NEW SOUTH WALES LAW REFORM COMMISSION

COMMUNITY LAW REFORM PROGRAM

NEIGHBOUR AND NEIGHBOUR RELATIONS

DISCUSSION PAPER

This is not a report of the Law Reform Commission. It is a discussion paper, designed to promote discussion of the views presented.

DP 22
1991

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Table of Contents

Terms of Reference

On 23 December 1987, the then Attorney -General, the Hon RJ Mulock LLB MP, referred the following matter to the Commission for investigation:

To inquire into and report on -

1. The laws which define and regulate relationships between people who live on neighbouring land with particular reference to:

   (a) access to neighbouring land for the purposes of maintaining fixtures and services required by an adjoining property;

   (b) easements for joint services, including joint connections for sewerage and drainage;

   (c) problems caused by trees;

   (d) noise control as it effects neighbours,

2. Any related matter.

Participants

The Law Reform Commission is constituted by the Law Reform Commission Act 1967. Pursuant to section 12A of the Act, the Chairman has consituted a Division for the purposes of this reference. The members of the Division are:

The Hon R M Hope QC
Associate Professor David Weisbrot
Professor Helen Gamble

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Chapter 1

INTRODUCTION

THE REFERENCE

1.1 On 23 December 1987 the Commission was given a reference to inquire into and report on:

1. The laws which define and regulate relationships between people who live on neighbouring land with particular reference to:

   (a) access to neighbouring land for the purposes of maintaining fixtures and services required by an adjoining property;

   (b) easements for joint services, including joint connections for sewerage and drainage;

   (c) problems caused by trees; and

   (d) noise control as it affects neighbours.

2. Any related matter.

1.2 Implicit in the reference is the need to consider the issues of dispute resolution and the availability of appropriate remedies and forums to deal with conflicts between neighbours.

1.3 A "neighbour" may be a shop, factory or other commercial or industrial establishment in the community which may create significant problems for a residential neighbour. However, the scope of this reference is limited to relationships between residential neighbours; ie, neighbours in adjoining houses as well as neighbours within blocks of flats and units.

BACKGROUND TO THE REFERENCE

1.4 The proposal to seek a reference on neighbour and neighbour relations originated from a conference convened by the Commission in 1983 at which representatives from Chamber Magistrates, Community Justice Centres, the Public Solicitor's Office and four Community Legal Centres identified matters suitable for inclusion in the Community Law Reform Program. Many of the matters identified concerned disputes between neighbours.

1.5 In December 1986/January 1987 the Commission distributed a Community Law Reform Program Pamphlet intended to encourage members of the community and interest groups to articulate their views on aspects of the law which they thought required modification. Specifically, the distribution of pamphlets was meant to produce suggestions which would give direction to the choice of references made in the Community Law Reform Program. Many of the suggestions received involved problems associated with dividing fences, joint use of services available to adjoining properties, problems created by large trees and noise. The response to the pamphlet caused the Commission to seek a reference on Dividing Fences and a Report on this topic was published in 1988.[1] Since most of the other suggestions related to disputes between neighbours they were amalgamated together in the Neighbour and Neighbour Relations reference which is the subject of this Discussion Paper.

PURPOSE OF THE DISCUSSION PAPER

1.6 The purpose of this Paper is to provoke thought and to encourage debate and feedback on the issues identified in the terms of reference. The options for reform presented in the Discussion Paper are preliminary suggestions only. There may be other options or suggestions for reform that have not yet been canvassed by the Commission. Comments and submissions on the contents of the Discussion Paper as well as on other matters related to the reference will be of great assistance to the Commission in formulating its final recommendations to the Attorney General. To assist in formulating your responses, the Discussion Paper contains a series of questions at the end of each chapter. The questions reflect the main issues which have been brought to the Commission's attention but should not be taken as the only matters on which views are sought.

OUTLINE OF THIS PAPER

1.7 The Discussion Paper is divided into seven chapters with one chapter devoted to each issue identified in the terms of reference. The common element that binds the various issues raised in this Discussion Paper is that they involve the relationships between people who live on neighbouring land.

1.8 *Chapter 2* focuses on the problems that arise with residential noise. Excessive noise is one of the greatest sources of community friction, particularly in concentrated urban areas. The scope of the *Noise Control Act 1975* in controlling noise in the community is examined, as well as the practical shortcomings of its enforcement and some tentative suggestions for reform.

1.9 *Chapter 3* deals with the issue of neighbourhood disputes relating to trees. Some of the common problems discussed include physical damage caused by tree roots, obstructed light, obstructed views and the emerging problem of obstruction by trees of light for solar energy. Again, some tentative suggestions for reform are made.

1.10 *Chapter 4* deals with access to neighbouring land for the purpose of maintaining fixtures on one's own property. The current law provides that unless an easement or an agreement with the neighbour exists, a person has no right to enter adjoining land even though it may be necessary for proper maintenance. The chapter examines the current law and proposes that some flexibility be introduced in circumstances where access for maintenance of fixtures has been refused by an adjoining owner. The proposal for reform is based on a consideration of reforms undertaken in other jurisdictions and tends to follow the recommendations made by the UK Law Commission.

1.11 *Chapter 5* deals with access to neighbouring land for maintaining services to one's own property. Whereas the issue in Chapter 4 is *fixtures* on one's own property, Chapter 5 is concerned with *services* to one's property. Some properties are serviced by means of pipes for sewerage or drainage passing through neighbouring land. If no valid easement was ever created authorising such an arrangement, the owner of the neighbouring property may not only refuse access to repair, but may actually apply to the court for an order to have the pipes removed. The proposed option for reform is the same as that suggested in Chapter 4.

1.12 The issues raised in Chapter 5 lead to the overlapping issue of easements for joint services which is the subject of *Chapter 6*. Easements for joint services usually arise in terrace houses when services are not connected to sewerage mains by individual pipes but by a joint service. In such circumstances unless a valid easement exists an adjoining owner could interfere with the service even though the consequences can be very inconvenient. The inadequacies of the present law are considered and options for reform are suggested in the light of recommendations by the UK Law Commission, which already have been implemented in Queensland, Tasmania and New Zealand with some modifications. It is proposed that a landowner should be able to apply to a Tribunal which would have a discretion to grant the application after a number of factors have been considered. In examining joint services the paper also looks at the issue of apportionment of costs. Consideration is given to the possibility of laying down strict guidelines for the apportionment of costs between affected joint service owners.

1.13 *Chapter 7* deals with the overriding matter of dispute resolution. Disputes over the particular issues discussed in this paper are often symptomatic of a more general problem with the relationship between neighbours. It is for this reason that while considering the appropriate forums to deal with the various issues identified in Chapters 2-6, Chapter 7 focuses quite strongly on the concept of alternative dispute resolution. In the second reading speeches on the Community Justice Centres (Pilot Project) Bill 1980, neighbourhood problems were identified as those most suitable for mediation, since, they involved people in a continuing relationship and where the "cost and emotional upset" of dealing with the dispute in a court would be "entirely disproportionate to the results achieved" in court.

Footnotes

1. New South Wales Law Reform Commission, Dividing Fences Report (LRC 59) 1988.

Chapter 2

NOISE

INTRODUCTION

2.1 The bush and wide open spaces may be central to Australian popular culture, but the reality for most Australians is life in a concentrated, urban environment. Metropolitan Sydney contains many of the most densely populated municipalities in the nation. One of the major problems of urban existence is excessive noise, with irritants including barking dogs, all-night parties, traffic noise, pneumatic drills and other construction noises, car alarms and lawnmowers. Complaints about noise are among the most common problems referred to Community Justice Centres[1] and a survey conducted by the Australian Environmental Council found that noise was the most serious form of environmental pollution perceived by residents in their homes. The most common complaints related to noise from barking dogs, parties, air conditioners and alarms.[2]

2.2 The concept of "neighbours" goes beyond those who live in adjoining private homes. Increasingly, noise problems in cities are between neighbours within blocks of flats or units. According to the NSW Strata Title Association, noise is the second most common complaint (after parking) among unit owners.

2.3 Noise has been variously defined as: "an unwanted sound";[3] "a sound without agreeable musical quality";[4] "loud outcry, clamour or shouting; din or disturbance ... a loud or harsh sound of any kind".[5] However as Richardson J of the New South Wales Supreme Court has noted "There is no precise or exact definition of the word noise"[6] (A statutory definition is provided under the *Noise Control Act 1975*, however. See para 2.9, below.)

2.4 Although defining noise in a universally acceptable manner is a hard task it is beyond question that noise, and in particular neighbourhood noise, is a common problem to most people. Such noise may be a one-off disturbance, such as the noisy late night party; or it may be an occasional or semi-regular noise such as the neighbour who practices an instrument late at night or frequently plays the stereo too loud; or it can be the persistent noise from a neighbour's workshop. In any case the nuisance and annoyance caused cannot be underestimated. As the times have changed, so have the particular noises. However, what has remained consistent is that neighbourhood noise still creates enormous frustration for those affected and causes much communal tension.

2.5 As Gifford has stated, "The difficulty lies, not in recognising that the problem exists - as indeed it does - but in finding adequate means of dealing with it."[7] This Chapter highlights some of the specific problems caused by excessive noise, outlines the existing legal regimes, and calls for submissions addressed to dealing with this community problem.

APPLICABLE LEGISLATION

2.6 Noise control is primarily dealt with under the *Noise Control Act 1975* and Regulations although there are parts of other Acts and the common law that can also be resorted to.

Noise Control Act 1975

2.7 The *Noise Control Act* which came into effect on 16 April 1975 (as amended) and the Regulations made thereunder represent the first attempt by the New South Wales Government to introduce legislation directed exclusively at the control of noise in the community. The preamble to the Act states that it is "an Act relating to the prevention, minimising and abatement of noise and vibrations".

Structure of Noise Control Act

2.8 Crucial to the operation of the *Noise Control Act* are the definitions of "noise" and "offensive noise".

2.9 Section 4 provides that "noise" includes sound and vibration. Thus both audible and inaudible nuisances may invoke the application of the Act. However, such noise must be unreasonable or offensive. "Offensive noise" is defined as:

> Noise that, by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances, is likely:
>
> (a) to be harmful to;
>
> (b) to be offensive to; or
>
> (c) to interfere unreasonably with the comfort or repose of,
>
> a person who is
>
> (d) if the noise is made in premises that are not a public place - outside those premises; or
>
> (e) if the noise is made in premises that are a public place - within or outside those premises.

2.10 Introducing the Bill, the Government said that the "major regulatory provisions of the Bill provide a five-pronged attack on the problem of noise" [8] These are:

> (1) Scheduling and licensing of certain premises.

(2) Regulating the maximum permissible level of noise for certain items offered for sale.

(3) Issuing of noise control notices.

(4) Issuing of noise control directions.

(5) Issuing of noise abatement orders.

2.11 The *Noise Control Act* is divided into parts that deal with each of these categories.

2.12 *Scheduled premises*. Scheduled premises dealt with in Part 3 of the Act are those most likely to emit a large volume of noise and are scheduled by reference to the activity carried on at the premises. For example, it includes premises used for: canning or bottling; the manufacture and processing of cement, ceramics, textile and scrap metal; quarrying and ship building. By virtue of s36 of the Act, the noise control provisions apply more strictly to scheduled premises than to non-scheduled premises. Section 40 provides that the provisions only serve as a warning in the latter case.

2.13 *Sale of noisy articles*. Part 4 of the Act prohibits the sale of articles which do not comply with noise emission specifications. The intention of this part is to ensure that new products have an acceptable noise emission level prior to entry into the market. Section 28 provides that manufacturers of prescribed items will have to ensure that their product does not exceed the set noise level for that class, or if it does that it must be fitted with a specific noise control device. Substantial additions over the years, particularly to the Regulations, reflect the Government's intention to keep the legislation up to date in reacting to different noise nuisances as they occur. For example, special provisions have progressively been inserted in the Regulations for chainsaws (1978), motor vehicles (1979), noisy dogs (1981), grass cutting machines (1982), air conditioners (1986) and car alarms (1988).

2.14 *Noise Control Notices*. Noise Control Notices are dealt with in Part 5 of the Act. They are intended to control unreasonable noise from scheduled or non-scheduled premises, and from articles which are already in use. The Notices also regulate the times of operation for trade or industry creating offensive noise. Notices may be issued by the State Pollution Control Commission, a local authority or the Maritime Services Board depending upon the circumstances.

2.15 *Noise Abatement Orders and Noise Abatement Directions.* Part 6 of the Act, which deals with Noise Abatement Orders, and Part 7, which deals with Noise Abatement Directions, apply specifically to noise as it relates to *residential* life. Magistrate W M Sherley in *Azpenes v O'Connell and O'Connell* saw "the enactment particularly of Parts VI and VII as creating a streamlined inexpensive way of having noise nuisance issues determined in a speedy manner."[9]

2.16 Manufacturing standards and the issuing of noise control notices do not cover many of the common noises in suburbia, however: the noisy party, the home handyman, the rowdy family. If a noise creates a civil disturbance the police may deal with the problem. Most often persistent noises do not amount to a civil disorder but rather are "offensive" in terms of the Act. At common law noises of this type are termed "nuisance", but s51 of the Act widens the common law to give "nuisance" the statutory meaning of "offensive noise". The definition of "offensive noise" was meant to be of particular importance in the control of neighbourhood noise via noise abatement orders.

2.17 Section 52 of the Act provides that if the occupier of premises makes a complaint alleging that occupation is being affected by offensive noise and the court is satisfied that the alleged nuisance exists, the court may order that the offensive noise be abated immediately or within a specific time or the court may direct that there be no recurrence of the noise.

2.18 Section 59 provides a procedure for the issue of noise abatement directions aimed at achieving prompt effective action. A complaint may be made to a police officer, an authorised officer of the State Pollution Control Commission, the local council or the Maritime Services Board. The officer, on going to the premises, assesses whether there is offensive noise either by hearing it on arrival or upon evidence that the noise was emitted from the premises within 30 minutes prior to arrival. If so satisfied, the officer may make a direction verbally or in writing. Section 60 provides that the effect of the direction is to render each of the persons responsible for the noise liable to prosecution if the noise does not cease promptly.

Impact of the Environmental Offences and Penalties (Amendment) Act 1990 on the Noise Control Act

2.19 The *Environmental Offences and Penalties (Amendment) Act 1990* was enacted to "fine tune" aspects of the structure of the *Environmental Offences and Penalties Act 1989.* The Amendment Act also affects other environmental legislation, including the *Noise Control Act.*[10]

2.20 The framework of the legislation is essentially three-tiered. The first tier created by the *Environmental Offences and Penalties Act 1989* deals with serious offences which require the prosecution to meet the traditional common law tests of culpability (intention or recklessness).

