5 May 2023

Utilities Disputes Submission – Review of the Electricity (Hazards from Trees) Regulations 2003

Utilities Disputes Limited Tautohetohe Whaipainga (UDL) has been a significant provider of complaint resolution services in the energy sector in Aotearoa New Zealand since 2001.

UDL acknowledges the need to review the Electricity (Hazards from Trees) Regulations 2003 (tree regulations) and is pleased to participate in the consultation by the Ministry of Business, Innovation and Employment (MBIE).

Our background

UDL is an independent, not-for-profit company that provides fair and independent resolution of utilities-related disputes that have not been able to be resolved between the parties.

We currently operate four dispute resolution schemes: the Government-approved Electricity and Gas Complaints Service (Energy Complaints Scheme), the Government-approved Broadband Shared Property Access Disputes (BSPAD) Service, a voluntary Water Complaints Service and a voluntary Telecommunications Service for broadband as part of a bundled offering.

We have strong relationships with consumer support agencies, consumer advocacy groups and our member utility organisations, including both retailers and distributors and Transpower.

Opening comments

Our submissions are based on our experience in dealing with tree related complaints in the energy sector. We have been working in this space for over 22 years and welcome the discussion paper which we believe is timely. We note MBIE spoke to a range of stakeholders, mostly vegetation owners and works owner, prior to the issue of the discussion paper. We acknowledge the issues raised are not simple and appreciate the thought that has gone into the paper.

In our view any changes to the tree regulations should ensure trees and power lines can coexist safely, with a minimum risk of causing outages and other safety hazards that can be caused by falling trees, focusing on:

- safe, reliable and secure supply of electricity across Aotearoa New Zealand
- certainty and safety for consumers, for vegetation owners and for works' owners
- recognition of Te Tiriti o Waitangi and Māori interests and role as kaitiaki of the land
- an accessible and responsive dispute resolution process.

Q1. Do you agree with the issues that MBIE has identified with the Trees Regulations? Why, or why not?

Yes.

We also believe that, while not the subject of this paper, there is general confusion among consumers around ownership of service lines.

UDL agrees with the issues MBIE has identified and the dichotomy between the rights of works owners and vegetation owners, and the importance of recognising the interests of Māori.

We regularly refer to the tree regulations when resolving complaints about trees under our Energy Complaints Scheme and are aware of the issues that frequently arise which they do not cover adequately. We agree there are limitations and risks in the current growth limit zone approach to maintaining trees that can encroach onto lines.

Some of the issues UDL encounters when resolving complaints involving the tree regulations include cases:

- where vegetation owners complain their trees have been over-trimmed or improperly removed leading to a loss of value
- where consumers are unaware of their obligations and rights in dealing with “no-interest” notices, “first trim” and remedial work issues
- involving trees planted before or after a line was installed
- about works owners attempting to access vegetation on private land.

From 1 April 2016 to 30 March 2023 UDL received 126 cases where the content concerned trees, this included consideration of 81 complaints that included issues specific to trees. Typical complaints are:

- the works owner has failed to follow the proper process for removing or trimming trees
- a vegetation owner does not want to pay for a tree that might impact a line to be trimmed or removed and is refusing to do so
- the cost to trim or remove trees is excessive
- a vegetation owner did not understand that declaring no interest in a tree could result in the tree being felled by the works owner
- a tree was excessively trimmed or felled
- a tree was removed that was valuable or had cultural significance
- new lines were installed over or close to an existing tree
- a neighbour’s trees are interfering with lines
- a tree owner has failed to trim a tree that has subsequently caused damage and led to a power outage.

While the costs of tree maintenance have been raised in the paper there is insufficient acknowledgement, in our view, of the costs to those consumers who suffer from outages caused by trees that have been inadequately maintained. UDL receives complaints regularly from individuals and from businesses which have suffered serious financial impact from falling trees causing outages usually during extreme weather events.

Q2. What considerations do you believe the Trees Regulations should have in respect to Te Tiriti o Waitangi?

UDL notes the comments in the discussion document about Te Tiriti and Māori interests. We strongly believe the tree regulations must make provision for these considerations. We acknowledge the importance of designing the tree regulations to ensure iwi organisations' concerns are addressed.

The tree regulations, and any disputes process, should be designed with the interests of Māori as kaitiaki and the health and mauri of land in mind. Vegetation and the environment need to be seen as intergenerational assets for current and future generations. The significant role forestry plays in the commercial activities of many iwi and the sizeable amount of Māori vegetation ownership needs to be recognised as part of the review.

The important role tikanga will play in managing vegetation issues and resolving disputes should also be considered. The courts in Aotearoa have strengthened the recognition of tikanga in recent times. There is now a body of case law which upholds tikanga as a unique and integral source of law, prioritises Māori cultural considerations, and upholds Māori evidence as determinative of the cultural impacts of proposed works.

For example, in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*[1] the Court ruled tikanga was a free-standing legal framework that was recognised by New Zealand law and could be a direct source for enforcing legal rights. The case concerned Transpower's proposed relocation of power poles directly adjacent to the entrance of the local Ngāti Hē marae.

In *Tauranga Environmental Protection Society Inc v Tauranga City Council*[2] it was confirmed the Court was entitled to, and must, assess the credibility and reliability of the relevant evidence of tikanga (in this case Ngāti Hē), but when the consistent and genuine view of the hapu is that the proposal would have a significant and adverse impact on an area of cultural significance, that view is determinative (and it is not open to the Court to find otherwise).

Other recent decisions on consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 have also considered the role of tikanga in the context of Māori customary rights, interests and activities. In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*[3], the decision-maker erred by failing to:

- address the effects of the proposals on the cultural and spiritual elements of kaitiakitanga,
- engage with the full range of customary rights, interests and activities identified by Māori as affected by the proposal, or
- consider the effect of the proposal on those existing rights.

