

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Whalley v Chambers & Anor* [2020] QCAT 20

PARTIES: **MARGARET EUGENE ANN WHALLEY**
(applicant)

v

**SEAN PATRICK CHAMBERS AND MIRINDA
EMMA GROSSE**
(respondents)

APPLICATION NO/S: NDR134-18

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 13 January 2020

HEARING DATE: 12 August 2019

HEARD AT: Gympie

DECISION OF: Member Milburn

ORDERS:

- 1. At their cost, the Respondents are to prune Tree 1 & Tree 4 to remove dead branches greater than 20 millimetres in diameter.**
- 2. The Respondents are to undertake the work stated in Order 1 within 90 days, and it must be conducted by an Australian Qualified Framework ('AQF') level 3 Arborist with relevant insurances.**
- 3. At their cost, the Respondents are to maintain Tree 2 back to the boundary line once a year.**
- 4. At their cost, the Respondents are to arrange for the conduct of a Visual Tree Assessment on Trees 1, 3 & 4, every second year or after a large weather event with a rating of Beaufort scale 9 (strong gale 76-87 km/h. 41-47 knots) or greater. Any required works resulting from this reassessment must be carried out by the Respondents within 90 days of the reassessment. The reassessment of the Trees must be completed by an AQF level 5 Arborist with the relevant insurances.**
- 5. In these Orders, the Trees are such as identified in the Tree Assessment Report prepared by Benjamin Inman dated 21 January 2019.**
- 6. The Tribunal makes no order in relation to costs.**

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES, VEGETATION AND HABITAT PROTECTION – DISPUTES BETWEEN NEIGHBOURS – where Application for a tree dispute filed – where it is alleged Trees pose a serious risk of injury or damage – where Applicant seeks Tree on Respondents’ land to be removed – where the Applicant then seeks an order due to branches overhanging the common boundary – whether Tree debris constituted a substantial, ongoing and unreasonable interference

ENVIRONMENT AND PLANNING – TREES, VEGETATION AND HABITAT PROTECTION – DISPUTES BETWEEN NEIGHBOURS – whether injuries were sustained as a result of fallen Tree debris – remoteness

ENVIRONMENT AND PLANNING – TREES, VEGETATION AND HABITAT PROTECTION – DISPUTES BETWEEN NEIGHBOURS – where the Trees were present before the Applicant bought her property – severe weather – abnormal event – whether the Trees represented an unacceptable risk to health or safety– whether a Tree Order should be made

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 41(1), s 42, s 45, s 46, 47(1), s 49, s 52(1), s 55, s 56, s 61, s 63, s 65, s 66, s 72, s 73(1), s 74, s 75

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented by Mr S Chambers

REASONS FOR DECISION

- [1] Mr and Mrs Whalley moved to Gympie in 2017, acquiring an established home in the sole name of Mrs Whalley (‘the Applicant’). They encountered difficulties, allegedly, as a result of falling branches and debris from the existing trees on a neighbouring property, owned by Mr Chambers and Ms Grosse (‘the Respondents’ or ‘tree-keepers’).
- [2] Mrs Whalley also says she suffered injury, because of the fallen branches and debris.
- [3] Mrs Whalley did not bring an Application requiring the Respondents to pay compensation to her for damage alleged to her land or property on her land.

- [4] On 14 February 2018, Mr and Mrs Whalley sent a letter to the Respondents in the following terms:

26 Crown Road Gympie QLD 4570,

14th February 2018

To the House Owner

We have now lived at the above address for 12 months. Over the past 12 months we have had to clear leaves, bark and other tree debris landing on our roof and into our yard from trees growing on your property on a far too regular basis. Recently we have had a Builder and a Tree Arborist inform us that your trees are placing our home in Grave Danger. Therefor [sic] we request that you have this Danger removed. We have had Large Branches fall on our roof, thus we feel compelled to send a copy of this letter to insurance company as proof that you have been notified.

Yours faithfully

Mr & Mrs J Whalley.

- [5] On 25 June 2018, Mrs Whalley filed an application¹ ('the Application') with the Queensland Civil and Administrative Tribunal ('QCAT' or 'the Tribunal'), which noted Mr Chambers and Ms Groff [sic] as the Respondents. In the Application, Mrs Whalley indicated that:

- (a) She had attempted to resolve the dispute with the Respondents, but Ms Groff [sic] said, 'if you want the f... ing trees cut down, f... ing cut them yourself'.
- (b) Branches from the Respondents' trees exceed the boundary line by more than 2 metres.
- (c) 90% of the said trees are hanging over the boundary line with branches exceeding 2.5 metres.
- (d) No tree has caused serious injury to any person, but she feels it is likely to cause serious injury within the next 12 months.

'I feel I take a risk every time I go outside. On windy days branches are always falling in my yard from the neighbour's trees'.²

- (e) A tree has caused serious damage to their land or property on their land.

'Falling branches have made holes in our stainless steel gutter guard which cost us \$1800 when we had it installed last year'.³

- (f) There is nothing other than the trees that have contributed, or are contributing, to the damage.
- (g) There is nothing she has done to contribute to the damage.
- (h) There is nothing she could have done that has contributed, or is contributing, to the damage.

¹ Application dated 25 June 2018.

² Ibid page 6 [11].

³ Ibid [13].

- (i) *Given that Mrs Whalley sought an order of the Tribunal to destroy the trees, she answered questions 19-22 in the Application.* Mrs Whalley said she was aware of the damage for 12 months, that the Respondents have not taken any steps to prevent the damage and that she could not have taken any steps to prevent further damage.

‘The trees on Chambers/Groff [sic] land are far too large for us to handle’.⁴

- (j) The Trees have caused substantial, ongoing and unreasonable interference with her use and enjoyment of the land.

‘I am in fear of large branches falling on my house consequently we lack sleep which is affecting our health’.⁵

- (k) The Respondents have not taken any steps to stop or reduce the interference.

- (l) She has not taken any steps to stop or reduce interference as the ‘trees too large need arborist’.⁶

- (m) The trees were on the Respondents’ land at the time she acquired her property.

‘Obviously they were. I thought they would be good for the Queensland hot weather. I did not realise the poor condition they were in.’⁷

- (n) The trees are not causing an obstruction of sunlight or view.

- (o) No consent or other authorisation from a government authority is needed to carry out work on the trees. For example, no local laws or legislation such as the *Nature Conservation Act 1992* (Qld), or the *Vegetation Management Act 1999* (Qld) are relevant in this case.

- (p) There are risks associated with the tree in the event of a cyclone or other extreme weather event.

- (q) The orders sought from the Tribunal are:

- (i) to remove the trees; and
- (ii) that a person may enter the Respondents’ land to carry out the order; and
- (iii) that the Respondents pay the costs for carrying out the orders; and
- (iv) that an appropriately qualified arborist prepares a report.

- (r) The orders are necessary.

Over the past 12 months I have had builders and arborists tell me that these trees present a real danger to my husband and I with the real possibility of them coming down on my house. Therefor [sic] I cannot rest comfortably until the danger is removed.⁸

[6] Mrs Whalley supplemented the Application with a single quotation (and two accompanying photographs) from Tree Logistics of Coolum Beach issued by Eric

⁴ Ibid page 9 [21].

⁵ Ibid [23].

⁶ Ibid page 10 [27].

⁷ Ibid page 11 [29].

⁸ Ibid page 15 [40].