2.21 The second tier in the amending legislation is the importation into a single environmental offences and penalties statute of those provisions concerning the protection of the environment which are currently dealt with in other pieces of environmental legislation, such as the *Clean Air Act 1961,* the *Clean Waters Act 1970,* the *Noise Control Act 1975* and the *State Pollution Control Commission Act 1970.* These provisions create offences which do not require proof of criminal intention. The amending legislation also provides for a uniform scale of penalties within the *Environmental Offences and Penalties Act 1989* and revises the

penalties both for corporations and individuals. An offence under the *Noise Control Act* previously attracted a penalty not exceeding $10,000 if committed by a corporation and a further penalty not exceeding $1000 for each day in the case of a continuing offence, or a penalty not exceeding $5000 if committed by a person and a further penalty not exceeding $100 for each day in the case of a continuing offence. The amending legislation increases those penalties to a maximum of $30,000 for a corporation and $15,000 for an individual and in the case of a continuing offence to $3,000 and $300 per day, respectively.

2.22 The penalties that may be imposed under the Noise Control Regulations have also been increased from $250 to a maximum of $10,000 in the case of an individual, and from $2500 to a maximum of $20,000 in the case of a corporation. The Regulations may insert a maximum penalty of $600 for offences to which penalty notices may be issued.

2.23 The third tier of the amending legislation relates to the introduction for the first time in New South Wales of an on-the-spot penalty notice system for dealing with relatively minor environmental law enforcement issues.[11] As is the case with traffic infringement notices, the person to whom the notice was issued can elect to have the matter dealt with by a court, but runs the risk of facing a much larger penalty as well as the inconvenience of attending the court. If for instance a person contravenes clause 12(2) of the Noise Control Regulation which prohibits a person from using certain articles (such as lawn mowers, chainsaws, power tools etc) during specified times, and having been informed of the contravention, continues, clause 12(3) makes the person liable to a maximum penalty of $250. Under the new scheme the penalty for the same offence if a penalty notice is issued is $150. The person could either opt to pay the $150 penalty or if the matter is dealt with by a court could be liable to a penalty of $250.

2.24 There is an obvious incentive to pay the penalty under the penalty notice scheme rather than take the matter to court. If the offender opts to pay under the penalty notice system it must be done within 28 days from the date on which the notice was served.

2.25 The new system also provides power for local council employees and other authorised officers to act as co-enforcers of these neighbourhood noise pollution problems. Authorised officers for most noise pollution offences are employees of the State Pollution Control Commission, Maritime Services Board and police officers. It is understood that the first point of response for noise pollution and anti-social noise behaviour in breach of the noise control regulation is usually the local police station.[12] Giving the police the power to issue on-the-spot penalty notices for such breaches could be a step towards a more realistic and effective enforcement mechanism.

Noise Control Regulation 1975

2.26 Part 8 of the *Noise Control Act* provides for the making of Regulations for a range of related matters. While the overall aim of the Regulation is to complement the enabling legislation, clause 12 is particularly crucial to the alleviation of neighbourhood noise. Clause 12 specifies the times during which certain articles may not be used on any residential premises if they are audible in a neighbour's residence. The purpose is to minimise noise in the residential neighbourhood during the hours when most people are sleeping or resting. Offensive noise does not need to be proved during the prescribed hours of restriction but other control measures, such as the issue of a noise control notice, may be taken when use of the article causes offensive noise during the periods of permitted use under the clause.

Other Noise-Control Laws

Local Government Act 1919

2.27 Section 289(c) and (d) of the *Local Government Act 1919* empowers councils to control and regulate the use of premises so as to prevent unreasonable noise or noises on the premises at unreasonable hours and to control and regulate noise in or near any public place.

Environmental Planning and Assessment Act 1979

2.28 The *Environmental Planning and Assessment Act 1979* provides substantial responsibility and opportunity for controlling environmental noise through the planning process. The formulation of State Environmental Planning Policies, Regional Environmental Plans and Local Environmental Plans establishes the framework within which other noise-control measures can be applied.

Liquor Act 1982

2.29 Objection to the granting of a liquor licence may be taken under the *Liquor Act 1982* on the grounds that the quiet and good order of the neighbourhood in which the premises are situated will be disturbed. The court may also revoke or vary the conditions of a liquor licence following complaints from the licensing inspector, the council of the area or any person authorised in writing by three or or more persons who reside in the vicinity of the licensed premises, on the grounds that the quiet and good order of the neighbourhood of the licensed premises are frequently unduly disturbed.

Registered Clubs Act 1976

2.30 Objections along similar lines to the granting of a certificate of registration of a club may be made by the licensing inspector, council, or any person owning or leasing land in the vicinity of the club or any person who would be adversely affected if the certificate were granted.

Strata Titles Act 1973

2.31 By-laws 12 and 19 (contained in Schedule 1 of the *Strata Titles Act 1973)* state that a proprietor or occupier shall not create such noise and shall take all reasonable steps to ensure that his/her visitors do not behave in such manner, that is likely to interfere with the peaceful enjoyment of another proprietor or occupier or of any person lawfully using common property.

2.32 By-law 25 requires the proprietor of a lot to ensure that all floor space (except kitchen, laundry, lavatory and bathroom) is covered or treated to prevent the transmission of noise likely to disturb the peaceful enjoyment of another proprietor or occupier.

Other Statutory Provisions

2.33 Traffic Regulation 106 made under the *Traffic Act 1909* prohibits the use of vehicles which make undue noise because of disrepair, loading or operation. Provision is also made to ensure that any noise control equipment is kept in serviceable condition.

2.34 The *Mining Act 1973* and the *Occupational Health and Safety Act 1983* also make provision regarding noise. However, these provisions relate to industrial settings and do not have any particular bearing on neighbourhood noise as narrowly defined for our purposes.

THE COMMON LAW

2.35 Apart from the legislation, an action in nuisance is also available to a person affected by a neighbour's noise. At common law noise may constitute a public or private nuisance. A public nuisance is an act that interferes with the enjoyment of a right to which all members of the community are entitled. A private nuisance consists of a wrongful disturbance or interference with a person's use of land, and can include the escape of deleterious things, including noise and vibrations, from the land. However, in order to be actionable:

> there must be an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty habits of living but according to plain and sober notions among our people. [13]

As with any nuisance dispute, this course of action would necessitate proceedings in the Supreme Court. This is a particularly expensive and lengthy process and one which could potentially exacerbate already tense relations between neighbours. It also assumes that there is a clear defendant to sue, which is not always the case.

ADEQUACY OF THE NOISE CONTROL ACT

2.36 There is no doubt that with the enactment of the *Noise Control Act* and Regulations the Government has made a positive effort towards minimising noise offence. More recently the amendments introduced by the *Environmental Offences and Penalties (Amendment) Act 1990* have attempted to refine the existing mechanisms of combating noise pollution. However, there is still much to be desired in terms of effective and realistically enforceable noise control legislation.

SUGGESTIONS FOR REFORM

General Concerns

2.37 Sound may be described by reference to three variables: intensity, frequency and duration[14] which should be taken into account in formulating more effective measures to abate such noise. Thus the one-off noise from the late night party probably needs to be treated differently (by perhaps retaining the warning procedure) from the continuous persistent noise from the neighbour who operates a workshop.

The Need for Immediate Relief

2.38 The principal criticism of the existing legislation is that although it adopts methods of reducing the offensiveness of environmental noise by prescribing acceptable noise levels and attempting to reduce noise levels at the source, it does not provide any immediate redress to the aggrieved neighbours. For instance, if a motor vehicle alarm is activated at 2.00 am for a period exceeding 90 seconds the Noise Control Regulation imposes a penalty and a penalty notice could now be issued pursuant to the *Environmental Offences and Penalties (Amendment) Act 1990* by a council employee, an officer of the State Pollution Control Commission or a police officer. However, there is no power to enter the vehicle and stop the alarm, even if it has been sounding for hours.

2.39 In the case of a burglar alarm the police do have powers of entry to stop the alarm from sounding although this power is rarely utilised in practice. It is anomalous that the Act does not prevent unattended noise unless it is from a burglar alarm.[15] For instance, it is possible that the offensive noise from a car alarm may occur while the vehicle owner is away. In such a situation all that an officer can do is to issue a direction, but this would be of little comfort to the neighbours who are distressed by the noise. There is clearly a need to routinise procedures - currently a person may ring the police, the council, the State Pollution Control Commission without getting any relief. There should be clear responsibilities for action, and then clear mechanisms for dispute settlement in persistent cases.

2.40 The increasing of penalties for offensive noise and the introduction of the infringement notice scheme indicate an increasing awaremess of the problems

caused by excessive noise. However, these approaches are only effective in reducing noise problems to the extent that they deter persons from producing this noise. Deterrance is only effective where there is a high risk of apprehension and punishment. A more direct solution would be to empower authorised officers to take the necessary steps to abate the noise immediately in order that it ceases to be a nuisance to neighbours.

New definition of "Offensive Noise"

2.41 Even where a noise abatement order has been issued there are difficulties in securing a prosecution as a result of the ambiguity of the definition of offensive noise. Section 51 links offensive noise and the common law concept of nuisance but it has not had the effect of avoiding the complexity involved in proving noise as a nuisance. A solution could be to define the term "offensive noise" more clearly to make explicit the considerations available to a court. At present difficulty in proving the concept of "unreasonableness" has cast the courts back upon the common law - a result the legislature might have hoped to avoid.

Strict Liability Offences

2.42 Another matter worth considering is whether there is merit in the philosopy of converting all noise offences to strict liability offences as well as removing the present practice of issuing warnings in the first instance. The State Pollution Control Commission, which administers the *Noise Control Act*, is currently considering this approach. Analternative option would be to reverse the onus of proof.

Education Programs

2.43 Another important matter to be considered is the development of community education and awareness programs centred on noise as an important environmental issue. The Environmental Noise Control Manual points out a number of matters which should be considered in order to reduce noise problems, including:

* the sensitive choice of place within the home, in relation to neighbours, for noisy activities (loud music, power tools etc);

* the careful selection of site in relation to neighbours for the installation of noisy equipment (pool pumps, air conditioners, exhaust fans);

* the sensitive choice of times for doing those things which are necessary but inherently noisy (lawn mowing); and

* paying attention to noise levels in the selection of products and equipment (air conditioners).[16]

2.44 More effective policing strategies and education programs are only part of the answer to the question of noise. As with other persistent community problems, a general strategy of locally-based dispute resolution is required. This is dealt with more extensively in Chapter 7.

QUESTIONS FOR DISCUSSION

* Is the *Noise Control Act* effective in reducing excessive noise in the community? If not, why not?

* Should authorised officers be given extensive powers of entry and the authority to take steps to abate "offensive noise"?

* Should the definition of "offensive noise" be clarified? If so, to what extent and how?

* Are the remedies prescribed under the *Noise Control Act* adequate?

* If not, what other remedies should be available?

* Should the remedies sought for noise depend on the intensity, frequency and duration of sound? Are there other variables that should be taken into account?

* Is there a need for issuing warnings?

* Should all noise offences be strict liability offences or should the onus of proof be reversed?

* Who should police noise? Should the policing agencies be expanded or restricted?

* Would community awareness programs be a useful mechanism in reducing the problem of neighbourhood noise?

Footnotes

1. NSW Community Justice Centres Annual Report1989/90, Appendix 1 at 31.

2. A Made, D Meagher and D Watkins-National Noise Survey 1986.

3. Stuart Hart, Director of Planning and Chairman of the State Planning Authority of South Australia in a Paper presented to the sixteenth Australian Legal Convention in 1971.

4. A Bell -"Noise - an occupational hazard and public nuisance" as quoted in Testro G "Noise - a strategy for attack" (1983) 57 Law Institute Journal 431.

5. Shorter Oxford Dictionary.

6. *William v Storey* (1957) 2 LGRA 226 at 232.

7. (1980)54 *Australian Law Journal* 408.

8. NSW Parliamentary Debates (Hansard), Legislative Assembly, 13 March 1975 at 4661.

9. 7 July 1977, Petty Session Chronicle, Nov/Dec 1977, 1650.

10. In 1989, when the Environmental Offences and Penalties Bill was first introduced, the Minister for the Environment indicated that at the end of a 12 month period a review of the operation of the Act would be undertaken and that amendments would be made to "fine tune" aspects of the structure of that legislation. NSW Parliamentary Debates (Hansard), Legislative Assembly 20 November 1990 at 10037.

11. That Part of the Act (Sch 1(12) had not yet been proclaimed to commence as at 10 April 1991.

12. NSW Parliamentary Debates (Hansard), Legislative Assembly, 20 November 1990 at 10038.

13. J G Fleming, *The Law of Torts*, Law Book Co, Sydney (7th ed, 1987), 389 See also *Walter v Selfe* [1851] 4 DCG and SM 315 at 322, 64 ER 849 at 851; *Don Brass Foundry v Stead* (1948) 48 S R (NSW) 482 at 486-487; *Madden v Lynch* [1911] VLR 230 at 231; *Ruthning v Ferguson* [1930] QSR 325 at 326.

14. G Testro: *"Noise - A strategy for attack"* (1983) 57 Law Institute Journal 431.

15. *Noise Control Act* 1975 s73.

16. Environmental Noise Control Manual published by the State Pollution Control Commission.

Chapter 3

TREES

BACKGROUND

3.1 The issue of trees was included in the Neighbour and Neighbour reference following the receipt by the Commission of many letters from people affected by their neighbours' trees. Problems caused by trees are common throughout the community but the formal resolution of these disputes (especially if there is resort to the courts) is often very costly and unsatisfactory.

PROBLEMS CAUSED BY TREES

3.2 Trees can lead to a wide range of difficulties between neighbours. Disputes may arise over encroaching branches or intruding tree roots which can lead to structural damage to buildings, fences and retaining walls and interference with sewerage and drainage pipes. Leaves can litter a neighbour's yard and cause particular problems for swimming pool owners. Falling branches have the potential for causing serious personal injury or property damage. Trees may simply obstruct a view or the passage of light, leading to a loss of amenity or damage (such as damp foundations and walls). An emerging issue relates to the obstruction of sunlight to solar energy collection devices.

3.3 Against all of these potential problems must be weighed the aesthetic value of trees, the legitimate interest of occupiers in planting trees to gain privacy and the general (but not absolute) right of landowners to use their land as they see fit. Moreover, the growing community concern with the environment reveals a greater commitment to tree planting and preservation in both urban and rural areas.

