citing *Smith & Hannaford v Zhang & Zhou:*

- 74 or 51.8% were dismissed due to a lack of evidence connecting the tree to the claimed damage, future damage or potential injury
- 25 or 17.5% were upheld as the applicant was able to validate their claim
- 43 or 30.1% were upheld in part, of these, a lack of evidence influenced 10 cases

Hinde v Anderson and Anor [2009] NSWLEC 1148 is the fifth most frequently cited case and was subsequently cited in 119 cases. This case outlined that a new application can be made if fresh evidence can be provided or if the circumstances change after Court determination. This case did not form part of the data for this research as this key finding was not considered relevant to the NE program.

***Haindl v Daisch [2011] NSWLEC 1145 (21 April 2011*)** is the sixth most frequently cited case and was subsequently cited in 69 cases. This case provides an interpretation of the meaning of a 'view' as per section 14E(2) of the Trees Act. Making an assessment on the severe obstruction of views is outside the scope of this research and as such this case was not further interrogated.

Grantham Holdings Pty Ltd v Miller [2011] NSWLEC 1122 is the seventh most frequently cited case and was subsequently cited in 51 cases. The key finding in this case is related to views and outlines that the trees are required to be severely obstructing the view at the time of the hearing. This case was also not interrogated for reasons outlined above.

Wisdom v Payn [2011] NSWLEC 1012 is the eighth most frequently cited case made under the Trees Act and was subsequently cited in 47 cases. This case involved the obstruction of a view by trees and whether or not those trees constituted a hedge. The applicant argued that the Court should take into account that a single Bottlebrush is perceived to form part of a hedge when viewed from the applicant's property, as opposed to basing the assessment on where the tree is positioned within the respondents property. The judgement states:

> *There must be a degree of regularity and arrangement, in a linear fashion, of the trees being considered. Whilst such an arrangement may be more than one tree deep and does not need to be in a perfectly straight line, the impression that is given by the planted arrangement of the trees must be one that, in an ordinary English understanding of the word, would be perceived as a hedge*.

Of the 47 cases citing *Wisdom v Payn,* 39 or 82.98% were dismissed because the subject trees did not form a hedge.

***Johnson v Angus (2012)* NSWLEC 192** is the ninth most frequently cited case and was subsequently cited in 39 cases. This cases involved an application to remove three Turpentine trees and the pruning of others to restore and maintain a view. The Court has jurisdiction in view applications only where the trees forming the hedge have been planted. The original decision was appealed. On appeal, the Judge took into consideration the tree species, age, health and growth habit and the scale of the landscape and was convinced that the trees had self-sown. The applicant was unable to prove that the Turpentines had been planted. The judgement states:

> *A self-sown tree cannot be a 'planted' tree as an unintentionally sown seed, by definition, cannot be found to have been sown purposefully 'so as to form a hedge' with other trees. To satisfy the requirements of this section, trees need to have been planted with the purpose of forming a hedge and this state of affairs needs to continue to the present.*

The trees need to have been deliberately planted in the ground for the purpose of forming a hedge and that hedge needs to have been continually maintained as a hedge.

Of the 39 cases which cited *Johnson v Angus*, 43.59% were dismissed as the trees subject to the application did not meet the description required within of the Trees Act.

North & Anor v Andrews; North & Anor v Cortis & Anor [2011] NSWLEC 1339 is an example of a case which cites the key finding in *Wisdom v Payn* and *Johnson v Angus*. Although this judgement has only been subseqently referred to in four cases, it is worthy of interrogation as it further clarifies the Courts interpretation of 'planted so as to form a hedge'. The details of this case involve an application to prune two trees within one property and six trees within another separate property. The applicant made the claim that the interlocking nature of the canopies of the separate trees on the two properties formed a hedge when viewed from his property. The Commissioner did not support this argument and the judgement states:

> *'The argument of interlocking canopies to be insufficient in itself to meet the criteria of being 'planted so as to form a hedge'.*

There have been no examples where an applicant has persuaded the Court that separate trees with interlocking canopies are hedges.