In *McGuire v Hastings District Council*[4], a more historical case that considered a challenge to the designation of a road through Māori land, Lord Cooke held '*that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads'* and *'if an alternative route not significantly affecting Māori land which the owners desire to retain were*

[1] *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] 3 NZLR 601, Palmer J held, at [32]-[33]

[2] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZRMA 492, Palmer J held, at [65]

[3] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, the Court of Appeal found, at [12], [170], [201]

[4] *McGuire v Hastings District Council* [2002] 2 NZLR 577, Lord Cooke held, at [21]

reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route'.

We encourage MBIE to ensure any solution acknowledges the important role of tikanga and to continue to engage with iwi in this regard.

It may be appropriate to supplement the tree regulations with, or incorporate in them, a policy statement with cultural 'bottom lines', similar to those provided for by the Resource Management Act 1991 (RMA). By way of illustration, s 58 of the RMA provides for coastal policy statements that may state objectives and policies about "*the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitati, and taonga raranga"* and *"the protection of protected customary rights*".

In light of the significance properly attached to Māori interests and tikanga, we also believe any associated dispute resolution process should ensure it offers a tikanga-based resolution method.

This would ensure Māori are able to present their views and interests in a setting that is culturally safe and consistent with those interests in terms of process as well as outcome. This is particularly important due to increasing involvement of iwi organisations in commercial forestry, and in recognition of kaitiakitanga - Māori guardianship and protection of the environment.

Q3. Do you think that the Trees Regulations should restrict the distance in which new trees can be planted or replanted in proximity to electricity lines?

Yes.

UDL believes there should be a restriction in distance in which new trees can be planted or replanted in proximity to electricity lines.

We receive complaints each year relating to outages caused by trees falling onto lines well outside of the current growth limit zone (GLZ). Many of these may have been avoided if there were adequate restrictions for new planting by setting a trigger distance around lines. The precise distance should be determined in consultation with the works owners and the other relevant stakeholders.

As a point of reference, we note that the regulations in South Australia restrict planting according to the height that trees grow to at maturity and the bush fire risk of the particular location (for example, only trees that grow up to 3 metres can be planted under/near power lines in high-risk bush fire areas, while trees that grow to between 3 and 6 metres can only be planted in low-risk bush fire areas).

In New Zealand, while we note the relevant data shows the frequency of outages has dropped from 2013 to 2019, the impact of a weather-related spike in 2015 is significant. We would expect a similar impact from recent weather events in Auckland and Gisborne, highlighting the importance of designing regulations that balance the interests of vegetation owners and all consumers who are affected by outages that can occur.

Q4. Arguably the judgement in Nottingham Forest Trustee Ltd v Unison Networks Ltd has decisively clarified the responsibility for managing the fall line risk outside of the GLZ. Do you agree, and if so, is further government intervention necessary to address this risk?

Nottingham Forest Trustee Ltd v Unison Networks Ltd (NFT) is helpful in providing some clarification of the responsibilities of vegetation owners in terms of managing the fall risk vegetation can pose to electricity lines. However, care needs to be taken when considering the significance of the decision and the guidance it can provide to the issues identified in the discussion paper.

NFT was concerned with trees that were outside of the GLZ in circumstances where there was clear evidence of the risk they posed as a result of prior damage they had caused. It was concerned with the tort of nuisance in very specific circumstances. As a result of four prior tree falls, the Court was satisfied further falls were inevitable and that it was entirely foreseeable they would cause physical damage to the power lines when this occurred. The Court was also dealing with a commercial operator and the role of tikanga was not a factor.

In our view, there will be many scenarios (and we have encountered some) where a tree outside the GLZ has either fallen onto lines or may be likely to pose a fall risk. In many instances it is likely there will be a lack of prior evidence of the kind that was relied on by the Court in NFT. While works owners can act when the tree becomes a serious hazard, that is often too late.

The Court of Appeal in NFT provides some guidance as to the parameters of nuisance, including in terms of exercising an ordinarily prudent standard of care in respect of one-off events. However, there remains significant ambiguity as to what constitutes a nuisance and, in particular, whether a fall-risk short of 'inevitable' can be an unreasonable interference. There also remains ambiguity as to what constitutes a reasonable time to respond and address the risk vegetation can pose.

It is arguable whether the decision creates any incentives for vegetation owners, particularly for non-commercial vegetation owners, to proactively address fall risk in the absence of prior falls. UDL has also considered recent complaints that highlight the deficiencies in relying on NFT as having clarified responsibilities around fall risk, particularly if there is no prior evidence of the risk the vegetation poses.

We believe resolution is best achieved in a conciliatory dispute-resolution context where the necessary 'give and take' is negotiable (rather than the adversarial setting of the Court in which it becomes contestable).

In our submission there needs to be a clear regulatory requirement, to clarify obligations for managing the fall risk outside of the GLZ to provide certainty to both works and vegetation owners, both private and commercially operated. This needs to be coupled with a resolution pathway that supports the parties to resolve any disputes in an efficient, accessible, conciliatory, and low-cost way.

Q5. Do you agree with our preferred objectives of the Regulation, why or why not?

UDL prefers expanding the objectives for the regulations as we have set out above in our opening comments:

- safe, reliable and secure supply of electricity across Aotearoa New Zealand
- certainty and safety for consumers, for vegetation owners and for works' owners
- recognition of Te Tiriti o Waitangi and Māori as kaitiaki of the land
- an improved accessible dispute resolution process.

Q6. Do you agree with our policy assessment criteria, why or why not?

UDL agrees with the policy assessment criteria of effectiveness, efficiency and regulatory certainty, with double weighting given to effectiveness.

Q7. What are your thoughts on extending the GLZ to cover a larger area, what would be the appropriate distance for the extension and how might this affect you?