LEGAL REGULATION OF TREES

3.4 Generally speaking, there is no restriction on the type or number of trees which landowners may plant or allow to grow on their land except for the provisions in the *Local Government Act 1919* which deal with the control and eradication of certain noxious plants.[1] Section 467 provides that the Governor may by Proclamation declare any plant to be a noxious plant throughout the whole or any specified portion of the State. Once a Proclamation has been served on local councils and published, an obligation arises on occupiers of private land to eradicate the noxious plant from their land.[2] Councils' powers relating to noxious plants are really only relevant to plants which of their nature constitute a nuisance no matter where they are growing (eg. blackberries and privet, because of their propensity to overgrow and take over surrounding areas). These provisions do not provide the flexibility to deal with plants that might only cause problems because of where they are planted (eg. large trees planted next to drains, trees that block

off light to neighbouring land). If planted in another position these same plants might cause no problems and make a valuable contribution to the aesthetic quality of the neighbourhood. There is no requirement to gain the approval of one's neighbours or of the local council before planting a tree and there is no mechanism whereby a neighbour's objections or interests can be taken into account. This situation can be compared with the controls that apply in respect of buildings or other structures under the *Local Government Act 1919* and the *Environmental Planning and Assessment Act 1979*. A 'building' is defined so widely that approval must be obtained for even very minor structures, such as a pergola. The matters to be considered by a building application are set out in s313 of the *Local Government Act.* These matters relate to the actual building itself and its effect on neighbouring buildings. Given that trees can grow as high as or higher than the height limits for buildings and have the potential to create similar problems that buildings built in the wrong place could create, it may be worth considering the application of a discretionary approval scheme or other controls to the planting of trees. Perhaps the establishment of a more flexible procedure to regulate sensible garden planning should be given some thought.

Tree Preservations Orders

3.5 Although it is unusual for the planting of trees to be prohibited, it is common for a tree preservation order to be in effect in a particular locality. These orders prohibit the cutting down or lopping of trees over a certain size (without council permission) and are contained in Environmental Planning Instruments (EPI) applying to the locality made under the *Environmental Planning and Assessment Act 1979*. The nature of the provisions which an EPI can contain are generally stated in Division 1 of Part 3 of the Act. Section 26(e) provides that an EPI may make provision for or with respect to protecting and preserving trees or vegetation.

AVAILABLE REMEDIES

Nuisance

3.6 A landowner cannot prevent a neighbour from planting a tree which may be unsuitable and will cause problems in years to come. However, the law of nuisance provides a remedy in certain situations to a person who suffers damage as a result of problems caused by trees. Generally speaking a remedy is only available once damage has already occurred or where it is apparent that substantial damage is a virtual certainty or is imminent.

3.7 The law of nuisance attempts to strike a balance between the interests of occupiers: between the right to use your own land as you see fit and the right of your neighbours to enjoy their land without unwarranted interference.

3.8 Nuisance protects a wide (but not exhaustive) range of interests in the enjoyment of land. It encompasses not only physical damage to land or buildings

"but equally the pleasure, comfort and enjoyment which a person normally derives from occupancy of land."[3]

3.9 However, not all amenities commonly associated with the enjoyment of land are protected. The aesthetic value in an unobstructed or pleasing view is not recognised nor is an occupier's right to an unimpeded passage of sunlight.

3.10 A remedy in nuisance will however be provided in many of the situations in which trees cause problems. In *Butler v Standard Telephone & Cables Ltd*,[4] the defendant's poplar tree roots spread across the boundary to the land of the plaintiff and caused clay on which houses were built to dry out, causing shrinkage and subsidence which resulted in damage to the houses. In *Smith v Giddy*[5] a grower of fruit trees succeeded in his action in nuisance against his neighbour for the damage caused to his trees by showing that they were stunted due to the effect of overhanging tree limbs.

Abatement (self-help remedy)

3.11 A right of abatement exists allowing a landowner to cut off overhanging branches and sever roots intruding into his or her property. The legal position was first clearly enunciated in *Lemmon v Webb*[6] in which Lindley LJ stated:

> The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away of so much of them as projects into or over his land.

This right does not require the permission of the court nor, although it is probably advisable, notice to the tree's owner. The right of abatement arises automatically in respect of encroaching branches or roots and actual damage need not be shown. Fleming states that the right can extend to entering upon neighbouring land to abate a nuisance, but there is no privilege of entry unless a mandatory injunction would have issued.[7]

3.12 Should any branches, roots and even fruit be removed they must be returned to the owner of the tree, otherwise an action for conversion may be instituted.

3.13 In practice, it is usually the neighbour who removes overhanging branches who bares the cost of the removal, as "attempts to recover the costs will usually aggravate the situation between neighbours".[8] It is not certain whether a claim for damages will be successful for the recovery of the costs of employing an expert to remove various parts of a tree. However the Courts have allowed abatement costs to be recovered pursuant to the law relating to public nuisance where the plaintiffs were public authorities who were under a duty to safeguard public rights.[9] Certainly, should a neighbour be reckless in his or her pruning then a legitimate action for damages may lie with the owner for any damage caused to the tree.[10]

Damages

3.14 Damages are available to compensate a person affected by a nuisance. Common law damages are available only in respect of past or existing losses and cannot be awarded in respect of future difficulties caused by a continuing nuisance. A plaintiff can only recover for continuing loss by bringing repeated actions for a successful claim. The damage must also be actual, physical damage.[11]

3.15 The need to bring repeated actions can be overcome by claiming damages in equity. A court exercising equitable jurisdiction can assess compensation once and for all, taking into account past and future losses.

Injunctions

3.16 In certain circumstances a mandatory injunction may be available from a court of equity requiring a tree owner to cut down the tree or otherwise abate the nuisance caused by it. Injunctions are only available where damages would not afford an appropriate remedy and in determining this the court will weigh the extent of the plaintiff's injury or inconvenience against the effect the injunction would have on the defendant. For instance in *Middleton v Humphries*[12] it was held that if an action on the case will lie, then the remedy of injunction must be available if the nuisance be a continuing one. This case was cited with approval in *McCombe v Read*[13] where it was held that the encroachment of the roots of the poplar trees into and under the plaintiff's land and the abstraction of water from the soil by the roots constituted a continuing nuisance for which the remedy of injunction would lie. Harman J observed

> It could not be right to throw on the plaintiff the burden of watching for further subterranean encroachment. In my judgment, however the plaintiff is not entitled to an unqualified injunction, for he has no remedy unless a nuisance be caused. The injunction will, therefore, be to restrain the defendants from allowing the roots from any tree on their property so to encroach on the plaintiff's land as to cause a nuisance.[14]

3.17 Generally speaking, injunctions are only available once damage has been caused. However, in exceptional circumstances a *quia timet* injunction may be issued ordering a defendant to avert prospective injury. Such injunctions are issued only if there is a strong probability that the nuisance will in fact arise or that the damage, if it materialises, will be irreparable. Under s68 of the *Supreme Court Act 1970 (NSW),* the Court may grant damages in lieu of an injunction for prospective damage. Further, disputes may now be resolved by the plaintiff being paid a full and final amount of compensation, whilst consenting to tolerate the continuing nuisance.

As Fleming argues

> this in effect amounts to a judicial power of expropriation and is administered very cautiously so as not to become an instrument for legalising the commission of a tort by any defendant able and willing to pay for it.[15]

PROBLEMS NOT RESOLVED BY AVAILABLE REMEDIES

View

3.18 Although the law of nuisance provides a remedy in many of the circumstances in which trees cause problems, its scope is limited. The right to a view is not protected. Gillespie has noted that:

> A survey of the case law suggests that an overwhelming majority of the judiciary agrees that a view is unworthy of protection from obstruction through the tort of nuisance ...
>
> A typical traditional response holds:
>
> Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation and vice versa. What is aesthetically pleasing to one may totally displease another - 'beauty is in the eye of the beholder' (*Ness v Albert* 2, 665 S W 2d (Mo App 1983))
>
> There is clearly potential for an imbalance to arise between the benefit derived by an occupier enjoying a view and the detriment that legal preservation of that view may have upon the use and development of surrounding land. In *Dunstan v King* [1948] VLR 269 for example, the plaintiff complained in nuisance about unacceptable levels of noise emanating from the defendant's sawmill. The Court had little difficulty in deciding that the plaintiff could no longer enjoy his land, and ordered the defendant to confine the operation of his circular saw to specified periods of time. By contrast, an obstruction of a view may cause annoyance and loss of property value, but will rarely, if ever, result in the complete loss of enjoyment of land.[16]

However, given the value of a view even in contributing to the enjoyment of property and in monetary terms, it must be questioned whether the law should not place some impediment on the right of one landowner to block the view of another, by the growth of trees or any other development.

Sunlight

3.19 Access to sunlight raises similar problems. Easements for light are rarely granted expressly and can no longer be obtained by prescription. Section 179 of the *Conveyancing Act 1919*, which gives effect to the *Ancient Lights Declaratory*

Act 1904, provides that no right of access to light or air shall be deemed to exist, if use of such access is merely for enjoyment. In the absence of an easement for light, it would seem that the mere interference with the passage of light to a neighbour's property will not be actionable unless it leads to physical damage, such as weakened foundations. These issues have particular relevance to the protection of access of sunlight to solar energy devices. In recent years there has been an increased interest in utilising the energy of the sun and more and more suburban homes are installing cost efficient, non-polluting solar energy devices. In these areas, Preece argues that the main problem is likely to be posed by the growth of trees and other vegetation so as to obstruct the light. Trees are likely to be the main problem in this context, because they are in general the tallest objects in residential communities, and because of their prevalence. Preece suggests that the obstruction can be minimised by the appropriate lopping of tops of trees and by an express grant or covenant protecting a right of access to sunlight but recognises that such solutions may not be very practical in view of the operation of Tree Preservation Orders."[17] As solar energy devices become more widespread, there may need to be some sort of regulation imposed to ensure that access to light is not restricted. In its Discussion Paper No 15 Easements and Covenants, the Victorian Law Reform Commission stated

> the creation of easements which guarantee access to solar energy is probably possible, but clarification of the substantive right and a standard form of words is necessary to encourage acquisition of solar energy easements.[18]

REVIEW OF AVAILABLE REMEDIES

3.20 A problem with the law of nuisance is that it is concerned principally with providing a remedy after damage has occurred. Even if a preventative injunction is obtained, compliance with the injunction will put the tree owner to expense that could have been avoided had the offending tree not been planted or allowed to overgrow.

3.21 With regard to existing trees, the law of nuisance does offer a wide range of remedies. The right of abatement is one solution to the problem of encroaching branches or roots. This right seems to be generally known and accepted in the community.

3.22 Although damages provide an appropriate remedy in some cases (for example, to compensate for the expense of repairing a pipe damaged by tree roots), in most cases of continuing nuisance an injunction would be a preferable remedy. However, an injunction (or indeed, a claim for equitable damages) can only be obtained in the Supreme Court, although a temporary injunction can be granted by the District Court.[19] The cost of such proceedings would generally be out of proportion to the gravity of the problem sought to be remedied. There is no reason why disputes between neighbours over trees should go to the Supreme Court unless the damage is so substantial that the cost and possible delay of going to the

Supreme Court will outweigh those obvious disadvantages. Indeed, this process is likely to exacerbate the conflict.

PROPOSALS FOR REFORM

3.23 It may therefore be prudent to give some consideration to a scheme for regulating garden planning, particularly in densely populated areas. One way of doing this would be to allow local councils to make regulations governing the planting of trees and other plants. As stated earlier, the existing powers relating to noxious plants lack the flexibility needed for this purpose. Regulations could prohibit certain types of trees in gardens less than a certain size, or within a set distance from pipes or buildings, or in the vicinity of swimming pools. An alternative would be to require council approval for the planting of certain types of trees or trees with the capacity to grow above a certain height. Consideration should be given to imposing a limit on the size and type of tree which can be planted in a suburban garden. Factors similar to those applied when examining a building application could be applied to such proposals. This would allow the interests of neighbours to be taken into account in assessing the desirability of the tree.

3.24 The most common argument against the sensible garden planning proposal is that tree growth is unpredictable as it is dependant on factors such as soil fertility and location. While there may be some merit in that argument, it is quite possible to predict what the impact of an eucalyptus globulus or a similarly proportioned tree will be if one chooses to plant it near a sewer line, boundary fence or neighbour's house. Often the problem results from the difficulty in identifying the plant and ignorance as to its average growth height which can be easily rectified if nurseries are made aware of their role in providing guidance and advice to purchasers of plants. While there is a great deal of community education and publicity on the value of trees and the importance of protection, preservation and promotion of trees, the community should also be made aware of the detrimental effects of planting the wrong trees in the wrong spots and the value of sensible garden planning. The Forest Commission of Victoria has made available to the public a brochure entitled, 'Planting near drains and sewers' which describes 'safe' plants. Simiarly the Melbourne and Metropolitan Board of Works has published a brochure entitled 'Root out a problem before it starts'. The Forestry Commission of New South Wales could, in consultation with the Department of Local Government, publish a similar document that could be made available to those seeking tree planting approval (if such a scheme is implemented) through the local councils and through nurseries when plants are purchased.

3.25 While the above suggestions could help to alleviate problems caused by trees in the long term, the lack of a suitably appropriate and efficient mechanism to solve immediate disputes about trees is a matter of some concern. As outlined above (paras 3.20-3.22), the only remedies currently available are at common law and equity and are not usually cost effective. The remedy of abatement could be modified to require the cost of removing the overhanging branches or intruding

tree roots to be borne by the owner rather than the aggrieved neighbour whether or not it gives rise to an action for nuisance. If there is a dispute as to whether or not some part of the tree is causing a nuisance which an attempt at mediation has failed to resolve, the local council or if necessary the Local Court (preferably a Chamber Magistrate) could be empowered to adjudicate . This would encourage owners to be more careful about tree planting since they will bear any future abatement costs.

3.26 Attention should be paid to the problems of the obstruction of a view and light which at present lack any remedies. Consideration could be given to balancing the benefit of the right to views or light as the case may be against the detriment that legal preservation of that right could cause on the lines suggested in paras [3.18] - [3.19].

3.27 A survey conducted after the recent storm in the Hornsby area revealed that the majority of the trees that fell were rotten and infested with white ants. The damage that resulted was enormous. Compulsory and regular inspection by qualified council officers would have alleviated this problem as such trees would have been removed or lopped if they were in a dangerous condition. It may therefore be worthwhile considering the prospect of councils carrying out regular tree inspections.

3.28 Finally, as mentioned in the previous chapter, the need for community education and awareness programs cannot be overstated. If the community is made aware of the value of sensible garden planning and maintenance, trees may not continue to be such a common cause of neighbourhood disputes.

QUESTIONS FOR DISCUSSION

* Should there be some limitation or regulation on the planting of trees, the type and height of trees planted and where to position a tree in relation to boundaries?

* Should there be policy guidelines only or legislative intervention to regulate trees on neighbouring property?

* If only policy guidelines, should some effort be made to inform or educate residents about the possible beneficial and detrimental effects of trees?

