

AUSTRALIA / JUDGMENT

Nagaya v Athreiya

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Land and Environment Court

New South Wales

Medium Neutral Citation:

Nagaya v Athreiya [2026] NSWLEC 1570

Hearing dates:

17 June 2026

Date of orders:

03 September 2026

Decision date:

03 September 2026

Jurisdiction:

Class 2

Before:

Austin AC

Decision:

The Court orders:

- (1) The Part 2 application is upheld, subject to the following orders.
- (2) Within 30 days of this judgment, the respondents, at their cost, are to engage a minimum AQF Level 3 Arborist with all appropriate insurances, to remove the dead hanging branch located in the tree canopy.
- (3) The respondents are to provide the same arborist with a copy of the Root Investigations Report by Geoff Nugent dated 1 August 2025 found in Exhibit B at Annexure D (Nugent's Root Report). At the respondent's cost, the same arborist is to prune the following roots detailed in Section 2.3.4 of the Nugent's Root Report back to the previous cut points away from the driveway utilising a hand saw or chainsaw.

- (4) Root 1-70mm in diameter, is to be cut at the previous cut point and the section of root between the cut point and the driveway is to be removed. (See image 11 of the Nugent's Root Report for the appearance of the root).
- (5) Root 2-50mm in diameter, is to be cut 20cm from the driveway edge. (See image 15 of the Nugent's Root Report for the appearance of the root)
- (6) Root 4-110mm in diameter. To be cut 20cm from the driveway edge. (See image 15 of the Nugent's Root Report for the appearance of the root).
- (7) Roots 3 and 5 are not to be cut or damaged. (See images 13 and 14 for Root 3 and Image 16 for Root 5 in the Nugent's Root Report for the appearance of the roots).
- (8) No wound dressings or paints are to be applied to the pruned roots.
- (9) The tree and root pruning works shall be completed in accordance with the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016.
- (10) The applicants shall provide all reasonable access for the arborists to undertake their works and to remove debris from the applicants' property upon receipt of at least 72 hours' notice by email of the date and approximate start time of the respective works.
- (11) All works shall be undertaken during reasonable daytime working hours.
- (12) If the respondents fail to comply with the specified timeframes, the applicants are authorised to:
 - (a) engage qualified contractors to perform the required work at the respondents' expense; and
 - (b) recover all reasonable costs as a debt in a court of competent jurisdiction.

Catchwords:

TREES (DISPUTES BETWEEN NEIGHBOURS) — Pt 2 application — neighbouring tree — whether the tree has caused damage — whether the tree is likely to cause damage or injury, — damage to property — severity of damage — whether causation has been demonstrated — severity of damage whether tree removal is required — Orders for root and branch pruning

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW)

Trees (Disputes Between Neighbours) Act 2006 (NSW), Pt 2, ss 7, 8, 9, 10, 12

Uniform Civil Procedure Rules 2005 (NSW), r 31.23

Cases Cited:

Black v Johnson (No 2) [2007] NSWLEC 513

Brown & anor v Weaver [2007] NSWLEC 738

Fang v Li [2017] NSWLEC 1503

Granger v Owners Corporation SP 18494 [2012] NSWLEC 1285

Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152

Smith & Hannaford v Zhang [2011] NSWLEC 29

Stevens v Russell [2016] NSWLEC 1233

Yang v Scerri [2007] NSWLEC 592

Texts Cited:

Australian Standard 4970:2025 (Protection of Trees on Development Sites), 2025

Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016

Category:

Principal judgment

Parties:

Masayoshi Nagaya (First Applicant)

Yim Boonu (Second Applicant).

Ramachandra Venkatraman Athreiya (First Respondent)

Uhsa Ramachnadra Athreiya (Second Respondent)

Representation:

Counsel:

M Wang (Solicitor) (Applicants)

A Johnson (Solicitor) (Respondents)

Solicitors:

Longton Blackwell (Applicants)

MillerPrince (Respondents)

File Number(s):

2026/91523

Publication restriction:

Nil

Judgment

Background

COMMISSIONER: In these proceedings, Masayoshi Nagaya and Yim Boonnu (the applicants) and Ramachandra Venkatraman Athreiya and Usha Ramachandra Athreiya (the respondents) own neighbouring residences in Holsworthy. The parties are in dispute about the alleged damage caused by one large *Corymbia maculata* (Spotted Gum) (the tree) growing near the western boundary in the front garden of 77 Lae Road, Holsworthy.

