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# Dividing Fences and Dangerous or Intrusive Trees: the Draft Neighbourhood Disputes Resolution Bill 2010 (Qld)

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## INTRODUCTION

The relationship between neighbours can be complex. Generally, our neighbours are not family members or pre-existing friends. More often, at least initially, they are the strangers with whom we live in close proximity.

Unwritten codes of social behaviour guide many people in their dealings with their neighbours. Being on good terms with neighbours can bring various benefits, such as having someone close by to keep an eye on your property when you are away, and feeling safer and more connected to your local community. Poor neighbourly relations can be associated with feelings of angst, resentment and frustration.

One explanation of the neighbourly relationship, and its potential complexity, is as follows:

A shared geography underlies an intractable interconnectedness and dependence.

It is our neighbours who are best placed to empty our letter box and feed our pets while we are on holidays, they can often do a spot of child-minding at a moment's notice and are the first to hear our house alarm when it is activated.

These bonds of co-operation are diminished when neighbours feel that they don't accept or understand each other. People act on the basis of reciprocity. A sense that one has not been treated well or betrayed evokes resentment.<sup>1</sup>

Examples of good neighbourly relations are sometimes reported, such as when neighbours help each other out or arrange get-togethers for a drink or to celebrate Christmas.<sup>2</sup>

Despite such reports, it was recently said that "neighbourliness may be a dying art in Australia".<sup>3</sup> A survey showed that nearly half of the population never, or rarely, spoke to their neighbours. Queenslanders are reportedly the least neighbourly in Australia, with:

- 22% not knowing any of their neighbours' first names;
- only 18% being able to name all of their neighbours;
- 52% rarely having a conversation with their neighbours;
- 43% preferring networking sites to their neighbours; and
- 33% being too busy to get to know their neighbours.<sup>4</sup>

Dividing fences and dangerous or intrusive trees have long been recognised for their potential to sour relations between neighbours. Other common causes of neighbourhood disputes include barking dogs, parking, loud music, smoke on balconies and the impacts of development applications.<sup>5</sup>

As our population grows, and we are more densely housed, the source of potential stressors on our relationships with neighbours increases.

The passions that neighbourhood disputes can evoke were described by one local government councillor as follows:

I've seen some shocking neighbour disputes in my time in office and they can be what others see as the smallest of things but to those persons concerned they're massive.

Some people have been under medical supervision because of the stress of these battles – anger management, stress and suicidal tendencies.<sup>6</sup>

Some people feel that their only way to deal with a neighbourhood dispute is to move away.<sup>7</sup>

Others react to neighbourhood disputes in a more extreme manner. For example, there have been reports of people defecating in their neighbour's letterbox, poisoning trees, allegedly shooting their neighbours, engaging in slingshot attacks and verbal abusing their neighbours.<sup>8</sup>

One lawyer attempted to contextualise these responses as follows:

A man's home is his castle.

After a long, hard day slugging it out in the salt mines, your average Joe likes to pull up the drawbridge and enjoy the comfort and privacy of his home sweet home.

It's his sanctuary from all the stress and pressure of an increasingly demanding world, the one place where he likes to think he's boss, where he calls all the shots.

Some guys will do anything to defend the castle against would-be intruders.

In 30 years of lawyering, I've seen a lot of crazy situations, but for sheer mind-numbing insanity, nothing

holds a candle to your good, old-fashioned neighbourhood dispute.

I once had a client who ended up in court after what started as a simple stereo war.

You know what I'm talking about.

The neighbour sits up late one night drinking tequila shots and playing Cold Chisel way too loud, so the next morning my client cranks up his stereo nice and early to get the neighbour out of bed.

The neighbour reciprocates a few nights later with another dose of Jimmy Barnes, so he counters with Neil Diamond ..., and his neighbour parries with the best of AC/DC, and so on it goes until all semblance of domestic tranquillity is soon nothing but a sad memory for both of them.

Knowing that good fences make good neighbours, my client then sets about erecting a six-foot paling fence along the boundary line.