* Should nurseries, Councils and the Forestry Commission be involved in the sensible garden planning campaign?

* Should consideration be given to re-introducing a right to light and air particularly in regard to the increased use of solar energy devices?

* Should there be a right to a view uninterrupted by obstructive trees?

Footnotes

1. The relevant provisions are contained in Part 12 of the *Local Government Act 1919.*

2. *Local Government Act 1919* s472(2)(b).

3. J G Fleming, *The Law of Torts,* (7th ed, 1987) 385.

4. [1940] 1 All ER 121.

5. [1904] 2 KB 448.

6. [1894] 3 CH 1, 14.

7. J G Fleming, *The Law of Torts*, note 3 at 414, 415.

8. S Molesworth "Suburban backyard environmental problems: confrontation or compromise?" (1984) 58 *Law Institute Journal* 645.

9. *Louth Rural District Council v West* (1986) 12 TLR 477; *The Ella* (1915) P 111.

10. *Roberts v Rose* (1865) 4 H C 103.

11. *Young v Wheeler* (1987) Australian Torts Reports 80-126.

12. (1913) 47 ILT 160.

13. [1955] 2 All ER 458 at 464.

14. id.

15. J G Fleming, *The Law of Tort*s, note 3 at 414.

16. J Gillespie "Private Nuisance as a means of protecting views from obstruction" (1989) 6 *Environmental and Planning Law Journal* 94 at 100, 105.

17. A A Preece, "Solar Energy & The Law," (1981) 6 *Queensland Lawyer* 96.

18. Victorian Law Reform Commission *Easements and Covenants* Discussion Paper 15 (1989) at 16.

19. *District Court Act 1973* s140.

Chapter 4

ACCESS TO NEIGHBOURING LAND FOR MAINTAINING FIXTURES ON ONE'S OWN PROPERTY

THE LAW AT PRESENT

4.1 There is currently no general right of entry upon neighbouring land in order to effect work upon one's own property even if the proposed work consists of essential repairs.

4.2 Thus, unless a specific right to enter a neighbour's land exists in law or has been created in one of the ways described below, a person who enters a neighbour's property to effect repairs to his/her own property without the neighbour's consent is a trespasser.

4.3 The situation identified above has been illustrated in the case of *John Trenberth Ltd v National Westminister Bank Ltd*[1] where the plaintiff and the first defendant owned adjoining properties. The defendant's building was in a dangerous state and, moreover, was required by statute to be maintained in a safe condition. The repairs could only be carried out by going onto the plaintiff's property. The defendant sought the plaintiff's permission, giving full assurances that nothing adverse to the plaintiff would occur, and full indemnities in case it should. The plaintiff refused. The defendant found itself in a dilemma and proceeded to carry out the necessary repairs despite the plaintiff's refusal of access. Such entry onto neighbouring land in the absence of the neighbour's consent was held to be trespass. Predictably the plaintiffs were granted the injunction they sought as the defendants were trespassers and had no lawful excuse to continue the work on their building.

4.4 Trespass to land is the interference with another's exclusive possession of property against that person's will, regardless of whether any damage has been done.[2]

RIGHTS OF ACCESS IN PARTICULAR CASES

4.5 Although there is no general right of access to neighbouring land, a right of access may exist or be created in particular cases as described below.

Express rights

4.6 A landowner may grant an adjacent landowner an express right of entry onto the former's land to enable the latter to carry out repair work, and to grant the right in such a way that it will bind successors in title of both parties. This constitutes an easement.[3]

4.7 An easement may also be created by a landowner who divests himself of part of his land, and expressly reserves an easement in favour of the land retained over the land granted away.[4] It is also possible for a landowner to grant such a right to an adjoining landowner through a personal arrangement which will bind only the immediate parties, and not their successors in title. This may be done for example, by licence or contract.

4.8 As express rights will be created where an adjoining landowner has consented to giving access, if rights of the parties have been clearly set down, it is unlikely that this is an area in which disputes will arise except down the track, if the relationship changes or a successor is differently minded.

4.9 An easement may be acquired compulsorily by an individual obtaining an order under the *Encroachment of Buildings Act 1922*. The Act applies in cases where a building belonging to one landowner encroaches on the land of an adjoining owner. In such circumstances the court is empowered under s3(2)(b) to make an order granting the encroaching owner an easement over land on which the encroachment stands. An easement granted in this way could be used for the purpose of carrying out repair and maintenance work upon the encroaching building. Because of the specific circumstances which need to exist before such an easement will arise, the *Encroachment of Buildings Act* is unlikely to assist the majority of people involved in disputes of the kind under consideration.

Other Rights at Common Law

4.10 An implied easement may be created in one of the following circumstances under the common law

* where the parties intended to create an easement but did not do so formally;

* as an easement of necessity, without which the land cannot be used at all, such as when it becomes "landlocked" following sale of the surrounding property;

* under the rule in *Wheeldon v Burrows*[5] following the transfer of part of a parcel of land, whereby rights necessary to the proper enjoyment of the land transferred, or rights which were continuous and apparent, will become easements over the land retained;

* by adverse possession or prescription; that is, by continuous use for a minimum of 20 years;

* under the principle of non-derogation from grant, whereby an easement is implied to prevent a grantor from using his own property in a way which interferes with enjoyment of the land granted; and

* under the doctrine of equitable estoppel, so that a landowner who stands by knowing that the neighbour is incurring expense in the belief that access will be granted, may be prevented from denying a right of access.

4.11 The foregoing will be of little assistance, however, in most neighbourhood disputes when it is borne in mind that, with only a couple of exceptions not relevant to the present discussion, implied easements cannot be created over Torrens land.[6] Section 42 of the *Real Property Act 1900* requires any interest in land, including easements, to be recorded in the folio of title. An exception is made for easements omitted or misdescribed.

4.12 Easements over Torrens land can be created only in the way provided by s46, that is, by executing a transfer.[7]

4.13 Rights, such as easements, attaching to land will not cease to exist simply because no claim in respect of the right was made in the primary application to bring land under the provisions of the *Real Property Act 1900*. Thus, failure to record the easement on the certificate of title will not extinguish it.[8] An implied easement created prior to the burdened land being brought under the Torrens system, and not recorded in the register, may therefore constitute an exception under s42 (1) (b).[9]

4.14 An easement created in the manner prescribed by s46 and noted on a Certificate of Title but omitted by error from a subsequent Certificate of Title is an example of an omission that can be rectified.[10]

DEFECTS IN THE PRESENT LAW

4.15 Despite the prevalence of particular cases where rights of access may exist as described above, few of these will assist the person seeking such access to effect repairs to his/her own property without the neighbour's co-operation. In other words, in the absence of a general right of access and since the express/implied creation of such rights is not of much practical use, it is necessary to consider whether the prevailing law should be reformed to overcome inherent difficulties.

LAW REFORM IN OTHER JURISDICTIONS

United Kingdom and Tasmania

4.16 Following a working paper published in 1980 and considerable consultation thereafter, the UK Law Commission published its Report No 151 entitled *Rights of Access to Neighbouring Land* in December 1985. The Law Commission considered the same problem of whether an occupier of land should have some

means of obtaining access to neighbouring land to enable the carrying out of work to his/her own property and took the view that the law should be changed. However no legislative action has been taken on the recommendations to date.

4.17 *Case for reform.* The Law Commission's main argument in favour of reform was based on the fact that:

> the absence of any general right of access to neighbouring land means that properties throughout the country are liable to deteriorate for want of repairs and maintenance with consequential financial loss to their owners and some detriment to the public, who have an interest in the maintenance in good repair of the country's stock of housing and other buildings.[11]

4.18 *Case against reform.* The case against reform identified by the Law Commission was based on the argument that:

> a landowner is entitled to exclude from his land any person whose entry is unwelcome for whatever reason; and that the giving of a general right of access would constitute an unjustifiable erosion of this fundamental principle.[12]

Those who advance this argument often quote the old maxim "An Englishman's home is his castle" as justifying their stand on this issue.

4.19 *Recommendations.* Attempting to strike a balance between the arguments for and against reform, the Law Commission maintained its view on the need for reform but considered that "the reform should be limited both in its nature and scope". Accordingly the Law Commission's principal recommendation was that:

> The law should be changed so as to enable a person to obtain a right of access to neighbouring land for the purpose of carrying out work to his own land. This right of access should arise only by virtue of an order made on an application made to a court.

4.20 The UK Law Commission's other recommendations were:

1. The type of work should be limited to "preservation work", as opposed to building works generally and should be reasonably necessary. In other words, it should include any work that is intended to preserve an applicant's property.

2. The scheme should, in general, permit entry to any neighbouring land of any description.

3. Every access order should specify (a) the work for which, (b) the land to which and (c) the timing within which access is to be authorised.

4. The successful applicant should be required to automatically indemnify the neighbour against any loss or damage to land resulting from the entry and to make good any damage so far as it is reasonably practicable.

5. The court should have power to impose conditions on access orders with a view to minimising the neighbour's inconvenience and loss of privacy, reducing security risks, the risks of financial loss, physical damage or personal injury and ensuring that the work is done properly and quickly, awarding compensation, if appropriate. This power should specifically enable the imposition of conditions to deal with matters such as the method of work, precautions and safeguards to eliminate or reduce the risk of damage or injury, re-imbursement of fees and expenses reasonably incurred by the neighbour in connection with the access, compensation for loss, the giving of security and the neighbour's supervision of the work.

6. The nature of the right of access should be a "one-off" right - ie that the right of access granted should not be a permanent right but rather should subsist only for the purpose of carrying out the particular project for which the right was sought.

7. There should be no restrictions on the categories of persons entitled to apply for access.

8. There should be no restrictions on the categories of persons capable of being treated as neighbours under the scheme.

9. The County Court (which is the equivalent of the District Court in New South Wales) should have initial, unlimited and exclusive jurisdiction in access proceedings, with power for the proceedings to be transferred to the High Court (which is the equivalent of the Supreme Court in New South Wales).

10. The power of the court to grant an access order should arise only if it is satisfied that the work for which access is sought is reasonably necessary for the preservation of the property and cannot be done without that access being granted.

11. The rights created by an access order should be enforceable in the same way and to the same extent as if they arose out of a contractual arrangement expressly created between the parties.

12. Costs should be decided in accordance with the court's normal discretion exercised in accordance with existing principles.

A summary of the UK Law Commission recommendations is reproduced at Appendix 1.

4.21 Using the UK Law Commission proposal as a model, the Tasmanian Law Reform Commission released its report on *Private Rights of Access to Neighbouring Land* in 1985 recommending a scheme whereby persons could apply to an appropriate tribunal for access rights to neighbouring land in order to carry out work on their own land. Legislation is likely to be introduced in Tasmania in 1991 to give effect to the Tasmanian Law Reform Commission's recommendations which are identical in essence to the UK Law Commission's recommendations.

THE UK LAW COMMISSION'S RECOMMENDED SCHEME - AN OPTION FOR NEW SOUTH WALES?

4.22 There is a strong argument that the present law needs to be more flexible. Access should be available to carry out repairs or maintenance to fixtures on one's own property provided a neighbour's privacy can be protected. For this reason the concept of an automatic right of entry would be unacceptable. The better option would seem to be that a right of access be available in certain circumstances on application to an appropriate Tribunal. The Tribunal should be able to impose certain conditions on the applicant.[13] If it is agreed that in certain circumstances a right of access should be available, the discretionary scheme suggested by the UK Law Commission would also seem appropriate for introduction in New South Wales.

QUESTIONS FOR DISCUSSION

* Is it appropriate to have a scheme whereby a person may be granted a right to enter neighbouring land?

* Should a person have an automatic right to enter neighbouring property in order to undertake work or should the grant of access be subject to the discretion of a Tribunal?

* What limitations or conditions should be placed on a grant of access to neighbouring property? Are the limitations suggested by the UK Law Commission adequate? If not, why not? Should they be expanded or reduced?

* If the discretionary model is adopted, what should be the scope of the discretion? Is it sufficient that the court needs to be satisfied that the preservation work is reasonably necessary and that it cannot be done without the access being granted or should the courts discretion be limited by other factors.

* Should there be limitations on the scope of the work that may be done on a neighbouring property (eg restricted to *urgent* maintenance/repair other than, say, re-modelling or should it be extended to include new building work)?

* Should there be any restriction on the type of land to which access may be sought?

* Should air space be expressly included in the legislation?

* Should compensation be restricted to payment for loss, damage or injury as a result of the access or should it be left open to the Tribunal? Should there be other non-compensatory licence fees?

* If access is required repeatedly should an application be made each time it is required, (ie should the scheme provide "one off" access only), or are there some instances where a continued right of access would be justified?

* Should the class of applicant (ie persons applying for access) be unrestricted or should it be restricted to particular categories?

* Should the class of respondents (ie the neighbours) be restricted to legal owners only or should it include:

  - those in occupation of any part of the land or premises who would be affected by the access sought, or

  - those who fear a real risk of damage which if not made good would substantially reduce the value of the estate or interest in the land owned by someone not falling into the category of occupier?

* If the class of "respondents" extends to occupiers (as opposed to owners) should it be limited to those in occupation:

  - by virtue of having some interest in the property, or

  - only those who would have a right to sue for trespass in respect of the access sought?

* What should happen if the land to be entered is not at the relevant time occupied by anyone?

Footnotes

1. (1979)39 P & CR 104.

2. In *Entick v Carrington* (1765) 95 ER 807 at 817 it was stated that:

> (O)ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

3. In *Auerbach v Beck* (1985) 6 NSWLR 424 at 442 the right to enter adjoining land for the purpose of maintaining the external wall of a dwelling-house was held to be capable of constituting the subject matter of a grant of an easement. See also *Ward v Kirkland* [1967] 1 Ch 194 at 223.

4. For example a right of way.

5. [1879] 12 Ch D 31.

6. *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618 (CA).

7. *Jobson v Nankervis* (1943) 44 SR (NSW) 277; *Kostos v Devitt* [1979] ACLD 516.

8. *Auerbach v Beck* (1985) 6 NSWLR 424 at 446; *Margil Pty Ltd v Stegul Pastoral Pty Ltd* [1984] 2 NSWLR 1 at 11.

9. *Beck v Auerbach* (1985) 6 NSWLR 454 at 463.

10. *James v Registrar General* [1968] 1 NSWLR 310.