(*Awad v Hardie (No 2) [2010] NSWLEC 1258* is a case which concerned a tree on a boundary. Incomplete information was provided on a survey and the Court was not able to determine the location and subsequent ownership of the tree. Although this judgement was only subseqently referred to in five cases, it is worthy of interrogation as part of this research as it deals with the jurisdiction of the Court. The Court can only make orders for trees which are substancially positioned (>50% at its base) within the respondents land. This case establishes a methodology in determining the location of a tree relevant to the respondent's property being 'adjoining land' as defined by the Trees Act. The judgement states:

> *For trees on boundaries, we have, as a matter of practise in the Court in the past, required surveys to be undertaken if there is doubt as to where a tree is located. In some instances, there has been a necessity for a surveyor to undertake more than one attempt at a survey to accurately depict the shape of a single-stemmed tree at the point where its trunk enters the ground.*

Owners' Corporation SP17514 v Owners' Corporation SP34633 [2013] NSWLEC 1105 is an example of a case in which *Barker v Kyriakides* was cited. Although it has only been cited once, it is a pertinent case to this research for considering potential risk of injury. The details of this case involved an application to remove three Norfolk Island Pines, in part, due to potential injury from falling branches. In this case the Court determined that when considering the potential for injury from a tree, there must be a risk in the foreseeable future. For the Court to make an order in this regards, the assessment must be based *on characteristics of the species, its condition at the time of the hearing, evidence of past failures and the circumstances in which the tree is growing.*

7.2 Evaluation Criteria

The following Evaluation Criteria (EC) have been developed based on the Guidance Decisions, Tree Planning Principles, other key findings and analysis of the judgements made under the Trees Act.

EC 1– Is the property on which damage is claimed owned or occupied by the applicant?

EC 2– Is the point where the tree makes contact with the ground positioned substantially (more than 50% at its base) on the respondent's land?

Rationale
These EC address Section 7 of the Trees Act which requires that an applicant may only apply to the Court if the damage is to their property and the tree is situated within the adjoining land. These EC have been developed based on the key findings within *Awad v Hardie (No 2) [2010] NSWLEC 1258 (2010)* which outlines that if the location of the tree is unclear or the ownership of the tree is in dispute, a survey should be produced which accurately depicts the shape of the tree stem at the point where its trunk enters the ground.

EC 3– Is the claim based on an annoyance or discomfort felt by the applicant due to the tree?

Rationale
This EC addresses Section 10(2) of the Trees Act which outlines that the Court can only make an order if it is satisfied that the tree *has caused, is causing, or is likely in the near future to cause, damage to the applicant's property*. The EC has been developed based on the Tree Dispute Principle made in *Barker V Kyriakides 2007* regarding the expectation of property maintenance. Of the 239 times this case has been cited, support has never been given for the pruning or removal of a tree where the property can be maintained. The EC was also developed based on the key finding in *Robson v Leischke (2008)* which found that annoyance or discomfort is not damage and that encroaching roots and branch or debris created by small tree parts such as leaves, fruits, seeds, twigs, bark and flowers is not damage. The annoyance and discomfort part of this case has been cited in 58 cases and support for removal or pruning of a tree was never given.

EC 4- Is the damage the result of an animal, slime or mould?

Rationale
This EC also addresses Section 10(2) of the Trees Act regarding property damage and has been developed based on key findings made in *Robson v Leischke (2008)*, *Dooley & Anor v Nevell (2007)* and *Hendry & anor v Olsson & ano r [2010] NSWLEC 1302* 2010). The key findings made in these cases outline that damage caused to property by an animals which may use a tree, or slime and mould as a result of a nearby tree, is not actual damage caused by the tree.

These key findings have been cited in 129 judgements and of these support has not been given by the Court for the pruning or removal of a tree due to these claims.

EC 5– Can the applicant provide evidence directly connecting the tree to the damage?

EC 6– Is there evidence that the tree would likely cause injury to a person?

Rationale
This EC addresses Section 10 the Trees Act, (2a) regarding damage and (2b) where the Court must be satisfied that the tree *is likely to cause injury to any person*. These EC have been developed based on the key findings made within *Smith & Hannaford v Zhang & Zhou* (2011) which requires that the applicant needs to demonstrate that there is more than a theoretical possibility that the tree is the cause of property damage or will likely cause property damage in the near future or likely to cause injury. That is, there must be actual and probative evidence of the nexus between the tree and the alleged damage or potential injury.