As mentioned above, many of the complaints we resolve concern outages resulting from taller trees outside of the GLZ falling over during an extreme weather event damaging power lines or vital equipment.

Amending the regulations to expand the GLZ would likely prevent many of the more complex complaints from arising. Extending the GLZ to cover a larger area would reduce complaints about outages. It might however increase complaints from vegetation owners who are requested to remove additional trees but, with the benefit of clear and comprehensive regulations, these should be able to be resolved more easily than is the current position.

The actual area for expanded risk management should be determined in consultation with the works owners and the other relevant stakeholders. A tiered approach (such as Option 4 in relation to Issue 1) would build on existing processes and understanding and maximise regulatory efficiency and certainty.

Q8. Would a 'likely to interfere with' approach work if 'likely interference' were clearly defined and limited in the regulation? What would this look like to you?

The "*likely to interfere with*" approach suggested would need to be clearly defined. If that approach were adopted, we expect there is still potential for it to be applied inconsistently. Accompanying guidelines are recommended given there are 29 works owners and no current processes to address uncertainty or disagreement.

On balance, we consider this approach would only contribute to regulatory efficiency and certainty, if it was coupled with an expanded tiered approach (such as that represented by Option 4 in Issue 1), that supplements a risk-based approach. We also believe there should be a review mechanism below the District Court (the process under the Telecommunications Act 2001 (the Act)), to avoid burdensome costs being borne by vegetation and works owners.

Statutory right of access to trim trees suggestion

We note the reference in the discussion paper to the Act and the process whereby the district court can make an order authorising the network operator to remove or trim vegetation that may interfere with a telecommunication line.

There may be merit in considering alternative methods that are currently balancing the rights of individual property owners alongside the need to install and maintain utilities. There are possible learnings that could be applied to the management of tree hazards and the rights of vegetation owners and landowners with the overriding aim of security of supply.

One recent model is the statutory right of access granted to Chorus and other fibre to the property (FTTP) Service Providers by virtue of the introduction of subpart 3 of the Act. This created rights for providers to deploy, upgrade and maintain fibre optic media on shared property so long as they comply with relevant statutory requirements. They also provide affected individuals with a clear pathway for objecting and resolving disputes: the Broadband Shared Property Access Disputes Scheme (the BSPAD Scheme), which UDL operates.

The Act gives FTTP providers a right to access property to carry out broadband installations if:

- they meet the required category based on impact
- more than one party has a legal interest in the property
- someone has asked for the installation
- the company belongs to the BSPAD Scheme
- the company has otherwise complied with the Act.

The BSAPD Scheme considers disputes about whether:

- a statutory right of access applies
- an affected person's objection to a proposed installation is valid
- a scheme member has met its obligations while exercising a statutory right, including the obligation to reinstate property.

We see synergies with that statutory right of access created for FTTP providers and the issues identified in the paper. The Act gives FTTP providers a right to access property to carry out lower-impact broadband installations in certain circumstances. Before doing so, they must issue a plan setting out the methods they will utilise. Access and methods for undertaking the work are informed by regulations and there are identified grounds for raising an objection. The regime has contributed to the fast delivery of Aotearoa New Zealand's fibre network which is world leading for its uptake.

For an objection to be upheld under this scheme, it must be served within a required timeframe and satisfy one or more of the six grounds of objection in the Act.[5] UDL assesses the objection and if it is found to have no merit the installation can go ahead. If the objection is upheld the installer is unable to go ahead without first obtaining consent of all affected parties. Experts are consulted where necessary. The objector has a right of appeal to the District Court.

[5] Telecommunications Act 2001, section 155N(1).

A similar statutory regime could be considered to assist works owners to identify hazardous vegetation and access private property to maintain trees for security and reliability of supply. This could apply where either a cut/trim notice has not been complied with or there is a *"likely to interfere with"* risk (but there is not necessarily an immediate danger to require action as per regulation 14).

This option would not just benefit works owners, it would also provide a clear and effective pathway for vegetation owners to raise and resolve objections.

We suggest MBIE explores this option in addition to the avenues set out in the paper. If suitable, it could allow works owners to access private land, in non-emergency situations, after serving a qualifying notice and plan describing the approach they will adopt, and reasons relied on for trimming or removing the vegetation in question.

The impact on private property rights could be justified based on electricity being an essential service.

If operated successfully, in addition to providing an effective pathway for works owners to proactively address the risk vegetation can pose, this could also reduce the risk of vegetation being unnecessarily trimmed or cut, and provide greater protection of trees from fire, addressing concerns that have been expressed by vegetation owners.

A statutory right of access dispute resolution scheme would be free to the objector and funded by the works owners. The question of who pays for tree maintenance is another matter.

In any event, we believe the provision for the expert arbitrator should be discontinued, and we expand on that below in our response to Q21.

Q9. Would a 'likely to interfere with' approach work if combined with a risk-based approach?

Tree risk management in this context requires striking a balance between the rights of the vegetation owners, the environment, and the works owners' need to ensure trees do not present a risk of harm to power lines which will affect the wider public.

As stated above, we agree with the combination of a "likely to interfere with" approach and a risk-based approach. This combination is best able to encompass the range of possible scenarios that threaten the safety and continuity of supply, including those that do not explicitly meet the definition of "*immediate danger*" or "*serious hazard*" as per regulation 14. For example, a tree might have come into contact with, or damaged a stay wire or pole, or be liable to cause a domino effect, such that it presents a risk or likelihood of interference, without necessarily being in contact with or close proximity to power lines and poles itself.

We also believe there needs to be an enforcement mechanism below the District Court.

Q10. What is your preferred option out of the options proposed by MBIE for issue 1? Are there any options you would recommend that have not been considered?