Wensing dated 19 June 2018 ('Tree Logistics'). The quotation was for the sum of \$10,450.00 (inclusive of GST) for work described as:

Price to remove large eucalypt, large Cadghi [sic], prune 2nd large eucalypt and remove the Golden Dewdrop (*Duranta erecta*) including stump grinding of the 3 removed trees. Price includes climbing of all trees, and removal of each branch by rope or as possible to drop the branches into the yard below, from the site. See the attached photos.

[7] On 23 August 2018, the Respondents filed a response⁹ ('the Response') with QCAT. In the Response, they indicated that:¹⁰

(a) They do not agree with aspects of the Application. Specifically, in the context of the matters in the Application to which they do not agree, they said (*including a reference to the original paragraph numbering in the Application*):

11. 'been advised very little risk (by arborist)';

13. 'any property damage will be covered by applicants [sic] insurance';

17. 'you could have trimmed overhanging branches if you were so concerned';

23. 'never had complaints from previous owners over 12 years'; and

29. 'advised by arborist trees in good condition & have been there for over 80 years & and [sic] full of local fauna, i.e. birds & koalas'

(b) They want the Tribunal to make an order to 'disregard & reject entire application'.¹¹

(c) The reasons they considered the orders sought by the Applicant should be dismissed are:

1. These trees are over 80 years old & full of local fauna (birds, koalas) and are in the heart of town & are a local icon, lots of people including myself would be in an uproar if they were removed or harmed in any way.

2. The trees were there when the applicants [sic] bought their house only 12 months ago & they should have done due diligence on their part.

3. I bought the property 12 years ago because of these trees being present.

4. If these trees have posed such a danger & and [sic] health risk as alleged why has the applicant not trimmed the overhanging branches at their (relatively conservative) cost.

5. I find it bizarre that I can have a dispute with someone I have never even spoken to, & [sic] am somewhat feeling harassed by their aggressive & bullying tactics.¹²

⁹ Response dated 20 August 2018.

¹⁰ Ibid page 3 [4].

¹¹ Ibid page 4 [5].

¹² Ibid [6].

[8] On 27 September 2018, by email, Mrs Whalley provided further information to the Tribunal, effectively as a reply ('the Reply') to the Response. Mrs Whalley did not include the Respondents by carbon copy; however, she did identify the following matters in the Reply:

(a) In response to the statement made by the Respondents where they disagree with the Applicant's position (*including a reference to the original paragraph numbering in the Application*):

11. We have had 2 local and 1 Sunshine Coast Arborist say these trees are a danger.

13. It would be too late when Trees do damage to us personally. To feel safe because you have Insurance is being an idiot in my eyes.

17. This seems to be Chambers/Groff [sic] reply to there [sic] Tree Problem. All we get told by them is that we can cut the f...ing trees down, this was stated in my original application.

23. Renters were here the previous five years before our purchase and yes they did have problems with Chambers/Groff [sic].

29 All trees have wildlife BUT are they dangerous to humans.

(b) They have spoken with other neighbours.

I have spoken to surrounding neighbours and they all agree with these Trees are a danger to us and certainly they do not see them as a local icon. On my block there are two large stumps where two large gums were removed prior to our purchase.

(c) They have spoken with an arborist.

The arborist informed us that Chambers/Groff [sic] were given a quote to remove Trees but considered the quote too expensive.

(d) Relations between her and the Respondents have become strained.

As far as Mr Chambers claim regarding [sic] he has never spoken to us. We consider after Ms Groff [sic] told us "if we wanted the f...ing Trees cut down then you f...ing cut them down. Why would we talk to people who talk like that, hence I wrote two letters to them and never got a reply. QCAT has have [sic] copies of these letters. My question is if you have never spoken to someone. How can you call them aggressive and bullying. I think Chambers/Groff [sic] should look in the mirror. Since my application has been submitted to QCAT I have had Council and the Police visit my home with bogus complaints from Chambers/Groff [sic] regarding us. I can only hope that my worries regarding the storm season and whatever else Chambers/Groff [sic] are coming up with next will soon be over.'

[9] On 20 November 2018, Mrs Whalley sent an email to the Tribunal. Once again, she did not include the Respondents as a recipient of the email. However, in the email she advised that her property was damaged during a violent storm.

As advised on the phone by QCAT this email is to advise you that the Tree Holders Trees have caused considerable damage to my property and myself. On Saturday 17th November during a violent storm Limbs came off the Trees Crushing a Shed and doing considerable damage to the roof on my house. I am insured for House and Contents content [sic] with Apia Insurance my

claim Number is [number withheld]. I have paid them \$500 excess as required in my policy. I now feel it is pointless to have a Tree Arborist appointed by QCAT to decide whether these Trees on the Chambers/Grosse land are a Danger to us, if you are in agreeance I would appreciate the refund of my \$500 paid to QCAT for the Arborists appointment. The Insurance Company have photos relating to the damage done to my property. I will contact my Insurance Company and ask them to forward photos onto you. While walking outside after the Storm I had a bad fall on the debris from the fallen limbs. I have broken ribs dislocated toe bad bruising and lacerations to my entire body. I was taken to Hospital with my injuries. I request that The Tribunal make an urgent decision on these Chambers/Gross Trees before there are any more disasters regarding these Trees. I truly do not feel safe in my home or outside. We are only in the Early Stages of Storm Season and live in fear. I will endeavour to send you photos of my injuries, please let me know if you do not receive.

- [10] The Tribunal received five photographs depicting injury to the limb and toes of Mrs Whalley.
- [11] On 29 November 2018, Mrs Whalley sent an email to the Tribunal. Once again, she did not include the Respondents as a recipient of the email. The Tribunal received a series of photographs of branches on the property owned by Mrs Whalley. Mrs Whalley said that the photographs were taken by her neighbour. Mrs Whalley also said that the insurance assessors with Apia Insurance assessed the damage to her home as between \$40,000.00 and \$45,000.00.

Tree Assessment Report

- [12] Mr Benjamin Inman ('the Assessor') was appointed by the Tribunal to assist in preparing a report. The Assessor prepared a tree assessment report ('the Tree Assessment Report') on 21 January 2019, being on the day that he attended at the subject site.
- [13] In the Tree Assessment Report, the Assessor advised that his brief, and his role as an Assessor, is to gather facts by observations and other simple tree tests about the trees and alleged tree damage, obstructions et cetera, and provide expert recommendations that help QCAT to:
- (a) Determine if the dispute is within the jurisdiction of the Tribunal;
 - (b) Determine if the orders sought are appropriate with respect to the matter; and
 - (c) Determine and specify appropriate actions, if any, that may lead to the efficient and fair resolution of the tree dispute.
- [14] The Assessor provided an overview of his qualifications and experience. He holds an Australian Qualified Framework ('AQF') level 5 (Diploma) in Arboriculture. He has 21 years total experience in the Arboriculture industry: 15 years as a Municipal Arborist, 12 years as a Consulting Arborist and eight years as a QCAT Tree Assessor.¹³ No party challenged his expertise. The Tribunal accepts the Assessor as an expert in his field, and the Tribunal accepts the Tree Assessment Report as an expert report.

¹³ Tree Assessment Report dated 21 January 2019, page 4 [1.2].

- [15] The Assessor referred to the storm that struck on 17 November 2018 and did note that damage was caused to the Applicant's property. He noted that the Applicant purchased her property in 2017 and the Respondents' trees were established at the time of purchase. The Applicant's pergola, situated at the back of the Applicant's dwelling, was installed soon after she purchased her property. The Assessor noted that the Applicant's roof was still covered with a tarpaulin, as per the roof restorer's request, as the gutters still required replacement from the storm. In relation to the Respondent's property, the Assessor noted that they purchased it in 2007 and the subject trees were established at the time of purchase. Tree 1¹⁴ was pruned approximately two years prior to the assessment.

