TALE OF A TREE

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I INTRODUCTION

Large or historic trees on privately-held urban land are among a number of objects which test the nature and extent of 'private' property because of their inherent public and environmental value. Such property is no longer merely 'private' but shaped by laws and practices that in different ways recognise and reinforce the public interest in certain resources. This paper will tell the story of one such tree in Adelaide's eastern suburbs – a 90 year old river red gum (*eucalyptus camaldulensis*) which, protected by legislation, was enclosed inside a glass canopy built as part of a shopping centre redevelopment.[1] Our key purpose in this article is to document the story of this tree, to explore its legal status and to comment on the efficacy of the law relating to such trees.

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1 Our telling of this story is reliant on publicly available documents and media reports and is therefore incomplete. We have not formally interviewed the Council, the owners/developers, the arborists, designers, or any of the other key players. Although this approach may seem unsatisfactory (as there are undoubtedly many interesting details which could be gleaned from personal conversations) we do not have a journalistic or even historical purpose to present the full truth. Rather, as we have indicated, our interest is in the law relating to urban trees, analysis of the competing public and private interests which a tree such as this brings into focus, and more broadly, in the social meanings of trees in urban spaces.

On one level, this is a story about the ways in which a single tree in a particular location has been caught up in a web of different interests and regulatory requirements, none of which have been fully attentive to the tree itself and its ecological relationships. However, to focus solely on the law and the different predicaments of the human actors would be to neglect a large number of other important factors. In addition to these micro-level relationships, it is impossible to think about these continuing events in any depth without also considering the many broader theoretical issues raised by the story. What are the cultural resonances of such trees – eucalyptus and in particular the river red gum? What is the significance of such iconic giants in the construction of local places in urban settings? Is it plausible, as others have argued, to see such a tree as exercising agency, in this case by resisting its own juridification and physical isolation in the only possible way – that is, by dying? A narrative such as this is multilayered, and a second purpose of the article is to tease out in a preliminary fashion some of the broader emblematic and cultural aspects of the tree's fate. We consider some of these theoretical matters towards the end of this article, but for reasons of space our discussion is necessarily limited.[2]

This article is divided into four sections. In the first, we provide a brief outline of events surrounding the Burnside Tree and the development which eventually led to its death. Second, we review the law as it relates to privately-owned trees in urban settings. The focus of this section is South Australian law: while other jurisdictions also protect trees, the methods by which they do so are not really broadly comparable.[3] Third, we return to a discussion of the Burnside Tree, and use it to illustrate and critique aspects of the law. In the final section, we consider some of the cultural resonances of this story, of eucalyptus trees, and of trees generally, which extend

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[2] A further article about trees is planned to deal with the theoretical issues in greater depth.

[3] For instance, the ACT has a specific *Tree Protection Act 2005* (ACT), which protects trees over a designated size. Other jurisdictions generally delegate tree protection to local government as part of their planning and environmental responsibilities.

its relevance well beyond the legal issues arising under development law.

II THE BURNSIDE VILLAGE REDEVELOPMENT[4]

Before 2004, the Burnside Tree ('the Tree') was simply one of hundreds of similar trees in the area, a leafy suburb just beyond the south-eastern corner of the Adelaide CBD. The Tree was for many years located at the edge of land owned by the Burnside Village, a shopping centre known for its concentration of upmarket shops. The land on which the Tree stood was adjacent to a car park owned by the Burnside City Council ('the Council'). Because of its size, the Tree was legally categorised as a 'significant' tree, meaning that it could not be 'damaged' without development approval.[5] In 2004, the owners of the Burnside Village ('the Cohen Group') sought the Council's permission to remove it. Citing a newspaper report about injuries caused by a falling tree in NSW,[6] and concerns raised by their public liability insurers, the owners argued that the Tree 'represented an unacceptable risk to the general public and property' and that 'healthy River Red Gums can and do drop healthy limbs

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4 Many of the documents we refer to were published as a set of attachments to the Burnside Council agenda for the 11 September 2012 meeting, item 14.1. They are available as *Attachments A-R* at: <http://www.burnside.sa.gov.au/Council/Agendas_Minutes/Council/Council_Agendas_Minutes_2012#.UtxaZ6te618>. Some of the attachments are very long so, for ease of location, we have used both the designated attachment letter and the page numbers added by the Council for reference purposes. The Agenda papers for that date also contain a helpful chronology of events from 2002 to 2012.

5 Approval may be granted by the council or the State Government Development Assessment Commission, depending on the circumstances. See the outline of the law, below. Outside the *Development Act 1993* (SA), any damage to a private tree would be a trespass, unless approved by the owner, but under the development provisions, even owners cannot damage their own significant trees without development approval.

6 Rex Jory, 'Insurance Fears Mean Our Gum Trees May Face the Chop', *The Advertiser*, Tuesday October 12, 18.

without any warning'.[7] They invited the Council's CEO to 'imagine the carnage a falling large limb would cause on a busy day'.[8] The Tree was not removed, and in reply (some eight months later) Council cited assessments by an arborist as well as by the Council's own arboricultural staff that found the Tree to be 'in good condition and that 'maintenance has been carried out to minimize the risk of limb failure and/or a loss of vigour'.[9]

A few months later, in September 2005, the Cohen Group, still concerned about the risk of the Tree 'killing or maiming one of the many thousands of customers who daily walk and stay in these areas', once again sought permission to remove it.[10] The letter from the Chairman of the Burnside Village to the Council, expresses more than a little frustration at the Council's refusal:

> We have applied many times for your permission to have the tree … removed and you have constantly refused this permission and we obviously have had to abide by your decisions. I wish to point out that there have been many accidents from large boughs falling from Rivergums and resulting in killing people, who happen to be underneath.[11]

Once again, unsuccessfully, the Cohen Group tried to persuade the Council to allow removal of the Tree for reasons of health and safety and for fear of litigation.

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7 Letter from Andrew Cohen, General Manager, Burnside Village, to John Hanlon (CEO, Burnside City Council), 20 October 2004 (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1 *Attachment C*, 12.

8 Ibid.

9 Letter from Bruce Williams, General Manager, Planning and Infrastructure, Burnside City Council to Andrew Cohen, 1 June 2005 (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment E*, 15.

10 Letter from Richard Cohen, Chairman, Burnside Village, to John Hanlon, 7 September 2005 (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment F*, 16.