This is an application made pursuant to Pt 2 of the Trees (Disputes Between Neighbours) Act 2006 (NSW) (the Trees Act). Part 2 provides an opportunity for orders pursuant to s 7 of Pt 2 of the Trees Act to remedy damage caused by a tree and to prevent the tree from causing damage or injury.

The Court has reviewed the Tree Dispute Application Form C (Exhibit A), the Claim Details Form H (Exhibit B) which includes the Tree Risk Assessment Report and Root Investigations Reports by Geoff Nugent as Annexures and the Structural Engineers report by Adrian LaManna (Exhibit C). The Court has also reviewed the respondents' material including the Arborist Report by Mark Hartley (Exhibit 1), the Respondents' Alternative Orders (Exhibit 2) and the Liverpool Council Tree Removal Determination TP-18/2024 (Exhibit 3).

Application to the Court

The applicants applied for orders pursuant to s 7 of Pt 2 of the Trees Act to prevent the tree from causing future damage or injury. The tree is situated on adjoining land.

The applicants seek orders to have the respondents remove the tree.

The respondents like the tree and associated fauna and wish to retain the tree. Alternative orders proposed by the respondents, include the retention of the tree and root pruning as described by their expert with a 50% contribution by the applicants for any proposed pruning works.

Notice of the application

The applicants gave notice of their application as required by s 8 of the Trees Act.

Jurisdiction to make orders

The orders that the applicants seek are orders the Court could make under s 9 of the Trees Act if all jurisdictional tests are met, although the Court may make different orders as it sees fit in the circumstances.

Reasonable effort to reach agreement

The applicant's solicitor sent a letter to the respondents in May 2025 requesting removal of the tree. The respondents produced the Liverpool Council Tree Removal Determination TP-18/2024 (refusal) which indicated that any further consideration would require additional expert reports. In or around August 2025, the applicants commissioned an arborist and a structural engineer who both completed inspections of the damage at the applicants' property allegedly caused by the tree and produced expert reports. On or around 29 August 2025, the applicants' solicitor provided the reports to the respondents along with a letter requesting the respondents to make a new application to the Liverpool City Council regarding the removal of the tree and if successful, the applicants stated that they were willing to contribute 50% of the tree removal costs. In November 2025, the respondents replied to the applicants' solicitor asserting that none of the expert reports provided by the applicants recommended removal of the tree. I am satisfied that a reasonable attempt to reach agreement has been made as required by s 10(1)(a) of the Trees Act.

The on-site hearing

The hearing took place on site, allowing the Court to observe the tree and both properties. Following introductions on the footpath, the on-site hearing commenced in the front yard of the applicants' property with an inspection of the purported damage. The Court next inspected and assessed the respondents' front yard and the tree. The Court then heard submissions from both parties while seated around a table located on the respondents' driveway. Mr Wang represented the applicants, and Ms Johnson represented the respondents. No experts were in attendance.

The site conditions

The applicants' property includes a brick front fence, double concrete driveway, double garage and a two storey brick house. The driveway and front fence were constructed in December 2005.

The respondents' house is a single storey house with a large front lawn beneath the tree. The respondents' driveway is on the eastern side of their yard, away from the tree.

There is no boundary fence between the front yards and the facades of the buildings. The location of the tree trunk would interrupt any boundary fence that was constructed, and the fence would need to be boxed around the trunk.

The tree concerned

The tree subject to the application is one large *Corymbia maculata* (Spotted Gum) located on the northwestern boundary in the front garden of 77 Lae Road Holsworthy. The canopy of the tree overhangs both the applicants and respondents houses as well as the Council foot path which has both Low and High Voltage powerlines located above. The tree appears to be reasonably sized tree in the aerial image from 2004 provided in Image 3 of the respondents Arborist Report by Mr Hartley (Exhibit 1).

The tree ownership

The tree is located on the front side boundary of the respondents' land. According to Mr LaManna, part of the trunk extends onto the applicants' land by 250mm (Exhibit C).