Jurisdictional Checklist

- [16] The relevant Act is the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* ('the NDA').
- [17] In the Tree Assessment Report, the Assessor identified four individual trees ('the Trees') relevant to the dispute. The Assessor determined that:
- (a) Each of the trees, which are part of the Application, are subject to the NDA ;¹⁵
 - (b) Each of the trees is a 'tree' as defined in the NDA;¹⁶
 - (c) Each of the 'bases' of the trees were situated 'wholly or mainly' on the adjoining land, as required by the NDA.¹⁷
- [18] The Tribunal accepts the jurisdictional checklist prepared by the Assessor and finds that:
- (a) The Trees meet the definition in section 45 of the NDA;
 - (b) The Trees are on land described in sections 42(1) and (2) of the NDA and the exceptions in sections 42(3) and (4) do not apply;
 - (c) The Trees are situated on the tree-keeper's land, meeting the requirement contained in section 47 of the NDA;
 - (d) The Respondents are the tree-keepers, which falls within the definition in section 48 of the NDA.
 - (e) The Applicant is the Respondent's neighbour and is the freehold owner of the neighbouring land, meeting the requirement contained in section 49 of the NDA;
- [19] Having considered section 42 of the NDA, the Tribunal is satisfied that the Trees are trees to which chapter 3 of the NDA does apply. The Tribunal determines that it has jurisdiction to hear and decide any matter in relation to the Trees in which it is alleged that, as at the date of the Application to QCAT, land is affected by the Trees.¹⁸

¹⁴ As identified below, under the heading 'The Trees'.

¹⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)*, s 42.

¹⁶ *Ibid* s 45.

¹⁷ *Ibid* s 47(1).

¹⁸ *Ibid* s 61.

The Trees

- [20] In the Application, Mrs Whalley requested an order of the Tribunal to remove four trees. The Assessor identified, and described, those four trees, as follows:

Tree number 1 ('Tree 1')

- (a) Mature Eucalyptus Major: Located approximately 7.6 metres east of the boundary fence. Approximately 1 metre of tree canopy overhangs the Applicant's property. It has a common name of 'Grey Gum', it has a height of 18 metres and a width of 16 metres. It is a mature tree that is significant, in fair health and has a good tree structure.¹⁹

Tree number 2 ('Tree 2')

- (b) Mature Sheena's Gold: Located approximately 8 metres south-west of Tree 1 and is approximately 600 millimetres east of the dividing fence line. No part of this tree overhangs the Applicant's property and/or roof infrastructure. It has a common name of 'Sheena's Gold', it has a height of 6 metres and a width of 8 metres. It is a mature tree that is desirable, in good health and has a fair tree structure.²⁰

Tree number 3 ('Tree 3')

- (c) Mature Cadaghi tree: Located approximately 4.5 metres south of Tree 2 and is approximately 600 millimetres from the dividing fence line. This tree is growing towards the light and overhangs the Applicant's roof, with most of the tree canopy overhanging the Applicant's property. It has a common name of 'Cadaghi', it has a height of 13 metres and a width of 11 metres. It is a mature tree that is desirable, in good health and has a good tree structure.²¹

Tree number 4 ('Tree 4')

- (d) Mature Eucalyptus Grandis: Located within the south-western corner of the tree-keepers' property and is approximately 800 millimetres east of the dividing fence line. It has a common name of 'Rose Gum', it has a height of 19 metres and a width of 18 metres. It is a mature tree that is significant, in good health and has a good tree structure.²²

- [21] The Tribunal accepts the description and information relevant to the Trees. None of the information about the identification, or description, of the Trees was challenged by the parties.

- [22] In short, the Assessor says that remedial work is required regarding Tree 1, within 12 months, and no action is required in relation to Trees 2, 3 and 4. However, the Assessor did identify work required, elsewhere, in the Tree Assessment Report.

Assessor's Risk Assessment of the Trees

- [23] The Assessor undertook a risk assessment regarding the likelihood of failure and threats in relation to the Trees in combination with consequences in delivering an

¹⁹ Tree Assessment Report dated 21 January 2019, page 5.

²⁰ Ibid page 7.

²¹ Ibid page 9.

²² Ibid page 11.

overall risk rating. Neither party challenged the risk assessments. The Assessor determined the risk assessment relevant to the Trees as follows:

- (a) Tree 1: medium priority, requiring remedial work within 12 months. A large trim is required, with removal of dead wood greater than 20 millimetre in diameter from the canopy of the tree.²³
- (b) Tree 2: low priority – no action required.²⁴
- (c) Tree 3: low priority– no action required.²⁵
- (d) Tree 4: low priority – no action required.²⁶

[24] However, in relation to Trees 2, 3 and 4, the Assessor did provide suggestions as to the methodology that might be adopted for regular pruning.

Extension of branches of the Trees on to the Applicant's property

[25] The Assessor identified the branches from the Trees extend approximately 1 metre to 16 metres into the Applicant's property.²⁷

Likelihood of the Trees causing serious injury within the next 12 months²⁸

[26] The Assessor did state that in relation to Tree 1 and Tree 4, while the Trees are not likely to cause serious injury within the next 12 months, there are some dead branches that require removal to improve the risk rating and to improve the safety to the users of both properties.²⁹

Observations about potential for injury from falling branches or whole tree

[27] The Assessor did state that there are not visually obvious, and arboriculturally significant, defects in the Trees.³⁰

[28] The Assessor did identify that there is evidence of previous tree or tree part failures. That is, there is visual evidence that branches from Tree 4 have failed from past wind events and they have caused damage to the Applicant's shed and the roof gutters of her dwelling.³¹ However, the Assessor identified that the Applicant has contributed to the damage:

Tree debris does fall onto the applicant's roof and is being trapped by the design of the gazebo that was installed by the applicant's [sic], soon after purchase.

Past falling branches have caused damage to occur to the applicant's garden shed and roof gutters of the applicant's dwelling.³²

²³ Ibid page 6.

²⁴ Ibid page 7-8.

²⁵ Ibid page 9-10.

²⁶ Ibid page 11-12.

²⁷ Ibid page 13 [2.2].

²⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)*, s 46.

²⁹ Tree Assessment Report dated 21 January 2019, page 13.

³⁰ Ibid.

³¹ Ibid.

³² Ibid page 14.

- [29] The Assessor did not assess damage to the roof of the Applicant's property, if any, under the area covered by a tarpaulin.³³
- [30] The Assessor also stated that there is no risk of injury to the Applicant or others from other non-defect parts of the Trees. For example, there is no risk of injury from thorns, heavy fruit, tree root trip hazards or allergic reactions.³⁴
- [31] The Assessor identified that there is evidence of previous pruning or other tree work. Specifically, that the tree-keeper alleged Tree 1 was pruned approximately 2 years ago.³⁵ However, the Assessor did not identify that the tree-keeper had pruned Tree 4, which is relevant, given that the Assessor identified that branches from Tree 4 have failed from past wind events and have caused damage to the Applicant's shed and roof gutters. He also identified that Tree 4 is located directly beside the Applicant's shed.