This, of course, presents the perfect opportunity for a stand-up barney between him and his neighbour about the exact location of the boundary line.

Their difference of opinion on the subject amounted only to a few centimetres, but it was enough to sustain an ongoing argument along the fence line, with my client's neighbour ultimately demanding he refrain from driving another post into the ground until the boundary had been professionally surveyed.

Versions differ as to just what really happened next, but it's safe to say that someone threatened, someone pushed and someone shoved, until the two were going at each other toe-to-toe, with the fence paling being pulled from one to the other.

By the time the case got to court, the prosecutor was alleging that, in a fit of rage, my client wrestled his neighbour to the ground and went for the old Count Dracula solution, spearing his victim through the chest with the fence paling.

Who would have thought Jimmy Barnes could still engender so much passion?

The truth was, it wasn't the music.

Even the blatant playing of Neil Diamond couldn't fully explain such rage.

It wasn't the boundary fence, the protestations, or even the pushing and the shoving that sent them both over the edge.

It was the loss of sovereignty.

The inner sanctum had been breached.

My client felt his castle had been invaded, his private sanctuary defiled, and I guess the other guy did too.<sup>9</sup>

This *e-Research Brief*:

- provides brief background information on the Queensland Government's recent review of the 'law of neighbourly relations';
- discusses the tabling in the Queensland Parliament in May 2010 of the [draft Neighbourhood Disputes Resolution Bill 2010 \(Qld\)](#) and the accompanying [draft Explanatory Notes](#);
- summarises the existing regulation of dividing fences in Queensland and the key changes proposed by the draft legislation;
- summarises the existing regulation of dangerous or intrusive trees in Queensland and the key changes proposed by the draft legislation; and
- provides brief comparative information on the regulation of dividing fences and dangerous or intrusive neighbourhood trees in one other Australian jurisdiction, namely New South Wales, where a number of amendments to the relevant legislation<sup>10</sup> (particularly in relation to retaining walls, and high hedges that obstruct sunlight or views) have recently taken effect.

## REVIEW OF THE LAW OF NEIGHBOURLY RELATIONS

In May 2007, the Queensland Government commenced a review of the law of neighbourly relations. The review examined the most common causes of neighbourhood disputes, namely dividing fences and dangerous or intrusive trees.

The purpose of the review was to:

... find more efficient ways of assisting neighbours to resolve their disputes.<sup>11</sup>

Coinciding with the commencement of the review was the release of a discussion paper, *Dividing Fences*.<sup>12</sup>

In July 2008, two further discussion papers, *Trees*<sup>13</sup> and *Resolving Neighbourhood Disputes*,<sup>14</sup> were released.

## Some observations about neighbourhood disputes

The *Resolving Neighbourhood Disputes* discussion paper made a range of observations about neighbourhood disputes, including the following selection:

Neighbourhood disputes involve many complex dynamics. For the most part, neighbours demonstrate a sensible approach to resolving their issues. Most want to deal with any issues or disputes that arise in a fair and amicable manner. Unfortunately, this isn't always possible. A sensible approach or the best of intentions may not be enough to arrive at a solution on one or even both sides, and efforts to resolve a common problem like overhanging branches, a barking dog or fence that needs repairing can result in frustration for the affected neighbour (p 1).

... [P]ersonal factors often have an important bearing on how, when and where problems are resolved between neighbours. The age, personality, attitude, living conditions and financial circumstances of neighbours have a significant bearing on what happens in a neighbourhood.

Neighbours deal with conflicts in a variety of ways. The way people respond or react to a dispute can affect the ultimate resolution. Typical reactions to neighbourhood disputes include denial, appeasement, harassment and bullying, compromise and cooperation (p 2).

Neighbours have two major choices when it comes to choosing a dispute resolution process for a neighbourhood dispute – court or a form of mediation.

Most neighbours are reluctant to take legal action to resolve a neighbourhood dispute. For many, going to court is a daunting prospect. It may be expensive, complicated, time consuming, drawn out and emotionally exhausting.