According to Geoff Nugent's Tree Risk Assessment Report (Annexure C in Exhibit B) (Nugent's Risk Report) The tree is located approximately 1.6m (measured from the centre of the stem) from the applicants' driveway to the west.

Where more than 50% of the base of the tree is located on the respondent's property, it should be regarded as being "situated...principally" on that property as seen in *Brown v Weaver* [2007] NSWLEC 738.

With the adduced evidence and the alignment between the eastern end of the front wall and the boundary fence that begins at the facade of the applicants' land, I am satisfied that the majority of the tree is located on the respondents' land and therefore will be considered to be principally on the respondents' land.

The tree condition

The trees attributes are accurately described in Nugent's Risk Report in Sections 2.1.1-2.1.7. Key attributes include:

"2.1.4 The Structural Root Zone was calculated as being 3.51m in radius and the Notional Root Zone was calculated as being 12.72m in radius."

2.1.5 The tree had good vitality with foliage, and form, typical of the species. There was no sign of terminal die-back in the upper canopy. The tree is considered to be structurally acclimatised.

2.1.6 Several defects were observed in the subject tree including a branch stub with fungal bracket located on the eastern side at approximately 2m, slight swelling of the trunk in the same location (Image 2), evidence of a live branch [estimated to be 120mm in diameter – length unknown] that had snapped out over the applicant's driveway and a large piece of deadwood hanging in the canopy approximately 3.5m long with an estimated diameter of 120 - 150mm (Image 3). There was also evidence of deadwood that is assumed to have fallen previously from the tree placed in a pile at the front of the respondent's property (Image 4)."

At Section 3.1.2, the Nugent's Risk Report accurately describes the previous branch loss:

"3.1.2 At the time of inspection there was evidence of what appeared to be one live branch that had snapped out. Based on this observation, it is reasonable to assume that although live branch failure is possible, a pattern of branch failure has not been typical for this tree."

At Section 3.1.4, the Nugent's Risk Report accurately describes the deadwood observed in the canopy:

"3.1.4 The tree was observed to have minimal deadwood. As a result, failure of attached deadwood was not considered a condition of concern."

The Nugent's Risk Report describes the current vigour of the tree to be good with a High Retention Value (HRV) using the Significance of a Tree Assessment Rating System (STARS - IACA 2010).

After inspecting the tree in the site view, and applying my own Arboricultural expertise, I agree with the content in sections 2.1.1 – 2.1.7, 3.1.2 and 3.1.4 of the Nugent's Risk Report. I did also observe a relatively new polyvinyl chloride (PVC) sewer and stormwater pipes that have been installed in the front yard of the respondents' land being at 77 Lae Road Holsworthy. Both the PVC sewer and stormwater lines cross the 3.51m structural root zone (SRZ). Evidence of the location of the pipes included the access vents near the front fence and the connection points to the house that were identified by the respondents. The respondents revealed that the PVC sewer and stormwater pipes were installed following the removal of a turpentine tree in the front yard in 2024. No information regarding root protection was available to the Court and the possibility of root damage must be considered if further root pruning is to be ordered.

Risk assessment

The Nugent's Risk Report applies the International Society of Arboriculture Tree Risk Assessment Qualification (TRAQ). In the TRAQ form, Mr Nugent has indicated that the tree presents a moderate risk due to an imminent likelihood of ongoing and further minor damage to the driveway.

In review of the TRAQ definitions, minor property damage is considered to include low to moderate value damage to property and may include damage to a structure requiring inexpensive repair. The use of minor consequences results in the moderate risk allocation, and I am aligned with the inputs to the TRAQ method.

The large piece of deadwood hanging in the canopy is approximately 3.5m long with an estimated diameter of 120 - 150mm (Image 3 in the Nugent's Risk Report) also presents as moderate risk. I find that the dead branch does present an elevated risk to cars on the driveway and removing this branch will reduce the risk of damage.

The root investigations

The root attributes are somewhat described in Mr Nugent's Arboricultural Assessment and Root Investigation Report (Annexure D in Exhibit B) (Nugent's Root Report). During his investigation of potential root / driveway conflicts, Mr Nugent excavated a trench between the tree and the edge of the driveway using an Air-Spade[®] to assess for the presence of roots that may be impacting the driveway. The trench was measured using a surveyors height stick and significant roots were sprayed blue with line marking paint to make them visible in the photographs.