Have the Trees caused, are they causing, or are they likely to cause, within 12 months, substantial, ongoing and unreasonable interference with the Applicant's use and enjoyment of the land

- [32] The Assessor concluded that the Trees have not caused, are not causing, or are not likely to cause, within 12 months, substantial, ongoing and unreasonable interference with the Applicant's use and enjoyment of the land.³⁶

Concerns raised by the Applicant to the Assessor

- [33] The Assessor spoke with the Applicant in relation to her concerns. In the Tree Assessment Report, the Assessor made the following factual observations relevant to the alleged interference from the Trees:

The applicant's [sic] advised that the main concern is not about tree debris in gutters, but the fear of tree related risks from a whole tree failure occurring and or part tree failures occurring and causing damage or injury to occur to themselves and or their property.

During the assessment it was noted that the only visible defective tree parts were some dead branches within the tree canopies. These dead branches can easily be pruned from the tree to improve this [sic] risk of these branches falling onto the applicant's property.

The assessment found that there is no further visual evidence of tree defects occurring in any of the 4 trees, that suggest [sic] there is an increase to the likelihood of whole tree failure to occur and or part tree failure occurring in strong weather events.

The applicant's shed is located directly beside the base of Tree 4, failed branches from the storm have fallen out of the tree and have caused damage to occur to the shed roof.

The applicant's dwelling is approximately 10 m away from Tree 4 where storm affected branches have blown onto the roof of the applicant's dwelling which has caused damage to occur to the roof gutters.³⁷

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid page 15.

Applicant's contribution to the alleged Tree affects in dispute

- [34] The Assessor did state that, in his professional opinion, the Applicant has contributed to the alleged tree affects in dispute.³⁸

Extended roof structure (gazebo) installed by the applicants [sic] shortly after purchasing the property, has been installed so that it slopes back towards the main house roof which has created a V channel which increases the amount of tree debris that is captured between the two roof structures.

This design does not allow for tree debris to fall away from the roof gutters as it previously did prior to this additional roof structure being installed. Therefore, it appears that the applicants have caused an increase of debris build to occur on their roof.

Applicants have been advised by Local tree companies and a builder that these trees are a danger to their property, this has increased their fear of living near large trees.³⁹

Benefits of the Trees

- [35] The Assessor identified Tree 1 and Tree 4 as visibly dominant in the surrounding landscape and 'could hold significant value to the surrounding area'.⁴⁰

- [36] The Assessor identified other values and benefits of the Trees, especially to the broader community and benefits to the tree-keepers, with the enjoyment of their property, in the following terms:

The tree-keepers value the shade and cooling effects that all the trees provide to their property, especially from the Western afternoon sun.

Ecological values, wildlife, it is alleged that a koala visited tree 1 approximately two years ago, king parrots have also been allegedly spotted in these trees.

The tree-keepers allege that they purchased their property because of the trees and significantly value them for the tranquillity they provide to their peace of mind and general wellbeing.⁴¹

The Applicant's request for removal of the Trees

- [37] The Assessor saw no arboricultural basis for removal of any of the Trees. In doing so, the Assessor considered the likely impact and feasibility of the requested tree works and related the Applicant's request for removal to the health, longevity and risk assessment relevant to the Trees. He made the following comments:

Complete tree removal of all 4 trees will destroy the tree-keeper's values and the removal costs will also be onerous.

Sound arboricultural practices can be applied to assist in resolving the applicant's ongoing issues.

Tree pruning to remove dead branches will reduce the amount of tree debris that falls into the applicant's property.

³⁸ Ibid page 16 [2.3].

³⁹ Ibid page 16.

⁴⁰ Ibid.

⁴¹ Ibid.

It is also recommended that all large trees are assessed on a regular basis, by a qualified Level 5 (Diploma) Consulting Arborist so that a Visual Tree Assessment (VTA) is conducted on each tree with any finding risk mitigation measures implemented. This will improve the ongoing risk rating with this group of trees. Please note that groups of trees, such as this group, have a greater ability than singular trees to withstand strong wind events.⁴²

- [38] The Assessor considered the quote provided by the Applicant for removal of the Trees. That is, the quote as prepared by Tree Logistics for the sum of \$10,450.00 (inclusive of GST). The Assessor said that the quote appears to be reasonably priced for the proposed works, but it does show how onerous the costs would be if this work (the removal of the Trees) were to be completed.

Assessor’s recommendations specific to the restraint, remedying or preventing established Tree effects on the Applicant’s property

- [39] The Assessor made recommendations specific to the restraint, remedying or preventing established Tree effects on the Applicant’s property. He stated:

To reduce the number of dead branches falling onto the applicant’s property it is recommended that trees 1 & 4 are pruned to remove dead branches greater than 20 mm in diameter.

This work should occur as soon as possible and should be conducted by an Australian Qualified Framework (AQF) level 3 Arborist with relevant insurances.

To assist in reducing debris impacts to the applicant’s pergola roof it is recommended that Tree 2 be maintained back to the boundary line once a year, this work can easily be completed by the tree-keeper.

Conducting a Visual Tree Assessment on all large trees, every second year or after a large weather event with a rating of Beaufort scale 9 (Strong gale 76-87 km/h. 41-47 knots) or greater. Any required works resulting from this reassessment should be carried out to maintain a low risk rating. The reassessment of the trees will need to be completed by an AQF level 5 Arborist with the relevant insurances.⁴³

Assessor’s recommendations about other work related to remedying or preventing the Trees’ affect

- [40] The Assessor recommended regular assessments and the carrying out of mitigation pruning, when required, as that will assist in maintaining the Trees to a low risk, as most defects can be addressed before the failure occurs.⁴⁴

Assessor’s opinion in relation to the storm event in November 2018

- [41] The Applicant expressed concern about branches dropping onto her property when she filed her Application. Clearly, the Applicant’s concerns were justified, given the damage caused to her property by falling branches during the storm event in November 2018. The Tribunal notes that the Assessor undertook his assessment after the storm event and he was able to comment upon it and the likelihood of what

⁴² Ibid page 17.

⁴³ Ibid page 18.

⁴⁴ Ibid.

might occur during future storm events, if any. In that regard, the Assessor made the following comments:

It appears that this group of trees has [sic] survived many past storms leading up to this recent storm event in November 2018.

It is unknown when and where the next storm will present itself and at what ferocity. Therefore, it is unreasonable to base tree removals on an event that may or may not happen.

The Visual Tree Assessments conducted on each tree found that the trees were of a fair to good health, structure and carried a medium to low risk rating.

The risk rating can easily be mitigated by conducting tree pruning works to remove dead branches greater than 20 mm [in] diameter.⁴⁵

[42] Neither party challenged those comments, or conclusions.

The Assessor's opinion of the effects of Tree debris on the Applicant

[43] The Assessor made the following comments:

Due to the closeness of the applicant's dwelling to the rear boundary line, tree debris will always blow onto their roof, regardless of pruning the trees back to the boundary line.

Therefore, pruning branches back to the boundary line from Trees 1, 3 & 4 is not required. The branches are located high above the applicant's property and are not directly causing damage to occur, no amount of tree pruning will reduce the natural tree debris falling onto the applicant's property.

The tree canopy of Tree 2 is located directly beside the applicant's rear pergola roof. The tree has previously been pruned back from the boundary line and can easily be maintained as a hedge once a year by the respondent.⁴⁶

The Applicant's fear of Tree failure

[44] The Assessor dealt with the Applicant's fear of Tree failure with the following statements and conclusions:

The applicant's fear of tree failure occurring appears to have increased as a result of the storm in November 2018.