This key finding has been cited in 143 cases. Of these 51% were dismissed because the applicant did not provide sufficient evidence to warrant orders for the pruning or removal of a tree.

In regards to injury, the key finding of *Owners' Corporation SP17514 v Owners' Corporation SP34633 [2013]* is used to consider the risk posed by a tree in the foreseeable future. This is based on the *characteristics of the species, its condition at the time of the hearing, evidence of past failures and the circumstances in which the tree is growing.*

EC 7– Is there a likelihood of potential damage in the near future?

Rationale
This EC addresses Section 10(2a) of the Trees Act where the term "in the near future" is used as a time threshold for potential property damage caused by a tree. The EC has been developed based on the Guidance Decision made in *Yang v Scerri* (2007) which established that there must be evidence that the tree would likely cause damage within a period of 12 months from the date of the assessment. This Guidance Decision has been cited 292 times and 274 or 94.59% of the cases were dismissed or only partly up-held because the circumstances did not meet the description required within the Trees Act.

EC 8– Have the trees been planted so as to form a hedge?

Rationale
This EC addresses Section 14A (1)(a)(b) of the Trees Act which outlines that an applicant may only apply to Court for the pruning or removal of a hedge where the hedge constitutes a group of two or more trees that are planted to form a hedge and that rise to a height of at least 2.5 metres above ground. This EC has been developed based on the key finding in *Wisdom v Payn* [2011], *Johnson v Angus (2012)* and *North & Anor v Andrews; North & Anor v Cortis & Anor* (2011).

The trees must have been planted to form a hedge and continue to form a hedge. The trees do not need to be in a perfect straight line but must be regularly arranged in a linear fashion and must give the impression that the trees have been planted to form a hedge. The interlocking canopies of individual trees is not necessarily considered a hedge.

7.3 Analysis of Neutral Evaluation Program

NE is an appropriate model of ADR for the resolution of neighbour tree disputes fundamentally due to the specialist technical nature of the circumstances. The experience of a Council tree manager would assist in fashioning a solution that is as sophisticated and as reliable as the information/evidence provided to them permits. Specialised knowledge held by the Council evaluator will improve the likelihood that their evaluation will be credible to the parties, more so than guidance from a non-expert mediator.

Council tree managers are suited as evaluators in a NE program for neighbour tree disputes as they are not an advocate for, nor retained by either one of the parties. An opinion given by a Council tree manager would be objective and based primarily on technical merits and the evidence provided by the parties, with some consideration given to relevant legal points. This process is similar to that already undertaken by Council tree managers in their role in the environmental planning system. That is, they are neutral in their assessment of applications and experts in urban tree issues.

Council tree managers not only see themselves as effective mediators of disputes between neighbours but they also have developed informal mediation and conflict resolution skills similar to local government planning professionals.

In the NE process, the Council evaluator makes a merits-based review of the facts as submitted by the applicant and circumstances as seen at a site visit. From this, the Council evaluator uses their expertise to assess the facts and circumstances in accordance with industry best practice, relevant Australian Standards and Council tree controls and policies. The neutral position of the Council tree manager enables an objective assessment and identification of pertinent issues. With the Council tree manager's opinion, the parties are encouraged to explain their respective position. The ideal outcome is for the parties to discuss and achieve a settlement. Alternatively, a focused plan can be developed to make further investigations for evidence that is likely to be most useful for achieving an outcome.

An important part of the NE process in neighbour tree disputes is for the Council evaluator to provide an opinion to the parties on the likely outcome if the matter was to be heard in Court. For this to be achieved, the Council evaluator will need a working knowledge of key case judgements. The evaluator will also require a sound understanding of the factors which have influenced these cases, the findings and outcomes. The Council evaluator uses the evidence based experience of the LEC to provide an opinion to the parties. The opinion is then used by the parties to contribute to the development of their case or make a judgment on their prospects of the outcome of litigation. In this regard, the analysis of judgements will be used in a similar fashion to the way in which Planning and Tree Dispute Principles are used in environmental planning disputes in the LEC.

