

Tree Wise Owners

A park with trees is the dream of every business owner and park visitor. But there are added responsibilities with a treed park. Land owners and park operators should consider the following liability, maintenance and responsibility issues.

Trees and tree limbs do fall – usually unexpectedly – and result in damage to persons and possessions and, sadly, deaths. Litigation may follow. As a freehold owner or park owner, what do you need to do?

If a tree or tree limb falls and damage or death occurs, a claim will most likely be made by those affected. The claim will usually be made against both the land owner and the business operator since the claimant will not want to choose the wrong party if a court finds one party rather than the other liable. As part of insurance requirements, any claim must be referred to your insurer, who, under your insurance policy, will then control the claim. This may not be the end of your involvement. Detailed investigations will be made into the cause of the accident, such as excessive rain and/or wind, or diseased trees or trees not being regularly inspected or maintained. This is where your liability may come into question.

What maintenance program do you have? Who carried out pruning, lopping or the like - you or a professional? Incorrect pruning may result in future problems.

While we all hope to avoid a disaster, prevention and expert advice may prevent such events or, if damage or death do occur, may give you peace of mind (and perhaps, peace of pocket) knowing you had done all you could do and it was “an act of God”. You should therefore implement a regular, professional maintenance program for all trees in your park.

The need for a maintenance program leads to the next question – who pays? As yet, there is no “right” answer. A freehold owner will say it is a cost of operating the business. A business owner may argue that trees are part of the freehold land and the responsibility rests with the Landlord.

This issue is being raised more and more. A business operator is often prepared to pay for a professional maintenance program and pruning, but not for the removal of diseased trees – which can be costly. Is the Landlord responsible? This issue is covered in some Leases but not all.

Section 52 of the *Retail Leases Act* refers to the Landlord’s responsibility for maintaining in good repair the “structure of” or “fixtures in” the retail premises, as well as other matters. Are trees part of the “structure”? Pending any court cases on liability for upkeep and removal of trees, this is unresolved.

If a Lease *is* silent on this issue, who should do and pay for what? Is it, for example, a situation where the business operator should implement a regular professional maintenance contract for inspection and pruning of trees, but if trees require removal, the Landlord should pay for the removal (since they form part of the freehold)?

This issue should be fully discussed when the Lease is renewed – it should not be ignored.

Also remember to check regarding any permit requirements in your area for pruning or removal of trees.

Please contact Tim Kelly at Rigby Cooke Lawyers on (03) 9321 7839 or tkelly@rigbycooke.com.au if you need assistance with these issues.

This article contains general information and should not be acted upon without specific professional advice based on your own circumstances.

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