UDL agrees with option 4 to add a new notice category using the existing structure of the notice system and adding a combination of a *"likely to interfere with"* and risk-based approach.

We have made comments above about potential options to combine this approach with a model that resembles the BSPAD scheme to provide a pathway for works and vegetation owners to manage and challenge the process effectively. We do not believe the existing model in the Act or the pathway requiring application to the District Court to authorise action is proportionate or cost-effective.

Q11. How do you think a risk-based approach in the Regulation to managing vegetation could be implemented and enforced?

There will need to be as much certainty as possible. It seems that the risk is best determined by the works owners given their expertise in this area. We do not consider it likely that a risk-based approach would be misused although this could occur, depending on who is responsible for the costs of carrying out tree maintenance.

Over-trimming of vegetation is always a risk and UDL has dealt with complaints in this regard. Requiring clear communication between works and vegetation owners in advance will assist. Having an independent dispute resolution process readily available (and at no cost) to vegetation owners to raise concerns in advance of work being undertaken, as well as after the fact to address concerns about the manner in which work was carried out, would be one useful way of mitigating this risk of misuse of such an approach and over-trimming.

Q12. What do you think are the most important aspects to include in a risk-based approach methodology? Are there any additional issues that you think should be considered?

What constitutes a good risk-based approach will depend on a number of factors including:

- the experience of the works owners
- the location of the trees
- the weather events that the location is exposed to (including fire risk)
- what the land is used for now
- who would be affected if there was an outage caused by trees, and
- how easily the trees can be accessed.

We expect there will be some actuarial calculations that may be able to be applied as well. International experience in assessing risk may be available from parts of Australia, Canada and the UK, where they have similar terrain and overhead lines.

An ideal approach will have sufficient transparency to inform vegetation owners of the risks they can avoid/mitigate when planting trees, and factors to be considered by works owners when

determining whether vegetation needs to be trimmed. There should be a balance between the right of a vegetation owner to challenge the assessment of the works owner, and the need to prevent undue delay in addressing the risks contemplated by the regulations. The BSPAD regime set out in Q8 is an example of a practical approach used for other utilities.

Q13. Do you agree with our view to include the consideration of fire risk in a risk-based approach to vegetation risk, why or why not?

Yes.

UDL agrees with MBIE's approach to include the consideration of fire risk in a risk-based approach given the comments from FENZ relating to climate change. As above, we note the regulations in South Australia prescribe limitations on planting of trees according to fire risk and consider this may also be appropriate in Aotearoa New Zealand.

Q14. What is your preferred option out of the options proposed by MBIE for issue 2, are there any options you would recommend that have not been considered?

UDL considers that Option 4, being a risk-based approach applied outside of the GLZ, to support a new notice power and prevent the over-trimming of hazardous vegetation is preferable. As mentioned above, the risk is best determined by the works owners. Any risk-based approach should be supplemented with guidelines and recourse to an effective independent dispute resolution option. This would ensure they are not applied inconsistently depending on where vegetation is situated in Aotearoa New Zealand. As above, this should also include provision for works owners to complete the required cut/trim in the absence of action by vegetation owners within the prescribed timeframe (using a pathway similar to that in the BSPAD scheme).

Q15. Do you have any feedback on the Tree Regulations obligation on works owners to remove danger to persons or property from trees damaging conductors?

We believe this obligation is necessary and sensible. Works owners have the expertise to identify serious hazards and respond appropriately. We expect consumers would be generally supportive of such provisions so long as they are exercised appropriately, and there is recourse to an effective independent dispute resolution service.

This obligation empowers works owners to act, even if vegetation owners dispute the assessment of risk. This means that any such disputes will not delay the removal of danger, which is consistent with the regulatory objective of safety.

The tree regulations clearly set out the circumstances in which either party will be liable for cost. That does not mean disputes will not arise over their interpretation. However, the clearly framed obligations on works owners to remove the danger will hopefully ensure that disputes about cost allocation will not cause delays.

As above, there are scenarios in which there may be a risk or likelihood of interference, where the definition of immediate danger or serious hazard is not met. Incorporating a combination of a "*likely to interfere with"* and risk-based approach would ensure such issues are also able to be addressed without delay, in the interests of safety. This would necessarily require establishing an actual risk, such that it could not be misused by works owners and would not disrupt the balance between the respective rights of works owners and vegetation owners in this context.

A complaint was recently referred to UDL by a vegetation owner who was being pursued by a works owner for the costs incurred when the works owner had to remove a branch that had fallen on an aerial stay wire.

The tree was outside of the GLZ. Once the branch fell the works owner deemed it to be a serious hazard. This was despite the fact the stay itself was not a conductor and no outage or actual damage had occurred at the time the branch was removed. Nevertheless, the branch's contact with the stay wire meant it was likely to cause damage or an outage.

UDL was satisfied the works owner was justified in removing it but did not agree the vegetation owner should bear the cost of removing the branch either under the tree regulations or applying the reasoning in the NFT case. In our view there was insufficient prior evidence of the tree posing a risk and prior notice had not (and could not have) been issued as the branch had not encroached the notice zone or GLZ.

This case illustrates the importance of the obligation on works owners to address vegetation risk, and the effectiveness of that obligation, but also the difficulty in establishing a serious hazard, and in allocating costs for addressing this where the hazardous tree sits outside the GLZ. Considering this, it may also be useful to revise the regulations around allocation of cost under regulation 14. This is especially so if a combination of a "*likely to interfere with*" and risk-based approach is applied, expanding the scope for action on the part of works owners.

Q16. Do you agree with MBIE's view that responsibility to identify risks sits best with works owners?

Yes.

UDL agrees that responsibility to identify risks should sit with the party most experienced in identifying risks in a particular area. UDL agrees that works owners understand the risk of vegetation and lines interaction and should therefore be responsible for its identification. Providing vegetation owners with recourse to an effective independent dispute resolution option can address any concerns about an over-vigorous risk assessment approach.