Council tree managers would use a consistent evidence based set of criteria as part of a NE program. This should improve the reported negative perceptions of tree professionals about the effectiveness and appropriateness of legislative and regulatory mechanisms of trees due to the varied tree management policies between NSW LGOs.

Other benefits of Councils using a program of NE to resolve tree disputes is the avoidance of costly and time consuming Court appeals. A program of NE facilitated by local government would provide an opportunity for the parties to maintain a higher degree of control over the outcome than via the Court process. This can in turn assist in preserving the relationship by encouraging cooperation rather than being adversarial.

A program of NE is not a panacea for all neighbour tree disputes. NE is a voluntary process where residents seek advice from Council as an alternative path to legal action through the Trees Act. The relationship of the parties is the main factor in deciding on the form of dispute resolution (i.e. Court or NE). If the relationship is irrevocably fractured simply engaging in a conversation on the subject may be impossible and one or both of the parties will be unwilling to be involved. Also, an enforceable Court order (to their benefit or not) may be the only satisfactory outcome for a rights-based dispute.

7.4 Proposed Neutral Evaluation Model

The below NE model is based on one developed by the Australian Administrative Appeals Tribunal (Tribunal 2018) and adapted for a neighbour tree dispute. Refer to Figure 2.

Preliminaries

In the preliminary phase the parties acknowledge that they have an understanding of the NE process including potential outcomes and limitations. The parties would formalise their agreement to participate by signing a terms of agreement document outlining the key points:

- The process is voluntary, non-binding and without prejudice
- Council has right of access to subject properties
- The evaluator is not an advocate for nor retained by either one of the parties
- The evaluator is there to give an opinion and is not there to make the final decision
- The evaluator's opinion may be that the matter can is outside of the jurisdiction of Council and a Court determination may be more appropriate
- The outcome will not preclude either of the parties undertaking a court proceeding in the future
- If agreement is reached the parties will be encouraged to sign an agreement at the conclusion

