

Problems with Trees

Planting

Trees can cause many problems so planting a new tree is not just a matter of deciding where it will look best, you will have to think about how it will affect your neighbours.

Trees can:

- block drains;
- damage buildings;
- damage driveways and pathways;
- litter backyards;
- reduce light; and
- interfere with views.

The Noxious Weeds Act 1993 makes it illegal to plant or grow 'noxious' plants in your garden. Councils have the power to order the removal of such plants and also have the power to impose fines on you if these plants are found on your property.

You are **not** required to get Council approval before planting a tree or plant, however talking to your Council and neighbours **before** you plant is a good way to avoid future problems. It may be wise to check that the tree you are planting will not damage water or sewerage pipes because of the tree's root system.

Removing and Pruning Trees

Points to consider:

- Councils have the power to place tree preservation orders on trees in the local area making it an offence to cut or prune without permission.
- Councils have the power to prosecute anyone for breaking a tree preservation order. This includes, cutting down, topping, lopping, removing, ringbarking or causing any damage to a tree whether directly or indirectly. The maximum fine in the Local Court is \$2,000.
- If the tree is particularly significant the case can be heard in the Land and Environment Court where the penalty can be as high as \$20,000.
- Check with your local Council to see if the tree is covered by a tree preservation order. Most applications take between two to three weeks to be processed and a council inspector may come out to check the tree before the decision is made.

What if the tree is protected can it still be pruned or removed?

This depends on the circumstances. Approval is likely to be given if:

- the tree is dead or damaged or about to fall or cause some other immediate danger;
- there are problems with roots blocking sewerage or other pipes;
- the tree is threatening a building or structure;
- the tree is on a boundary and you or your neighbours want to erect a dividing fence;
- branches are threatening roof tiles or some other damage, or if overhanging branches are causing a nuisance.

What if the problem branches belong to a neighbour's tree?

The Council would probably require your neighbour's agreement before giving approval for you to prune. Many councils are reluctant to give approval to prune to anyone but the owner of the tree as problems can arise if the tree is pruned unevenly or becomes unstable.

What if the Council does not grant the application to prune or remove a protected tree?

You can appeal to the Council to review the decision. If the Council rejects your appeal you can lodge an appeal to the Land and Environment Court.

What if the tree is on a public area?

The Local Council is responsible and any problems should be referred to the Council.

What is the law regarding trees and plants intruding onto your property?

According to the law, you own the airspace above your land and the earth beneath your land (subject to special government laws on airspace etc). However, dealing with a neighbour can lead to difficulties in deciding what should be done and who should pay for it. The law leaves it up to neighbours to work this out, giving some rights to those affected by problem trees but no clear responsibility to owners to pay for these costs.

Your best option is to try and reach an agreement with your neighbour about what should be done **before** lopping offending trees. If you are having difficulties you should contact a Community Justice Centre. The CJC is a government funded organisation designed to assist people to resolve their problems by mediation. The service provided is **free**. Professionally trained mediators will sit down with the parties in an attempt to resolve the matter quickly and possibly save the parties legal costs which result from court action.

Select [this link](#) to for the contact details of **Community Justice Centres**

[http://www.lawlink.nsw.gov.au/lawlink/Community Justice Centres/II_cjc.nsf/pages/CJC_index](http://www.lawlink.nsw.gov.au/lawlink/Community%20Justice%20Centres/II_cjc.nsf/pages/CJC_index)

Can I cut and remove any problem branches and roots?