11. The Law Commission *Rights of Access to Neighbouring Land* Report 151, (1985) at p7.

12. Ibid at p9.

13. This is consistent with the UK Law Commission proposal.

Chapter 5

ACCESS TO NEIGHBOURING LAND TO MAINTAIN SERVICES TO ONE'S OWN PROPERTY

THE LAW AT PRESENT

5.1 Some properties are serviced by means of pipes, for sewerage or drainage, passing through neighbouring land. In most of these cases a valid easement will have been created in favour of the property being serviced.[1]

5.2 If such an easement exists, the common law recognises the right of the owner of the serviced land to enter onto the other's property in order to carry out any necessary repairs to the pipes or drainage.[2]

5.3 Moreover, in some cases the owner of land who benefits from an easement is obliged to carry out repairs, or be liable for damage which would otherwise result to the surrounding property, for instance damage resulting from faulty pipe or sewer lines.[3]

5.4 It may be, however, that notwithstanding the fact that a landowner's service pipes pass through another's land, no valid easement was ever created. In such circumstances a purchaser of the burdened property may not only refuse access to repair, but may also apply to the court for an order to have the pipes removed.

Easement of necessity

5.5 An easement of necessity has been defined as

> an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property.[4]

5.6 Earlier in this paper (at para 4.10) reference was made to the possibility of an easement of necessity arising at common law in cases where the land that lacks an easement cannot be used at all. An easement of necessity could arise where a property becomes "landlocked", that is, where an owner is without access to or from her/his property because all surrounding land belongs to others. In such circumstances the courts have found that an easement of necessity in the form of a right of way exists only when the right claimed is essential and not merely a matter of convenience.[5] An alternative right of way that was inconvenient would invalidate any claim for an easement of necessity,6 as would only a temporary obstruction or the difficulty or expense of creating alternative access.[7]

5.7 In *Pryce and Irving v McGuinness*[8] it was found that the supply of a service such as drainage, is a matter of convenience and not a necessity. Consequently an easement would not exist.

5.8 One recent case that demonstrates the difficulties some landowners face and the costs which must be incurred as a result of the failure to create an easement is *Industrial Non Wovens Pty Ltd v Wieder*.[9] There a landowner's property backed onto another property and both blocks had street frontage. The landowner's block lay on a downward slope from its fronting street. At some time in the past, sewerage pipes from the landowner's property had been installed so as to lie beneath the neighbouring property and draining into the main located in the front of that neighbouring property. This was done, presumably, to avoid having to pump the sewerage from the landowner's property uphill to the nearest main. Unfortunately for the landowner, no valid easement was ever created for the laying of the pipes through the neighbour's land, and a purchaser of the neighbouring block applied successfully to the court for an order to have the trespassing pipes disconnected.

5.9 The outcome was that the Water Board, acting under its statutory powers, extended the sewer main located under the street fronting the neighbour's property, through the neighbour's property to the landowner's. Thus, where the landowner's pipes had formerly run beneath the neighbouring property carrying sewage to the main, the main in effect now came up to the landowner's property, also through the neighbouring land. The problem of stormwater drainage, a matter within the authority of the local council and not the Water Board remained unresolved. The cost of extending the sewer main was $21,000 of which two-thirds was met by the Board and the remaining third by the landowner.

5.10 Existing statutory provisions enabled the landowner's property to enjoy the benefit of a service, delivered in what was presumably the most practical way in the circumstances, namely via the neighbouring property. The obvious drawback in this case was the cost, financial and otherwise, in duplicating the existing means of delivering that service.

DEFECTS IN THE PRESENT LAW

5.11 The problems that arise in the absence of a valid easement are apparent. The question which arises is whether there should be a statutory right to have pipes traverse neighbouring property if circumstances require. If such a right is granted a right of access to repair or maintain such services would almost automatically follow.

PROPOSALS FOR REFORM

5.12 In the absence of such an easement or statutory right there is no legal obligation on the neighbour to allow access for the purpose of repairs. In that case a scheme which allows access for "one-off" instances of repair, such as that proposed by the UK Law Commission (referred to in Chapter 4) and followed by the Tasmanian Law Reform Commission could be extended to apply to access to a neighbour's land to repair sewerage, drainage pipes or joint services on a neighbour's land. It need not be limited to access to neighbouring land to repair only fixtures on one's own land. However the problems associated with access to neighbouring land to maintain services where no easement exists could cease to be a problem if a statutory right to have joint services traverse neighbouring property (dealt with in Chapter 6) is granted.

QUESTIONS FOR DISCUSSION

5.13 The issues raised in Chapter 5 are closely linked with those dealt with in Chapters 4 and 6. The Questions at the end of those chapters are relevant to this chapter.

Footnotes

1. See para 6.6.

2. In *Jones v Pritchard* [1908] 1 Ch 630 at 638 Parker J said:

> (T)he grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Thus the grantee of an easement for a watercourse through his neighbour's land may, when reasonably necessary, enter his neighbour's land for the purpose of repairing, and may repair, such watercourse. See also *Goodhart v Hyett* (1883) 25 Ch D 182, *Spear v Rowlett* (1924) 43 NZLR 801 at 803.
>
> See also *Hemmes Hermitage Pty Ltd v Abdurahman* unreported, Supreme Court of NSW, 22 March 1991 where it was held that at common law rights of deviation or repair of an easement, including a right of footway, were implied in order to make the grant of the easement effective.

3. In *Jones v Pritchard,* (id) His Honour went on to state:

> (T)here is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damages due to any want of repair.

> Thus, if the easement be to take water in pipes across another man's land and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for damage done by such water.

4. *Union Lighterage Co v London Graving Dock Co* (1902) Ch 557, per Stirling J at 573.

5. A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia*, Butterworths, Sydney 1987 at 60 para 414.

6. *McLernon v Connor* (1907) 9 WALR 141 FC.

7. *Tarrant v Zordstra* (1973) 1 BPR 9381.

8. [1966] Qd R 591.

9. Unreported, Supreme Court of NSW Eq Div No 4968 of 1987.

Chapter 6

EASEMENTS FOR JOINT SERVICES

BACKGROUND

6.1 The issue of easements for joint services tends to overlap with the issue of access to neighbouring land for maintaining services to one's property to the extent that consideration of one would be incomplete without consideration of the other.

6.2 As stated previously the crucial issue is whether there should be a right to have services traverse neighbouring property.

6.3 In the Sydney metropolitan area there are approximately twenty thousand properties that rely on joint services.[1] These properties are concentrated primarily in the inner city suburbs of Paddington, Redfern and Surry Hills. The properties are usually terrace houses, but include some semi-detached houses. When these properties were built they were not connected to sewerage mains by individual pipes, but by means of a joint service. This service may have carried the sewage of as many as 20 dwellings to the main sewer.

THE PROBLEM

6.4 A person may wish to relocate the sewerage and drainage pipes in his or her backyard, connect the pipes to the main directly and thus avoid any joint service, or refuse to have his or her neighbour's sewage pass under his or her property, such as, where a property has been subdivided and a pipe carries sewage from one property through the other to the main. Unless a valid easement exists, in all such cases, the neighbour has no means of preventing the adjoining owner from interfering with the service even though the consequences can be very inconvenient and expensive. For instance, it may force the neighbour to bear the cost of a direct connection to the sewerage main that would otherwise be unnecessary.

6.5 The Water Board's current practice is to refuse applications for disconnection unless all relevant parties have consented in writing to this course of action or the application is supported by a declaration of the Court.[2] In *Industrial Non Wovens Pty Ltd v Wieder*[3] the Court made such a declaration. A declaration needs to be obtained from a Court in every instance where an easement does not exist.

6.6 In some cases, an easement for a joint service may exist although it does not appear on the Certificate of Title. For example, the easement may have been created by prescription prior to the land coming under the Torrens Title System and was omitted from the Certificate of Title, or it may be implied by the description of the property on the Certificate of Title itself.[4]

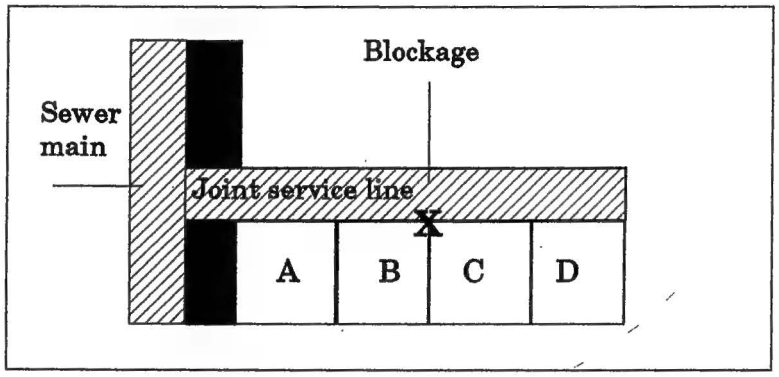
6.7 It has been held that easements of necessity will not apply to joint services since joint service connections are not "necessary" to the use of land. In *Pryce and Irving v McGuinness*[5] Hanger J found that a dominant tenement had a right of way over a servient tenement as an easement of necessity (in a landlocked situation) but the claims for easements for electricity and drainage over the same land were not successful.

COSTS

6.8 A related issue which is often the subject of dispute is liability for costs.

6.9 Problems continue to arise when blockages occur in the joint service, particularly when only some of the owners have their sewerage or water service affected. There is no legal obligation for all owners to contribute to the repair bill, nor any guidelines for apportioning the cost. Moreover, according to the Water Board unresolved disputes between owners bring about demands for severance and removal of pipes from the property.

6.10 The diagram below will serve as an illustration. A, B, C and D share a joint service, with A enjoying a direct connection to the main and D being the furthest upstream:



6.11 If a blockage occurs at the spot marked X, sewerage or water services to C and D will be disrupted, while A and B will not be affected. The issues are, which parties should pay and in what proportion. Should all four parties contribute equally? A and B could argue that the blockage could not possibly have been due to them and refuse to pay. D may refrain from paying, preferring to wait for C to be forced to have the service repaired rather than face the possibility of sewage or water discharging onto C's property.

6.12 Regulations 10 and 16 of the Water Board's *Plumbing and Drainage Regulation* (September 1989) prohibit the sharing of water and sewerage services, except with the approval of the Board or as provided by those regulations. However, for those older properties still subject to joint services, it may be argued that regulation 9 obliges owners to be jointly responsible for the maintenance of

their water main, sewerage or storm water drain. That regulation provides:

> The owner of land connected to a water main, sewer or stormwater drain of the board must:
>
> (a) install and provide, as prescribed by or under the Act, and
>
> (b) at all times keep in good order and condition and free from defects
>
> the water service, sewerage service or stormwater service on the land from the water main sewer or stormwater drain to the property.

6.13 The by-law does not, however, give a private right of action to sue, nor is it advisable that a person incur the legal costs and risks in suing neighbours for contribution.

NEED FOR REFORM

6.14 The need for reform is therefore not limited to the issue of easements for joint services but also to the associated question of liability for costs.

LAW REFORM IN OTHER JURISDICTIONS

United Kingdom

6.15 In 1971 the UK Law Commission published a working paper that dealt with a number of matters connected with Appurtenant Rights including easements, positive and restrictive covenants, rights of support and suggested the imposition of "Land Obligations" similar to easements or rights permanently attached to land. Those rights could be obtained by application to the appropriate Tribunal. The Commission envisaged a procedure which would follow essential facilities over other land to be obtained by private persons. Such a right would be obtained if the following conditions were met -

> (a) the proposed use for development was in the public interest,
>
> (b) the imposition of the obligation was necessary for the practical and economic development of the property,
>
> (c) the servient landowner could be adequately compensated in money, and
>
> (d) the refusal of the servient landowner to agree to the imposition of the obligation was unreasonable.[6]

6.16 Since the Lands Tribunal, constituted under the *Lands Tribunal Act 19* already had power to discharge and modify restrictive covenants, the Commissi proposed that the Tribunal's jurisdiction in this field be widened so that it wou have power to impose, confirm, vary or discharge land obligations.[7] The Commi sion also suggested that in order to discourage applications to impose lan obligations from being lightly made, the whole of the costs of the proceedings b borne by the applicant. This would also reduce the risk of servient landowne being pressured to acquiesce under threat of costly proceedings being taken.[8]

6.17 A right of support of land by adjoining land that is in its natural state i not an easement but a natural right. This right exists in relation to both Ol System Title and Torrens Title. In essence it is a negative right in that th adjoining owner is required merely not to remove support - there is no duty to tak any positive action to provide support. An established scheme exists in relation t rights of support in the metropolitan area of London.[9] Under this scheme a landowner proposing to excavate near an existing building is obliged to give notic of such an intention and a landowner may, (or if required by the neighbour, must) take steps to support the neighbour's building during the operation. Although this gives an advantage to the builder who builds first, the Law Commission used the Act as a basis for reform believing it was preferable to put the burden of support on the second builder.

6.18 The Law Commission suggested that support of land and buildings should be provided for by legislation as a general right of ownership by imposing obligations on landowners to:

(i) allow the natural flow of water in a defined channel subject to the reasonable exercise of the rights of the owner of the land through which the channel passes;

(ii) not do anything which will withdraw support from any other land or from any building, structure, or erection which has been placed on it;

(iii) (in addition and without prejudice to (ii)), not excavate in circumstances which give rise to a potential danger of withdrawing support from the land or buildings of an adjoining owner without following a statutory procedure;

(iv) except in accordance with statutory provisions

(a) not erect any structure which would become a party structure or would cause an existing structure to become a party structure,

(b) not demolish, lower, raise, underpin, thicken, cut into or alter any party structure,

(v) allow an owner who desires to build close up to the line of junction to place under the land any projecting footings or foundations which are required for that purpose subject to statutory provisions as to compensation and the procedure to be followed.[10]

6.19 The above proposals concerning the imposition, variation and discharge of land obligations, and the introduction of certain obligations as a statutory incident of ownership, have not yet been enacted in the United Kingdom. However legislative reforms in Queensland, Tasmania and New Zealand along the lines suggested by the UK Law Commission, have been introduced.

Queensland

6.20 In 1973, the Queensland Law Reform Commission published its Report on Conveyancing endorsing the findings of the UK Law Commission with respect to the imposition of land obligations which it termed 'statutory rights of user.'[11]

6.21 Having referred to the UK recommendation, the Queensland Commission noted:

> In Queensland such problems have arisen not so much in the sphere of estate development where owners can generally be induced by the offer of a substantial consideration to grant the rights required, but in relation to individual residential or commercial properties requiring access to or for utilities and services on to public highways - these problems are accentuated by the titles registration system, which precludes recognition of easements which would ordinarily be implied or imposed at law or in equity.
>
> There seems to be no reason why the court should not have power to create such rights in favour of the dominant land and to impose them on the servient land where this is necessary in the interest of effective user of the dominant land.[12]

6.22 By section 180 of the *Property Law Act 1974 (Qld)*, which resulted from the report, the court is empowered to impose on servient land an obligation as to user. An application must be brought by the owner of the dominant land and the court must find that the obligation is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land.