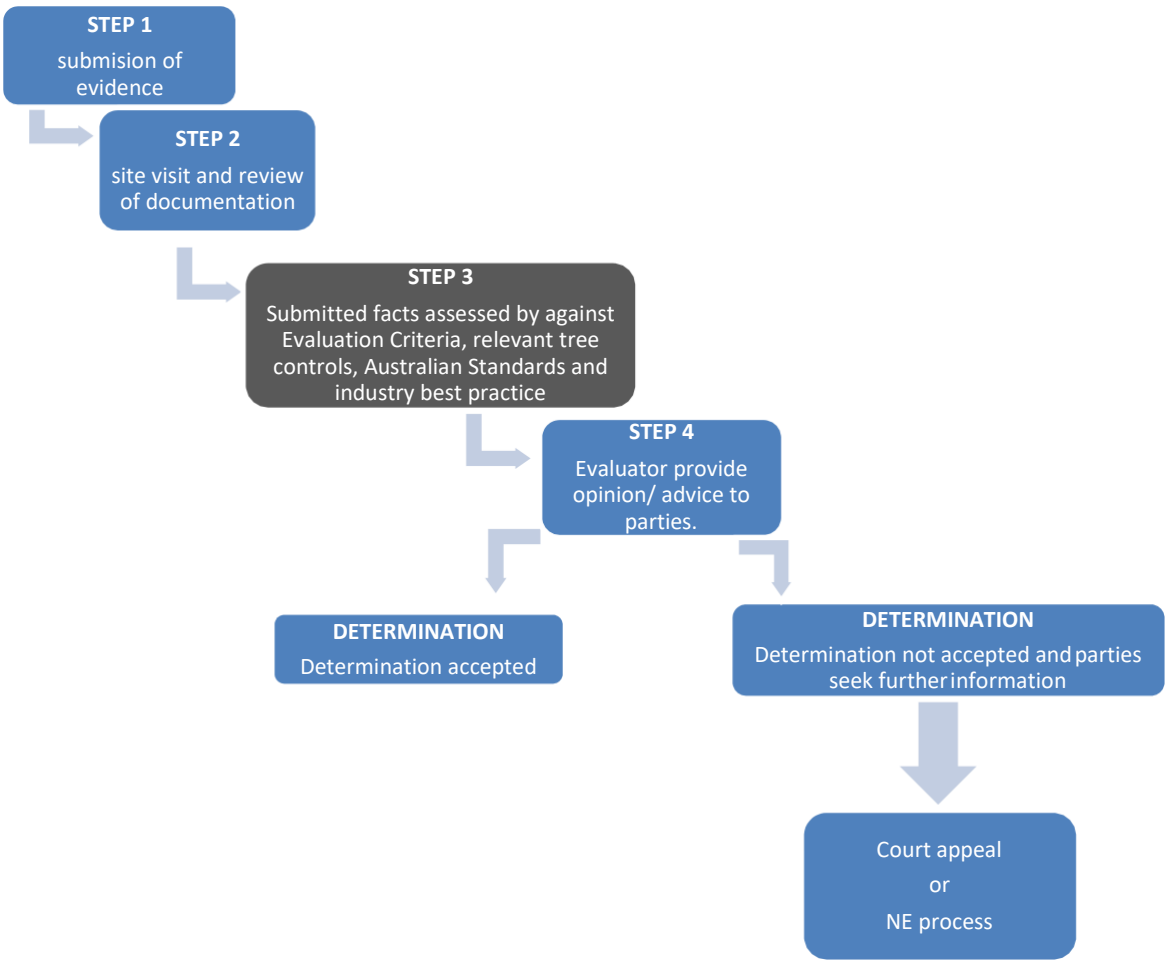

Figure 2: *Showing proposed tree disputes NE model*

STEP 1: Submission of Evidence

The applicant (and should they wish to, the respondent) provides supporting documentation, evidence and statements to the Council evaluator for review. This information will be the primary basis on which the evaluator will make their assessment. Any specific site/tree factors which the parties wants the evaluator to review when on site should be highlighted at this stage. Both parties will have the opportunity to view each submission. The submissions should be limited to the facts associated with the matter and no personal or relationship information or comments on the other party should be included.

STEP 2: Review of Documentation
The Council evaluator undertakes a site visit to view tree/s and site conditions and uses their tree management expertise to make a merits-based review of the submissions. Opportunity is given to each party to make a brief statement and highlight any pertinent factors.

STEP 3: Evaluation of Criteria
The merits-based assessment is then checked against the Evaluation Criteria, relevant tree controls, Australian Standards and industry best practice.

STEP 4: Opinion of Evaluator
The Council evaluator provides the parties with an opinion on the issues in dispute based on their assessment of Steps 2 and 3. The evaluator may indicate how the key disputed issues can be resolved and suggest options to the parties for negotiation and compromise. The opinion may also include identifying any missing information or evidence which would be useful in resolving the dispute. The evaluator may also give an opinion on a likely outcome if the matter was to proceed to Court based on the existing facts.

At the conclusion, the parties have the opportunity to re-assess their risks regarding the final outcome and they may decide to gather additional information or take the matter to Court.

STEP 5: Concluding Joint Session
Where agreement between the parties is reached and the matter is settled, the evaluator must ensure that the terms of settlement are in accordance with relevant tree and planning controls and industry Australian and Standards.

If a settlement is not reached, the evaluator makes a record of the process which could be used to satisfy Section 10(1) of the Trees Act to demonstrate that the parties have made an effort to resolve the dispute before making a Court application.

The summary also provides the parties with impartial feedback from the evaluator about the merits of their positions. Guidance can also be given as to how to acquire any additional evidence the parties may need to facilitate a settlement. A direct reference to the guiding criteria will most likely be

7.5 Analysis of the Interviews
Interviews were undertaken with three Council tree managers each with a minimum of 10 years public service experience. This provided an opportunity to obtain early feedback as to the feasibility and acceptability of Council taking a more proactive role in neighbour tree disputes. Additionally, feedback was sought on the utility of a NE model and the Evaluation Criteria in resolving these disputes. Their responses are valuable as they are currently in roles in which a NE program would be potentially implemented, the interviewees have a significant level of contact with the community, and a good understanding of the administrative framework in which trees are managed in local government. Hence, their views on the shortcomings of the proposed program will assist with identifying areas requiring further investigation or development for successful implementation. The questions and a summary of their responses are provided below.