If the problem branches or roots are spreading onto your property, you are entitled to cut them back. You are not entitled to prune more than 10 per cent of the tree and if the tree is protected you will need to get Council approval before you prune. Matters to consider before talking to your neighbour about the problem:

- you could ask your neighbour to cut back the branches, rather than doing it yourself. As the branches are hanging over your property, your neighbour would be legally responsible for any damage caused to your property in the process of removing them.
- you could get a professional to do the work, pruning can be dangerous and permanent damage can occur if it is not done properly. However, this can be expensive. You could ask your neighbour to pay for it or share in the cost, but even though their tree is causing the problem, they are not **legally** obliged to pay for the work unless they have agreed to do this.
- if negotiations are not successful and your neighbour refuses to pay for all or part of the work, you can consider legal action to recover costs on the basis that the branches were causing a legal nuisance.
- if legal action is something you are considering it may be preferable at first instance to have your solicitor write a letter to your neighbour clarifying the parties legal responsibilities.
- if you decide to prune the tree yourself and do it **carelessly**, your neighbour could sue **you** for damage to the tree or for damage caused by falling branches.

- any roots, fruit, branches you remove from your neighbour's tree remain your neighbour's property. Legally you should return them. Don't throw such things back over the fence, they should be placed neatly on an agreed site to stop any ill feeling between the parties.

What if I want to trim the branches but can only do it from my neighbour's land?

Firstly, discuss it with your neighbour and ask for permission to enter onto their land. If permission is refused you can apply to a Local Court for an order granting access to your neighbour's land under the Access to Neighbouring Land Act 2000. Before applying you must give at least 21 days notice of your intention to lodge the application to your neighbour. The Local Court has to be satisfied that there is **substantial difficulty or unreasonable hardship**. The court, if satisfied, can grant an order allowing you to cut back any tree or shrub.

What can I do about falling leaves, damage to pipes and dangerous trees?

There is no law making neighbours responsible for removing leaves which fall onto neighbouring property. If you are facing ongoing costs to clear gutters and drains it may be possible to reach an agreement with regard to costs with your neighbour. If your neighbour refuses and the damage involved is substantial you could take legal action under the law of **nuisance**. Nuisance is a technical area of the law and the legal term nuisance is different from the ordinary use of the word. A person can complain of **nuisance** only if damage is caused by some continuing or regular activity or occurrence on their neighbour's land which the neighbour caused or did not try to prevent. It will not be a case of nuisance if:

- the neighbour's activity is a reasonable use of their land and they have taken precautions to prevent any damage from occurring;
- the person who suffers the damage has put up with it without complaint for a long time;
- the person suffered the damage because they or their property are unusually sensitive.
- public authorities may sometimes be excused for causing a nuisance in the course of performing necessary work.

It is in your interest to notify your neighbour in writing of the damage being caused and giving your neighbour an opportunity to rectify the problem before commencing legal action.

If your sewerage or stormwater pipes are blocked by roots and you suspect your neighbour's tree, the first step is to identify the offending tree. NSW State Forest has a root identification service that can help, the service costs approximately \$130. If your neighbour is not prepared to pay for repairs it may be possible to sue under the law of negligence or nuisance. In order to take an action for negligence, you would need to prove that your neighbour knew about the problem and failed in their **duty of care** by not doing anything about it. As previously mentioned your first options should be discussions with your neighbour, referral to the Community Justice Centre or a letter from your solicitor.

If your neighbour's tree is diseased or damaged and in danger of falling and you have not been able to reach an agreement with your neighbour, you are **not** legally entitled to take action yourself if the tree is on your neighbour's property. If the tree is a danger to the safety of people, your local Council can order its removal. For people living in rural areas it may be possible to involve the Rural Fire Brigade, if the Rural Fire Brigade declare the tree a fire hazard and dangerous it has to be removed by the owner.

If there is a dangerous tree it may be wise to take the following precautions:

- put the request in writing to your neighbour and keep a copy. If the tree does damage your property, you have proof that your neighbour knew about the problem and this will assist in damages claimed for negligence.

Where an impending damage would be irreparable it may be possible to apply to the Supreme Court for an injunction under the law of **nuisance** ordering your neighbour to take action to prevent future injury. Courts tend to only grant injunctions when damage has already occurred or is in the process of occurring, otherwise the burden of proof rests on you. The Supreme Court procedure can be complex, slow and very expensive. An interim injunction is only granted in urgent cases when the nuisance is serious.