11 Ibid.

At around the same time, the Council called for expressions of interest from developers to purchase or lease the adjacent land, which was mainly a car park. As successful bidders, the Cohen Group entered into an agreement with the Council to purchase this land.[12] Such a purchase would allow an expansion and improvement of the shopping centre: preliminary ideas for the development had been drawn up as part of the bid.[13] As a further part of the negotiations, a Land Management Agreement ('LMA') was entered into by the Cohen Group and the Council in 2007.[14] This agreement included various provisions about storm water, car parking, and the development process, and singled out the Tree in a 'Tree Retention Plan'. The LMA was subsequently amended, but the effect remained unchanged: 'the Tree should be retained and preserved' and the Owner 'shall not cause, suffer or permit the clearance of the Tree'.[15]

As indicated above, the Cohen Group proposed an extension of the Burnside Village onto the newly acquired land. The initial development application for the Burnside Village surrounded the Tree on all sides but left it open to the elements. An aboriculturalist report annexed to the LMA and referred to in it, stated that whilst the development was 'theoretically feasible' there was nonetheless 'a significant potential for tree damaging activity to occur' which 'may

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[12] 'Heads of Agreement Between the City of Burnside and Burnside Village', 17 March 2006 (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment M*, 197.

[13] City of Burnside Council Meeting Agenda, 19 September 2006, Item 19.1, 'Confidential Sale of Lot 31 (Burnside Village Car Park)', 20-26. See also 'Burnside Village Expression of Interest', December 2005 (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment L*, 162.

[14] See Land Management Agreement and Amended Land Management Agreement (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachments J and K*. A Land Management Agreement is an agreement which the Minister, greenway authority or, usually, council enters into with an owner of land. A council may enter into such an agreement for 'the development, management, preservation or conservation of land'. See *Development Act 1993* (SA) s 57(2). LMAs are recorded on the certificate of title.

[15] Land Management Agreement (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment J*, Clauses 2.7-2.9, 52-53.

have a detrimental affect (sic) on tree health'.[16] The report suggested a number of conditions be imposed on construction to minimise any such damage. The development application was amended in 2009 to incorporate a roof over the Tree. The roof was to be made of 'a performance glass which is designed to minimize the transfer of radiant heat whilst still allowing adequate light for photosynthesis'.[17] Once again, advice from Council staff and independent experts was sought. They agreed that the roof would not significantly impair the Tree's health, and would allow sufficient air flow and access to water (primarily through the roots).[18]

The development also proposed partial containment of the roots as part of the construction of an underground car park. After receiving approval from the Development Assessment Commission,[19] the development proceeded and, as planned, both the sides of the Tree's root system and the canopy were contained within the building structure. The Tree became the central feature of the very impressive 'Tree Mall' of the Village. Far from being regarded as a danger to the public, in 2012 it was claimed by the owners to represent 'the growth of the centre [i.e. the Village] over the past 40 years'.[20] In this and other ways (which we will discuss later in the paper) the enclosed Tree added a symbolic dimension to the place in which it stood – from being one among many significant trees, it came to represent a connection between nature and culture and was, moreover, the central feature in a very human space.

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16 Ibid 84.

17 Burnside City Council, Strategic Planning and Environment Committee Meeting, Agenda 21 July 2009, 7. This meeting considered an amendment to the original Development Application. Although the amended application was being assessed by the Development Assessment Commission, all amendments to the application had to be approved by the Council under the terms of the Land Management Agreement.

18 Ibid.

19 In this instance, the Council had a conflict of interest in the assessment process because of the sale of the car park, so the assessment was handled by the DAC.

20 Fact Sheet: River Red Gum at Burnside Village (Eucalyptus camaldulensis) <http://www.burnsidevillage.com.au/wp-content/uploads/2012/09/Fact-Sheet-for-printingv2.pdf> (undated, viewed 8 April 2013), link no longer operating, document on file with the authors.

Unfortunately, the Tree fairly quickly entered a state of terminal decline. In the construction of the Tree Mall, its roots had been enclosed on the sides, the glass in the new roof blocked too much of the sunlight meaning that effective photosynthesis could not occur,[21] it received no rain, little wind, and subsisted in an air conditioned climate with low humidity.[22] The 90 year old river red gum,[23] which probably seeded itself in an open paddock with few buildings nearby, had almost been turned into an indoor plant (though not completely enclosed either by the roof or by the underground car park). A safety net protected patrons of the café beneath from the now more credible risk of falling branches and limbs.[24]

Despite steps being put in place to remediate some of the environmental stresses, including a misting system, UV lights, and nutrient injections,[25] the owners conceded in late 2012 that they did have a replacement plan, possibly involving a less troublesome tropical tree.[26] A trip to the Tree by the authors in late June 2013

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21 See Martin Bader and Giles Hardy, 'Health Assessment of the River red gum (Eucalyptus camaldulensis) growing in the Burnside Village Centre' annexed to Burnside Village 'An Update on the River Red Gum' (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment H*, 42. This report states 'the vertical canopy profile in light availability suggests severe light-limitation of photosynthesis'. The stomata were also regarded as effectively closed.

22 Marcus Lodge, 'The Burnside Village Tree – A Case Study of Construction and Tree Protection' (Paper presented at the 13th National Street Tree Symposium, 2012) 37.

23 Ibid 28. The exact age of the Tree is unknown. Burnside Village documentation refers to it as 'approximately 90 years old'.

24 City of Burnside Council Meeting 12 February 2013, Item 14.4 Report, which mentions 'risks associated with potential limb drop that are being managed by the Burnside Village', 49.

25 Ibid 51; Lodge, above n 22.

26 Burnside Village 'Burnside Village River Red Gum' quoted in (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment H*, 30. See also '$5m tree's shaky future', *The Advertiser*, 1 September 2012. The Council did consider in late 2012 whether it would be possible to take legal action to require the owners to replace the glass in the roof with something more suitable. However, since the development had complied with the Building Rules specifications, there were no grounds for such a legal action: (City of

revealed a notice declaring that a final decision about the Tree's fate would be made in October.[27] However, in August 2013 the Tree was pronounced dead or rather, possibly since the precise moment of tree death may be as problematic to define as that of human death, a statement was made that it 'could be considered dead'.[28] In order to avoid disruption to shopping, it was removed in two overnight operations on August 2 and 3, 2013.[29] All that remained was a load of logs, reportedly destined to be recycled as sculptural and design features in the Village, and a cavernous space originally housing the now-absent tree.[30]

Public response to the Tree's demise was predictably varied, with no view clearly predominating.[31] There were those who thought that eucalyptus trees are too dangerous to be grown in urban areas at all and that the Tree ought to have been removed years before, along with all similar trees. There were those who thought of the Tree as the innocent victim in a tragic contest between Council and developer. Others thought that the development, and in particular the roof, should never have been permitted, while some, on the other hand, thought that the Tree should have been removed before the building was constructed. While the Tree still stood, some wanted the roof removed urgently. There was also astonishment that the

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Burnside Council Meeting, 27 November 2012) Item 14.2 Report, 37-40. Roof replacement had been recommended by the academic experts from Murdoch University some months earlier, quoted in: (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, Attachment H, 44. The Cohen Group rejected this option on essentially logistical and economic grounds: (City of Burnside Council Meeting, 27 November 2012) Item 14.2, *Attachment A*.