6.23 Section 180 lists specific requirements which must be satisfied prior to the court granting an order imposing a land obligation and includes the following:

(a) statutory right of user sought must be

(i) reasonably necessary in the interest of effective use of the land;[13]

(ii) not inconsistent with the public interest;[14]

(b) owner of the servient land can be adequately compensated; and

(c) servient land owner's refusal to accept the imposition of the user is unreasonable.

6.24 The Court retains a wide discretion to grant an order and to determine the scope of the right[15] and the form of the right granted.[16]

6.25 Since the commencement of the Act in December 1975, there have been several reported cases dealing with section 180.[17]

6.26 In two of the cases orders were made pursuant to the section.[18] The section has also received favourable comment from text writers.[19]

6.27 Although the reported cases have only dealt with applications for rights of way and none have touched on the specific area of rights of access in order to effect repairs or to obtain and maintain services, Hanger CJ stated in *Re Seaforth Land Sales Pty Ltd* (No 2)[20] that

> granting a statutory right of user, the court obviously has power to frame the right granted to meet the circumstances of a particular case. Subsection (2) of the section also is designed to give a large scope to allow for variations for particular circumstances.

The provision is obviously drafted to cover a variety of fact situations, such as rights of access to and from landlocked land. Its terms are sufficiently wide to encompass the specific concern with the provision of services. Section 180 (7) (b) includes a reference to the placing of utilities on or through land, while paragraph (c) includes many types of services within the definition of utilities. This section has not yet been tested in the courts with regard to providing a right of user to place utilities on neighbouring land.

6.28 The section was envisaged to apply primarily to disputes relating to individual residential and commercial properties, rather than to commercial developments and this has proved to be the case.

6.29 Although section 180 has proved its general utility and versatility, a number of defects and deficiencies have been exposed. Consequently the Queensland Law Reform Commission in its Report No 37 suggesting amendments to the

Property Law Act 1974 recommended that section 180 be amended bringing it more in line with the Tasmanian provision which was considered to be "superior in clarity".[21]

Tasmania

6.30 In 1978 a provision similar to s180 of the *Property Law Act 1974 (Qld)* was added to the *Conveyancing and Law of Property Act 1884 (Tas)*. In summary, section 84J of the Tasmanian Act provides for:

* Imposition by a court of a statutory right of user over land for public or private purposes in circumstances where
  - the court is satisfied that the purpose is consistent with the public interest, and
  - the owner of the servient land can be adequately compensated in money for any loss or disadvantage.
* The statutory right of user to take the form of an easement, licence or other right which may be created by the owners of the land.
* An order for a statutory right of user to be binding on the owners of the servient and dominant land and their successors in title.
* The right to be extinguished or modified by acts of the parties.

Sub-section (7) provides that a statutory right of user that affects any land within a plan of subdivision cannot be created under this section if it could have been created by that plan or an amendment of that plan.

New Zealand

6.31 Legislation also exists in New Zealand which empowers the government to grant the benefit of an easement to one landowner over the property of another.[22] There are, however, significant departures from the Queensland and Tasmanian provisions. In particular, the law applies to "landlocked" land only, defined as land to which there is no reasonable access.

6.32 The factors that the New Zealand courts are directed to consider before making an order include:

* the type of access (if any) that existed when the applicant acquired the land;
* the circumstances in which the land became landlocked;

* the conduct of the parties involved;

* whether hardship would be caused to either party if an application for an order was granted or refused; and

* such other matters as the court considers relevant. (s129B(6)).

Payment of compensation by the applicant is at the court's discretion (s129B(8)(a).

6.33 The court may make an order granting an easement or vesting the owner of the landlocked land with the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land).[23] This is a drastic remedy and the New Zealand courts have not yet granted such an order.

6.34 While the New Zealand legislation is directed at a specific problem area and lacks the adaptability of the Queensland and Tasmanian provisions, it reflects the same underlying concern that land should be used efficiently without diminishing unduly the rights of adjoining landowners. The Queensland and Tasmanian provisions have been criticised for not going far enough and, in effect, achieving only piecemeal reform of this area of the law.[24] Nevertheless it has been suggested that:

> [O]ther jurisdictions may be interested in introducing the concept of judicially imposed statutory rights of user in respect of land. Their observance of the limited Queensland experience to date will indicate to them that such a law is not going to result in a wholesale upsetting of the rights of private property owners. It may be a novel law, but it is not really a radical one; it is merely another small means of adjustment between conflicting private property rights. By judicious use of the device, some rights may be rendered more useful and convenient. True it is that in consequence there may be some inconvenience to other rights : the palliative for the inconvenience is the payment of compensation.[25]

PROPOSALS FOR REFORM

Easements for joint services

6.35 Having considered law reform proposals in other jurisdictions there seems little doubt that the law in New South Wales relating to easements for joint services is in need of review. The Commission is of the opinion that if the issue of easements for joint services is resolved then the associated question of access to maintain such services will cease to exist.

6.36 The recommended option for reform is therefore in keeping with the Queensland and Tasmanian approach discussed above. As stated in section 180 (b) of the Queensland *Property Law Act 1974* a statutory right of user will be defined to include any right of, or in the nature of, a right of way over, or access

to, or of entry upon land and any right to carry and place any utility up, over, across, through, under or into land. A utility will include any electricity, gas, power, telephone, water drainage, sewage and other service pipes on lines with all facilities and structures reasonably incidental thereto.

6.37 The specific requirements that will need to be satisfied before the court could grant an order should be as follows-

(1) The right of user must be reasonably necessary in the interest of the effective use of land.

(2) The right must be consistent with the public interest.

(3) The owner of the servient land must be adequately compensated.

(4) The servient land owner's refusal to accept the imposition of the user must be found to be unreasonable.

(5) The right should take the form of an easement, licence or other right which may be created by the owners of the land.

(6) An order granted by the court must be binding on the owners of the servient and dominant land and their successors in title.

(7) The right may be extinguished or modified by the acts of the parties.

Costs

6.38 Consideration might be given to establishing a scheme as to liability for costs such as that contained in sections 7 and 13 of the *Dividing Fences Act 1951 (NSW)*. Section 7 provides

> the owners of adjoining lands not divided by a sufficient fence shall be liable to join in or contribute in equal proportions to the construction of a dividing fence between such lands.

Section 13 states

> [w]henever any dividing fence is out of repair the owners of land on either side thereof shall be liable to join in or contribute in equal proportions to the repair of such fence.

Adjoining property owners must, therefore, apportion equally the costs for any work needed to be done on their dividing fence. Similar legislation could be enacted regarding joint services, spelling out the obligations of the parties.

6.39 This could be in line with, but less ambiguous than regulation 9 of the Water Board's Plumbing and Drainage Regulation (September 1989) 26. Alternatively, s22 of the *Building Act, 1984 (UK)* could serve as a model. That section provides, *inter alia,* that where a local authority determines that buildings should be drained either separately or in combination, it shall fix the proportions in which the expenses of constructing or maintaining and repairing the sewer are to be borne by the owners concerned and in certain circumstances bear a proportion of those costs itself.

QUESTIONS FOR DISCUSSION

Easements for joint services

* Should there be a right to apply to a court for an easement of access, or right of way applying to neighbouring land, in the absence of an agreement for an easement or right of way?

* What factors should a court consider in determining whether to grant an easement or right of way?

  - the necessity of the easement or right of way or access sought?

  - the history of the title to the land?

  - the circumstances by which an easement or right of way became necessary, or the land became landlocked?

  - the intentions of a party at an earlier stage?

  - the adequacy of monetary compensation?

  - any other matter?

* In what circumstances should a court refuse to grant access, or an easement or right of way -

  - only when the compensation offered is inadequate

  - when the access, right of way or easement would cause inconvenience or

  - is mere inconvenience sufficient to deny a right of way or access?

* Should the right of way granted by a Tribunal be capable of subsisting as a legal interest, registered on the title and binding on successors in title or should the right of way exist for the duration of the applicant's interest in the land only?

* Is the statutory right of user as defined in s180 (7) (a) of the Queensland *Property Law Act 1974* wide enough for New South Wales purposes? If not how should it be extended?

* How should the right or way be extinguished or discharged -

  - by agreement of those benefited by the right of way?

  - discharged by Court order, or

  - when apparently abandoned by the parties?

* If there is an alternative means of access or right of way should this automatically exclude the right to an easement?

* If the alternative route or means of access is inconvenient or involves considerable expense to use, should an easement be granted?

* What public policy issues should govern the granting of an easement by a tribunal?

* Should there be any requirement akin to Section 180 (1) of the Queensland Property Law Act 1974 that the easement be "reasonably necessary in the interests of the effective use of the land" before it is granted?

* Should there be a requirement that the easement requested should not be inconsistent with the public interest?

Apportionment of Costs for Joint Services

* Should liability for costs among adjoining owners be guided by policy only or should there be legislative intervention to enforce a system of apportionment?

* Should costs be apportioned equally between neighbours even where one or more properties having the joint service are not affected?

* Should costs be apportioned only between the affected owners?

Footnotes

1. Spokesperson from the Sydney Water Board as at 10 April 1991.

2. Annual Report of the Ombudsman of New South Wales for the year ended 30 June 1979 at 41.

3. Unreported, Supreme Court of NSW, Eq Div, No 4968 of 1987.

4. The discussion in chapter 4, para [4.13] concerning implied easements created prior to land being brought under Torrens Title and not being recorded on the title thereby constituting an exception to indefeasibility under s42 of the Real Property Act is relevant. See *Auerbach v Beck* [1985] NSWLR 424, *James v Registrar General* (1967) 69 SR NSW 361 and *Margil Pty Ltd v Stegal Pastoral Pty Ltd* [1984] 2 NSWLR 1.

5. [1966] Qd R 591 at 608.

6. The (UK) Law Commission Working Paper on *Appurtenant Rights,* para 118 and proposition 15, Working Paper 36 (1971).

7. ibid, paras 113-115.

8. ibid, para 119.

9. The *London Building Acts (Amendment) Act 1934.*

10. The (UK) Law Commission Working Paper on *Appurtenant Rights*, pp 66, 68, Working Paper 36 (1971).

11. Queensland Law Reform Commission on *A Bill to Consolidate, Amend, and Reform the Law relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report 16 (1973).

12. ibid, para 80.

13. *Property Law Act 1974 (Qld)* s180 (1).

14. ibid, s180(3)(a) and see *Ex parte Edward Street Properties Pty Ltd* [1977] Qd. R 86 at 90 and *Re Worthston Pty Ltd* [1987] 1 Qd. R 400 at p403.

15. ibid, s180(7) (b).

16. ibid, s180(2).

17. *Re Seaforth Land Sales Pty Ltd* [1976] Qd R 190; aff'd [1977] Qd R317;

    Nelson v Calahora Properties Pty Ltd [1985] Q Conv R 54-202.

    Ex parte Edward Street Properties Pty Ltd [1977] Qd R 86.

Tipler v Fraser [1976] Qd R 272.

Re Worthston Pty Ltd [1987] 1 Qd R 400.

18. *Re Seaforth Land Sales Pty Ltd* [1976] Qd R 190 and *Nelson v Calahora Properties Pty Ltd* [1985] Q Conv R 54-202.

19. H Tarlo, "Forcing the Creation of Easements - A Novel Law" (1979) 53 *Australian Law Journal* 254; A J Bradbrook, "Access to Landlocked Land: A Comparative Study of Legal Solutions" (1985) 10 *Sydney Law Review* 39.

20. [1977] Qd R 317 at 321.

21. Queensland Law Reform Commission on *A Report on a Bill to Amend the Property Law Act* 1974-1986, Report 37, (1987).

22. *Property Law Act 1952* (New Zealand), s129B.

23. ibid, s129B(7).

24. H Tarlo, "Forcing the Creation of Easements - A Novel Law" (1979) 53 *Australian Law Journal* 254 at 255.

25. ibid, 263.

26. See para 6.12.

Chapter 7

DISPUTE RESOLUTION

INTRODUCTION

7.1 As stated in Chapter 1 of this Discussion Paper, fundamental to each of the issues dealt with in Chapters 2-6 is the general question of how to resolve disputes which arise between neighbours.

THE NATURE OF DISPUTES BETWEEN NEIGHBOURS

7.2 What distinguishes disputes between neighbours from many disputes which come before the courts is that in neighbour disputes the parties are in an ongoing relationship. Commercial or negligence actions for example, will often arise out of a one-off encounter between the two parties concerned. However, the relationship between disputing neighbours will usually be continuous and more broadly based.

7.3 By definition, neighbours live in immediate proximity to each other and are generally forced into frequent interaction. There will often be a personal element in disputes between them. Just as the relationship is ongoing, so the dispute which comes to court is commonly part of an ongoing conflict or is a reflection of the relationship between the neighbours. Thus, a dispute which ends up in court is often simply a by-product or symptom of a more wide-reaching problem in the relationship. Disputes about personalities, interests, manners, lifestyles and values are transformed into disputes about issues which are recognised at law when legal action is taken.

7.4 The reality of this situation is borne out by the experience of those involved in the area of community relations. With respect to dividing fences, Community Justice Centres have noted that "in many of the 'fence' disputes, the fence was a convenient way of punishing the other party for earlier real, or imagined wrongs."[1] Similarly, the New Zealand Property Law and Equity Reform Committee in its report on fencing legislation notes the existence of a problem with "spite" fences.[2]

EXISTING OPTIONS FOR RESOLUTION OF NEIGHBOURHOOD DISPUTES

7.5 Dispute resolution mechanisms may be generally divided into court-based and non-court-based systems. The non-court-based systems are comprised of many different types of agencies.

Non Court-Based Dispute Resolution

Police and Councils

7.6 The first point of complaint in the case of most neighbourhood disputes, especially about noise, is the police and sometimes the local council. Generally, local councils deal with noise in residential areas in daytime hours and the police deal with evening noise. The State Pollution Control Commission also has the power to issue Noise Abatement Orders to residential occupiers but generally its main task in regard to the *Noise Control Act* is to regulate industrial noise. Pursuant to recent amendments made by the *Environmental Offences and Penalties (Amendment) Act 1990*, the police, officers of local councils and other authorised officers are empowered to issue on-the-spot penalty notices to offenders. Although section 40 of the *Noise Control Act* empowers local councils to serve a Noise Control Notice on an occupier in respect of offensive noise, it is understood that the current practice of local councils is not to take this course of action unless at least three or four complaints about a particular situation are made.

7.7 Although the police and local councils do have some powers in relation to the noise problems and are often contacted in relation to other neighbourhood disputes, they have more of a policing role than a dispute settlement role. However they do act as an active referral source for Community Justice Centres, as do Chamber Magistrates and legal aid providers.[3]

Community Justice Centres

7.8 The next step on the ladder of the resolution process through non-court-based means is often the Community Justice Centres. These Centres were established by the New South Wales Government in 1980 to provide for the resolution through mediation of minor civil and criminal disputes shown by experience to be unresponsive to conventional legal remedies.

