

## **LG Alert: *Hargraves & Anor v City of Holdfast Bay* [2018] SAERDC 41 – the distance between a tree and a swimming pool**

*Hargraves & Anor v City of Holdfast Bay* [2018] SAERDC 41 was an appeal against the Council decision to refuse approval for the removal of a Norfolk Island Pine Tree (“the tree”) on the property of the Applicant. Relevant to the Court’s decision was that:

- the tree had a trunk circumference of between 4 and 4.5 metres;
- the tree had a ‘bulge’ at the base of its trunk; and
- the subject land contained an existing inground swimming pool.

Relevant to this appeal is regulation 6A(5) of the *Development Regulations 2008* that exempts trees from constituting regulated trees, regardless of their size, where:

- the tree is located within 10 metres of an existing dwelling or an existing in-ground swimming pool; and
- the tree is not a Eucalyptus species (any tree of the species) or an *Agonis Flexuosa* (Willow Myrtle).

As the tree was a Norfolk Island Pine, the exemption would apply if it was located within 10 metres of the pool.

The trunk of the tree ‘bulged’ at its base. The distance between the bulge and the coping (the edging) of the pool was less than 10 metres. The distance between the trunk proper and the pool coping was more than 10 metres. The Council determined that the latter measurement was correct and refused the development application. On appeal, the appellant argued that the measurement considered by the Council was incorrect.

There were two legal issues that the Court determined in the appeal:

- what constituted the trunk of the tree – that is, whether the “bulge” at the base of the tree formed part of the trunk; and
- what was included as part of the pool structure – that is, whether the measurement to the tree should be taken from the inside edge of the pool wall or from the outside edge of the pool coping.

In handing down its decision, the Court gave the terms ‘trunk’ and ‘root’ their ordinary meanings. At paragraph [25] of the decision the Court stated that there is a (Court’s underline):

...broad dichotomy between a trunk or system and the roots, namely by acknowledging the former to be that part of a tree which grows above the ground (the trunk), and the latter which is below ground (the roots).

The Court found that:

- the “bulge” on the tree’s trunk was part of the trunk as the “bulge” was above the ground and hence was not a root” (refer paragraph [26] of decision); and
- the pool structure included the coping stating at paragraphs [48] and [49] (Court’s underline):

The structure under consideration here should not, in my view, be artificially divided up into component parts such as the walls and coping. They are each part of the same structure which makes up the swimming pool...Accordingly, when reg 6A(7) speaks of the nearest part of the swimming pool, it should be interpreted and understood as meaning the nearest part of the structure constituting the swimming pool which, in the circumstances under consideration, is constituted by the coping.

- the measurement between the tree and the pool could be taken from the outside edge of the bulge of the tree’s trunk to the outside edge of the pool coping.

On this basis, the measurement from the edge of the “bulge” on the tree trunk to the outside edge of the pool coping was less than 10 metres (9.95 metres) and, as such, the tree was not a “regulated tree” and could be removed without development approval.

While this decision does not provide a definitive outcome in relation to determining what constitutes the trunk of all tree species, for example trees that may have exposed or buttressing root systems such as Ficus species, it is nevertheless a useful guide. In the absence of a tree being a species that is known for having exposed or aboveground root systems, it is appropriate to include abnormalities as part of the tree trunk.

The decision is definitive that when measuring the distance of a tree from a pool the coping will be taken to form part of the pool structure.

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