27 Photo on file with the authors.

28 Emma Altschwager, 'Tree Will Live On as Wood Put to Use', *The Advertiser* (Adelaide), 3 August 2013.

29 Ibid.

30 Ibid.

31 Comments on Emma Altschwager, 'Burnside Village's dead gum tree to be chopped down – and Turned into furniture or a sculpture', *Eastern Courier Messenger* (Adelaide), 2 August 2013, on file with author. As is often the case with online commentary on news stories, the comments varied enormously in their level of reasonableness: we report them here simply as a brief indication of the diversity of responses that the series of events generated.

experts could not see what was (in some people's view) a plainly predictable outcome, unfounded speculation about a deliberate effort to produce the death of the Tree, as well as a degree of ennui at the saga as it went on. Interestingly, once the Tree had been removed, there was very little further public debate.

III THE LEGAL STATUS OF TREES

We will return to a further discussion of the Burnside Village Tree shortly, but in order to provide proper context to the matter, it is necessary to provide a brief overview of the law relating to trees in South Australia.

A *The Common Law*

Privately-owned trees in South Australia are subject to a number of laws. These include the common law of property, which broadly speaking regards 'natural' trees (*fructus naturales*) as part of the land upon which they stand, or fixtures. Such a tree is regarded as the property of the person or entity who owns the land and only becomes a chattel if it is severed from the land.[32] By contrast, plants which are essentially part of a crop (*fructus industriales*) are not regarded as fixtures. The rights of ownership that accrue to the owner of land thereby also extend to a tree, including the rights to use the tree, alter it, destroy it, and gather fruit, flowers, or timber. The right to gather may also be held by others under a *profit à prendre* but again, only if the tree is a fixture.[33] Tree owners are also affected by the common law of trespass, negligence and nuisance, which may limit what an

[32] The distinction between trees which are and are not crops is not necessarily a simple one, however: see *Seas Sapfor v Commissioner of Stamps* [1997] SASC 6207 (27 June 1997).

[33] *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426; *Clos Farming Estates Pty Ltd v Easton* (2002) 11 BPR 20, 605; see generally Brendan Edgeworth, 'The Numerus Clausus Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387, 416.

owner can do with their tree.[34] Trespass would only apply where there was a direct and deliberate incursion into a neighbour's property – a branch growing over a boundary will not ground a claim for trespass, but felling a tree or cutting a branch on one's own land so that it falls onto one's neighbour's land would constitute trespass. Negligence and nuisance are non-intentional but fault-based torts and may ground claims by neighbours or (in the case of negligence) visitors to the land who suffer damage as a result of a tree. Such tortious remedies aim to rectify specific personal losses, but do not address the interests of the public at large in the aesthetic, historical, cultural or environmental values associated with trees.

Common law property rights have been considerably modified by legislation which aims to protect trees because of the amenity they provide and because of their environmental significance. In South Australia, legislation controls urban trees as heritage and as native vegetation, and by classifying damage to especially large trees as development.

B *Heritage Law*

The *Heritage Places Act 1993* (SA) protects places and objects of 'heritage significance', many of which are privately owned. The Act establishes the South Australian Heritage Register and sets out criteria for registration. [35] Entry on the Register provides protection under the Act. A number of trees have been entered. South Australians are perhaps most familiar with the Proclamation Tree, or Old Gum Tree, in North Glenelg. Bent double and dead for over 70 years, this is reportedly the tree under which the colony was proclaimed by Governor John Hindmarsh in 1836.[36] The tree is in

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[34] A helpful review of these torts as they relate to trees, as well as a discussion of the NSW Law Reform report on nuisance, is to be found in *Robson v Lieschke* [2008] NSWLEC 152, [36]-[132].

[35] The criteria for registration of a place or an object on the Heritage Register are set out in s 16.

[36] The State Heritage Register describes the tree in the following terms: 'The Old Gum Tree marks the supposed site of the proclamation of the establishment of

fact so bent that what is left of its trunk forms a complete arch, the ends of which have for decades been encased in concrete. Another, perhaps less well known but more interesting (and non-urban) tree that has been entered on the Register is the Herbig Family Tree in Springton, close to the Barossa Valley. This tree has a large hollow base of the kind which is normally a home for animals. In the 19th century, it provided habitat for a German migrant, Friedrich Herbig; subsequently also to his wife Caroline, and the first two of their 16 children.[37] Although the interior of the hollow is darkened by the fires which must have been lit by the Herbigs and possibly by Aboriginal residents before them, the top of the tree still boasts a respectable living canopy. A number of other (mostly un-named) trees have also been entered on the Register, including quite a few rows, stands, and clumps of trees.[38]

Trees may also be protected, without the need for registration, under the *Aboriginal Heritage Act 1988* (SA) if they are of significance according to Aboriginal tradition, or of significance to Aboriginal anthropology, archaeology, or history. Such trees may include trees which show the effects of making canoes from bark.[39]

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government in the new colony of South Australia on 28 December 1836. Down the years there has been considerable debate as to whether this is the actual site'. Department of Environment, Water and Natural Resources, *Heritage Places Database Search,* <http://apps.planning.sa.gov.au/HeritageSearch/HeritageItem.aspx?p_heritageno=4399>.

37 The Heritage listing, which does not however provide much information, is available at: Department of Environment, Water and Natural Resources, *Heritage Places Database Search,* <http://apps.planning.sa.gov.au/HeritageSearch/HeritageItem.aspx?p_heritageno=16693>.

38 See generally, Department of Environment, Water and Natural Resources, *Heritage Places Database Search* Use instead, <http://apps.planning.sa.gov.au/HeritageSearch/HeritageSearchLocation.aspx?>.

39 For instance, the National Trust of South Australia website lists a canoe tree at Currency Creek: <http://www.nationaltrust.org.au/sa/significant-tree-300-canoe-tree-currency-creek>.