Question 1
What role do you think local government should play in resolving neighbour tree disputes?

The response here was weighted towards Council not increasing their role in neighbour tree disputes. The two not in favour held the traditional position that the dispute is a matter for the neighbours to resolve and Councils should not be involved. The explanation for their position was that Councils don't have the skilled staff or resources to deal with these matters. The interviewee who supported Council having a more involved role suggested that Councils are the closest level of government to the people and have the relevant expertise to educate the community regarding general technical, procedural and legal aspects of trees.

There was a consistent view that there is an opportunity for Councils to play an advisory role in a neighbour tree disputes. However, the degree to which that advice should be given varied slightly. One interviewee noted that to a person unfamiliar with the tree statutory controls, the process can be complex and challenging and Councils had the expertise to provide clarity to the system. Although in favour of giving advice, another interviewee suggested the advice should be limited to how that particular LGO would determine the matter based on their specific tree controls and policies. They were apprehensive of the thought of becoming involved in neighbour disputes.

In summary, mixed responses to the increasing the role of Council involvement in neighbour tree responses indicate some potential barriers to the implementation of a NE program.

Question 2
Based on your review of the NE model, do you think this process would be suitable to assist resolving neighbour tree disputes?

There was agreement that the NE model would be a suitable alternate path to Court. One interviewee commented that local government can use this to help manage and simplify a dispute and to provide a quick outcome. Another considered that the Community Justice Centre was better placed to provide the service due to their impartiality.

There were however consistent concerns around the cost to Councils and the community and how the program would be funded to compensate for the time and resources of the Council. Questions were raised about potential costs and fees to the parties with one respondent suggesting that it would need to be user pays system to negate the community footing the bill for ambit claims. One interviewee suggested that a detailed review would need to be made on the financial elements of the program.

An upfront provision of estimated time and cost to the parties was suggested so that Councils and the community at large could determine whether the scheme is in the public interest. Another suggestion was that the program needed to discourage vexatious claims and possibly reward applicants (by way of reduced fee) who made a genuine effort.

One interviewee was concerned that there was potential for a NE program to embed another level of bureaucracy to an already complex process. The NE program could also create another avenue for a determined applicant to achieve an outcome that suited their interest.

There was general agreement that the NE model is a suitable alternate path to resolve disputes however issues around cost was considered the main imposition on Council.

Question 3
Are there any changes you would make to the NE model that would make it more suitable in resolving neighbour tree disputes?

The responses reflected concern around the administrative aspects of the process and costs were again raised. One response suggested that the timing of property ownership could be a consideration. This was based on recent experiences in which a trend of new owners attempted to remove trees soon after purchasing a property or just prior to lodgement of a Development Application or Complying Development Code to minimise tree removal as part of development.

Another suggestion was to incorporate specialist conflict resolution training as part of the basic tree curriculum to better equip tree managers across the industry. Alternatively, specially-trained tree managers (not only in the public sector but private sector consultants) could be used.

One interviewee suggested that the NE model could include a remedy component in which the evaluator provides an opinion on repair/reconstruction issues.

In summary, the issue of Council and the community bearing the cost of the NE program was again raised. The importance of training Council tree managers to facilitate the program was also highlighted.

Question 4
Do you use the experience of court judgements when making assessments and determinations for regular tree works applications?

There was a unanimous and positive approach by respondents to this question as all utilised findings of the Court to guide their decision-making in tree applications assessments. Further, one interviewee also uses Court findings as part of internal discussions and negotiations with other departments such as engineers and planning. They outlined that the Court experience was powerful, and where precedence has been established, Council should follow that lead. This interviewee outlined that they regularly use the findings which are in line with EC 3 (annoyance and discomfort), 4 (animal slime or mould), 5 (provision of evidence) and 6 (is there evidence that the tree will cause injury).

In summary, the usefulness of Court findings was in guiding decision making was supported by all respondents.

Question 5
Does your Council adopt any of the LEC's Tree Dispute Principles, Guidance Decisions or other key findings into its tree management policies?

The LGOs for all interviewees used the Court experience to some degree in developing tree controls and policies. One interviewee did note that it was their belief that local government should not become slavish to the Court.