The conventional, adversarial court system may not always be the best option to provide a lasting resolution of disputes for neighbours who wish to continue to reside in the same neighbourhood. However, there are a series of ways of resolving neighbourly conflicts without court action available (p 3).

## Specific outcomes in terms of dividing fences and dangerous or intrusive trees

An online survey conducted as part of the consultation on the discussion papers found that almost:

- 80% of respondents had experienced a dispute with their neighbour;
- 60% of respondents reported disputes with their neighbours over a dividing fence; and
- 56% of respondents reported disputes over dangerous or intrusive trees.<sup>15</sup>

The key outcomes of the consultation were that:

- the existing legislation governing dividing fences in Queensland, the [Dividing Fences Act 1953 \(Qld\)](#), needed to be modernised and many provisions clarified; and
- people should be responsible for the proper care and maintenance of their trees.<sup>16</sup>

## DRAFT NEIGHBOURHOOD DISPUTES RESOLUTION BILL 2010 (QLD)

On 12 May 2010, the Hon C Dick MP, Attorney-General and Minister for Industrial Relations, tabled in the Queensland Parliament public consultation drafts of the Neighbourhood Disputes Resolution Bill 2010 (Qld) ('[draft Bill](#)') and the accompanying Explanatory Notes ('[draft Explanatory Notes](#)').

The Attorney-General stated that the [draft Bill](#) is "the result of extensive research and broad consultation that examined the most common causes of neighbourhood disputes and how they might be resolved".<sup>17</sup>

By way of summary, the main objects of the [draft Bill](#) are to:

- provide rules about each neighbour's responsibility for dividing fences and trees so that neighbours are generally able to resolve any associated issues without a dispute arising; and
- facilitate the resolution of any disputes that do arise (cl 5(1)).

**Chapter 2** of the [draft Bill](#) deals with dividing fences, and **Chapter 3** deals with trees.

In terms of some of the anticipated benefits of the changes proposed under the [draft Bill](#), the Attorney-General has said:

No one wants their relationship with a neighbour to turn sour over something that could be easily resolved.

These laws will make it easier for neighbours to resolve disputes before they get out of hand.

Friendly, tight-knit communities are one of Queensland's great strengths and the proposed laws will help us preserve this lifestyle. ...

Community members need a clear path and practical remedies to help avoid, reduce and resolve disputes with their neighbours over these common causes of disagreement.

While the proposed new laws will not resolve each and every neighbourhood dispute about fences and trees, the government expects that they will go some way to make our suburbs more friendly and neighbourly places.

At the end of the day, we want to keep people out of the courts by ensuring they have a clear understanding of their rights, and accessible mechanisms to resolve disputes amicably, as good neighbours.<sup>18</sup>

The [draft Bill](#) and [draft Explanatory Notes](#) gave the community an opportunity to provide feedback on the proposed changes.<sup>19</sup>

Public feedback closed on 9 July 2010.

Just prior to the close of submissions, the Attorney-General advised that about 150 submissions had already been received. The Attorney-General noted that "clearly there is a lot of community interest in preventing and solving some of the most common causes of conflict in our neighbourhoods".<sup>20</sup>

## DIVIDING FENCES

### BACKGROUND

The Queensland Government has acknowledged the role dividing fences play in neighbourhood disputes:

Many things affect relations between neighbours and fences are one of the most common causes of neighbourhood conflict and complaints to government departments and councils.<sup>21</sup>

This part of the *e-Research Brief*:

- summarises the existing regulation of dividing fences in Queensland, by mentioning some of the key provisions of the [Dividing Fences Act 1953 \(Qld\)](#) and the associated issues identified in the Dividing Fences discussion paper; and
- discusses a selection of the key changes proposed by the [draft Bill](#).<sup>22</sup>

### EXISTING REGULATION UNDER THE *DIVIDING FENCES ACT 1953 (QLD)*

The existing legislation regulating dividing fences in Queensland, the [Dividing Fences Act 1953 \(Qld\)](#), commenced on 15 October 1953 (almost 57 years ago) and has been amended on nine occasions.