Mr Nugent identified five roots in the trench he exposed beside the driveway that are all located in the SRZ.

Root 1 was located near the front brick fence. The root was found to have been previously cut. The new root originating from the cut point is 70mm in diameter, runs parallel with the front brick wall and has direct contact with the underside of the driveway.

Root 2 was approximately 50mm in diameter and runs directly beneath the applicant's driveway.

Root 3 was approximately 225mm in diameter and runs directly beneath the applicant's driveway.

Root 4 was approximately 110mm in diameter and then branches into several smaller diameter roots which continue beneath the applicant's driveway. It is assumed that Root 4 was previously cut due to the branching habit.

Root 5 was "stub shaped" and appears to dive down into the soil. No measurements were provided.

Notably, Mr Nugent did not identify any roots in the 1.4m of trench between Root 5 and the garage.

I observed the open trench during the site view I agree with the findings of the Nugent's Root Report listed in [28] and [29] that Root 1 was the only root in contact with the driveway concrete.

The turpentine

A mature *Syncarpia glomulifera* (Turpentine) was removed from the front yard of the respondent's land in 2024 due to poor condition through repeated powerline clearance pruning. While the trunk was not as large as the tree subject to these proceedings, the turpentine was located closer to the damaged front fence at 77 Lae Road Holsworthy than the tree subject to these proceedings (Exhibit 1, Image 4).

The alleged damage

The applicants' experts suggest that the damage caused by the tree includes displacement of the front fence which is out of alignment and the driveway slabs are displaced with minor lifting and cracking. Furthermore, they contend the front gate no longer functions as the latch does not align.

Overall, I consider the damage detailed by Mr LaManna in his report (Exhibit C) to be minor.

Key findings from the LaManna report are noted at 2.0 of his report.

The driveway slab is in good condition. It had been lacquered a week prior to the inspection.

Brickwork to the residence within the vicinity of the zone of influence of the tree is intact with no cracking visible.

Concrete slab in the garage is in good condition with only signs of wear and tear due to the age of the structure. Cracking in the northeastern corner of the garage is located within the mapped zone of influence of the root system from the tree.

The front fence is out of plumb by 25mm over its full height leaning towards Lae Road. The roots are pushing on the fence foundations.

Saw cut construction joint found 2.570m from front fence adjacent to the tree has lifted and separated. The front panel has risen approximately 5mm higher than the adjacent panel. This construction joint is located approximately centreline of the trunk to the tree.

Gate post at front fence no longer locks. Steel post is 10mm out of plumb over its height. The slotted hole for the lock has been extended several times, but the gate has now become unserviceable.

Mr LaManna concluded at 3.0 of his report.

From the inspection carried out, it was found that the tree has had an effect on the property. The tree is causing damage of the driveway at 77 Lae Road Holsworthy via direct contact of the lateral roots radiating from the neighbouring tree.

The roots against the front boundary wall will also continue to push the front wall out of plumb and may destabilise the wall.

Whether the tree has caused, or is likely to cause damage

Part 2 s 10(2) of the Trees Act states:

- (2) The Court must not make an order under this Part unless it is satisfied that the tree concerned—
 - (a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or
 - (b) is likely to cause injury to any person.

In *Smith & Hannaford v Zhang* [2011] NSWLEC 29, Craig J discussed at [38] the need for a causal nexus to exist between the tree and the damage to, on the balance of probabilities, satisfy the test at s 10(2)(a) of the Trees Act.

If one or more of these tests is satisfied, the Court can move to consider the discretionary questions of whether the damage or risk is sufficiently serious to warrant the intervention of the Court, and if so, what should be ordered and who should pay.

The expert evidence

Despite three experts having inspected damage to the applicant's property, there is limited conclusive evidence of the alleged property damage that has been adduced in these proceedings.

All expert reports were prepared as expert evidence and each report acknowledges receipt of the Code referred to in r 31.23 of the Uniform Civil Procedure Rules 2005 (NSW) and agreed to be bound by it.