In summary, interviewees already value and utilise Court findings in their everyday decision-making and this supports the use of providing a more consistent and thorough Evaluation Criteria that is likely to be accepted within the industry.

Question 6
Would this set of consistent Evaluation Criteria be useful in the assessment of a NE process?

All respondents agreed by providing answers such as '*they would be essential'* and *'most definitely'*. The rationale being that the Court currently provides a good degree of consistency from experienced Commissioners and the Evaluation Criteria, being evidenced-based, would reinforce this consistency between LGOs and Council tree managers. The EC provides Council tree managers with the potential to make an assessment of the tree and site conditions, explore options other than tree removal and also provide a legal opinion.

In summary, there was good agreement that the Evaluation Criteria would be a crucial component of a program of NE.

Question 7
Do you think a program of NE should be compulsory before a matter proceeds to a Court hearing?

There was agreement that a program of NE would be useful as a pre-Court process that could be used to settle the more simplistic matters.

It was also pointed out by all interviewees that Council tree managers are not trained in the appropriate conflict resolution techniques to take on this role. Two interviewees were firm in their position that it should not be taken on as a Council responsibility. The reason being the cost (as outlined above) and lack of expertise of tree managers. If it did become a Council program, the matters which were assessed needed to be only those which the Council had the delegated authority to determine.

On review, general support for a program of NE was provided but the burden to Council of cost and responsibility were raised.

Question 8
Do you see any other use for the findings of the review of the Trees Act such as in tree management planning instruments and policies?

There was an agreed position between the respondents that the findings of the review of the Trees Act would be useful in assessing tree works applications. The issue of inconsistency between Council controls was raised by all interviewees. They concurred that considering the EC is based on the Court experience, it would be a useful tool for providing consistency in assessments between tree managers within an organisation. One interviewee made the suggestion that if adopted at a state level the EC could bring consistency across the industry within NSW.

An important observation made by one interviewee was that the EC would be even more useful in the development of new tree controls and policies which could be crafted to reflect the experience of the Court. The rationale was that there could potentially be a conflict of jurisdictions if the EC was not in line with established tree controls or policies.

In summary, feedback suggested that the EC could also function as a tool for increasing consistency of decision making within Councils and across organisations.

8. CONCLUSION

LGOs have significant powers to develop tree policies and are the consent authority for most tree works in an urban environment. Councils are the custodians and place-shapers of the urban forest by reflecting the preferences and identity of the local community.

Neighbours having conflict over trees is inevitable and there is an expectation within the community that local government will assist. However, there is a long standing and traditional reluctance for Councils to give guidance to the community in these disputes. There may be two reasons for this; firstly insufficient formal training and/or experience for Council tree managers in dispute resolution may have led to a lack of confidence in dealing with these matters. Secondly, there are no formal mechanisms, policies or guidelines which support Council tree managers in this process.

Most neighbour tree disputes are resolved in the LEC under the Trees Act where a specialist Commissioner makes a determination. The Trees Act uses a consistent methodology based on jurisdictional tests and considerations and relies on precedence and industry best practice to produce enforceable outcomes. This has led to the Court process being highly regarded within the community and industry compared to the reported diverse policies and procedures of local government.

The analysis of the case judgements under the Trees Act identified a number of key findings which have been developed into Evaluation Criteria which could be used to support a program of NE. The Evaluation Criteria used in a program of NE provides local government and the community with a preliminary, structured, evidence-based and consistent approach in resolving some neighbour tree disputes. A large number of disputes, which have relatively simple issues, could be settled using the NE program and without the need for going to Court. The NE process may not necessarily result in an avoidance of litigation in all circumstances however it could be used as a suitable alternate to Court, a preliminary step prior to Court proceedings, or give clarity to the parties by narrowing the issues in dispute. The success of NE fundamentally depends on the relationship of the parties. A Court enforceable outcome will be more appropriate if the relationship is irrevocably fractured or if there is a power imbalance.

The interviewed industry experts already use the findings of Court to guide their decisions in tree planning matters and agree that the Evaluation Criteria would be essential in a program of Neutral Evaluation. However, concern was raised about the role of Council in what has traditionally been considered as a civil matter. Nevertheless, there was agreement that Councils should provide general statutory and technical advice when a dispute arises. The financial burden to Councils, the cost to the parties and lack of formal specialist training in dispute resolution were seen as significant impediments to the program.