At the time of release of the Dividing Fences discussion paper, the then Attorney-General, the Hon K Shine MP,<sup>23</sup> was reported as saying the existing legislation was "more than 50 years old" and "did not reflect the problems experienced in a modern community".<sup>24</sup> More recently, the Premier, the Hon A Bligh MP, said:

The Dividing Fences Act 1953 has been the statutory authority on boundary issues for over half a century in Queensland. ...

But times have changed and the Queensland of today is a very different place. ...<sup>25</sup>

### Overview

In summary, the [Dividing Fences Act 1953 \(Qld\)](#):

- governs the liability of neighbours for the costs of constructing and repairing dividing fences;
- provides a procedure which must be followed if a person seeks a contribution from their neighbour towards such costs; and
- empowers persons engaged in constructing or repairing dividing fences to reasonably enter neighbouring property for the purpose of undertaking such work.

The [Dividing Fences Act 1953 \(Qld\)](#) does not provide for the scenario in which a person undertakes work in relation to a dividing fence without seeking a contribution towards the cost of such work from their neighbour.<sup>26</sup>

Other issues concerning dividing fences not addressed by the [Dividing Fences Act 1953 \(Qld\)](#) include:

- the ownership of a dividing fence (see the Dividing Fences discussion paper, p 6);

- altering a dividing fence, or attaching something to it, without a neighbour's agreement (see the Dividing Fences discussion paper, p 9);
- where responsibility lies for the cost of repairing a dividing fence damaged through the negligent or deliberate act of a person who enters land with the consent of the owner, such as a visitor or tradesperson (see the Dividing Fences discussion paper, p 8);
- liability for the cost of constructing or repairing a dividing fence adjacent to strata title land (see the Dividing Fences discussion paper, p 12); and
- what should happen when a person sells their property while a dividing fence is being built, or buys a property when a dividing fence needs repair (see the Dividing Fences discussion paper, pp 6-7).

## Application

The [Dividing Fences Act 1953 \(Qld\)](#) does not apply:

- to unalienated Crown land, subject to some limited exceptions (s 4); and
- in relation to a State plantation forest, including a licence area in a State plantation forest, or to a plantation licensee or plantation sublicensee (s 4A).<sup>27</sup>

In terms of rural land, the Dividing Fences discussion paper, p 13, noted a “general confusion in the community” about whether the [Dividing Fences Act 1953 \(Qld\)](#) applies to the owners of rural properties (which it does). It noted:

There are many different considerations for fences erected in rural areas as opposed to residential areas. For example, the properties are much larger and it may be days or even weeks before an owner would visit the boundary of their property. Rural landowners need very different types of fences to those in residential areas. Problems can also arise where agricultural or pastoral land adjoins residential land.<sup>28</sup>

The Dividing Fences discussion paper, p 13, raises the following questions about dividing fences in rural areas:

- what considerations should be taken into account for dividing fences in rural areas?
- what is a rural area?
- what should constitute a sufficient fence in rural areas?
- what will be a sufficient dividing fence where land zoned rural or semi-rural adjoins residential land?

## What is a ‘fence’?

The [Dividing Fences Act 1953 \(Qld\)](#), s 6, defines ‘fence’ to mean:

... a structure of posts and boards, palings, rails, galvanised iron, metal, or wire, or a wall, ditch, or embankment, or a combination of any of these, enclosing or bounding land, and includes any foundation, foundation wall, or support reasonably necessary for the support and maintenance of the fence, but does not include a wall which is part of a house or other building.

The Dividing Fences discussion paper, p 3, noted that other jurisdictions have wider definitions which include, for example, hedges or other vegetative barriers.

Specific reference is also not made in the [Dividing Fences Act 1953 \(Qld\)](#) to its application to retaining walls and building walls. In this regard, the Dividing Fences discussion paper, p 13, states:

The definition of fence includes a wall but it is not clear what this means. This uncertainty can cause disputes between owners. Often they are required to resort to the common law to look for guidance on issues which arise with retaining walls between their adjoining lands. While the common law may set out the rules, it does not provide a practical solution for an owner because of the legal costs involved.