Living trees therefore can be and are protected under heritage legislation. However, these protections do not limit property rights in a great number of trees. Their objectives are primarily protection of cultural heritage and natural history, rather than the environment, animal habitat and biodiversity.[40]

C *Native Vegetation Law*

The *Native Vegetation Act 1991* (SA) controls the clearance of 'native vegetation'. The definition of 'native vegetation' excludes anything planted intentionally by a person, with a few exceptions to protect plantings made in pursuance of legal obligations.[41] It is therefore best to think of the *Native Vegetation Act* as protecting primarily 'remnant' native vegetation from clearance. The *Native Vegetation Act* applies across the State, but is geographically limited within Adelaide, applying only in designated zones, notably the Adelaide Parklands and other parts of the Metropolitan Open Space System, the Hills Face Zone, east of the Hills Face Zone, and various specified suburbs.[42]

D *The Development Act 1993*

The most extensive and generally applicable protection of private trees in the urban setting is to be found in the *Development Act 1993* (SA). In 2000, this Act was amended so that the definition of 'development' was extended to include 'tree-damaging activity' to 'significant' trees.[43] 'Tree-damaging activity' is broadly defined, and includes almost any kind of major alteration to a tree or any act which causes a major alteration to the tree, but excludes 'maintenance pruning that is not likely to affect adversely the general health and appearance of a tree'.[44] The definition of a 'significant'

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40 *Heritage Places Act 1993* (SA) ss 16(1)-(2).
41 *Native Vegetation Act 1991* (SA) s 3 (definition of 'native vegetation').
42 For further detail, see *Native Vegetation Act 1991* (SA) s 4.
43 *Development (Significant Trees) Amendment Act* 2000 (SA) ss 3(a)-(b).
44 *Development Act 1993* (SA) s 4 (definition of 'tree-damaging activity').

tree has been amended over time and was recently supplemented by a new category of 'regulated' tree, a change which we will describe shortly. In general terms, a tree is 'significant' if the circumference of its trunk, measured one metre above the ground, meets a prescribed minimum (this has varied from 1.5 to 3 metres).[45] A tree can also be 'significant' if it is prescribed as such individually, or as a stand of trees, by a council's Development Plan.[46]

However, even when a tree comes within one of these definitions, this is no guarantee of tree retention. It merely brings an activity that could damage the tree within the definition of 'development'. It therefore has to be assessed under the *Development Act* prior to it being undertaken. Development is assessed by the relevant authority against the Council's Development Plan in order to determine whether it merits approval.[47] Development that is 'seriously at variance' with the Plan may not be approved.[48] The merits of proposed development have to be weighed against the impact on the tree in the light of the principles and objectives contained in the Development Plan. This assessment determines whether a tree is retained.[49] In some cases, a development may be approved because,

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[45] The definition of significant and regulated trees has varied over time. The minimum trunk circumference under the regulations has varied between 1.5 m and 2.5 m, although until 2006 the minimum differed according to the area in which a tree stood. After 2006, the minimum measurement became 2 m without reference to area, until trees were no longer merely 'significant' but 'significant' and 'regulated' under the amendments to the Act and regulations considered below. Under all definitions, trees with multiple trunks may still be significant or regulated as long as a total measurement of their trunks' circumferences satisfies the same measurement required of a single trunk and, on average, each trunk's circumference satisfies a certain measurement.

[46] *Development Act 1993* (SA) s 4 (definition of 'significant tree').

[47] *Development Act 1993* (SA) s 33(1)(a). The 'relevant authority' is normally the Council, but may also be the Development Assessment Commission, a central statutory body established to assess certain applications. See also s 34.

[48] Ibid s 35(2).

[49] 'The development plan is an important guide; indeed, a relevant authority may not grant consent to a development that it has assessed as being seriously at variance with the relevant provisions of the development plan (*Development Act 1993* (SA) s 35), but the language is advisory. The relevant authority must

despite the tree falling within a protected category, the broader principles of a council's Development Plan favour what the development offers. For example, in *McCormick Smith Property Group Pty Ltd v City of Burnside*,[50] the appellant applied for consent to remove a large Aleppo Pine, a significant tree. Consent was refused by the Council, and the applicant appealed to the Environment Resources and Development ('ERD') Court. The development involved building works, and also proposed planting new indigenous trees. Unlike the foreign Aleppo Pine (described by the court as 'not an attractive tree'),[51] these new trees would better fit in with the broader principles of the council's development plan. Consent was granted by the ERD Court.

D Recent Amendments to the Development Act

In 2011, amendments to the *Development Act* reduced the protections afforded to trees. They also, according to one Member of Parliament, made Councils' role in ensuring compliance with the law more complex.[52] The key change is that the *Development Act* now distinguishes between 'regulated' and 'significant' trees. The definition of 'development' now refers to any tree-damaging activity in relation to a 'regulated' tree (which, by definition, includes all significant trees).[53] Regulated trees have a minimum circumference of two metres, while significant trees have a circumference of three metres.[54] As before, Development Plans can additionally declare that specified trees or stands of trees are regulated or significant.[55] Certain trees are excluded from the definitions of regulated or

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make a planning decision, based on the provisions of the development plan': *Summers v City of Unley* [2002] SAERDC 113 (28 November 2002) [21] (Trenorden J); *Cheung & Kindlen-Cheung v Onkaparinga* [2004] SAERDC 21 (9 March 2004).

50 [2003] SAERDC 90 (12 September 2003).

51 Ibid [25].

52 South Australia, *Parliamentary Debates*, Legislative Council, 28 November 2012, 2895 (Mark Parnell, Greens).

53 *Development Act 1993* (SA) s 4 (definition of 'development').

54 *Development Regulations 2008* (SA) reg 6A.

55 Ibid.

significant, including a number of named exotic species, trees (other than eucalyptus or willow myrtle) within 10 metres of a dwelling or existing swimming pool, and plantation trees.[56]

Significant trees are given greater protection than regulated trees and are regarded as more valuable. For instance, the Act provides that expert reports are not required for developments involving regulated (but not significant) trees, unless special circumstances apply.[57] Where a tree has been removed, three 'replacement' trees are required for significant trees, and only two for regulated trees.[58] Similarly, Development Plans typically frame the development principles relating to significant trees in stronger language than for regulated trees. So, for instance, the Burnside Development Plan states:

> **'**Development should have minimum adverse effects on *regulated* trees'.

But,

> 'Land should not be developed where the development would be likely to result in a substantial tree-damaging activity occurring to a *significant* tree'.[59] [emphasis added]

Finally, the recent amendments excluded a number of 'tree-damaging activities' from the definition of development. This means that no development approval is required for damaging or removing the following: a tree within 20 metres of a dwelling in areas of medium and high bushfire risk; a prickly leaved paperbark or a Norfolk Island hibiscus; a tree in the Botanic Gardens or similar

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[56] There are other exclusions – see *Development Regulations 2008* (SA) sub-reg 6A (5).

[57] *Development Act 1993* (SA) ss 39(3a)-(3b).