While this fear is understandable, it is not a reason to base tree removals on. It is not possible to predict when and where and at what ferocity, the next storm will hit.

The assessment found the trees to have had a good health & structural characteristics that suggest that these trees have survived many past storms and will continue to survive many more.

To assist in reducing some of the tree effects to the applicant's property and the applicants themselves, it is recommended the [sic] trees 1 & 4 are pruned to have deadwood removed to improve the risk rating to both properties.

Tree 2 to be maintained as a hedge and be reduced back to the boundary line once a year by tree-keeper.

⁴⁵ Ibid page 19.

⁴⁶ Ibid.

To ensure that tree risks are maintained it is recommended that all large trees on the tree-keeper's property are regularly assessed, once every second year or after a strong gale wind event, by a suitably qualified Consulting Arborist. All risk mitigation works recommended as a result of these assessments should be conducted if the trees are to be maintained in a low risk rating.⁴⁷

The Applicant asks the Tribunal to consider the matter from the perspective that branches from the Trees overhang her land

- [45] At the hearing, Mrs Whalley made an opening statement. She acknowledged that in the Application she sought removal of the Trees, but given the Tree Assessment Report, she had reassessed her position and now seeks an order of the Tribunal that two of the Trees (the two eucalyptuses, being Tree 1 and Tree 4) be trimmed, such that there is no overhang beyond the boundary line. That is, at the hearing, Mrs Whalley appeared to abandon (but did not formally abandon) her claim for an order for the removal of the Trees, and she based her claim on issues relating to her land being affected because branches from the neighbouring trees were overhanging her land. The Applicant did not indicate to the Tribunal whether she had given prior notice of this change of approach to the Respondents.

The Applicant's evidence

- [46] Mrs Whalley said that she initially tried to discuss these matters with the Respondents without success. It was as a result of her failure to engage in meaningful discussions that she brought the Application. She gave evidence that as a result of several large storms in November 2018, she has suffered damage. She said that the second storm resulted in branches dropping onto her property and that it caused \$80,000.00 worth of damage. She said that one of the branches hit the chimney on her home and her solar system. She gave evidence that her entire roof had to be replaced. She gave evidence that upon inspecting the site, she fell in the tree rubble and as a result she dislocated and broke her toes, broke her ribs and suffered other injuries. Mrs Whalley spoke of the terror that she felt when the Trees fell on her property. She said that police have been called to her home as a result of unsubstantiated complaints made by the Respondents.
- [47] Mrs Whalley said that Tree 1 and Tree 4 are both near her bedroom. She acknowledged that these Trees were well-established when she bought her property in 2017 but she did not realise the damage that might be suffered as a result of a storm in Queensland. She bought the property for 'peace and serenity', but the property has now become her nightmare. She feels that no one polices the law in relation to trees.
- [48] Mrs Whalley said that she has spent money on her property. She described the branches that fell on her husband's shed as more than just dead wood. She said that the branches still had live vegetation attached. The damage caused included damage to her husband's tools. She said that a person on her property suffered injury when struck by branches when putting up an awning on her property.
- [49] Mrs Whalley said that she is now terrified about storms and her relationship with the Respondents has deteriorated.

⁴⁷ Ibid page 20.

- [50] During cross-examination, Mr Chambers challenged the extent of damage claimed by Mrs Whalley or indeed that the damage was caused by his Trees. He disputed the claim made by Mrs Whalley that she suffered damage in the sum of \$80,000.00.

The Respondents' opening statement

- [51] Mr Chambers made an opening statement. He said that he does want to remove dead wood on Tree 1 and Tree 4, as per the conclusions contained in the Tree Assessment Report and would like an order of the Tribunal that the cost associated with that work is shared equally between the parties.

The Respondents' evidence

- [52] Mr Chambers gave evidence at the Tribunal hearing. He said that he accepts the recommendations of the Assessor. He said the Applicant had designed a flawed pergola roof that causes the accumulation of Tree debris. He pointed to that part of the Tree Assessment Report that indicates the Applicant has caused an increase in risk of damage to her own property, through constructing the pergola. Mr Chambers said that he has pruned the Trees over the past two years. He sought recovery of the legal fees he has incurred.
- [53] In cross-examination, Mrs Whalley challenged Mr Chambers' request to claim legal fees.
- [54] In written evidence,⁴⁸ the Respondents said they are willing to comply with all recommendations of pruning and a bi-annual assessment contained in the Tree Assessment Report. They supported their commitment with the following statements during their oral evidence, that are accepted by the Tribunal,:

We are willing to comply with all above-mentioned recommendations (being the recommendations in the Tree Assessor's Report) for pruning and a bi-annual assessment.

We are responsible tree-keepers that conduct necessary maintenance of our trees. We pruned our trees just over two years ago and have removed over 6 large trees over the previous 12 years of living on the property.

We purchased the property 12 years ago mainly because of the beauty and value of the established trees. We experience enjoyment from the shade and cooling of [sic] the trees provide. The trees attract immense amount of birds and wildlife, including on occasion Koalas. In our minds the value of the trees is immeasurable, and we consider that their removal would diminish the market value of the property and the presence of wildlife in the area.

We have never been subject to any infringement notices from the Council or subject to a tree dispute since living at this property and believe that we observe our obligations as tree-keepers and are particularly aware of our responsibilities in keeping such large trees.

We deny all allegations in Mrs Whalley's Statement of Evidence and say these comments are untrue and counter-productive to reaching a resolution of this dispute.

There is no evidence that our trees are causing substantial, ongoing or unreasonable interference with Mrs Whalley's use and enjoyment of her land,

⁴⁸ Statement of Evidence by Sean Patrick Chambers and Mirinda Emma Grosse undated but filed with the Tribunal on 11 July 2019.

and clear evidence that the trees can be appropriately managed to maintain a low risk level.

We are prepared to comply with an Order granted in accordance with the recommendations of the Tree Assessor's Report. We propose that we provide two quotes from qualified and suitable arborists to Mrs Whalley for her selection of one, and that we share the costs equally with Mrs Whalley.

In conclusion, we acknowledge that Mrs Whalley has concerns about the overhanging branches and are hopeful that the pruning of the branches will provide her with some comfort and we can all continue to live in a harmonious neighbourhood.

- [55] In support of the evidence, the Respondents produced two quotes for the removal of dead wood in the two large eucalyptus trees (Tree 1 and Tree 4). One quote was from Smith Tree Solutions dated 19 June 2019 in the sum of \$660.00 (inclusive of GST) and the other from Farrugia Bros Vegetation Management dated 12 June 2019 in the sum of \$2,200.00 (inclusive of GST).