As pointed out by Mr Hartley at par 24 in the respondents Arborist Report:

“24. The [sic] engineers report provides a little more detail on the alleged damage than the arborist report. However, it fails to provide any geotechnical data, or calculation on the pressures exerted by roots, the driveway’s mass or the soil load bearing capacity. Rather, it assumes the damage is solely due to root growth. In the absence of any calculations, I am unable to verify any assertions about the tree causing damage.”

Mr LaManna’s brief was to assess the damage caused to the applicants’ property by the tree. Mr LaManna has not carried out the type of investigation that would be necessary in these circumstances to form a concluded opinion.

While Mr LaManna’s descriptions of the damage to the wall and slab are useful, the Court cannot rely upon his conclusions or recommendations. Galwey AC describes the type of investigations and evidence that might assist a party to demonstrate a causal nexus, where one exists in *Fang v Li* [2017] NSWLEC 1503 at [58] – [60]:

“[58] At this point, it may assist future parties applying to the Court pursuant to Part 2 of the Trees Act, where such applications include claims of structural damage to property, to provide some framework for inquiry that might assist an engaged expert to carry out the relevant investigations that would assist the Court to consider and determine the matter. This list of investigations is not exhaustive but would assist in forming a sound chain of reasoning to demonstrate causation, and to eliminate other factors. Each site is unique, and each situation may require its own combination of investigations.

[59] In cases where it is alleged that tree roots are causing structural damage to a building or other property, consideration of the following matters, via appropriate investigations, may provide useful information.

“(1) If roots are found near footings, especially in areas where footings have moved, it is necessary to identify the tree to which the roots belong. This may be possible by physically tracing a root’s path, or may require microscopic or DNA analysis. An arborist can provide useful information regarding species and growth traits of any nearby trees.

- (2) It is important to collect information on the building’s history and construction methods, as well as the history of the surrounding area, including any trees removed in recent years.
- (3) The age, depth and construction type of the footings, especially in areas where footing movement is identified, is relevant and should be investigated and reported.
- (4) Identifying the part of the building or structure that has moved, and in which way it has moved, is critical to determining causation. This might be done by undertaking a survey of the building or structure to identify and be able to demonstrate where and how it has moved and the nature of the movement (whether lateral, rotational or vertical). This is important as some movements of a building or structure may not, in the circumstances, be possible to attribute to a tree.

- (5) Knowledge of where the building is still actively moving, during which seasons, and in which directions, will further assist in identifying causation. Where time constraints allow, this might be done by repeating the level survey over time, as well as monitoring any cracking patterns.
- (6) Where footing movement is identified, it is important to know the ground conditions and soil moisture conditions in the vicinity of movement, as well as in other areas for comparative purposes. This can be done by undertaking routine soil investigation, such as boreholes for soil classification and soil moisture testing. If these conditions vary over time as a consequence of seasonal or other climatic conditions, more extensive testing to ascertain the impact of such variable conditions may be required.
- (7) Downpipes and other pipes near the building, especially those near any areas of relatively higher soil moisture levels, can contribute to movement of footings. Therefore, the condition of all downpipes and other pipes should be investigated and reported.”
- [60] To the extent to which the Court must be satisfied of causation, the burden of proof lies with the applicant. Such investigations would ordinarily be expected of an engineer engaged by an applicant to demonstrate the cause of structural damage. It would be unusual for an engineer to be able to demonstrate cause by simply recording the locations of cracking and noting the proximity of trees and locations of tree roots. Reports that include consideration of the above matters, with photographs and plans that clearly show their findings, would greatly assist the Court.”

The Court has not been informed of the build quality of the concrete slabs, slab thickness or any other direct root contact other than Root 1, which I note is not near the cracks in the slab. The footing quality and suitability of the front wall is also omitted from the evidence.

The onus to demonstrate causation lies with the applicant. The applicants Arborist Report (Exhibit B) and Structural Engineers Report (Exhibit C) do not investigate those key factors to show causation.

In *Stevens v Russell* [2016] NSWLEC 1233 at [41], Commissioner Fakes notes that:

“it is a common assumption that the mere presence or proximity of a tree is sufficient to conclude that the tree is the cause of the damage. It is not. It is necessary to find evidence to substantiate the assumption that the tree has caused the damage. In the case of alleged root damage, some excavation is usually required.”