[58] Replacement trees are required where an authorised development provides for the destruction of a regulated (or significant) tree. See *Development Act 1993* (SA) s 42(4); *Development Regulations 2008* (SA) reg 117(2).

[59] Burnside Council Development Plan (Consolidated 30 January 2014), Principles of Development Control, 80, 83.

sites; a tree on land under the care of the Minister for the Environment; or a dead tree.[60]

The recent amendments have in general terms lowered the protections provided to trees, and arguably made it more difficult for councils to ensure compliance with the law. Essentially, protection is reduced because there are now two categories of regulated tree, one of which is less protected, and a number of exotic species are excluded altogether from protection, whatever their size. As we have seen, dead trees are also no longer protected. The difficulty in applying the law arises from the need for councils to determine which trees (between two and three metres in girth) should be regarded as 'significant' and from the fact that people may (intentionally or unintentionally) remove trees on the grounds that they are a non-protected species, when that is in fact not the case. Moreover, the amendments may make assessment of development applications more difficult for councils as arborists' reports are no longer compulsory for merely 'regulated' trees.

III SOME TENSIONS IN THE LAW

Considerable efforts were made by the Council, the developers, the tree experts, and – one presumes – the architects and builders, to maintain the Burnside Tree and to utilise it in what would have been a very magnificent and unusual feature for a shopping centre. Indeed, we think it is even reasonable to say that the approved development represented a highly creative response to what might in other circumstances have played out in terms of much more polarised interests – the public interest defended by the Council of protecting a significant tree, and the commercial interests of the shopping centre owners. What *could* have been a contest over removal of the Tree became an effort to do something more innovative, though clearly, as is often the case with innovation, it involved risk both to the Tree and

[60] *Development Regulations 2008* (SA) sch 3 s 17.

probably also to the commercial bottom line (primarily as a result of the added cost of the development but also as it turned out in the cost of trying to save the Tree).[61] Whether keeping the Tree healthy in the enclosed tree mall was plausible is a different matter, upon which we clearly do not have the expertise to comment.

There are several law-related questions which this story brings into focus: the status of dead trees; the effect of enclosing a tree; and generally the individualising tendencies of the law-development-culture matrix in the context of what is, across Adelaide, a quite significant urban forest.[62] We will deal with each of these matters briefly.

A *Tree Death*

As we have seen, removal of a dead tree is no longer considered 'development', meaning that no application or approval is necessary

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[61] In 2012, the developers reportedly spent $126,000 on the tree: see Emma Altschwager, 'Shoppers Say on Village Tree', *Eastern Courier Messenger* (Adelaide), 12 September 2012. However, the total cost of maintaining the tree, attempts at remediation, and final removal and replacement must have been somewhat higher.

[62] 'Urban forestry is generally defined as the art, science and technology of managing trees and forest resources in and around urban community ecosystems for the physiological, sociological, economic, and aesthetic benefits trees provide society'. Cecil C Konijnendijk et al., 'Defining Urban Forestry – A Comparative Perspective of North America and Europe' (2006) 4 *Urban Forestry and Urban Greening* 93, 93. An urban forest is not necessarily a natural forest or area of wilderness (though in some areas these may still be contained within urban areas), but rather the 'forest' integrated with urban spaces. As The City of Burnside states in its *Urban Tree Strategy*, 'Cities around the world now regard trees and other vegetation as critical urban infrastructure – as important to how a city functions as roads or public transport and particularly vital to the health and wellbeing of communities. The benefits of urban forests span environmental, economic, cultural and political domains. These benefits are interrelated, with each cumulatively feeding into the creation of resilient and sustainable urban landscapes', 5.

in such cases. At the time of its removal, the Burnside Village Tree was 'considered dead' and, as it was removed after the commencement of the new regulations, its removal did not therefore constitute 'development'.[63] Had there been serious doubt about the death of the tree, removal without development approval could have been called into question. The change in the law is notable because previous case law had made it clear that both living and dead trees could be 'significant' trees. In *Silegna v City of Burnside*, Her Honour Judge Cole said:[64]

> Dead trees may be a prominent element in a landscape and may dominate the landscape character. They may also enhance visual amenity, even in an urban setting. There is no doubt … that in certain circumstances, dead trees may be an important habitat for native fauna. As such, they would contribute to local biodiversity. A dead tree may be remnant native vegetation. In short, the retention of a dead tree may serve any one of the purposes for which the significant tree legislation was passed.

However, the current law has made any 'significance' of dead trees irrelevant by excluding the removal of dead trees from the definition of development.[65] This is a curious and arguably regressive exclusion for many trees, not simply because it may be a matter of controversy as to whether a tree is dead or not, but because – as Judge Cole has stated above – dead trees can be an important environmental resource. Far from being ecologically redundant, a dead tree may be absolutely integral to biodiversity. Of course, such a consideration could not have applied in the case of the Burnside Village Tree as by the time it was removed it was somewhat isolated and unlikely to provide habitat or enhance biodiversity: any environmental contribution it made would therefore have been minimal. Having said that, there were still – even right to the end –

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63 Of course, regardless of the status of the tree under development law, the tree may still have been protected by the Land Management Agreement which the Council and the Cohen Group had entered into at the time of the sale of the land. However, because our concern in this article is essentially with the tree provisions of the Development Act, we have not investigated this matter further.

64 *Silegna Pty Ltd v City of Burnside* [2004] SAERDC 8 (2 February 2004) [33].

65 *Development Regulations 2008* (SA) sch 3 s 17.

calls for the dead tree to be retained as a sculptural feature, an option which could have had aesthetic promise but possibly (we are speculating) compromised the utility of the space given concerns about falling limbs. At the time of writing, the space previously occupied by the base of the Tree had been replaced by a small but attractive garden of indoor plants such as palms and lilies.

B *Can an Indoor Tree Constitute a Notable Visual Element in the Landscape?*

A second, perhaps more technically and conceptually problematic concern relates to the effect of enclosing a protected tree in such a way that some of the attributes meriting protection are potentially compromised.

Because the circumference of the Burnside Village Tree's trunk measured 4.05 metres,[66] it always came within the definition of 'significant tree', even as that varied over time.[67] The sufficiency of the Tree's trunk to bring it within the Act's regime speaks to an emphasis the *Development Act 1993* (SA) places on objective measures to perform a gatekeeping function (that is, to determine whether a tree meets the threshold criterion for protection). These are ideas about raw size, but also (post 2008), species and, as we have seen, life and death. The criterion of size clearly does not bring all of the trees that might be worthy of protection into the development regime, and does little to promote very extensive and diverse urban greenery, which is reliant on shrubs and trees of all sizes. However, it is arguably the very large trees which are most valuable but most at risk from development, and therefore most in need of protection. On the one hand, such trees can be entire ecosystems, they can radically improve the aesthetics and character of an area, and take decades to replace, but (on the risk side) they also take up much more space,

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[66] This measurement varies slightly in the different reports, but the difference is not significant.