The Tribunal's observations upon the evidence

Evidence of Mrs Whalley

- [56] In her letter to the Respondents on 14 February 2018, Mrs Whalley made allegations against the Respondents. The Tribunal makes the following observations:
1. Mrs Whalley said that she has had a builder and a tree arborist inform her that the Respondents' Trees are placing her home in grave danger. Despite that, Mrs Whalley did not produce evidence from this builder or this tree arborist to support her claims.
 2. Mrs Whalley said that over the past 12 months, she has had to clear leaves, bark and other tree debris landing on her roof and into her yard. However, Mrs Whalley did not provide any evidence, photographic or otherwise, to support that claim.
- [57] In the Application, Mrs Whalley made statements, and she made allegations against the Respondents. The Tribunal makes the following observations:
1. Mrs Whalley said that 90% of the trees were hanging over the boundary line. Mrs Whalley produced no independent evidence to that effect and that statement is not supported by the information contained in the Tree Assessment Report. That is, Mrs Whalley's claim is not supported by reference to the photographs that are contained in the Tree Assessment Report.
 2. Mrs Whalley said that she feels it is likely that the Trees will cause serious injury to a person within the next 12 months. She said that on windy days, branches are falling into her yard from the Respondent's Trees. It appears to the Tribunal that it is unlikely that Mrs Whalley would venture into the yard in an extreme weather event, if she believes that to do so would be to expose herself to a risk of serious injury. In any event, Mrs Whalley did not produce any independent evidence to support her contentions, and the evidence contained in the Tree Assessment Report is contrary to her allegations.
 3. Mrs Whalley said that falling branches have made holes in her stainless-steel gutter guard, which cost \$1,800.00 when it was installed. Mrs Whalley has not produced any independent evidence in relation to the alleged damage, or the

claimed cost associated with installation of the gutter guard. The Tribunal further concludes that as a result of installing the gutter guard, apparently soon after acquiring the property, Mrs Whalley was aware of the extent of tree debris, or at least, she should have been aware of the likely extent of tree debris when she purchased the property.

4. Mrs Whalley said that there is nothing other than the Trees that have contributed, or are contributing, to the damage and that she has done nothing to contribute to the damage. That contention is not supported by the evidence. In the Tree Assessment Report, the Assessor concludes that by constructing the pergola, and doing so in the manner that she did, Mrs Whalley has contributed to the damage. The Tribunal notes that Mrs Whalley constructed the roof of the pergola to create a V shape between the pergola and her home, which has acted as a means of collecting tree debris. Given that the Tribunal has concluded that Mrs Whalley was aware of the extent of Tree debris or should have been aware of the extent of likely Tree debris, Mrs Whalley could have assisted in avoiding a contribution to the damage in the positioning or the design of the pergola.
5. Mrs Whalley said that she could not have taken steps to prevent further damage, because the Trees are far too large for her to handle. Mrs Whalley did not support that statement with any evidence that she intended to personally become involved in the process of maintenance of the Trees.
6. Mrs Whalley said that the Trees have caused substantial, ongoing and unreasonable interference with her use and enjoyment of the land, and the fear of large branches falling on her house has caused her lack of sleep and it is affecting her health and the health of her husband. Mrs Whalley has not produced any independent evidence to that effect.
7. Mrs Whalley said that the Respondents have not taken any steps to stop or reduce interference. That statement is not consistent with the evidence. The evidence of the Respondents and the evidence contained in the Tree Assessment Report suggest clearly that the Respondents have regularly acted, as tree-keepers, to maintain the Trees.
8. Mrs Whalley acknowledges that the Trees were on the Respondents land at the time that she acquired the property. She purchased her property believing that the Trees would be advantageous to her by making her statement that 'I thought that they would be good for the Queensland hot weather'. Mrs Whalley bases the Application on the premise that the Trees are in poor condition. In the Application, Mrs Whalley says 'I did not realise the poor condition they were in'. Mrs Whalley has not produced any evidence to suggest that the Trees are in poor condition. The evidence in the Tree Assessment Report does not support that conclusion and, to the contrary, the conclusion of the Assessor is that, in all respects, the Trees are in fair, to good, condition. Accordingly, the premise upon which Mrs Whalley brings the Application is rejected.
9. Mrs Whalley states that no consent or other authorisation from a government authority is needed to carry out work on the Trees. She does not support that statement with any independent evidence.

10. Mrs Whalley says that there are risks associated with the Trees in the event of a cyclone or other extreme weather event. In that regard, her statement is accepted, with limitations. Given the events in November 2018, which have caused branches from the Trees to cause damage to her property, the Tribunal does accept that there are some risks associated with the Trees to Mrs Whalley and her property, in extreme weather events. However, it does not necessarily follow that the Tribunal will consider that the making of orders is appropriate.
 11. Mrs Whalley repeated her statement that she has had a builder and a tree arborist inform her that the Respondents' Trees are placing her home in grave danger. Mrs Whalley supplemented the application with a quotation for the removal of trees. However, the person who prepared the quotation did not include any comments in relation to the need to remove the Trees, or any potential damage to Mrs Whalley or her property should the Trees not be removed.
 12. As an applicant, Mrs Whalley must accept responsibility for producing evidence to enable the Tribunal to make an appropriate order. It is insufficient for an applicant to simply state to the Tribunal that, in effect, they are troubled, and that the Tribunal should undertake investigations to resolve the issue. While the Tribunal may inform itself as it sees fit, ultimately, decision-making in the Tribunal is evidence-based.
- [58] In the Reply, Mrs Whalley made statements, to which the Tribunal provides its observations.
1. Mrs Whalley indicated, for a third time, that she had independent evidence to support her claim that the Trees are a danger to her. On this occasion, she now refers to having evidence from three arborists, rather than as was previously the case, a builder and a tree arborist. She does not identify the names of the witnesses or produce any detail in relation to this 'evidence', nor does she produce any evidence from these parties. The Tribunal rejects the statements by Mrs Whalley in relation to danger to herself, her husband or her property, on the basis that they are not supported by the evidence of independent persons.
 2. Mrs Whalley says that she has spoken with neighbours who she says agreed that the Trees are a danger and are not a local icon. Once again, Mrs Whalley has failed to produce evidence consistent with her suggestions. The Tribunal rejects the statements of Mrs Whalley, because they are not supported.
 3. Mrs Whalley said that she received information from an arborist that the arborist provided a quote to the Respondents to remove the Trees. That suggestion is not supported by a statement from the arborist, who is not identified. The implication that the only reason the Respondents did not proceed with removal of the Trees was because of the expense is not supported by the evidence. Mrs Whalley has not produced evidence from the arborist to support this hearsay statement made by her. To the extent that Mrs Whalley seeks the Tribunal to draw an adverse conclusion against the Respondents by this alleged statement, the request is rejected.

- [59] Mrs Whalley had an opportunity to seek leave of the Tribunal to produce further expert evidence on the issues covered by the Assessor in the Tree Assessment Report, but she failed to do so.⁴⁹
- [60] Mrs Whalley has attributed her injuries to a limb and her toes to the Respondents. In my view, the assertion is too remote for the Tribunal to consider it as an issue of relevance.
- [61] On 29 November 2018, Mrs Whalley informed the Tribunal that the insurance assessors, engaged by her insurance company, assessed the damage to her home as between \$40,000 and \$45,000. At the hearing, Mrs Whalley said that the damage to her home was assessed at \$80,000. However, Mrs Whalley did not produce a statement from her insurers or any information whatsoever from her insurance to verify either or both claimed amounts. Mrs Whalley provided no information to the Tribunal to suggest why the amount of damage had been reassessed, and if so, to such a great amount. The Tribunal gives no weight to the evidence of Mrs Whalley in relation to the amount of damage sustained other than by considering what damage could be perceived from the photographs provided. From the photographs, the damage appears to be substantial, but not serious.
- [62] The evidence contained in the Tree Assessor's Report was clearly against the arguments maintained by Mrs Whalley, yet she chose not to call the Assessor to give evidence, or to produce expert evidence contrary to the evidence of the Assessor. Almost entirely, Mrs Whalley did not challenge the evidence of the Assessor.
- [63] That said, Mrs Whalley did provide photographs that establish such a degree of damage that demonstrates that her concerns associated with the Trees during extreme weather conditions were justified.
- [64] The evidence of the Assessor confirms Mrs Whalley's statements that she did suffer property damage as a result of the dropping of branches onto her property in November 2018. The evidence also confirms that there have been past incidents of droppage of branches and this is consistent with the evidence of Mrs Whalley that prior to November 2018, branches had fallen onto her property causing a degree of damage.
- [65] For all of the weaknesses associated with Mrs Whalley's evidence, and the conduct of her case, given the fact that significant branches, as evidenced by the photographs that she produced, did fall onto her property, the Tribunal is prepared to accept that the damage was substantial, but not serious.