Interview responses reflected other research that there is significant inconsistency of policies across LGOs and tree assessment procedures between Council tree managers. This presents opportunity to utilise the experience of Court through an Evaluation Criteria to bring consistency within the industry.

LGOs have an obligation to be flexible, continually improve and strengthen the public value of their role as the service delivery organisation of the urban forest. This research has identified that there is opportunity for Councils to play a more active role in neighbour tree disputes in line with their other substantial powers in the management of amenity trees.

9. RECOMMENDATIONS

- Undertake a trial program of Neutral Evaluation as a preliminary step before Court

- Undertake a financial analysis on the cost and fee structure of Council administering a NE program

- Further research a standardised assessment methodology (similar to the Evaluation Criteria) into existing tree management DCPs and policies at a local government level

- Further research a standardised assessment methodology (similar to the Evaluation Criteria) into the VNRA SEPP

- Provide dispute resolution training as part of arboricultural qualifications and ongoing professional development for Council tree managers

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11. RESEARCH QUESTIONS

Question 1
What role do you think local government should play in resolving neighbour tree disputes?

Question 2
Based on your review of the NE model, do you think this process would be suitable to assist resolving neighbour tree disputes?

Question 3
Are there any changes you would make to the NE model that would make it more suitable in resolving neighbour tree disputes?

Question 4
Do you use the experience of court judgements when making assessments and determinations for regular tree works applications?

Question 5
Does your Council adopt any of the LEC's Tree Dispute Principles, Guidance Decisions or other key findings into its tree management policies?

Question 6
Would this set of consistent Evaluation Criteria be useful in the assessment of a NE process?

Question 7
Do you think a program of NE should be compulsory before a matter proceeds to a Court hearing?

Question 8
Do you see any other use for the findings of the review of the Trees Act such as in tree management planning instruments and policies?

12. RESEARCH CONSENT FORM

Consent Form

I *[participant's name]* .....

agree to participate in the research project *Alternate Dispute Resolution for neighbour tree conflict*, *and the role of local government* being conducted by Andrew Simpson, a postgraduate student at the Centre for Local Government (CLG) at the University of Technology Sydney.

I understand that the purpose of the research is to explore if Alternate Dispute Resolution (ADR) in the form of a neutral evaluation (NE) program is suitable for local government to use to resolve neighbour tree conflicts. The research will also investigate if guiding criteria can be developed from frequently cited cases made under the *Trees (Disputes between neighbours) Act 2006* (NSW) for use in the NE program.

The research will assist local government by providing a dispute resolution program which is based on an ADR structure recommended by the Court. The production of guiding criteria will give clarity to the stakeholders' in a dispute and consistency across local government organisations.

I understand that my participation will involve responding to a set of brief questions on the validity and potential application of an ADR program for tree disputes within local government. I will be responding to the questions verbally in a face to face interview and I am aware that I will be sent the questions a minimum of 7 days prior to the interview for consideration. The interview is expected to take 1 hour of my time.

I am aware that I can contact Andrew's research supervisor, Ronald Woods (0419 414 868) if I have any concerns about the research. I also understand that I am free to withdraw my participation from this research project at any time I wish without giving a reason.

I agree that Andrew Simpson has answered all my questions fully and clearly.

I agree that the research data gathered from this project may be published in a form that does not identify me in any way. Alternatively, I understand that I will be given the opportunity, prior to publication, to check any text that is to be used in the published report that identifies me or my organization to ensure the meaning was interpreted correctly by the researcher.

Signature ..... Date .....

Note:

Studies undertaken by the Centre for Local Government (CLG) and the Institute for Public Policy and Governance (IPPG) have been granted program approval by the University of Technology, Sydney, Human Research Ethics Committee. If you have any complaints or reservations about any aspect of your participation in this research you may contact Ronald Woods (0419 414 868) or the UTS Ethics Committee through the Research Ethics Officer, (02 9514 9772). Any complaint you make will be treated in confidence and investigated fully and you will be informed of the outcome.