[67] *Development Act 1993* (SA) s 4; *Development Regulations 1993* (SA) reg 6A.

provide obstacles for developers, and are sometimes regarded as dangerous or a nuisance. There is therefore good reason to provide added protection to very large trees.

As we explained above, the development approval process is about assessing proposed development against the relevant principles in a Development Plan. In terms of significant trees (i.e. as determined by size and species), the current Development Plan for Burnside is essentially the same as that which applied prior to the recent changes:[68]

> Where a significant tree:
>
> (a) makes an important contribution to the character or amenity of the local area; or
> (b) is indigenous to the local area and its species is listed under the National Parks and Wildlife Act as a rare or endangered native species; or
> (c) represents an important habitat for native fauna; or
> (d) is part of a wildlife corridor of a remnant area of native vegetation; or
> (e) is important to the maintenance of biodiversity in the local environment; or
> (f) forms a notable visual element to the landscape of the local area;
>
> development should preserve these attributes.

These principles are an effort to express the value of large trees in urban places, their ecological importance, their purely physical status, and their aesthetic qualities. In a 2004 assessment of the Tree, the Burnside Village Tree was evaluated by a consultant arboriculturist to satisfy (a), (c), (e) and (f).[69] In 2006, however, the

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[68] Burnside Council Development Plan (Consolidated 30 January 2014), Principle of Development Control, 84.

[69] Arborman Tree Solutions, 'Tree Report – TR567-JetsCafeEcam' commissioned by Burnside Village (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment B*, 8. Interestingly, Judge Trenorden in *Summers* casts doubt on the appropriateness of arboriculturists providing expert advice – at least to the ERD Court – on all of these matters: "Before I conclude, it is appropriate that I comment on the expert evidence. It seems to me that the Court would be assisted by hearing from landscape architects in these

assessment had changed, and the Tree was said only to satisfy (a) and (f), and was therefore no longer regarded as an 'important habitat' or 'important to the maintenance of biodiversity'.[70] It was still seen as making an important 'contribution to the character or amenity of the local area' and to 'form a notable visual element to the landscape'. It is certainly true that the Tree had for some time been fairly isolated next to the car park, and one can only speculate as to how many birds, mammals, lizards, and other creatures it provided habitat for.

At the same time, without coming to any definitive conclusion on the matter, it is interesting to consider whether the development that *enclosed* the Tree and made it, if not quite invisible at least much less prominent from the street, allowed it to continue to make a contribution to the character of the area and to form a 'notable visual element to the landscape'. Rather than physically changing, directly damaging or removing the Tree, the development did arguably change its surrounding environment and therefore the local community's relationship with the Tree. While the enclosed tree remained visible from certain angles in the street, it was – as a tree with a roof over it – a quite *different* sight (though not necessarily an inferior one).

'significant tree' cases, to assist in the assessment of the contribution a tree makes to the character and amenity of an area. The evidence of an arboriculturist is of value when consideration has to be given to whether the tree is diseased and its chances of returning to a healthy state, and the nature of the tree in the context of safety issues. On some other matters ... engineering evidence may be appropriate. What is clear is that an arboriculturist is not an expert in all aspects requiring assessment in relation to significant trees ... A similar message has been given by this Court, in respect of expert planning witnesses, in the past. Expertise in one field does not qualify one to comment in other fields and it is unfair for an authority to expect this from its experts … In so saying, the Court is not insisting on hearing from a panoply of experts, but reminding parties of the worthlessness of having an expert in one field comment on matters beyond his or her expertise': see *Summers v City of Unley* [2002] SAERDC 113 (28 November 2002) [45]-[47] (Trenorden J).

70 Arborman Tree Solutions, 'Tree Report ATS619 – Burnside Village PreCon', commissioned by Cohen Group of Companies (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment G*, 22.

C *Individual Trees and the Urban Forest*

These observations speak to what is perhaps an unavoidable tension in the protection of significant trees under the *Development Act*. Unlike Herbig's tree or the Old Gum Tree, these trees are not protected because they have a particular historical or cultural connection with human society. Rather, they are protected because of their size, and because they make a contribution to the amenity and environment of urban localities. In this regard, such a tree shares the reason for its significance with hundreds of other trees and, as part of an urban forest, its protection is part of a broader effort to maintain living quality in urban spaces for humans and non-humans.[71] At the same time, each significant tree is unique to a location which does give it a physical distinctiveness and identity of its own. Moreover, though one rationale for the law is to protect the collectivity, a forest, the protection attaches primarily to distinct individuals or specimens. There is therefore both a physical and legal differentiation of specific trees from the urban forest as such. In the case of the Burnside Village Tree, the development arguably *further* individualised and separated the Tree (in both a physical and a legal sense), removing it from the streetscape and from any ecological setting it had previously had,[72] consequences which could be seen to undermine the reasons for its significance in the first place.

As we have tentatively suggested, the process seems to have sidelined the fact that by enclosing the Tree, it may have lost at least part of its reason to be protected. As the space around the Tree changed, arguably so too did its legal status. It could no longer offer habitat, at least not to birds and mammals, and probably not to geckos, and though it could be seen from the street, the enclosure of its canopy made it more difficult to spot. The individualisation of the Tree was legal, physical, and symbolic: partly a result of the law and its emphasis on huge specific trees, partly a result of a massive

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[71] As an example of the broader value on maintaining the urban forest: see City of Burnside Urban Tree Strategy 2014-2025.

[72] Though as we have seen, the advice on this matter changed.

structure being built to house it, and partly the result of public interest being focused on the particular tree as the saga went on. Rather than being one part of a complex and integrated urban ecology, the Tree could be said to have gained value as an end in itself, becoming more akin to a heritage item, a museum piece, or a caged animal in a zoo, than simply a large urban tree. The geckos, possums and galahs were not central here – only one majestic tree, the protection of which was apparently so crucial that it was completely enclosed. The Tree therefore gained an almost human status, a sentiment voiced by Pat Cohen (of the Cohen Group) on the day of its demise: '[It's a bit like] a favourite member of the family that's been in intensive care for a long time and the doctor has to finally come to a decision, brain dead, remove all the things so that's what we're doing'.[73]

IV THE MEANING OF TREES

This brings us to the final and in some ways most intriguing matter for consideration, which is that in order to analyse the ways in which trees and other collectively important objects are understood and regulated, it is also necessary to have some appreciation of their cultural and symbolic significance. This is not something that we can deal with in detail here, but some preliminary observations will suffice to introduce the issue. As we mentioned above, each significant tree, though part of an urban forest, gains an individual status through the law: the Burnside Village Tree exemplifies this as an extreme case (more an individual than part of a forest), but it is nonetheless true of every tree protected by this regime. In parallel with this tree-forest relationship and in the context of the symbolic and cultural significance of trees, it seems clear that many trees develop distinctive and individual meanings in their particular location, but also draw on wider cultural narratives about trees.