Evidence of Mr Chambers

- [66] The Tribunal accepts Mr Chambers as a reliable witness. The Tribunal accept his evidence as forthright and accurate. He made no attempt to overstate, or where relevant, to minimise, the Respondents' position.
- [67] However, where the evidence of Mr Chambers was deficient is in relation to any steps taken by the Respondents, as tree-keeper is, to prevent or minimise the interference that the Trees had, and were having, to the Applicant. There is evidence that the Respondents had attended to pruning Tree 1 some two years earlier.

⁴⁹ On 29 November 2018, the Tribunal issued directions to the parties which included the appointment of a tree assessor, noting that no party would be allowed to produce further expert evidence on the same issues covered by the tree assessor's report without the leave of the Tribunal.

However, the evidence does not indicate that there has been the type of systematic maintenance of the Trees as had been suggested as appropriate by the Assessor. In their written submissions, the Respondents make no reference to the work they have undertaken, by way of maintenance to prevent or minimise interference caused by the Trees.

[68] The Tribunal is of the view that the Respondents have minimised the level of substantial, ongoing and unreasonable interference that the Trees have caused to their neighbour's use and enjoyment of her property. It is insufficient for the Respondents to simply adopt an approach that any damage caused to the Applicant by the dropping of branches from the Trees 'will be covered by the Applicant's insurance'.⁵⁰

[69] In the Respondent's statement of evidence,⁵¹ they say that:

We are responsible tree keepers that conduct necessary maintenance of our trees. We pruned our trees just over two years ago and have removed over six large trees in the previous 12 years of living on the property'.

[70] It is consistent with the statements of the Assessor, but only in relation to Tree 1. Otherwise, the statement is not supported by independent evidence and it is not particularised. The evidence does not include specific reference to the extent of maintenance undertaken by the tree-keepers in relation to Trees 1 and 4.

[71] At the hearing, Mr Chambers claimed that he should be entitled to an order of the Tribunal for legal fees but he provided no evidence to the Tribunal in relation to the nature or extent of the legal work undertaken and the legal fees charged as a result. The Respondents did not include any request for the Tribunal to consider the payment of legal fees in their material.

[72] In the Response, the Respondents stated that they had been advised by an arborist that the Trees were in good condition, yet they failed to produce any independent evidence, documentary or otherwise, to that effect. To that extent, the Respondent's evidence is rejected, as it unsubstantiated.

[73] Significantly, the Respondents provided no indication as to why they had failed to undertake maintenance work on the Trees in the past two years. They did produce evidence, by way of quotations, as to the work that might be undertaken. It would have been of comfort to the Tribunal had the work been undertaken prior to the hearing. If the Respondents had taken steps to prevent or minimise the interference caused by the Trees to the applicant prior to November 2018, then the Tribunal is of the view that the Applicant may not have suffered the extent of damage caused to her property during the storm event.

Written Evidence of the Assessor

[74] As indicated earlier, the Tribunal accepts the Assessor as an expert in his field and accepts his evidence, which was largely unchallenged by the parties, in its entirety.

[75] The Tribunal accepts the Assessor's statements in relation to jurisdictional issues.

⁵⁰ Response [4].

⁵¹ Statement of Evidence filed 11 July 2019 [2].

Jurisdiction

- [76] The Tribunal is satisfied that it does have jurisdiction to provide a decision in relation to the Trees. Having considered section 42 of the NDA, the Tribunal is satisfied that the Trees are trees to which chapter 3 of the NDA does apply.

Responsibilities of a tree-keeper

- [77] A tree-keeper is responsible for cutting and removing any branches of the tree that overhang a neighbour's land.⁵²
- [78] A tree-keeper is responsible for ensuring that the tree does not cause—
- (a) Serious injury to a person; or
 - (b) Serious damage to a person's land or any property on a person's land; or
 - (c) Substantial, ongoing and unreasonable interference with a person's use and enjoyment of the person's land.⁵³

What orders, if any, are appropriate?

- [79] In the Application, Mrs Whalley sought an order of the Tribunal for removal of the Trees. On 27 June 2019, Mrs Whalley sent an email to the Tribunal, but did not include the Respondents in the communication, indicating that she would like the Respondents to cut and remove any branches that overhang her land, ensuring that the Trees do not cause serious damage to her or her property. Mrs Whalley did not formally amend her Application to reflect her amended proposed orders. At the hearing, Mrs Whalley said that she did not wish to pursue the original Application for removal of the Trees. Mrs Whalley based her case on issues relating to her land being affected because branches from the neighbouring Trees were overhanging her land.
- [80] Mrs Whalley alleges serious injury or damage. The Tribunal rejects those allegations for these reasons:
1. In the Application, Mrs Whalley concedes that no Tree has caused serious injury to any person.
 2. In the Application, Mrs Whalley alleges that a Tree has caused serious damage to her property, in that falling branches made holes in her stainless-steel gutter guard. For the reasons I have outlined above, I reject the allegation as unsubstantiated.
 3. Mrs Whalley produced little by way of evidence to support her allegation of serious damage to her property from the Trees.
 4. The Assessor found that the Trees are not likely to cause serious injury within the next 12 months. I accept that finding.
 5. The Assessor determined that Trees 2, 3 and 4 have a risk assessment regarding likelihood of failure and threats that are low, and no action is required. I accept those findings. The Assessor determined that Tree 1 is of medium priority risk, requiring remedial work, but not removal, within 12

⁵² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 52(1).

⁵³ *Ibid* s 52(2).

months. I accept that finding. However, by accepting that remedial work is to be undertaken during the next 12 months it does not, automatically, follow that the Tribunal must make an order in relation to the Tree. Equally, by accepting the Assessor's findings, it does not, automatically, follow that the Tribunal will decline to make an order.

6. Mrs Whalley is not likely to expose herself to the risk of, what she believes to be, serious injury during an extreme weather event.
7. The injuries sustained by Mrs Whalley, when she went into her yard to inspect tree damage, is too remote to be considered as injuries caused by the Trees. The photographs, of themselves, do not establish that Mrs Whalley has suffered serious injury.

[81] In coming to its conclusion, the Tribunal does consider those matters set out in section 74 of the NDA.

[82] The Tribunal may make the orders it considers appropriate in relation to the Trees (or any one of them) in relation to one or more of two parts:

1. To prevent serious injury to any person; or
2. To remedy, restrain or prevent—
 - (i) serious damage to the neighbour's land or any property on the neighbour's land; or
 - (ii) substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.⁵⁴

[83] Given my finding in relation to 'serious injury to any person', there is no basis for the Tribunal to make an order in relation to the first part of section 66(2) of the NDA. The next question is, should the Tribunal make an order under the second part, to remedy, restrain or prevent serious damage **or** (emphasis added) substantial, ongoing and unreasonable interference.

[84] Given that I have accepted the findings of the Assessor in relation to risk, in my view, there is no basis for the Tribunal to make an order to remedy, restrain or prevent serious damage.

