



**Land and Environment
Court**
of New South Wales

PRACTICE NOTE

CLASS 2 TREE APPLICATIONS

Commencement

1. This practice note commences on 1 December 2018. It replaces the Practice Note Class 2 Tree Applications dated 13 May 2014.

Application of Practice Note

2. This practice note applies to all applications under the *Trees (Disputes Between Neighbours) Act 2006* (the Trees Act) in Class 2 of the Court's jurisdiction.
3. Applications subject to this practice note are referred to as "tree applications". This practice note is to be known as *Practice Note – Class 2 Tree Applications*.

Note: Additional explanatory material about applications under the Trees Act; links to cases which may provide guidance about the Court's processes under the Trees Act; and a range of additional material about the Trees Act can be found in the Tree Dispute Practice Collection on the Court's web site (www.lawlink.nsw.gov.au/lec accessed through the link to "Tree Disputes").

Purpose of Practice Note

4. The purpose of this practice note is to set out the process leading up to a final hearing of a tree application to ensure the just, quick and cheap resolution of tree applications.

Responsibility of parties, legal practitioners and agents to facilitate just, quick and cheap resolution

5. It is the responsibility of each party and their legal practitioners and agents (as applicable) to consider the orders and directions appropriate to be made in the particular case to facilitate the just, quick and cheap resolution of the tree application.

Note: The parties will be the applicant and the owner of the land where the tree is situated. In addition, the local council and the Heritage Council are entitled to be a party and, if the land where the tree is located is tenanted, the tenant is also entitled to be a party if they wish. The Court may also direct that other people can be made parties if special circumstances exist making this appropriate.

6. If any party reasonably considers that compliance with this practice note will not be possible, or will not be conducive to the just, quick and cheap resolution of the tree application, the party should apply to be relieved from compliance on the basis that an alternative process will be more conducive to such resolution.
7. If an application is made pursuant to paragraph 6, that party is to notify all other parties of the proposed alternative process as soon as practicable and is to make available to the Court a short document reflecting that alternative process.
8. Parties are to ensure that all directions which they seek with respect to tree applications will assist in enabling such applications to be dealt with at the final hearing with as little formality and technicality, and as quickly as the requirements of the Trees Act and of every other relevant enactment and as the proper consideration of the matters before the Court permits (see s 38 of *the Land and Environment Court Act 1979*).

Legal practitioners and agents of parties to be prepared at any hearing

9. Each party not appearing in person shall be represented at any hearing before the Court by a legal practitioner or duly authorised agent familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made.

Making a tree application concerning damage to property or injury to a person

10. Application under s 7 of the Trees Act concerning damage to property or likelihood of injury to a person is to be made on the Tree Dispute Application form [Form C (version 2)] and accompanied by a completed Tree Dispute Claim Details (damage to property or injury to a person) form [Form H (version 1)].

Making a tree application concerning high hedges

11. Application under s 14B of the Trees Act concerning severe obstruction of sunlight and/or views by hedges is to be made on the Tree Dispute Application form [Form C (version 2)] and accompanied by a completed Tree Dispute Claim Details (high hedges) form [Form G (version 1)].

Note: The application form and claim details forms for applications under the Trees Act can be found in the Court Forms section on the Court's web site accessed through the link "Forms and Fees".

Before the preliminary hearing

12. Tree applications will be given a date, time and place for a preliminary hearing which corresponds with the next available preliminary hearing after the expiry of the statutory period of 21 days for service of the tree application. This will usually be 4 to 6 weeks after filing of the tree application. The preliminary hearing will usually be before a Registrar of the Court.
13. Tree applications are to be served on the owner of the land on which the tree is situated (and any other person or organisation specified by the Court at the time of lodgment) at least 21 days before the date of the preliminary hearing.

Notes:

- (a) Parties may apply to the Court for an early preliminary or final hearing of the proceedings if appropriate – see paragraph 25 below.
- (b) An applicant may also apply for a later date for the preliminary hearing if the applicant demonstrates that service cannot be achieved within the time required. The Court may also extend the period if circumstances, such as public holidays, make it appropriate that a longer period be allowed for parties to take the action required by this practice note before or by the return of the proceedings.