Q17. Do you agree with MBIE's view that the allocation of the first cut or trim should remain with improvements to its application, and why or why not?

No.

UDL believes the cost allocation for the first cut or trim, as per regulation 11, is generally not well understood by consumers and should be discontinued, particularly for urban properties and smaller rural properties.

We do, however, consider the ability to declare no interest in a tree is worth retaining and possibly expanding if there is concern the removal of the first cut or trim notice would have an undue impact on vegetation owners. This should include clearer implications of what this means in practical terms. The requirements for and implications of no-interest notices, as per regulations 15 – 17, 24 should also be included in the "required information" to be provided by works owners to tree owners, as per regulation 5, to ensure such notices are correctly understood and issued by tree owners.

We are aware of the difficulties works owners have in ascertaining who the owners of individual trees are, and in being assured that the required notices have been received by the correct person before they enter a property to trim trees. On occasion, they face aggression, which makes them reluctant to enter properties.

In a 1966 Supreme Court case,[6] a landowner appealed against a decision of the then local power board to charge him for wilfully obstructing workmen removing trees, which they had lawful authority to do. The power board had served a notice under s 324 of the then Public Works Act 1928. The Judge allowed the appeal due to the insufficiency of the notice given. Much of the discussion was about whether the notice had specified a particular tree in sufficient detail.

It is difficult to impute whether a first cut or trim has already been carried out to a new property owner who may have no knowledge of what occurred prior to their purchasing the property, for the purpose of cost allocation.

Rural developments where forestry is the main purpose of the operation should have a different approach with vegetation owners taking responsibility for ensuring vegetation is appropriately maintained in relation to works.

For urban properties, an educative campaign would be useful, perhaps championed by works owners, local councils, and garden centres/nurseries, aimed at urban residents to encourage the planting of appropriate trees that do not grow to such a height as to interfere with network lines. We are aware some works owners have taken this approach individually in the past and this could be supplemented with a national approach supported by MBIE. This could run together with an educational piece encouraging homeowners to be responsible and trim their trees regularly before it becomes a dangerous exercise. Information could be included in planning and consent materials that are provided to ensure all relevant parties are on notice of the risk from the time of planting vegetation and developing land. Increased awareness would reduce the number of trees that works owners would need to attend to and, over time, reduce the cost involved for them.

We note South Australia has an education campaign about planting and a tool for plant selection:

- See the animated video at: https://www.sapowernetworks.com.au/safety/vegetation-around-powerlines/tree-trimming-program/
- See the tool at: www.plantselector.botanicgardens.sa.gov.au

[6] *Dowling v South Canterbury Electric Power Board*

Q18. Is there a way to apply the notice system at a higher level than the individual tree?

UDL believes the approaches suggested to apply the notice to multiple trees would work. We understand, in practice, some works owners already issue notices for multiple trees at a time. Care needs to be taken that each affected tree is clearly included and able to be identified by the tree owner.

Q19. What is your preferred option out of the options proposed by MBIE for issue 3, are there any options you would recommend that have not been considered?

UDL believes option 3 is preferable as it provides more certainty for vegetation owners and works owners. As noted in the discussion paper the administrative burden on works owners is high and it is arguable whether this outweighs the costs expended. As mentioned elsewhere, our view is that the provision for cost of the first cut or trim notice to be met by the works owner should be discontinued.

Q20. What is your preferred option out of the options proposed by MBIE for issue 4? Are there any options you would recommend that have not been considered?

Our preferred option is the suggestion set out in Q 8 above, which could address the difficulties identified with Option 3.

If that is not pursued, UDL agrees with Option 2. This involves amending the notification wording in regulation 11(3)(e) to make it easier for works owners to notify vegetation owners about land access. The aim is to improve works owners' ability to obtain the consent of the landowner or occupier to enter the land before trimming a tree.

We believe this is a pragmatic solution that would allow landowners to contact vegetation owners as appropriate. We note there are still likely to be cases where a works owner has received a previous no-interest notice, conducted a trim and the person who issued the no-interest notice is no longer the owner or occupier of the land.

We consider the issues with access for first cut and trim purposes reflect the issues regarding access to vegetation more generally. It is difficult for works owners to access trees needing to be cut or trimmed for safety reasons as per regulation 14. It will be similarly difficult to do so if provision is made for works owners to cut or trim in the absence of action on the part of tree owners in response to cut or trim notices. For these reasons, we reiterate our recommendation to adopt an approach modelled on the BSPAD Scheme.

Q21. What is your preferred option out of the options proposed by MBIE for issue 5, are there any options you would recommend that have not been considered?

UDL was not consulted prior to the discussion paper being issued which was regrettable as the scope of the service it provides to vegetation owners and works owners is wider than what is set out in the paper.

For completeness, we have provided additional information providing a snapshot of the services we offer and complaints we have dealt with, in relation to tree hazards and the issues that can arise. We do so in the hope this will assist with the important work that is being undertaken.

In resolving tree disputes UDL utilises its experience in the following areas:

- specialist knowledge of dispute resolution, conciliation and decision making,
- expert knowledge of vegetation management drawing on relationships with and advice from expert arborists
- cost allocation and compensation
- the ability to offer a tikanga-based dispute resolute model facilitated by practitioners who have significant expertise and experience in doing so
- identification and management of consumer interests, and
- the expertise UDL has obtained from being the sole dispute resolution service provider for over 20 years in the energy sector.

UDL regularly resolves vegetation complaints concerning issues that go significantly further than the dispensation issue which the tree arbitrator is currently confined to.