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[73] ABC News, 'Burnside shopping centre gum tree dead and will be removed', 2 August, 2013, <http://www.abc.net.au/news/2013-08-02/burnside-shopping-centre-gum-tree-dead-and-will-be-removed/4860802>.

Within Western culture (and even more so in other cultures) some of these narratives are extremely ancient.[74] Carole Cusack traces two key images in particular back to Indo-European cultures, and forwards through Greek, Roman, Celtic and other early European cultures. These two images are the *imago mundi* and *axis mundi*.[75] As Cusack explains, the *imago mundi* sees a tree as a representation or microcosm of the world or even of the cosmos, while the *axis mundi* is a more place-based expression of a tree as the centre or axis of the world. We can see both of these tropes drawn upon in the Burnside Village development: in an early concept plan, the 'civic piazza' (later known as the 'Tree Mall' was described in the following terms:[76]

> The main landscape focus in the new building will … be the town centre grand civic piazza, where the River Red Gum tree will become the symbolic and physical centre of the development, around which social, community, and shopping activities will occur.

The suggestion that the Tree was at the centre of the (shopping) world of the Burnside Village was no overstatement: once the development was complete, and although the Tree was not at the geographical centre of the Village, it clearly, nonetheless, became a focal point for social activity and an organising principle for the Village. Similarly, the *imago mundi* idea was explicitly drawn upon by the Village owners once the Tree's health started to decline: the aforementioned fact sheet, said that the Tree 'represents the growth of the Centre over the past 40 years'.[77] It seems remarkable that this ancient imagery, through which a tree may become the centre or axis of the world as well as symbolising the world as a whole, should have such perfectly seamless resonance today in planning and marketing material.

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[74] See generally Carole M Cusack, *The Sacred Tree* (Cambridge Scholars, 2011); Della Hooke, *Trees in Anglo-Saxon England* (Boydell Press, 2010); Laura Rival (ed), *The Social Life of Trees: Anthropological Perspectives on Tree Symbolism* (Berg, 1998); Owain Jones and Paul Cloke, *Tree Cultures: The Place of Trees and Trees in Their Place* (Berg, 2002).

[75] Cusack, above n 74, 8-13.

[76] Burnside Village 'Registration of Interest' (2005) (City of Burnside Council Meeting Agenda, 11 September 2012) Item 14.1, *Attachment L*, 172.

[77] Fact sheet, above n 20.

These two metaphors are foundational to tree imagery but are supplemented by many other mythical, religious and cultural symbolic references. Trees represent knowledge, life, regeneration, growth, and fertility. They have often been central in rituals,[78] and have sacred meanings in many religions (notably in the West, in early pagan and Christian settings in particular). Trees can be figured as human-like[79] or as magical, otherworldly, and even supernatural, and as both dangerous and as life-giving. In a more everyday sense, trees are often seen as having protective characteristics.[80] (To take a non-everyday example, the Ents in *The Lord of the Rings*, are guardians of the earth and tree-shepherds.) Trees also represent strength and timelessness, while different species can carry more specific connotations.

There are also many instances of trees having geo-political and ethnic connotations. Many countries have a national tree, or a strong association with a particular tree, most of which are integrated into an extensive mythology: several countries are identified with different varieties of the oak and olive, Canada of course has the maple, Lebanon has the cedar, New Zealand has the silver fern, and China has the gingko. These associations can even enter into political

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[78] See, eg, Rival, above n 74, 7-9.

[79] Rival, above n 74, 10. Rival refers to Calame-Griaule 'who points out that trees in many African folktales are considered living beings whose morphological features are comparable to those of humans. The resulting associations between, for example, sap and blood, leaves and hair, limbs and arms, bark and skin, or trunk and the human body should not be taken as merely analogical, for they establish a kind of identity between signifier and signified'.

[80] Della Hooke, above n 74, 59, 63. For a description of the folklore around particular European trees – the oak, ash, beech, rowan, yew, hawthorn: see Francis C Biley, 'Utilizing the Mythical and Folkloric Power of Trees in the Modern Hospital Environment' (2000) 7 *Complementary Medicines in Nursing and Midwifery* 207-210. The real therapeutic qualities of trees in urban spaces is recognised and the benefits of cleaner air and cooler cities (at least in Australia) seem obvious. Claims have also been made about trees reducing population mortality and crime rates: see, eg, Geoffrey Donovan et al, 'The Relationship Between Trees and Human Health: Evidence from the Spread of the Emerald Ash Borer' (2013) 44 *American Journal of Preventive Medicine* 2, 139-45.

conflicts as Irus Braverman has so compellingly illustrated in *Planted Flags*, an account of the Israel-Palestine conflict as played out between the pine and the olive.[81] In Australia, we have an official floral emblem in the *acacia pycnantha*, a shrub or small tree, but it is surely the eucalyptus which has attained a much deeper significance and is identified most closely with the Australian landscape.[82]

As collectivities – forests or the bush – trees can accrue somewhat different meanings. Forests are often seen as the edge or the other to human civilisation[83]; they can be regarded as extremely dangerous, or on the other hand as places of rest and refuge – a place where one can get lost and die, or find inner peace and harmony with nature. Natural or non-urban forests are often figured as disordered and random, unpredictable, and tangled by contrast to constructed gardens. Clearly, the notion of an 'urban forest' disrupts these conventional images to a large degree – the urban forest is not beyond civilisation, but integrated into it, and neither completely disordered nor entirely planned.[84] It may, however, be a reminder of the world beyond the city, both the agricultural rural world and the wilderness. Compared with trees in the bush, individual trees within the urban forest may be vested with a greater everyday significance by a larger number of people, as they have historical and emotional associations.

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[81] Braverman, *Planted Flags: Trees, Land, and Law in Israel/Palestine* (Cambridge University Press, 2009).

[82] The strong attachment to the eucalyptus among non-Indigenous Australians – our adoption of it as 'ours' – is of course symbolically complex in a nation which has so comprehensively failed to deal with its essentially colonial character.

[83] Jones and Cloke, above n 74, 23.