The Nugent’s Root Report does provide sufficient detail to show there are five roots beneath the driveway, however, only Root 1 was shown to be in contact with the driveway slab.

Considerations

The driveway slab has been lifted, there is some minor cracking, and the front wall is slightly displaced, although adduced evidence does not demonstrate the causes, relying on my own expertise, I expect the large woody roots required to support the large tree will spread at least some distance beneath the concrete driveway. Taking the applicant's case at its highest, I accept that root growth might have contributed to damage, but other factors may also have had some influence. Nevertheless, due to the tree's proximity to the driveway slab, I find that the root growth is likely to continue to cause minor damage to the driveway slab in the near future and s 10(2)(a) of the Trees Act is enlivened.

In *Granger v Owners Corporation SP 18494* [2012] NSWLEC 1285 at [12], Commissioner Fakes indicates that even relatively minor damage engages the Court's jurisdiction. However, Commissioner Fakes suggests the extent of the damage may influence the orders the Court makes.

At present, only minor cracking and displacement of the driveway slabs and minor displacement of the front fence is observable, I do not consider the minor damage warrants interference by the Court.

The tree was present when the applicants constructed their driveway. The driveway comes to within 1m of the tree's base. I find the damage was foreseeable. The tree's presence, and future root growth, were not sufficiently considered when the driveway and fence were installed. It appears that the driveway and fence could have been located further from the tree (see *Black v Johnson (No 2)* [2007] NSWLEC 513) (Black). Alternatively, the driveway and fence have been constructed with consideration for the likely effects of tree root growth.

The Black principle might be relevant in ordering the apportionment of costs for any repairs, but no compensation is sought, only removal of the tree.

Likelihood of further damage

Regarding the likelihood of further damage, there is nothing within the applicant's evidence to satisfy the Court that the existing minor damage to the driveway and fence is likely to increase in severity in the near future. In *Yang v Scerri* [2007] NSWLEC 592, at [14], the Court established a principle that 'the near future' (at s 10(2)(a) of the Trees Act) might best be considered in tree disputes as a period of 12 months. The Court has consistently relied upon this principle.

The large piece of deadwood hanging in the canopy approximately 3.5m long with an estimated diameter of 120 - 150mm (Image 3 in the Nugent's Risk Report) is likely to fall in the near future and orders will be made to address this dead branch.

Discretionary matters – s 12

In *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 (Robson), Chief Justice Preston provided commentary on environmental considerations under s 12 of the Trees Act at [203]:

“The matters concerning the values of the tree and its environmental contribution are notable additions to the matters recommended by the Law Reform Commission in its report. The Law Reform Commission report was relatively quiet about environmental factors, in contrast to the earlier discussion paper which had emphasised the environmental values of trees. The legislature, however, took a different view and required the Court to consider environmental factors. This was a point specifically made in the second reading speech:

“The provisions that require the Court to consider environmental factors prior to making an order are in recognition of the importance of urban trees as an environmental asset. Urban trees play a proven environmental role in every urban society. They provide energy savings through lower cooling costs, reduce stormwater run-off, help reduce salinity and provide aesthetic and social benefits associated with being in proximity to nature. The bill therefore recognises the environmental contribution of urban trees as a factor that the court must take into consideration in determining applications.”

In making an order, the Court considers relevant matters in s 12 of the Trees Act.

The tree is located in the respondent's property (s 12(a)).

Pruning or removal of the tree/s would require consent from Council under the Environmental Planning and Assessment Act 1979 (NSW) (s 12(b)).

The tree contributes to protection from the sun and adds to the natural landscape and amenity of the respondent's property, and to the locality. The tree is close to and prominent from the street and thus has intrinsic value to public amenity (ss 12(b3), 12(e) and 12(f)).

With a dense canopy, large size, and being a native species, the tree could be expected to provide food and shelter for local fauna and thus would contribute to local biodiversity (s 12(d)).

The tree is likely to be providing some benefit to soil stability, and, particularly, to absorbing water and reducing run off (s 12(g)).