Problems can arise where one owner attaches things to the retaining wall or building wall of their neighbour, or where the retaining wall becomes damaged or worn on one neighbour's side of the boundary line. With trends towards smaller lots and more development occurring on sloping terrain, disputes regarding retaining walls and building walls are increasing.

The Dividing Fences discussion paper, p 14, asked:

- whether the [Dividing Fences Act 1953 \(Qld\)](#) is the appropriate legislation to address issues about building walls and retaining walls;

- who should be responsible for the cost of repairs to existing building walls and retaining walls;
- whether the owner who is retaining their land should be solely liable for the cost of repairs to retaining walls, or whether both owners should share the costs; and
- whether the [Dividing Fences Act 1953 \(Qld\)](#) should govern the construction, maintenance, drainage, design, rebuilding costs and repair of retaining walls, and, if not, where these details should be specified.

## Contributions to construction or repair costs

The basic position under the [Dividing Fences Act 1953 \(Qld\)](#) is that neighbours are liable for the costs of constructing or repairing dividing fences in equal proportions (ss 7 and 15).

Strict written notice requirements must be followed in order to seek a neighbour's contribution to such costs (ss 8 and 16).

Failure to follow the stated process will preclude the operation of the [Dividing Fences Act 1953 \(Qld\)](#), and the person's only option will be to negotiate a contribution with their neighbour, which may be unsuccessful.<sup>29</sup>

The Dividing Fences discussion paper, pp 2, 4 and 7, raises various considerations about the contributions of neighbours towards dividing fence costs, and the process for obtaining such contributions.

## What is a 'sufficient dividing fence'?

The [Dividing Fences Act 1953 \(Qld\)](#) states that neighbours must contribute equally to the cost of a 'sufficient fence' (s 7), without providing guidance as to what constitutes a 'sufficient fence'.

If neighbours cannot agree as to the kind of dividing fence to be constructed, an application can be made to a Magistrates Court or to the Queensland Civil and Administrative Tribunal ('[QCAT](#)')<sup>30</sup> for an order determining the kind of fence to be constructed (s 9(1)).<sup>31</sup>

In making such an order, consideration must be given to "the kind of fence usual in the locality where it is proposed to construct the fence and the purposes for which the adjoining lands are used" (s 9(4)).

The lack of guidance in the [Dividing Fences Act 1953 \(Qld\)](#) on what constitutes a 'sufficient dividing fence' in terms of, for example, height or type of construction material, is considered in the Dividing Fences discussion paper, p 3.

## Orders Magistrates Court or QCAT may make

In general, applications about disputes regarding the construction or repair of dividing fences may be made to the Magistrates Court (currently for disputes up to and including \$50,000, which will be increased to \$150,000 on 1 November 2010)<sup>32</sup> or to [QCAT](#) (for disputes up to and including \$25,000)<sup>33</sup> (s 18).

Disputes about a new dividing fence can relate to the construction of the proposed dividing fence (for example, whether it is needed or whether an existing dividing fence should instead be repaired), the line of the fence, or the kind of fence to be constructed. The orders made by the Magistrates Court or [QCAT](#) can include:

- the kind of fence to be constructed;
- what proportion of the cost each neighbour is responsible for;
- the time within which the fence must be constructed;
- if necessary, the line upon which the fence is to be constructed; and
- whether an existing dividing fence should instead be repaired rather than replaced (s 9(1)).

Disputes about the repair of an existing dividing fence can relate to whether the fence should instead be replaced with a new dividing fence, whether the fence in fact needs repair and what portion of the cost each neighbour should bear. The orders made by the Magistrates Court or [QCAT](#) in this instance can include:

- whether the dividing fence should be repaired or replaced;
- whether the dividing fence needs repair;
- who should effect the repairs; and
- the proportion of the repair cost each neighbour should bear (ss 9 and 16).