[85] The NDA states that 'a living tree should not be removed or destroyed unless the issue relating to the tree cannot otherwise be satisfactorily resolved'.⁵⁵

[86] That leaves the final question for the Tribunal to determine whether it should make an order to remedy, restrain or prevent substantial, ongoing and unreasonable interference.

[87] The Applicant did frame her case based on the overhang of branches onto her property. Part 4 of the NDA specifically deals with the issue of 'Removal of Overhanging Branches' and is comprised of sections 55 to 58 of the NDA (inclusive). Part 4 applies if a neighbour's land is affected by a tree because branches from the tree overhang the land; and the neighbour wants the overhanging branches removed.⁵⁶ The tree-keeper and neighbour are encouraged to resolve the

⁵⁴ Ibid s 66(2).

⁵⁵ Ibid s 72.

⁵⁶ Ibid s 55.

issue informally. However, the neighbour may exercise the common law right of abatement; or use the formal resolution process set out in Part 4 of the NDA.⁵⁷ It appears to the Tribunal, that Mrs Whalley has not attempted to exercise her common law right of abatement. Mrs Whalley did not avail herself of the formal resolution process set out in Part 4 of the NDA, but that is understandable in the circumstances, given that the process is available only to trees of a maximum height of 2.5 metres. Therefore, this is not a case where Mrs Whalley could resolve the dispute using the process under Part 4 of the NDA.

[88] The Tribunal has power to make orders to resolve issues about trees, subject to the manner prescribed in the legislation for the application of the relevant part (Part 5 of the NDA) and the jurisdictional requirements.

[89] Before the Tribunal may make any orders under section 66 of the NDA, it must be satisfied of four matters that are specifically referred to in section 65 of the NDA.

1. I am prepared to accept that Mrs Whalley has made a reasonable effort to reach agreement with the Respondents. That deals with the first matter.
2. I am prepared to accept that Mrs Whalley has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process. That satisfies the second matter.
3. I am prepared to accept that, to the extent the issue relates to the land being affected because branches from the Tree overhang the land, the branches extend to a point over Mrs Whalley's land that is at least 50 centimetres from the common boundary. That satisfies the first part of the third matter.
4. I am prepared to accept that, to the extent the issue relates to the land being affected because branches from the Tree overhang the land, Mrs Whalley cannot properly resolve the issue using the process under Part 4 of the NDA. That satisfies the second part of the third matter.
5. I am prepared to accept that Mrs Whalley has given a copy of the Application in accordance with the requirements of section 63 of the NDA. That satisfies the fourth matter.

[90] Mrs Whalley has therefore satisfied all the preliminary statutory requirements before an order may be made. The Tribunal has no inherent power to make any orders it sees fit, or it deems may be convenient. Tribunal orders must be made pursuant to the terms of an enabling Act, such as the NDA. The Tribunal has no inherent power to make an order that goes beyond the terms of the enabling Act.

[91] In considering whether to make orders, the Tribunal must have regard to section 73 of the NDA. The Trees do make a contribution to the local ecosystem and to biodiversity,⁵⁸ the Trees do contribute to the natural landscape and scenic value of the land or locality,⁵⁹ the Trees do contribute to public amenity⁶⁰ and the Trees do contribute to the amenity of the land on which they are situated.⁶¹ In this regard, I

⁵⁷ Ibid s 56.

⁵⁸ Ibid s 73(1)(d).

⁵⁹ Ibid s 73(1)(e).

⁶⁰ Ibid s 73(1)(f).

⁶¹ Ibid s 73(1)(g).

accept the evidence of the Assessor and I have considered risks associated with the Trees in the event of a cyclone or other extreme weather event.⁶²

- [92] The Tribunal does also have regard, given the allegations of unreasonable interference made in this matter, to the provisions of section 75 of the NDA. Those provisions have been considered. The Tribunal finds that the Applicant has contributed to the interference, that the Respondent have taken some, but not sufficient, steps to prevent or minimise the interference, and that the Trees existed before the Applicant acquired her land. The Tribunal does consider the size of the Applicant's property.⁶³
- [93] In addition, the Tribunal is persuaded by the recommendations of the Assessor, contained within the Tree Assessment Report. The Assessor states in his report that the Trees have not caused, are not causing, or are not likely to cause within the next 12 months, substantial, ongoing and unreasonable interference with the Applicant's use and enjoyment of the land.⁶⁴ However, the Assessor also clearly states that work must be undertaken to minimise the ongoing risk. The Tribunal is satisfied that the Trees caused substantial, ongoing and unreasonable interference with the use and enjoyment of the Applicant's land.
- [94] Mrs Whalley would no doubt be comforted by the statements included by the Respondents in their submissions to the Tribunal dated and filed on 11 July 2019. They indicated that they were 'willing to comply with all above-mentioned recommendations for pruning and a bi-annual tree assessment'.
- [95] The Tribunal is not prepared to make an order that the Trees be pruned back to the boundary line between the Applicant's property and the Respondent's property. There is no evidence to suggest this is necessary. There is no evidence to suggest that if such work was undertaken, it would not adversely affect the structural integrity of the Trees. There is no basis for making such an order based on the evidence. However, there is clear evidence that the Tribunal should make an order to remedy and prevent the substantial, ongoing and unreasonable interference caused by the Respondents with the use and enjoyment of the Applicant's land.
- [96] The Tribunal is not prepared to make an order that the Trees be trimmed, such that there is no overhang beyond the boundary line. Although a tree-keeper is responsible for cutting and removing any branches of a tree that overhangs a neighbour's land,⁶⁵ there is nothing in the NDA that compels QCAT to make an order to compel strict compliance with that obligation.⁶⁶ The Tribunal does have discretion to make such an order, but for the reasons stated, there is insufficient evidence to justify such an approach.
- [97] In determining who should bear the financial cost associated with compliance with the order of the Tribunal, the Tribunal does note section 41(1) of the NDA, which provides that:

⁶² Ibid s 73(1)(i).

⁶³ 780 m²; Application dated 25 June 2018, [28].

⁶⁴ Tree Assessment Report dated 21 January 2019, 14 [where the Assessor refers to *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 46(a)(ii)(C)].

⁶⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 52(1).

⁶⁶ Relevant to the Tribunal's findings in this matter, the Queensland Civil and Administrative Tribunal may make orders by reference to *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 66.

A tree-keeper is responsible for the proper care and maintenance of the tree-keeper's tree.

[98] For all these reasons, the Tribunal does make orders that it considers appropriate in relation to the Trees in the following terms:

1. At their cost, the Respondents are to prune Tree 1 & Tree 4 to remove dead branches greater than 20 millimetres in diameter.
2. The Respondents are to undertake the work stated in Order 1 within 90 days, and it must be conducted by an Australian Qualified Framework ('AQF') level 3 Arborist with relevant insurances.
3. At their cost, the Respondents are to maintain Tree 2 back to the boundary line once a year.
4. At their cost, the Respondents are to arrange for the conduct of a Visual Tree Assessment on Trees 1, 3 & 4, every second year or after a large weather event with a rating of Beaufort scale 9 (strong gale 76-87 km/h. 41-47 knots) or greater. Any required works resulting from this reassessment must be carried out by the Respondents within 90 days of the reassessment. The reassessment of the Trees must be completed by an AQF level 5 Arborist with the relevant insurances.
5. In these Orders, the Trees are such as identified in the Tree Assessment Report prepared by Benjamin Inman dated 21 January 2019.
6. The Tribunal makes no order in relation to costs.