The respondents have not contributed to the damage through any act or omission (s 12(i)).

The age of the driveway slab and front wall must also be considered. A certain amount of wear and tear is expected to arise with any structure over time. The Court considers these matters when determining the extent to which a tree may or may not have caused the alleged damage. (s 12(j)).

The management options

Three management options present themselves.

Remove the tree.

Reconstruct the driveway and fence.

Perform root pruning and dead wood removal.

Tree removal

Having balanced the tree's value and its benefits against the minor property damage observed, I accept the respondents' submissions that removing the tree is a disproportionate response for the current extent of damage and tree removal is not considered to be a reasonable management option.

Reconstruct the driveway

While the driveway could be demolished and reconstructed in a manner sympathetic and accommodating to tree roots, (similarly for the front fence), I observed only minor damage to a fully functional driveway. The driveway slab is in good condition according to the applicant's own expert (Exhibit C). Therefore, this management option is not considered reasonable.

Root pruning and deadwood removal

The applicants' experts contend that root pruning is not possible as the location of the required root pruning is in the SRZ of the tree.

Australian Standard 4970:2025, Protection of Trees on Development Sites, 2025 (AS 4970:2025) defines the SRZ at s 3.4 as the "notional area required for tree stability". Many factors affect the size of the SRZ (e.g. tree height, crown area, soil type, soil moisture). Natural and built structures such as rocks and footings can also influence the SRZ.

As the SRZ can be influenced by such factors, I do not consider it is a sufficient argument to claim that tree removal is required because the proposed root pruning is in the SRZ, especially when a tree with HRV is the subject. Mr Hartley has similar commentary in par 40 (Exhibit 1).

At s 3.3.6 of AS 4970:2025, it is indicated that if works are to occur in the SRZ, then a project arborist shall be engaged to explore alternative designs or demonstrate that the tree will remain viable. Relevant factors in s 3.3.2 should also be considered. The relevant factors in s 3.3.2 for this situation include:

"(a) the location and distribution of roots

- (b) potential loss of root mass resulting from the encroachment (number and diameter of roots)
- (c) tree species and tolerance to root loss
- (e) age, health, current size and projected size of the tree
- (i) lean and stability of the tree
- (j) soil characteristics and volume, topography and drainage

(m) whether a root investigation is required....”

The Nugent’s Root Report has provided suitable information to determine the location and size of the roots that are in proximity to the damage.

The tree has good vigour and vitality, it has an upright form with no lean and is considered stable. I would expect this species when in good health to tolerate some root loss.

Mr Hartly in Exhibit 1 pars 41 and 42 has placed the tree and roots into a root loss calculator. Mr Hartley contends that cutting Roots 1 to 4 detailed in the Nugent’s Root Report would be limited to 1/3 of the tree’s circumference and would result in an 8.5% of the total root mass. While considerable thought has gone into the creation of the root loss calculator utilised and developed by Mr Hartley, I do not align with the findings being adequate to rely on with sufficient confidence. The root loss calculator has numerous references to scientific literature to support the hypothesis, however, there is no benchmark study displaying results that can support the claims contained within. In this circumstance, whole tree failure has a high likelihood of causing a severe consequence, and I am not satisfied pruning Root 3 will not have an impact on the stability of the tree.

I accept that some previous root pruning on the applicants’ side has been tolerated by the tree. Additional root damage may have occurred in the SRZ in the respondents’ land with the recent trenching to install the sewer and stormwater pipes, potentially adding to the root loss suffered. Furthermore, and importantly, the tree has a long-established fungal bracket typical of *Phellinus* sp., located at 2m height on the trunk. *Phellinus* sp. is a pathogen that causes wood decay and often results in strength loss. In this circumstance the extent of decay has not been investigated, however the good health and vitality of the tree suggest the decay has been effectively compartmentalised. Pruning large diameter roots such as Root 3 close to the trunk base can result in a loss of vitality and the pathogen could exploit any resulting deficiency in the tree’s current ability to compartmentalise decay. The pruning of a 22cm diameter root close to the root crown will result in a large wound face that will be slow to close and leave the root crown exposed to further colonisation of the decay for a considerable length of time. Considering these compounding factors, I would not support the cutting of the largest root of 22cm diameter (Root 3). Roots 1, 2 and 4 can be cut without elevating the concerns raised in this paragraph. Root 4 is closest to the cracking in the slab and Root 1 is in contact with the slab.