7.9 In essence, mediation involves a third party who intervenes in a dispute to assist the parties to negotiate towards reaching an agreement. Both parties must agree to the intervention of a mediator, who can be appointed by an authority or approached by the parties.[4]

7.10 In the second reading speech on the Community Justice Centres (Pilot Project) Bill 1980 the Hon Frank Walker, QC then Attorney General and Minister for Justice, said:

> The key to the concept of Community Justice Centres is mediation .... The mediation services offered by a Community Justice Centre will be available to anyone who seeks to avoid the expense and frustration of court proceedings, or who is simply searching for a way to resolve a dispute, even of an inter-family nature, without suffering the embarrassment of confiding in friends, relatives, or the impersonal countenance of the legal profession.[5]

In the Upper House the Hon Paul Landa said:

> The types of disputes which may be dealt with by mediation are virtually limitless, the only necessary criterion being that the disputing parties must have or have had, an ongoing relationship.[6]

7.11 Both speakers identified neighbourhood problems as those most suitable for mediation, because they involve people who must continue to live in close proximity and people who were usually engaged in what was a minor dispute where the "cost and emotional upset" of dealing with the matter in court were "entirely disproportionate to the results achieved in court".[7] As predicted, the majority of matters dealt with by Community Justice Centres have been disputes between neighbours. The latest Annual Report of 1989/90 states that "neighbours continue to be represented most frequently in the case load at 57.6%." In 1988/89 neighbour disputes comprised 61.6% and in 1987/88 67.5% of the total case load.[8]

7.12 The types of mediation services available range from highly specialised services, conducted as part of a court system, to quite unstructured groups based in the community. The aims of the different services also vary from achieving peace to achieving understanding or communication or co-operation or the recognition of differences - to that of encouraging the parties to take responsibility for their own actions.

7.13 However, the 1989/90 Annual Report provides that where a mediation session was held, agreement was reached in 84.6% of sessions.

7.14 Although mediation at a Community Justice Centre offers an inexpensive and speedy means of resolving neighbourhood disputes, there is no *guarantee* that the dispute in question will not continue or re - emerge since there is no provision to enforce any agreement reached.[9] While some may regard this as a major drawback, the Community Justice Centres claim that any move to make an agreement legally enforceable would undermine the essential empowering function of mediation and inadvertently create more work for an already overworked justice system.

7.15 Despite the fact that court action often means a time consuming, expensive and sometimes enervating experience with no guarantee of effective resolution of the dispute, some people do resort to court-based dispute resolution with or without prior unsuccessful attempts at mediation.

7.16 The Attorney-General's Department also offers some basic legal assistance through its Chamber Magistrate service. Chamber Magistrates and clerks of local courts are court officials with legal training who provide general legal assistance. Where mediation breaks down at a Community Justice Centre, the parties are often referred to a Chamber Magistrate.

Court-based Dispute Resolution

7.17 The courts most commonly used for the resolution of neighbour disputes are the Supreme Court, the District Court and the Local Court.

7.18 The Supreme Court is rarely the most appropriate forum for the resolution of neighbourhood disputes, however, even where such disputes qualify to be heard, in view of the cost and delay factors. For instance, if a problem is caused by trees and an action for nuisance does lie, the cost of seeking equitable remedies in the Supreme Court would often be prohibitive.

7.19 The District and Local Courts have the power to deal with civil and criminal matters but have limitations on their jurisdiction. In civil cases Local Courts are limited to hearing disputes in which the claim for damages is not in excess of $10,000, while the District Court limitation is $100,000. The vast majority of disputes come before the Local Courts but even in this court the process may become lengthy and costly. For instance, should a complainant decide to use section 52 of the *Noise Control Act* and take a matter to the Local Court, a summons will issue to the allegedly noisy neighbour requiring attendance in court to answer the allegations. Should the neighbour seek to defend the allegations the matter will be set down for hearing. The intention of section 52 was to provide an inexpensive method of determining disputes over noise. The two parties would appear before the court and outline details of the dispute with the court making an appropriate determination. However, parties pursuing this section can retain legal counsel and in some instances call acoustic experts to give evidence regarding the noise, which will naturally result in increased costs and delay. A survey by the State Pollution Control Commission in 1985 found that few people tend to use section 52 to take their matters to court, largely due to the anticipated expense of conducting such litigation.

7.20 The Local Courts could, however, become a more suitable forum for the resolution of neighbour disputes when the *Local Courts (Civil Claims) Amendment Act 1990* commences later this year. The main aim of this Act is to make special provision for small claims. Introducing the Bill in Parliament the Attorney General the Hon John Dowd QC, MP, said:

> This bill is designed to establish in the Local Courts a Small Claims Division which can provide litigants in small civil actions with a fast, cheap, informal, but final resolution of their disputes. The basic principle in the argument for Small Claims Courts is that the full rigours of the adversarial system are neither necessary nor appropriate for small civil actions, and the system is far too expensive in the light of the amounts in issue.[10]

The amending Act divides each Local Court, when exercising civil jurisdiction, into a General Division and a Small Claims Division and confers jurisdiction on the latter to determine civil actions in which the amount claimed does not exceed $3,000.

7.21 A court sitting in a Small Claims Division is to be constituted by an Assessor or by a Magistrate sitting alone. Assessors will be recruited from the local profession much like arbitrators. Section 23A of the *Local Courts (Civil Claims) Act 1970* (as amended) requires the Assessor or Magistrate to attempt conciliation in the first instance. Section 23B provides that proceedings "are to be conducted with as little formality and technicality as the proper consideration of the matter permits" and the rules of evidence are specifically excluded. No appeal lies except for lack of jurisdiction or denial of natural justice. The thrust of the provisions in the Act is towards assisting and encouraging the litigant in person although lawyers are not excluded from the Small Claims Division.

7.22 An action for $3,000 or less will be in the Small Claims Division from its commencement, unless and until the Court otherwise orders. The criterion likely to be adopted is, unless the Court is of the opinion that the issues likely to arise in the action are so complex or difficult as to law and fact, or that the action is otherwise of such unusual importance, that the action should not be heard and determined in the Small Claims Division.

7.23 Although the Supreme Court, District Court and Local Court provide the majority of the state's dispute resolution services to the community, there are other courts which have specialised powers to handle certain types of disputes. The Land and Environment Court is one such court which has powers to make determinations in disputes concerning building and development applications, land valuations and environmental matters and this court could perhaps be put to more use in the area of neighbourhood dispute resolution, particularly in relation to trees.[11]

OPTIONS FOR OTHER DISPUTE RESOLUTION MECHANISMS

7.24 One option is that a completely new tribunal be set up to resolve disputes between neighbours. Such a body could operate using both mediation and, failing that, adjudication. A new tribunal would have the advantage that techniques sensitive to the particular needs of inter-neighbour disputes could be developed and implemented. Since the jurisdiction of the tribunal would be limited to neighbourhood disputes and (approaching the CJC in the first instance could be made a pre-condition), the delays associated with other courts will not necessarily cause a problem.

7.25 On the other hand, a number of disadvantages would exist. One major obstacle is that there would have to be a large number of disputes in order to justify the creation of such a new body. A further problem is that it is unlikely that such a new body would have sole jurisdiction over neighbourhood disputes, since not all areas of New South Wales could be serviced. It is likely that a tribunal dealing with disputes between neighbours would not be able to give extensive coverage outside Sydney. It can also be argued that adding another tier to the judicial system may create more problems than it solves. Setting up a new Neighbour Tribunal is therefore not one of the preferred options of the Commission.

7.26 A second option is that the jurisdiction to resolve disputes between neighbours could be given to an existing tribunal. In this regard, a viable body would appear to be the Land and Environment Court, which already has an expertise in planning matters. Thus, for instance, if consideration is given to the regulation of tree planting in line with the controls that apply in respect of buildings under the *Local Government Act 1919* as suggested in Chapter 3, the Land and Environment Court could deal with the disputes arising out of the contraventions of such legislative controls with ease.

7.27 Quite apart from its experience in dealing with planning matters, the mechanism already exists in the Land and Environment Court to call expert witnesses to clarify difficult technical considerations.

7.28 However, adding such matters to the workload of the Land and Environment Court could cause delays within the system and would not alleviate the problem of the expense associated with court-based dispute resolution.

7.29 A third option is that rather than having one tribunal offering both mediation and adjudication, (as is proposed for the Local Courts -Small Claims Division) these functions could be separated. This is the system that exists at present in which the Community Justice Centres offer mediation services and the courts adjudicate disputes.

7.30 While Chamber Magistrates, solicitors and courts could refer neighbour disputes to Community Justice Centres more actively, it is in the area of adjudication that improvements are most necessary. Consequently, rather than create additional dispute resolution mechanisms, it may be worth reviewing the existing structures to make them more cost effective and efficient.

COURT-BASED OR NON-COURT-BASED DISPUTE RESOLUTION FOR NEIGHBOUR DISPUTES?

7.31 There are two alternative bases for determining whether neighbour disputes would be better resolved through court-based or non-court based dispute resolution. One option is to consider the type of dispute, that is, whether the legal issues that arise are better resolved by means of a binding court order. Alternatively, if the parties are amenable to mediation the use of non-court-based dispute resolution mechanisms in the first instance may be advocated, irrespective of the type of dispute or cause of action.

7.32 *Type of dispute as determining factor.* The nature of disputes between neighbours is such that in many cases the conventional court system may not be able to provide an effective solution. A court may only concern itself with the specific dispute before it and may often ignore any background conflict of which the litigated dispute is a symptom. The adversarial nature of litigation and the winner/loser solutions which courts impose may serve to exacerbate disputes of a personal nature.[12]

7.33 It must be emphasised that the fact that the conventional court system may not be able to deal effectively with many disputes between neighbours does not mean that adjudication is *always* inappropriate. Many disputes will be purely legal or commercial in nature and will not reflect an ongoing conflict. Further, mechanisms such as mediation will not always be successful and it may often be necessary to fall back on adjudication in order to provide a final, binding resolution to a dispute.

7.34 Consequently, there is need for a flexible approach to neighbour and neighbour disputes. While many disputes may require background issues to be addressed through informal mediation and conciliation processes, some may well be resolved more quickly and effectively by adjudication. This point is appreciated by those most closely involved in the area of mediation. Wendy Faulkes, Director of the Community Justice Centres has written that "clearly, mediation will not work in all cases and some adjudication or arbitration process is needed."[13]

7.35 The challenge therefore is not merely to provide community mediation facilities, but to identify with some degree of accuracy, those cases which are in fact appropriate for resolution in this manner and those which will more appropriately be resolved by courts or other enforcement agencies.

7.36 *Type of parties as determining factor.* An alternative basis for determining whether court or non-court based dispute resolution is more appropriate in the particular situation could depend on the type of parties to the dispute. If the dispute concerns access issues that may well be dealt with by a court but may also be capable of resolution by mediation and the parties are amenable to the latter then that could be the deciding factor. Opting to have the dispute resolved by mediation does not mean sacrificing one's legal rights. Recourse to courts will not be precluded at any stage. On the contrary, if mediation is successful the dispute will be resolved more expeditiously, cost effectively and often more satisfactorily.

7.37 In the recent case of *Hemmes Hermitage Pty Ltd v Abdurahman*[14] Kirby P commented:

> This case is a good illustration of the need for a mediation procedure to help parties to a reasonable solution to a neighbouring dispute before they become locked into the rigidities of litigation with its attendant risks, costs and inconvenience. Each of the parties to this case could appeal to important but competing principles of law. Each could appeal, as well, to the unreasonableness of the case for the opponent as perceived by them... but it would be no misfortune, if, associated with the court's procedures, facilities were available to add the authority of the court to attempted consensual resolution, at least for cases between persons such as family or neighbours who must continue to live in relation with one another.

This is the preferred option of the Commission. If the parties are amenable to mediation, non-court-based dispute resolution through the Community Justice Centres should be attempted.

SUITABLE FORUMS FOR THE RESOLUTION OF THE NEIGHBOURHOOD DISPUTES

Noise

7.38 As with trees, the problem of noise may be more appropriately resolved through Community Justice Centres than through the courts as it is possible that the right of a legal challenge could further sour neighbour relations.

7.39 One of the main benefits of seeking resolution through Community Justice Centres is that the mediation process helps to preserve the ongoing relationship. There could, however, be instances where the disputing parties have no ongoing relationship. For instance, the temporary housesitter who is very noisy or the stranger who parks his car with a faulty alarm in the street for the day, would have no ongoing relationship with the aggrieved residents of the neighbourhood. While it is not suggested that such disputes should be rushed into court, they may not be the typical disputes suitable for resolution by the Community Justice Centres.

7.40 If Community Justice Centres are not able to resolve the dispute, judicial relief can be sought in the Local Court, the Land and Environment Court or the proposed Neighbour Tribunal. In this case, procedures presently in place under the *Noise Control Act* may be adequate.[15]

Trees

7.41 As has been pointed out, the cost of taking an action for nuisance in respect of problems associated with trees in the Supreme Court is often prohibitive.

7.42 Consideration could be given to investing the Local Courts or a new Neighbour Tribunal with discretionary powers to make orders concerning disputes between neighbours over trees. One option to achieve this would be to give the nominated courts powers similar to those contained in the *Noise Control Act 1975*. Section 75 of that Act provides that where a Local Court is satisfied that a noise amounting to a nuisance exists and is likely to continue, it can make orders directing the person responsible to abate the nuisance and/or prevent its recurrence. The Act provides for a right of appeal from an order of a Local Court to the Land and Environment Court.[16]

7.43 If consideration is given to the regulation of tree planting in line with the controls that apply in respect of buildings under the *Local Government Act 1919,* the Land and Environment Court could be given jurisdiction to deal with disputes arising out of contraventions of such legislative controls. This will merely be an extension of its existing jurisdiction in respect of building and development applications.

7.44 Problems associated with trees may often be satisfactorily resolved by Community Justice Centres without recourse to the courts. Most often in these

disputes there is a continuing relationship between the parties and there is a balance of negotiating power. According to the 1989/90 Annual Report of the Community Justice Centres, disputes over trees, shrubs and plants is one of the more common categories of complaints. No doubt it will be easier for Community Justice Centres to help resolve differences if the proposals for reform suggested in Chapter Three are implemented as the new remedies provided will offer a better basis for the resolution process. In any event, if the legal issues are only peripheral to the main dispute, the Community Justice Centres would be the more appropriate forum.