We note this paper's reliance on *Marlborough Lines Ltd v Cassels*[7]. This case makes certain declarations and declines to make others, seemingly without the benefit of information about UDL. The judgment suggests that an independent arbitrator would be of great assistance in resolving the issue at hand, but that the limited scope for arbitration of disputes under the tree regulations "*leaves landowners with no practical recourse if they disagree with works owners*", and that this "*seems inappropriate*".

In reality, land and tree owners already have practical recourse through UDL, if a vegetation owner disagrees with works owners. For reasons set out below, we consider the dispute resolution forum to be more appropriate and conducive to regulatory certainty than arbitration by a decision-maker with arboriculture-specific expertise.

A more accurate summary of UDL's services is contained in *Contact Energy Ltd v Jones*[8] which states:

> *[UDL's] work includes facilitating the resolution of complaints about services provided to consumers and, where complaints cannot be settled, making determinations by deciding what is far and reasonable after observing and applying any applicable law.*

[7] *Marlborough Lines Ltd v Cassels* [2012] NZHC 9

[8] Contact Energy Ltd v Jones [2009] 2 NZLR 830, by Miller J, at [7]

In our view, this provides a very practical, accessible and appropriate pathway to resolution of disputes between tree owners and works owners. This was reinforced in *Contact Energy Ltd v Moreau*[9]*:*

> *Parliament intended to provide a quick (efficient), inexpensive (accessible) and effective dispute resolution mechanism for complaints. They emphasise the importance of natural justice, fairness, reasonableness, cost effectiveness and finality… [T]he Scheme...is a consumer-oriented and relatively informal mechanism for the efficient resolution of disputes.*

We believe the above qualities are the hallmark of an effective dispute resolution pathway and should be borne in mind when assessing the changes to guidelines in this area.

Specialist knowledge

The discussion paper says UDL does not have the specialist arboriculture knowledge that an arbitrator must have to understand the specific risks related to vegetation and electricity line interaction. We do not accept that this is the case.

UDL has specialist knowledge gleaned from resolving numerous cases relating to tree disputes. From 1 April 2016 to 30 March 2023 UDL received 126 cases where the content concerned trees. This included consideration of 81 complaints involving issues specific to trees. See **Appendix One** for more information about some of these cases.

Dispute resolution capability

We believe it is more appropriate to rely on an independent dispute resolution mechanism that has the capability and expertise to deliver specialist resolution to the issues contained in the tree regulations. This will require expertise and knowledge of vegetation, tikanga, property rights, consumer engagement and the electricity sector.

UDL agrees vegetation knowledge is vital. However, effectively resolving tree disputes will require a broader set of skills and capabilities. These include the ability to promote the relevant issues and increase the awareness and accessibility of the service. A more effective method is to use expert submissions and evidence when required, which is the model UDL operationalises across all of its schemes, including for tree disputes. For example, organisations such as the NZ Arboricultural Association can be utilised for expert evidence, and guidance on vegetation issues.

A recent example of this model operating effectively involved a complaint about trimming. The works owner had the vegetation owner's permission to trim a stand of trees, however they incorrectly removed the entire stand. The complaint was not able to be considered by the tree arbitrator but was within UDL's jurisdiction.

The complaint involved the value of the trees and what compensation should be paid to the vegetation owner. The works owner and vegetation owner had each obtained independent arborist evidence on value with a significant disparity in amount. UDL obtained its own independent view from an experienced arborist and applied established legal principles to determine the amount that should be paid. This was accepted by the works owner and upheld by the Disputes Tribunal when the vegetation owner sought a review. UDL's process was free to the vegetation owner - our costs are covered by levies payable by all works owners.

[9] Contact Energy Ltd v Moreau [2018] NZHC2884 at [111]

In general, we find tree complaints often concern issues beyond the vegetation itself and can include actions or inactions by works owners (and questions regarding quality of supply and Consumer Guarantees Act 1993 guarantees) that would not be within the purview of a tree arbitrator.

Cost allocation

The discussion document states that works owners and vegetation owners would bear the full cost of resolving disputes through UDL, and would be responsible for organising mediation, which may disincentivise vegetation owners to refer matters.

This is not how UDL currently works nor how it resolves tree-related complaints.

UDL's energy complaints scheme operates on a not-for-profit basis. Providers (in this case works owners) pay the full cost of UDL's service through an annual fixed levy based proportionately on their ICP count and a variable levy for each case UDL formally accepts and investigates. There is no cost to tree owners when they make a complaint or access UDL's services. This funding is standard for most dispute resolution organisations, including Ombudsman organisations.

We believe UDL could continue to deal with tree disputes under its existing scheme or, as noted above (under our response to Q8), access issues could be dealt with in a similar manner to subpart 3 of the Act.

In all UDL's work, mediation or rapid resolution using a variety of specialist techniques, is a first step.

Gearing towards consumers

The discussion document says UDL is more geared toward the average consumer, so while it may help urban vegetation owners it may not work well for businesses such as those in the forestry sector.

This is not the case. UDL receives complaints from a range of consumers including rural consumers, businesses and commercial entities. While the bulk of our work relates to an average consumer, we receive and competently manage commercial disputes.

Regulatory certainty

The discussion document states that if UDL was used in place of a tree arbitrator there would be little regulatory certainty or guidance for solving disputes.

We disagree. We believe there is general support within the industry for UDL to continue with its current role for resolving tree disputes. We would support the little-used tree arbitrator provisions being discontinued.

UDL publishes summaries of certain complaints and provides a consistent approach when making a written determination, allowing for the specific facts of each complaint. Tree arbitrators have no mechanism for feedback to the sector.

UDL has established mechanisms for feeding case outcomes back to industry and regulators through various reporting requirements, MOU's, case studies and other ongoing working relationships. UDL also receives and considers guidance from government agencies, regulators and industry best practice, that informs the resolution of disputes.