## KEY CHANGES FOR DIVIDING FENCES PROPOSED BY THE DRAFT BILL

The [draft Bill](#) proposes repealing the [Dividing Fences Act 1953 \(Qld\)](#) (cl 99).

Matters concerning dividing fences are set out in **Chapter 2** of the [draft Bill](#). A selection of the key changes proposed is discussed below. In summary, these include:

- a broader definition of 'fence' to include, for example, hedges or similar vegetative barriers;
- specific exclusion of retaining walls from regulation under the [draft Bill](#);
- greater guidance on what constitutes a 'sufficient dividing fence';
- a statement that neighbours equally own a dividing fence;
- a new, single, procedure to be followed when a dividing fence is to be constructed or repaired, including a new pro-forma notice for use when seeking a contribution to fencing work;
- a reduced contribution for owners of certain rural land that adjoins residential development;
- provisions directed at the resolution of dividing fence disputes by [QCAT](#);
- provisions governing the construction or alteration of dividing fences which are also swimming pool fences; and
- a process for dealing with the unauthorised construction or demolition of a dividing fence.

### Basic principles for dividing fences

Various basic propositions underlie the draft provisions on dividing fences, including the following:

- there should be a 'sufficient dividing fence' if one neighbour requests a dividing fence;
- a dividing fence is required even if one or both parcels of land are vacant land;
- a dividing fence is not required if either parcel of land is 'excluded land',<sup>34</sup> or if both parcels of land are 'agricultural land';<sup>35</sup>
- generally, neighbours must contribute equally to the cost of building and maintaining a sufficient dividing fence;
- generally, neighbours must not attach something to a dividing fence that materially alters or damages it;<sup>36</sup> and
- neighbours are encouraged to attempt to resolve dividing fence issues informally; however, failing that, a dispute may be taken to [QCAT](#) for resolution (cl 7).

### A broader definition of 'fence' and express exclusion of retaining walls

Some of the changes proposed to the meaning of 'fence' include:

- broadening the term to include hedges or similar vegetative barriers;
- distinguishing what is a foundation for a fence from a retaining wall; and
- specifically excluding retaining walls from regulation under the [draft Bill](#) (cl 10).

The [draft Explanatory Notes](#), p 7, state that a foundation for a dividing fence is distinguished from a retaining wall to overturn the decision in *Jackson v Randall* [2000] 2 QdR 31.<sup>37</sup>

'Retaining wall' is defined to mean "a structure that supports excavated or filled earth" (cl 10(3)).

The [draft Explanatory Notes](#), p 7, state:

A retaining wall is not a fence. It serves a different purpose.

As the NSW Law Reform Commission explained in its Report 59 (1988) Community Law Reform Program: Dividing Fences,<sup>38</sup> at paragraph 4.8:

*"Retaining walls serve quite different purposes from fences. They are usually substantial and expensive structures which repose within the subsurface of the land of one adjoining owner, and are therefore required to withstand considerable lateral stress. They also interfere with the cross-flow of subterranean water and so must normally include weep holes and other drainage works. The foundations or footings often encroach substantially upon the downward adjoining landowner. Retaining walls are usually erected solely for the benefit of the owner who undertakes excavation work. ..."*

Alternatively, retaining walls can be established to support “built up” earth. Generally retaining walls involve engineering specifications prior to construction. They are more than the mere levelling of dirt.

Unlike fences, it is not possible to make both adjoining owners liable for the cost of maintaining, repairing or replacing a retaining wall. This is because usually a retaining wall is of greater benefit to one of the adjoining owners.

### **Greater guidance on what constitutes a ‘sufficient dividing fence’**

What constitutes a ‘sufficient dividing fence’ will depend on the nature of the adjoining land (**cl 12**).

For adjoining land consisting of two parcels of residential land, the dividing fence must be between 70cm and 1.8 metres in height and constructed substantially of any of the following material (unless the material does not comply with a requirement under a relevant local law):

- wood, including timber palings and lattice panels;
- chain wire;
- metal panels;
- bricks;
- rendered cement;
- concrete blocks;
- stone; or
- other material of which a dividing fence is ordinarily constructed (**cl 12(1)(a) and 12(3)**).