The deadwood hanging in the tree as indicated in image 3 and par 2.1.6 of the Nugent’s Risk Report must be removed from the tree as it is likely to fall in the near future.

When orders are made by the Court, respondents generally carry the financial burden for the execution of such orders, unless there are extenuating circumstances. Although the respondents claimed they should not be liable for the cost of orders made due to the pre-existence of the tree, and the judgment of Black provides for apportionment of liability. I consider the absence of a compensation claim by the applicants for the minor damage to property to constitute a reasonable outcome for the respondents, and a fair apportionment of liability between the parties due to the relatively small amount of tree work proposed.

Conclusion

The tree provides significant benefits to the respondents and the wider community.

Pt 2 of the Trees Act has been enlivened by the minor damage to property that has occurred.

Having balanced the tree's value and its benefits against the minor property damage which was observed, I accept the respondents' submissions that removing the tree is a disproportionate response for the current extent of damage.

The tree was growing in its location at the time of the building construction. The close proximity of the tree to the driveway creates a foreseeable risk of future damage that could have been considered at the time of construction.

I was not convinced that the minor cracks on the tree side of the garage slab could be attributed to the tree as the garage slab also had minor cracks on the side of the garage located away from the tree.

The front wall may have been displaced by the previously removed Turpentine and there is insufficient evidence to prove otherwise. Root 1 from the tree, subject to this proceeding, runs parallel with the wall and then under the driveway. There was no evidence to suggest that it has caused the footing to rotate.

While the observed property damage may slowly increase in severity over time, the likelihood of this damage becoming significant or warranting intervention in the near future is remote. The evidence adduced does not indicate that the damage will become more significant in the near future.

The applicants have not attempted repair works on the front wall or gate latch. The applicants can undertake remedial works to repair the gate latch and front wall as they see fit. No claim has been made for costs associated with the damage (Exhibit A) and no orders will be made for compensation for any remedial repair works.

The removal of the dead branch and the pruning of the smaller roots can be ordered by the Court and will reduce the risk of further/more severe property damage or injury in the near future.

Orders

The Court orders:

The Part 2 application is granted, subject to the following orders.

Within 30 days of this judgment, the respondents, at their cost, are to engage a minimum AQF Level 3 Arborist with all appropriate insurances, to remove the dead hanging branch located in the tree canopy.

The respondents are to provide the same arborist with a copy of the Root Investigations Report by Geoff Nugent dated first August 2025 found in Exhibit B at Annexure D (Nugent's Root Report). At the respondent's cost, the same arborist is to prune the following roots detailed in section 2.3.4 of the Nugent's Root Report back to the previous cut points away from the driveway utilising a hand saw or chainsaw.

Root 1 - 70mm in diameter, is to be cut [HL3.1]at the previous cut point and the section of root between the cut point and the driveway is to be removed. (See image 11 of the Nugent's Root Report for the appearance of the root).

Root 2 - 50mm in diameter, is to be cut 20cm from the driveway edge. (See image 12 of the Nugent's Root Report for the appearance of the root).

Root 4 -110mm in diameter, is to be cut 20cm from the driveway edge. (See image 15 of the Nugent's Root Report for the appearance of the root).

Roots 3 and 5 are not to be cut or damaged. (See images 13 and 14 for Root 3 and Image 16 for Root 5 in the Nugent's Root Report for the appearance of the roots).

No wound dressings or paints are to be applied to the pruned roots.

The tree and root pruning works shall be completed in accordance with the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016.

The applicants shall provide all reasonable access for the arborists to undertake their works and to remove debris from the applicants' property upon receipt of at least 72 hours' notice by email of the date and approximate start time of the respective works.

All works shall be undertaken during reasonable daytime working hours.

If the respondents fail to comply with the specified timeframes, the applicants are authorised to: engage qualified contractors to perform the required work at the respondents' expense; and recover all reasonable costs as a debt in a court of competent jurisdiction.

A Austin

Acting Commissioner of the Court

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Decision last updated:

04 September 2026

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