UDL belongs to the ANZEWON (Australian New Zealand Energy and Water Ombudsman Network) and regularly meets with our counterparts who also resolve tree-related disputes in their

jurisdictions. We also have links with other regulatory and consumer organisations. We are aware of their operating models, including those in Victoria, South Australia and Adelaide. We would be willing to share our experience and view on these if this would assist.

All relevant communications from electricity providers (retailers and works owners) to their consumers are required to include reference to UDL's dispute resolution service and contact details. This includes cut and trim notices.

UDL also has a centralised decision-maker (Commissioner) for when resolution techniques are not successful. The Commissioner's identification of systemic issues, investigation and recommendation on fair and reasonable outcomes, experience, is currently used by consumers, is known and trusted by stakeholders in the sector, and contributes to growing consumer awareness.

As noted above **Appendix One** has some case summaries involving tree-related issues, illustrating the effectiveness of an accessible disputes' resolution process, which can clarify respective obligations, draw on expert advice as needed, and create opportunities for settlement and for enhancing working relationships.

Q22. Do you consider that ongoing penalties are a useful element of the current regulatory regime?

Education is preferred over penalties. We note from the discussion paper that penalties have not been enforced to date. We would support penalties remaining available as a deterrent factor.

Q23. Do you have any comments on our proposals for monitoring, evaluating and reviewing the Trees Regulations, for example when a review of the new Trees Regulations should occur?

A two-yearly review once any new regulations are in place would be desirable, which would include consultation with all stakeholders, and thereafter on a 5 yearly basis. We expect all stakeholders would remain in regular contact with MBIE as to any issues arising.

Q24. Do you have any additional feedback that you would like to provide on the regulation or the options we have proposed?

UDL would be happy to meet with MBIE if it wished to further explore any of the above suggestions including a possible statutory right of access for works owners for the purpose of management of trees to ensure safety and security of supply of electricity, other than in emergency situations.

We would suggest that the process to trim culturally or historically protected trees be reviewed to ensure it is fit for purpose.

Ngā mihi nui

Mary Ollivier
Commissioner|Toihau
Utilities Disputes
Limited|TautohetoheWhaipainga

Next steps

If we can be of further assistance at this stage, please contact Paul Moreno at paul@udl.co.nz

Appendix One: Some examples of cases, application of tree regulations and observations

Complaint	Outcome	Application of tree regulations	Observations
Trees on complainant's property caused damage to neighbour's service line, for which complainant reimbursed them. Complainant had previously asked works owner to trim trees, which complainant said would have prevented damage.	**SETTLED**: Works owner agreed it was possible the damage would have been prevented had its predecessor responded to the trim request. Complainant declared no interest in the trees on his property, and the works owner removed seven of them, and offered to pay for the cost of damage. Parties settled on this basis.	Complainant declared no interest (although initially not in writing) as per reg 15 of tree regulations. Works owner had not previously issued cut/trim notice as per regulation 10 or notified complainant of dangers and growth limit zones as per regulation 5.	It is difficult for complainants to correctly declare no interest as per regulation 15 in the absence of the relevant information, and the required information to be provided by lines companies as per regulation 5 does not include this.
Complainant (land occupier) alleged works owner delayed cutting of trees constituting hazard to power lines, in breach of its obligations and safety requirements.	**NOT UPHELD** (recommendation): Works owner met its obligations, in that it issued cut/trim notice to landowner when trees encroached growth limit zone and cut the trees when they became an immediate danger, in absence of action from landowner. Records showed no interruptions caused by the trees.	Works owner issued cut/trim notice as per reg 9 of tree regulations. It then undertook the cutting of trees itself in the face of immediate danger, as per reg 14. Works owner would have been entitled to recover costs from landowner as per reg 14, but this issue was not considered.	It is difficult to retrospectively establish whether an immediate danger existed. The absence of interruptions or of interference with conductors (where other assets, such as stays, or other trees likely to create a domino effect are involved) does not deny an immediate danger to persons or property.
Complainants objected to works owner severely trimming tree on their property without their knowledge or consent (works owner had sent cut/trim notice to wrong address, and then proceeded without further contact).	**SETTLED**: Works owner admitted failure to notify complainants of required cut or trim. It apologised. and undertook to send notices to correct address in future, take all reasonable steps to make contact, and allow complainants to be present if it was cutting trees itself (in absence of action from them). Works owner also offered $1,000 compensation. Parties settled on this basis.	Works owner failed to notify complainants as tree owners in manner prescribed as per regulations 9 and 23. The trees cut, in the absence of action by the complainants, were not necessarily serious hazards posing an immediate danger	Tree regulations are unclear as to whether trees encroaching growth limit zone can be cut in the absence of action by a tree owner on receipt of a cut/trim notice. Regulation 14(2)(iii) provides for removal of danger before expiry of a cut/trim notice and regulation 14(3) implies removal of danger should only require cutting back past the growth limit zone, but neither establishes that such encroachment constitutes a serious hazard in and of itself.