[84] Much less has been written about the meanings of urban forests than about their environmental, economic, physiological, and ecological benefits: see generally the Urban Forestry & Urban Greening Journal. Some sociological work on the subjective value of urban forests include R Bruce Hull, 'How the Public Values Urban Forests' (1992) 18 *Journal of Arboriculture* 2, 98-101; R Bruce Hull et al, 'Place Identity: Symbols of Self in the Urban Fabric' (1994) 28 *Landscape and Urban Planning* 109-20; John F Dwyer, 'The Significance of Urban Trees and Forests: Toward a Deeper Understanding of Values' (1991) 17 *Journal of Arboriculture* 10, 276-84.

Symbolism, political associations, and cultural references are, however, only one – rather abstract and discursive – element of the role of trees in both urban and non-urban settings. In *Tree Cultures*,[85] Owain Jones and Paul Cloke analyse the significance of trees along four axes: first, the culture and symbolism of trees from forests to individual species and specimens; second, the 'agency' of trees in networks of relationships which incorporate both humans and non-humans; third, the role of trees in the construction of localities; and finally the implications for a revised ethics which extends beyond sentient beings. We have considered the first of these elements of tree significance, but it is also worth briefly considering the other three angles.

The question of the agency of trees arises essentially from an extended relational or networked view of the world. Much theory from the 1980s onwards critiqued a pre-social and atomistic view of human subjectivity, and proposed a notion of the subject which is almost entirely constituted by social and discursive relationships. This did not necessitate a deterministic understanding of society in which we have no ability to act freely, because it was coupled with a rethinking of the notion of agency as constrained and performative, rather than entirely free.[86] Agency is contextual, relational, and responsive, rather than unconstrained and unidirectional. A logical extension of this type of thinking is that humans are not the only actors in any network – it is also made up of objects, natural and otherwise, and that agency is produced by and through the network rather than emanating solely from any individual source. Actor Network Theory is probably the best known social-theoretical focal point for these ideas,[87] but they have also been developed in feminist theory since the early 1990s.[88]

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[85] Jones and Cloke, above n 74, chapters 2-5.

[86] See, eg, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).

[87] Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2005).

[88] Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Chapman and Hall, 1991); Karen Barad, *Meeting the Universe Halfway:*

As Cloke and Jones argue, trees 'are a fertile territory' for thinking about non-human agency, essentially because they are so visibly integrated in a variety of systems:[89]

> …collectively … [trees] have a bewildering range of skills and/or uses, and they are embedded in a plethora of relationships, both with humans and with other non-humans. Equally, with humans they are embedded in a vast range of cultural, social, technological and economic networks, as well as being highly visible in local, national and global disputes over the 'environment'. They operate in their own ecological time which is rather different from the typical time-scales of human-centred analysis. Finally, they offer interesting examples of how floating signifiers transfer between human and non-human codes, contributing to the hybridities which result.

We have seen a number of these engagements in our analysis both of the significant tree regulations, and in the particular case of the Burnside Village Tree. There is a sense in which the legislation and regulation regarding significant trees could be seen as simply defining and objectifying trees as a resource, but it is also possible to see it as an effort to acknowledge and structure tree-human relationships in such a way as to recognise trees as important players in the urban environment. More pertinently, although we have analysed the Burnside Village Tree essentially by reference to its subjectification to various laws, regulations, and physical interventions, it is also possible to see it as an active participant – indeed the central one – in a network of relationships including the public, the Council, the Village owners, the arborists, the birds, the surrounding roads and buildings, and many other 'actants'. Such a view may be controversial and unfortunately we do not have space to analyse it fully here. Nonetheless, it does help us to re-orient and expand our thinking about the place of trees in society, and more broadly about how 'the natural and the social flow into one another'.[90]

Quantum Physics and the Entanglement of Matter and Meaning (Duke University Press, 2007).

89 Jones and Cloke, above n 74, 54.

90 Ibid 52.

The third aspect of Jones' and Cloke's discussion of the role of trees is in their importance in the construction of localities. Again, this is a matter that we have discussed earlier, and it needs little extra discussion here. Suffice it to say that analysis of the identity of a place in relation to one or more trees can itself be broken down into a number of elements[91] such as the material presence of the tree itself, its place in a landscape or streetscape, its relationship to human constructions, and to the general character of a wider area. As we have seen, trees often have aesthetic, environmental, and identity-forming significance for particular physical localities, and it is in part these characteristics that regulation – such as that of the *Development Act 1993* (SA) – seeks to protect. As we indicated, changes in built environments may radically change the nature and meaning of individual trees: the streetscape largely lost the presence of the Burnside Village Tree; in turn, the Tree was domesticated by being integrated into a purpose-built shopping mall which then, on the removal of the Tree, became a void bearing little but the imprint or memory of a tree.

Finally, there is the matter of ethics, and Jones and Cloke make a simple if very far reaching point on this matter. It is essentially an acknowledgment that the non-separation of human life from nature and of the agency of the natural world must lead to an expanded ethical imaginary.[92] It is simply inconceivable that 'ethics' should any longer refer only to relations between human beings, when even those relations are so deeply integrated with the non-human world and non-human actors. Beyond human society, nature itself has intrinsic value and a contemporary ecological ethics must take this into account. Exactly what this means for human relationships and human law is not a matter we can discuss here, but its significance must not be overlooked.

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91 Ibid chapter 4.
92 Ibid chapter 5.

V CONCLUSION

This paper has endeavoured to examine the tension between private interests and community interests in the context of law relating to tree protection. We have approached this question through the lens of one intriguing yet ultimately failed attempt to reconcile these conflicting interests. Clearly it is an area where the design and operation of law is extremely complex as it brings into play so many intangibles – the interests of plants and animals in a vast and somewhat indefinable urban forest, the magnitude and significance of certain trees within that forest, the often conflicting views of residents, private and commercial interests which are heavily dependent on context, and a cultural background characterised by deeply ingrained beliefs and ancient symbolism. In addition to these somewhat open ended parameters, there exist several more tangible and even measurable factors, such as the effects of urban greenery on mental and physical wellbeing, flood mitigation, crime rates, and other social and environmental benefits. Such matters may provide some of the rationale for protecting trees, but are not directly addressed by the law. It would be quite impossible for a single system of governance to take into account all of these different factors, which traverse different planes and scales of analysis, and lead to incommensurable normative imperatives.

Like much law, the end result here reflects an attempt to balance many different interests. It seems obvious, however, that this is an area where the law will continue to change, probably incrementally with little variations here and there in an effort to get the balance somehow ‘right’. It also seems obvious that the demands of development, property rights, and quality of life in urban settings will continue to intensify, as the effects of increasing population densities are felt.