Access and Joint Services

7.45 It was suggested in Chapter Four that the United Kingdom Law Commission's recommendation in relation to access and in Chapter Six that a similar provision to section 180 of the *Queensland Property Law Act* in relation to joint services should be implemented in New South Wales. This requires the existence of an enforceable court order. Questions of law will also need detailed consideration before the dispute can be resolved. The United Kingdom Law Commission stressed the need for speed, economical cost and accessibility as well as the availability of comprehensive machinery for enforcing the orders and, on balance, concluded that their County Court was best equipped to meet the identified needs. The forum for an application under section 180 of the Queensland *Property Law Act* is the Supreme Court. It is questionable whether the same forum should be adopted in New South Wales, in view of the cost and delays referred to earlier.

7.46 Although the UK Law Commission proposed the use of the County Court which is equivalent to the District Court in New South Wales, and the Supreme Court is used in Queensland, use of the Local Courts or the Land and Environment Court may be better in New South Wales. Alternatively, a new Neighbour Tribunal could be created, for this purpose.

7.47 There is an argument that if complex legal issues are required to be considered, or if nothing short of a court order would resolve the problem, then mediation through the Community Justice Centres may not be the appropriate forum in those types of disputes.

7.48 However, in the recent case of *Hemmes Hermitage Pty Ltd v Abdurahman*[17] which was heard in the Supreme Court and which involved consideration of real property issues such as registered title, right of footway and easements, Kirby P, suggested the need for mediation irrespective of the cause of action and type of dispute.[18]

CONCLUSION

7.49 There is a need for a flexible, quick, inexpensive and appropriate set of resolution procedures than those that exist at the present time. The Commission

favours the option of an attempt at mediation through Community Justice Centres in the first instance before proceeding (in the event of failure to mediate) to use the court based dispute resolution process. Whether mediation is to be employed in the first instance irrespective of the type of dispute or whether the type of dispute will determine the forum in which the dispute will be resolved is still an unanswered question. However, the main objective to be borne in mind is that mediation and the legal process must be employed to achieve what the people in dispute mostly want - an opportunity to enjoy their home and their neighbourhood in peace with others with the least inconvenience.

QUESTIONS FOR DISCUSSION

Dispute Resolution in Access Disputes

* What is the most appropriate forum for dispute resolution in access disputes?

  - Supreme Court
  - Land and Environment Court
  - District Court
  - Local Court
  - Proposed Neighbour Tribunal
  - Other forum: please specify

* Should the procedure commence by the issue of a notice requesting access and if no access is agreed upon should the matters then proceed to a Tribunal?

* If no response is received to a notice should access be exercised without requiring further notice? If not, what alternatives do you suggest?

* Should the court have a discretion to award costs against one of the parties?

* How should the right to access be enforced?

* Should either party have the power to apply for an injunction to stop the work or to enforce the conditions?

* If the application for access can be sought and granted by the Local Court, should the parties be able to apply for an injunction from the Local Court rather than the Supreme Court?

Joint Services

* Should the Supreme Court in New South Wales have jurisdiction to create the right of user similar to the statutory right of user defined in s180 of the *Property Law Act 1974 (Qld)* and s84J of the *Law of Property Act 1984 (Tas)*?

* Should the Land and Environment Court have jurisdiction in this area?

* If so, should it be an alternative to Supreme Court jurisdiction?

* Should a Tribunal other than those suggested deal with such applications?

Apportionment of costs for Joint services

* Should the issue of apportionment of costs for repairs, maintenance or establishment of a joint service, be dealt with in the Supreme, District or Local Court or some other Tribunal?

Trees

* Problems with trees are normally only actionable when they cause a nuisance. Legal action is limited to damages, or in some cases injunctions. The Supreme Court has exclusive jurisdiction in this area. Is the Supreme Court an appropriate forum for neighbours to settle their disputes concerning trees?

* If not, what would be a better dispute resolution forum?

Noise

* Is it appropriate that noise disputes between neighbours be dealt with by a court?

* Should there be more emphasis on mediation and regulation through orders and fines?

General

* It has been suggested that neighbours should be encouraged to settle their disputes by negotiation, if necessary with the aid of a mediator. How should this take place

* What is the most appropriate forum?

  - Community Justice Centres

  - local authorities

  - Other forum please specify

* Should the choice of the appropriate dispute resolution forum and process (ie whether through the legal process or mediation) be dependent on the type of disputes?

* Alternatively, should the parties be free to decide on the appropriate forum, irrespective of the type of dispute?

* If the parties are amenable to mediation, should the dispute be resolved by the mediation process even if real property issues are to be resolved?

* Should a Neighbour Tribunal be created? If so should it deal only with disputes relating to

  - Noise

  - Trees

  - Noise and Trees

  - Noise, Trees and disputes concerning access and joint service

  - Other matters

* How would matters be referred to a Neighbour Tribunal?

* Should attendance be compulsory?

* Should the Neighbour Tribunal orders be enforceable?

* Should legal representation be allowed?

* Should hearings be bound by the rules of evidence?

Footnotes

1. Letter to the Commission dated 22 April 1983 from Wendy Faulkes, Director, New South Wales Community Justice Centres.

2. New Zealand Property Law and Equity Reform Committee Report on *The Fencing Act 1908 (1972)* at 7.

3. Community Justice Centres Annual Report 1989/90 at 10.

4. W Faulkes, "Resolving Disputes: Community Justice Centres; The Mediation Process" (Being a paper presented to the College of Law Continuing Legal Education Seminars on 15 May 1986) (College of Law, Sydney, 1986).

5. NSW Parliamentary Debates (Hansard), Legislative Assembly, 19 November 1980 at 3147.

6. ibid Hon P Landa at 3585.

7. ibid Hon F J Walker QC at 3147 and Hon P Landa at 3584.

8. Community Justice Centres Annual Reports of 1989/90, 1988/89 and 1987/88 respectively.

9. *Community Justice Centres Act 1983*, s23 (3).

10. NSW Parliamentary Debates (Hansard), Legislative Assembly, 22 November 1990 at 10415.

11. See para 7.26.

12. Kevin Anderson, former Deputy Chief Magistrate of New South Wales, expressed these concerns as follows:

> ..the conventional justice system (adjudication) is not equipped to provide a lasting resolution of disputes between people in continuing relationships.
>
> A court is required to give a judgment only with regard to the particular issue before it. That may be only a single incident in a continuing conflict. The procedural rules are designed to exclude from consideration any concerns not immediately relevant to the isolated issue being litigated. The parties very often in the course of a hearing will be struggling to discuss the whole conflict. Their efforts are frustrated by the court. This is for a good (conventional justice system) reason - relevance. Adjudication, typically, is concerned with questions of right and wrong, winner and loser, guilt and innocence. The conventional justice system rarely even claims to be dealing with the underlying tensions and conflicts.

> Magistrates recognise from experience, the inappropriateness of conventional legal procedures in these disputes.

Quoted in David Williams, *Mediation an Alternative to the Courts for the Settlement of Personal Disputes.* Unpublished paper 1983.

13. Letter to the Commission dated 22 April 1983.

14. Unreported, Supreme Court of New South Wales, 22 March 1991.

15. See para 7.42.

16. *Noise Control Act 1975* s69.

17. Unreported, Supreme Court of New South Wales, 22 March 1991.

18. See para 7.37.

Appendix 1

Summary of Recommendations of UK Law Commission on Rights of Access to Neighbouring Land (Report No 151)

Our principal recommendation

(1) The law should be changed so as to enable a person to obtain a right of access to neighbouring land for the purpose of carrying out work to his own land. This right of access should arise only by virtue of an order made on application to a court.

(para 3.42)

The work for which access should be available

(2) The types of work for which access should be available under the scheme should be limited to *preservation work*. Other types of work should fall outside the scheme.

(paras 4.2-4.6)

(3) "Preservation work" should include any work that is intended to preserve an applicant's property. It should thus include the inspection, decoration, cleaning, care, maintenance and repair of any building, fence, wall or other thing constructed on or under the land, including the strengthening of foundations, damp-proofing and the making good of lost support or shelter.

(para 4.7)

(4) Improvements and alterations done for their own sake should not count as preservation work. However, improvements and alterations that were merely incidental to the carrying out of work that did count as preservation work should be covered.

(para 4.8)

(5) Demolition of a structure (or any part of one) and its rebuilding or replacement should be capable of being treated as preservation work; but an access order should be available for rebuilding or replacement work following demolition only if the work amounted to preservation work.

(paras 4.9-4.11)

(6) The scheme should also apply to non-structures. So it would cover preservation work to trees, hedges and other natural growths.

(para 4.12)

(7) The right of access should, if granted, also permit access to anyone reasonably assisting the applicant in connection with the work; it should also permit the placing on the neighbouring land of materials, plant and equipment needed in the course of the work and any waste arising from the work.

(para 4.13)

The property to be entered

(8) The scheme should, in general, permit entry to any neighbouring land of any description.

(paras 4.14-4.16)

(9) The scheme should not authorise the making of an order against the Crown.

(para 4.17)

(10) The scheme should not apply so as to afford access to the highway.

(para 4.18)

(11) No exception should be made for agricultural land.

(paras 4.19-4.20)

(12) The scheme should not contain any provisions restricting or excluding its application in cases where the access required was either to repair a structure built by the applicant on or close to the boundary or else would be impeded or blocked by something already on the neighbouring land.

(paras 4.21-4.26)

Automatic provisions

(13) The following provisions should be contained in every access order:

(a) *The work:* this provision will describe the work for which access is authorised;

(b) *The land:* this provision will describe the land access to which is authorised;

(c) *Timing:* this provision will include the dates on or between which access is to be allowed.

(paras 4.2,4.34 and 4.39)

Automatic obligations

(14) The following obligations should attach to every access order:

(a) *Access:* the neighbour to be required to permit the applicant to have the access (and any other facilities) provided in the order;

(b) *Making good:* the applicant to be required to reinstate fully the property entered and make good any damage so far as reasonably practicable;

(c) *Indemnity:* the applicant to be required to indemnify the neighbour against any loss or damage to the land resulting from the entry.

(paras 4.31, 4.50 and 4.106)

Conditions of access

(15) The court should have power to impose conditions on any access order, with a view to minimising the neighbour's inconvenience and loss of privacy; to reducing security risks and the risks of financial loss, physical damage or personal injury; to ensuring that the work is done properly and quickly; and to awarding compensation if appropriate.

(para 4.28)

(16) This power should specifically enable the imposition of conditions dealing with the following matters:

(a) *Method of work*: this condition would be that work should be done in a particular way.

(b) *Precautions and safeguards:* this condition relates to the prescribing of precautions and safeguards to eliminate or reduce the risk of damage or injury, or to take account of security risks. It is to be wide enough to provide for the taking out of insurance cover.

(c) *Neighbour's supervision of work:* this condition would be that the work should be done under the neighbour's supervision.

(d) *Reimbursement of fees and expenses:* this condition would be that the applicant should pay any fees and expenses reasonably incurred by the neighbour in connection with the access.

(e) *Giving security:* this condition would be that the applicant should be given security for any payment that might become due from him in connection with the access.

(f) *Compensation:* this condition would be that the applicant should pay compensation for any loss, damage or injury which the neighbour suffers as a result of the access. But no compensation should be payable for nuisance or inconvenience or for the access itself; nor should the enhanced value of the applicant's property (or any consequential reduction of the value of the neighbouring property) arising from the access be relevant for the purposes of assessing compensation.

(paras 4.29-4.61)

The nature of the right of access

(17) A right of access granted under the scheme should not be a permanent right, but should subsist only for the purpose of carrying out the particular project of work for which the right of access was sought. It would thus be a "one-off" right.

(paras 4.62-4.64)

The applicant

(18) There should be no restrictions on the categories of person entitled to apply for access under the scheme.

(paras 4.65-4.67)

The neighbour

(19) There should be no restrictions on the categories of person capable of being treated as neighbours under the scheme: the applicant would be free to make respondent to his application anyone whose interest in the neighbouring land appeared to him to be such as to make it necessary that he be bound by an order.

(para 4.73)

(20) Only a person who was a party to an access order would be bound by it. The effect of a neighbour's being so bound would be to prevent him bringing any action in trespass in respect of the applicant's entry on the neighbouring land in accordance with the order.

(para 4.73)

(21) A person who was not a party to the order would not be bound by it and should be able, for example, to sue the applicant in trespass even though the applicant had entered the neighbouring land in accordance with the access order.

(para 4.73)

(22) An applicant should, however, be entitled to apply to the court, at any time before completion of the work, for any person to be joined as a party to the access proceedings.

(para 4.74)

(23) It should be possible for any party to the access proceedings to apply at any time for the access order or conditions to be varied, suspended or discharged.

(para 4.76)

(24) In a case where, because the neighbouring land is unoccupied, the applicant does not know whom to make respondent to his application, he should be able to apply *ex parte* for an order on satisfying the court that he has taken such steps to identify respondents as are reasonable in the circumstances.

(paras 4.77-4.79)

(25) An applicant should, in general, enjoy no special immunity against actions in nuisance. He should, however, be immune from an action in nuisance brought on the ground that the exercise of the right of access pursuant to an order would interfere with the respondent's easements over the neighbouring land.

(paras 4.80-4.83)

(26) An applicant entering land pursuant to an access order should be immune from prosecution under any provision making it a criminal offence either to trespass, or to enter, or be, on that land without the respondent's consent.

(paras 4.84-4.87)

Jurisdiction

(27) The county court should have an initial, unlimited and exclusive jurisdiction in access proceedings, with power for the proceedings to be transferred to the High Court.

(paras 4.88-4.93)

(28) There should be no preliminary procedure (involving notices and counter-notices) operating prior to the access application.

(paras 4.94-4.95)

Getting the access order

(29) The scheme should contain no detailed guidelines as to the court's exercise of its power to grant access. However, this power should arise on its being satisfied that the work for which access is sought:

(a) is reasonably necessary for the preservation of the land to which the work is to be carried out; and

(b) cannot be done (or would be substantially more difficult or expensive) without that access.

The power should then be exercised in favour of the applicant unless the respondent satisfies the court that, despite any terms and conditions that the court may be prepared to attach to the order, entry by the applicant would cause such hardship that it would be unreasonable to make an order. If, but only if, the respondent is able to satisfy the court on this point, the order should be refused.

(paras 4.98-4.105)

Enforcement of the order

(30) The rights created by an access order should, in principle, be enforceable in the same way and to the same extent (but without the need for separate proceedings) as if they arose out of a contractual right of access expressly created between the parties.

(paras 4.107-4.109)

Costs

(31) In deciding the question of costs, the court should have its normal discretion, which it should exercise in accordance with existing principles, including those applicable where any party is legally assisted.

(paras 4.113-4.118)

Contracting out

(32) The power of the court to make an access order should not be capable of being excluded or restricted by any agreement, whether made before or after the legislation comes into force.

(paras 4.119-4.120)

Appendix 2

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