Complainant said works owner should pay for damage to his property after clashing power lines allegedly caused a fire.	**WITHDRAWN**: Expert advised that, if lines had caused fire, there would have been evidence of a fault on the network records, but this was not the case. After UDL explained this to the complainant, and explained our determination would be based on this expert report, the complainant accepted and withdrew complaint.	N/A	In some cases, the ability to communicate expert advice in a simple and time-efficient manner can address a complainant's concerns and expedite resolution. A dispute resolution process is best placed to both call on expert advice, as needed, but also communicate this in a consumer-friendly way.
Complainant said power surge damaged appliances at property when tree fell onto power lines and clash occurred between 33kV and 11kV lines. Complainant sought compensation for damage.	**UPHELD** (binding decision): Electricity retailer liable under Consumer Guarantees Act 1993 (CGA). Works owner did not breach obligations under tree regulations, but supply did not meet acceptable quality guarantee as per CGA. Retailer ordered to pay compensation.	The tree that fell and caused the line clash and resultant surge was not within the growth limit zone prior to the fall, such that the works owner was not required to issue cut/trim notice or take action as per regulations 9 or 14.	As above, the tree regulations do not provide any guidance for addressing potentially serious hazards outside the growth limit zone. Disputes about trees often also involve other issues.
Complainant said works owner cut down 60-year-old weeping willow without notice or grounds to do so. Complainant said tree had practical, aesthetic and sentimental value. Works owner offered replacement tree of up to $500 and $1,000 compensation, but complainant wanted $10,000.	**NOT UPHELD** (recommendation): Works owner accepted it should not have felled the tree, and took steps to mitigate damage, including stumping. It offered to replace tree and pay compensation. Fair and reasonable compensation is $1,100 including $800 for cost of replacing tree and $300 for stress and inconvenience.	N/A	This recommendation draws on the expert advice of an arborist, which UDL brought in to determine the value of the tree and cost of replacement. This was able to inform a fair and reasonable outcome.
Complainant said works owner should have issued cut and trim notice for tree on property that hit power line and created fireball in storm. Complainant sought to remove danger after this incident and suffered injury while doing so.	**SETTLED**: UDL facilitated conciliation meeting, at which complainant disclosed that he was not wearing shoes or safety equipment while operating chainsaw. Works owner said it inspected tree before incident, and it had not encroached	Tree had not encroached growth limit zone or triggered cut/trim notice requirements as per regulations 9 and 10. Works owner had not met costs of cutting or trimming (as cut/trim notice had not been issued and work had not	As above, the tree regulations do not provide any guidance for addressing potentially serious hazards outside the growth limit zone. It is likely the works owner would have been required to remove the danger after the

	growth limit zone. Works owner offered $500 because it had not paid for first cut and trim. Parties settled on this basis.	been undertaken on this basis) as per regulation 11.	incident, as per regulation 14, if it had become aware of the associated immediate danger at that time.
Works owner completed first cut/trim at own cost at complainant's property and offered $500 compensation for loss of foliage. It also offered to trim as per tree regulations for as long as complainant owned property, if complainant removed debris. Complainant said works owner should compensate for each trim, or remove the tree and provide full compensation, or otherwise underground lines, because tree predated power lines.	**NOT UPHELD** (recommendation): Complainant was responsible for ongoing maintenance of trees on property and works owner was not liable for compensation in this regard. Works owner's offer was reasonable.	Works owner had issued notice as per regulation 11. Complainant sought compensation under section 58 of the Electricity Act 1992 (as per regulation 38).	Complainant did not object to first cut/trim by works owner at its own cost but sought unreasonable compensation. If complainant had objected, or if first cut and trim had been completed and complainant refused to comply with notice, the tree regulations are unclear as to what recourse the works owner would have, as above, unless it could establish the tree constituted a serious hazard to lines.
Complainant disputed invoice from works owner for remedial work online after tree fall, charged at afterhours callout-rate, on basis the tree and line were allegedly local council responsibility. Works owner offered to charge standard callout-rate, but complainant still refused to pay.	**SETTLED**: UDL facilitated conciliation meeting at which works owner explained complainant was legal owner of the line, and therefore responsible for maintenance. It also explained the need to urgently attend to the fault, as a serious hazard. Complainant accepted explanation and undertook to pay through insurance company. Works owner agreed to reissue invoice accordingly. Parties settled on this basis.	Tree falls on lines constituted serious hazard as per regulation 14.	In some cases, complainants simply need the relevant information explained to them in simple terms. An accessible disputes resolution process not only determines a fair and reasonable outcome in the circumstances but enhances understanding and promotes compliance on the part of tree owners and works owners alike.
Complainants objected to invoice from works owner for cut/trim of eight trees subject to cut/trim notice and quote, after	**PARTIALLY UPHELD** (recommendation): Works owner's communication was poor as it only tried to call the complainants twice,	Cut/trim notice issued as per regulation 9.	As above, the tree regulations are unclear as to whether trees encroaching the GLZ can be cut in the absence of adequate action by a

complainants independently engaged arborist who failed to trim branches close to high voltage lines. Complainants said works owner's communication was poor and work completed by it was not that for which it was quoted originally.	after their initial cut/trim work. Recommended it pay complainants $100 compensation. However, works owner entitled to invoice complainants for cut/trim work, on basis of its cut/trim notice which made clear that it would do this if complainant failed to complete work outlined.		tree owner on receipt of a cut/trim notice (note: UDL nonetheless found it fair and reasonable for the works owner to proceed with cut/trim and invoice the complainant for the work, in this case, given the cut/trim notice clearly outlined that contingency).
Complainant said works owner caused delays in provision of services to support tree clearing (in close proximity to the works owner's pole) and that this resulted in his arborist charging him additional costs. The complainant filed proceedings in the District Court, having not been notified about UDL. The District Court judge referred the matter to UDL.	**PARTIALLY UPHELD** (recommendation): Works owner failed to notify complainant of UDL services. Recommended it pay complainant $250 as compensation for this. Otherwise, there was no causal link between delays by works owner and additional costs charged by complainant's arborist.	N/A	The District Court considered this matter was most appropriately dealt with by UDL's disputes resolution process.
Complainant gave works owner permission to trim two poplar trees. Works owner removed rather than trimmed them. Works owner offered $6,500 compensation, however complainant sought $22,000.	**PARTIALLY UPHELD** (recommendation): Expert arborist advised UDL that wholesale value of trees was $7,200. Recommended works owner compensate complainant for this value and for cost of complainant engaging her own arboriculture expert.	N/A	As above, where arborist expertise is required, UDL is able to engage external advisors and incorporate this into our process in efficient and customer-friendly way.