At the preliminary hearing of tree applications

14. At the preliminary hearing of all tree applications, the parties should expect that the usual directions set out in Schedule A will be made to prepare for the final hearing of the tree application including setting a timetable for exchange of relevant information prior to the final hearing date.
15. When a tree application is made seeking an order to prevent injury to any person and the “injury” is an illness, allergy or similar medical condition, the supplementary directions set out in Schedule B will be made concerning evidence in such cases.
16. A final hearing date will also be set for the tree application and this final hearing date will usually be not more than 6 weeks after the preliminary hearing.
17. Parties may also propose alternative directions if they have a reasonable basis for considering that alternative directions will better facilitate the just, quick and cheap resolution of the tree application. If alternative directions are proposed, the party seeking those directions is to notify all other parties before the preliminary hearing and ensure that a document setting out the proposed alternative directions has been provided to the other parties and is available to be handed to the Court at the preliminary hearing.
18. The parties are to inform the Court whether there is any reason for not holding the final hearing for tree applications concerning damage to property or likelihood of injury to persons at the site where the tree is located.
19. If any party seeks to raise an issue of fact or law that it contends precludes or demands the determination of the tree application in a particular way or otherwise seeks to have any issue dealt with separately before the final hearing, then the party raising that issue is to identify it and provide a document

setting out the issue and the reasons why it should be dealt with separately to the other parties and to the Court not less than 2 days prior to the preliminary hearing.

20. A Judge will deal with any application for separate determination of such an issue on the day of the preliminary hearing or at a separate hearing shortly after the preliminary hearing. However, the presiding Registrar at the preliminary hearing may still fix a date for the final hearing of the tree application.
21. The parties are to be sufficiently prepared at the preliminary hearing to assist the Court in making, and to be able to accept, a timetable up to and including the final hearing.
22. Legal practitioners and other representatives of the parties are to advise the parties of their obligation to be ready to agree to a timetable up to and including the final hearing and are to obtain full and timely instructions to ensure the parties comply with this obligation.

Final hearings of tree applications concerning damage to property or injury to a person

23. The Court will usually allocate a maximum of three hours for the final hearing of tree applications for damage to property or likelihood of injury to any person on the day set for that hearing. These hearings will commence (and usually be finalised) on site on that day.

Final hearings of tree applications concerning high hedges

24. The final hearing of tree applications concerning severe obstruction of sunlight and/or views by hedges will usually be finalised on the day set for that hearing. These hearings will commence on site and will continue as a court hearing at the Land and Environment Court at 225 Macquarie Street, Sydney or at an available, nearby Local Court courthouse.

Applications for an early preliminary hearing or final hearing

25. Any party may make an application for an early hearing of a tree application. Early hearings can be sought for either the preliminary hearing or the final hearing or both. Any such application must be in writing and supported with a short statement setting out the reasons in support of having an early hearing. Any such application must be given to the other parties as well as to the Court. Applications for an early hearing may be dealt with by the Court “on the papers” after telephone consultation with all parties or by a quick hearing on the application [such a hearing may be conducted by telephone to avoid the need for the parties attending at the Court].

Notification if breach of the Court's directions

26. If there is any significant breach of the Court's directions, including a breach sufficient to cause slippage in a timetable, the parties must promptly, by e-mail communication or fax to the Registrar, notify the Registrar of the breach. The Registrar may require the parties to attend before the Court if it is considered that the reasons for the breach are not adequately explained in that e-mail communication or facsimile or if the breach might materially affect the timetable. Parties are reminded that where the conduct of either party unnecessarily or unreasonably increases the number of appearances in Court, that party may be at risk of the making of a costs order against them.

Applications to vary the Court's directions

27. Any party to a tree application may apply to the Court to vary the Court's directions, including the timetable leading to the final hearing or the date fixed for the final hearing. Any application to vary the Court's directions must be in writing setting out the changes proposed and the reasons for them. The person making such an application must provide a copy of the application to the other party, the relevant local council and to the Court.
28. Applications to vary an existing timetable may be dealt with by the Court "on the papers" after telephone consultation with all parties or by a quick hearing on the application [such a hearing may be conducted by telephone to avoid the need for the parties attending at the Court].

Liberty to approach the Court

29. Parties have liberty to approach the Court without a notice of motion on two working days' notice or earlier if urgency requires. A party seeking to make urgent application should, if possible, make prior arrangement with, or give appropriate notice to, any other party, and should send an e-mail communication or fax to the Registrar.

Amendments to tree applications

30. An applicant requires permission from the Court to amend a tree application.
31. Any application to amend is to be in writing and accompanied by a short statement in support explaining the reasons for seeking permission to amend. Applications to amend may be dealt with by the Court "on the papers" after telephone consultation with all parties or by a quick hearing on the application [such a hearing may be conducted by telephone to avoid the need for the parties attending at the Court] or during either the preliminary hearing or the final hearing of the tree application.

Applications to change hearing dates and for adjournments

32. Tree applications will not be adjourned generally. If a tree application is to be adjourned, it will be adjourned to a specific date, time and place that will be notified to the parties by the Court.
33. Tree applications usually will not be adjourned because of failure to comply with this practice note or Court directions or because of lack of preparedness for any attendance before the Court. If failure to comply or lack of preparedness nevertheless does cause the adjournment of the proceedings, the defaulting parties or legal practitioners may be ordered to pay costs.
34. Applications to change hearing dates fixed by the Court are to be in writing, with a statement in support explaining the circumstances of the application and the reasons the hearing date should be changed. Applications to change a hearing may be dealt with by the Court “on the papers” after telephone consultation with all parties or by a quick hearing on the application [such a hearing may be conducted by telephone to avoid the need for the parties attending at the Court].

Applications for final orders by consent of parties

35. If the parties settle the dispute and its resolution does not require the Court to make any orders under the Trees Act, the applicant is to file a notice of discontinuance of the tree application signed by all parties.
36. If the parties settle the dispute and its resolution does require the Court to make orders under the Trees Act, it will be necessary for the Court to determine the tree application rather than filing terms of agreement with the Court registry. The parties are to exercise the liberty to approach the Court (under paragraph 29 above) and request that the application for final orders by consent be listed for determination by the Court. The parties are to file the proposed consent orders signed by all parties before the date fixed by the Court for hearing and determining the application for final orders by consent.
37. At the hearing of the application for final orders by consent the parties will be required to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to make the consent final orders.
38. For a tree application concerning damage to property or likelihood of injury to a person, the Court will need to be satisfied that at least one of the jurisdictional tests in section 10(2) of the Trees Act is met. In addition, the Court will have regard to the matters in sections 9, 10 and 12 of the Trees Act.
39. For a tree application concerning severe obstruction of sunlight and/or to a view, the Court will need to be satisfied that sections 14A(1) and 14E(1) and at least one of the jurisdictional tests in section 14E(2) of the Trees Act are met. In addition, the Court will have regard to the matters in sections 14D and 14F of the Trees Act.

40. It is also likely that no final order by consent for interference with or removal of a tree will be made without an inspection of the tree.

Expert evidence

41. Parties are encouraged to consider whether expert evidence is genuinely necessary to resolve the issues in dispute in tree applications. Unnecessary expert evidence substantially increases the time and cost of hearings.
42. In this context, parties are to pay regard to the Court's usual practice that tree applications are fixed, whenever possible, for final hearing before at least one Commissioner who is an arborist. If the Court is not able to list a Commissioner who is an arborist for the final hearing of such applications, if time and circumstances permit, the Court will notify the parties of this fact. A Commissioner who is an arborist may not be required to be listed for tree applications seeking compensation for damage only.
43. Where expert evidence is proposed to be considered at a final hearing, the Court usually accepts that evidence in written form and does not require attendance of the expert, unless attendance is required by another party (see paragraph 51 below).
44. It is not the role of any expert to express an opinion whether a tree application should be granted or dismissed. Expert opinions in reports and joint reports are to deal with the relevant issues raised by the parties. Any other matter relevant to the expert's expertise, which the expert feels obliged to draw to the attention of the parties and the Court, may also be noted.
45. An expert and the expert's report are to comply with the requirements of Division 2 of Pt 31 of the Uniform Civil Procedure Rules 2005 and the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules.
46. An expert witness should identify any pre-existing relationship between the expert witness, or their firm or company, and a party to the application.
47. If experts are directed by the Court to confer, experts are to ensure that their joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue and is not to be a mere summary or compilation of the pre-existing positions of the experts.
48. Legal representatives and parties to the application are not to attend joint conferences of experts or be involved in the preparation of joint reports without permission being given by the Court.
49. Where expert evidence from more than one expert in the same discipline is to be given at the final hearing, the experts will give such evidence concurrently (subject to any order to the contrary by the presiding Court member hearing the tree application).

50. The Court expects legal practitioners and experts to work together to implement this practice note in a practical and sensible way which ensures that it achieves its intended purpose.

Witnesses required for cross-examination

51. If a party requires any expert or other witness for cross-examination, notice is to be given at least 5 working days before the final hearing.

Non compliance and costs

52. If a breach of the Court's directions or of this practice note causes costs to be thrown away, a party, legal practitioner or agent responsible for the breach may be ordered to pay those costs.
53. The cost of unnecessary photocopying and assembly of documents is unacceptable. Legal practitioners and agents for the parties are to consider carefully the documents necessary to be provided to the Court during any hearing of a tree application. Unnecessary documents may attract adverse costs orders.
54. Any failure by one party to comply with the Court's directions will not be considered an adequate excuse for any failure to comply by the other party. Both parties are responsible for ensuring that they comply with directions.

Applications for a cost order

55. Where a Commissioner has heard and determined a tree application, any party seeking an order for costs of the proceedings must apply for costs by notice of motion filed within 28 days of the final orders in the proceedings.

Note: Pt 3 r 3.7 of the Land and Environment Court Rules 2007 provides that for proceedings in Class 2 of the Court's jurisdiction, including tree applications, the Court "is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances": Pt 3 r 3.7(2). Some of the circumstances in which the Court might consider the making of a costs order to be fair and reasonable are listed in Pt 3 r 3.7(3).

56. The notice of motion for costs will be heard and determined by either the Registrar or a Judge of the Court.

***The Honourable Justice Brian J Preston
Chief Judge
22 November 2018***

Schedule A

Usual directions on the preliminary hearing for tree applications [blanks will be completed at the preliminary hearing, relevant directions ticked and directions not needed will be crossed out].

- 1 Time and place of final hearing**
(a) The matter is fixed for an on-site hearing/a court hearing commencing on site on [date].....at am/pm.
(b) The hearing will continue in Court at [location] at am/pm;
- 2 Notice of appearance**
The applicant's legal representative/respondent's legal representative/respondent is to lodge a Notice of Appearance with the Court and give a copy to the respondent/applicant, by 4.30pm on
- 3 Service of directions**
(a) The applicant is to serve a copy of these directions on the respondent and on the local council by 4.30 pm on;
(b) The applicant is to serve a copy of these directions on the Heritage Council of NSW by 4.30 pm on
- 4 Proof of service**
The applicant is to file with the Court a statutory declaration or an affidavit of service demonstrating service of the tree application and/or compliance with direction 3 for service of directions by 4.30 pm on
- 5 Issue of subpoenas to produce documents**
Leave is granted to all parties to issue subpoenas to produce documents by not later thanwith such subpoenas to be returnable before the Court not later than
- 6 Applicant's evidence**
The applicant is to file with the Court and serve a copy on the respondent, the local council and the Heritage Council of NSW, by 4.30pm on, any further statements, reports, affidavits, photographs or any other documents upon which the applicant intends to rely at the hearing;
- Note: When an application is made for an order to prevent injury to any person and the "injury" is an illness, allergy or similar medical condition, specific supplementary directions [see Schedule B] will be made concerning evidence in such cases.
- 7** For all Part 2 claims seeking orders for compensation for damage to property or orders to rectify damage to property, the applicant's documents provided pursuant to direction 6 are to provide details of:
- when and how the damage was brought to the attention of the respondent including copies of any correspondence (if this information has not been provided as part of the application); and
 - the basis of any amount claimed for past damage (including all relevant receipts and/or invoices) and any quotations for proposed works which the applicant requests the Court to require to be undertaken (whether such proposed works are to the applicant's property or to the property where the tree is located);
- 8** In addition to the deadline in direction 6 for the applicant to provide further material, the applicant may file with the Court and serve a copy on the respondent, the local council and the Heritage Council of NSW, by 4.30pm on, any documents produced in response to a subpoena, on which the applicant intends to rely at the hearing;

- **9 Respondent's evidence and alternative orders**
The respondent is to file with the Court and serve a copy on the applicant, the local council and the Heritage Council of NSW, by 4.30pm on, any statements, reports, affidavits, photographs or any other documents (including subpoenaed documents) upon which the respondent intends to rely at the hearing;
- **10** The respondent is to file with the Court and serve a copy on the applicant, the local council and the Heritage Council of NSW, by 4.30pm on, any order pursuant to s 9 and/or s 14D of the *Trees (Disputes Between Neighbours) Act 2006* or pursuant to s 13A of the *Dividing Fences Act 1991* which the respondent proposes as an alternative to or in addition to the orders sought by the applicant. If the respondent wishes to retain the tree, the respondent's proposed order should include any solution to prevent the tree causing damage to the applicant's property, including any engineering or construction solution, which would enable the tree to be retained;
- **11 Local council's evidence**
The local council is to file with the Court and to serve on the applicant, the respondent and the Heritage Council of NSW, by 4.30 pm on, any statements, reports, affidavits, photographs or any other documents upon which the local council intends to rely at the hearing;
- **12 Heritage Council's evidence**
The Heritage Council of NSW is to file with the Court and serve on the applicant, the respondent and the local council, by 4.30 pm on, any statements, reports, affidavits, photographs or any other documents upon which the Heritage Council intends to rely at the hearing;
- **13 Access for inspections**
The parties are to permit access to their property by the other party and the legal representatives and expert advisors of the other party, the local council or the Heritage Council of NSW, provided that access is on reasonable notice (given to the party's legal representative or, if the party does not have a legal representative, direct to the party) and at a reasonable time. The parties are permitted to supervise any such access;
- **14 Expert evidence**
 - (a) Any expert giving written or oral evidence on behalf of a party, the local council or the Heritage Council of NSW is to be advised that:
 1. Any expert engaged to give opinion evidence in these proceedings has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise;
 2. Such expert witness's paramount duty is to the Court and not to the person retaining the expert; and
 3. Such expert witness is not an advocate for the party who has engaged that expert;
 - (b) Any written expert evidence is to include acknowledgement that the expert has read and agrees to be bound by the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules 2005.
- **15 Witnesses required for cross-examination**
If a party, the local council or the Heritage Council of NSW requires any expert or any other witness for cross-examination, notice is to be given at least 5 working days before the final hearing.
- **16 Liberty to re-list**
Each party has liberty to re-list the matter before the Court on two days notice to the other party, the Court, the local council and the Heritage Council of NSW.

Schedule B

Supplementary directions for an order to prevent injury to any person and the “injury” is an illness, allergy or similar medical condition.

- 1. Further to direction 6 of the principal directions in this matter, the applicant is to provide, by the close of business on, any statement of medical or arboricultural evidence and any supporting medical or arboricultural peer reviewed literature relied upon in support of a claim that a tree which is the subject of the application is a “likely cause of injury to any person”;

- 2. Any expert evidence concerning matters contained in 1 above is to include acknowledgement that the expert has read and agrees to be bound by the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules 2005.