The [draft Explanatory Notes](#), p 8, state:

While generally a provision of this nature would be considered a matter for local councils, given the number of local councils and the degree of inconsistency between local laws, it has been included in the Bill.

For adjoining land consisting of two parcels of pastoral land, the dividing fence must be sufficient to restrain livestock of the type grazing on each parcel of land (**cl 12(1)(b)**).

In any other case, the dividing fence must be what the adjoining owners agree is a sufficient dividing fence, or what [QCAT](#) decides is a sufficient dividing fence (**cl 12(1)(c)**).

The [draft Explanatory Notes](#), p 8, provide:

The basic rules stated for a fence are not intended to imply that any dividing fence less than the standard is now insufficient. For example, there may be great contention between adjoining owners as to whether an existing fence is sufficient and whether it needs repair rather than replacement. In older more established suburbs, the usual fence may have been a short chain wire or picket fence. It is not intended by this legislation that the shorter fence should now be considered insufficient and needs to be replaced. If a fence is sufficient to divide and is serving this purpose well, it should be retained. In fact, the history of the fencing between the properties and in the surrounding area should be treated as a very good guide as to what is sufficient.

When [QCAT](#) decides whether a dividing fence is a sufficient dividing fence, all the circumstances of the case may be considered, including the following:

- any existing or previously existing dividing fence;
- the purposes for which the adjoining parcels of land are used or intended to be reasonably used;
- the kind of dividing fence normally used in the area;
- whether the dividing fence is capable of being maintained by the adjoining owners; and
- any policy adopted, or local law made, in relation to dividing fences by the applicable local government (**cl 36**).

The [draft Explanatory Notes](#), p 17, state the following in terms of any existing or previously existing dividing fence:

As older suburbs are re-developed or become more fashionable, newer residents may desire a more elaborate fence than has previously been common in the area. In those circumstances, the fact that previously a shorter paling or chain wire fence has been used as a dividing fence is a highly relevant consideration in deciding what is sufficient.

In terms of whether a dividing fence will be capable of being maintained by neighbours, the [draft Explanatory Notes](#), p 17, state:

This is intended to refer both to the capacity to maintain the fence physically (an adjoining owner may be unable to undertake painting) and also to the adjoining owners' financial means. If a fence is erected which is beyond the financial means of one adjoining owner (for example, a pensioner) to maintain in the future, then it is not a sufficient dividing fence.

## Equal ownership of dividing fences

Under the [draft Bill](#), a dividing fence on a common boundary is owned equally by the neighbours (**cl 19**).

## When a fence is within a boundary rather than on the common boundary

Where a person builds a fence within their own boundary in order to have the kind of fence they desire, problems can arise with the construction and maintenance of an actual dividing fence on the common boundary.

The [draft Explanatory Notes](#), p 8, state:

There have been inconsistent decisions in the past about the appropriate treatment of such a fence, so the Bill clarifies the matter.

The [draft Bill](#) provides that the existence of a fence, other than a dividing fence, on adjoining land is not to be taken into account in deciding whether there is a sufficient dividing fence (**cl 12(2)**).

In addition, [QCAT](#) will have power to order that such a fence be removed if it considers its removal is necessary to allow a dividing fence to be constructed or repaired (**cl 33(3)**).

When a new dividing fence is to be constructed, the [draft Bill](#) requires it to be constructed on the common boundary, except to the extent it is impracticable to do so because of physical features (**cl 20(2)**).

## A single procedure for fencing work

The [draft Bill](#) proposes that a single procedure be followed when seeking a contribution to 'fencing work', which will replace the existing separate procedures for constructing or repairing a dividing fence.

The [draft Explanatory Notes](#), pp 9-10, state:

In other jurisdictions, some owners have been deprived of contribution because the court held that they had proceeded under the incorrect section (that is, that they have sought repair, but should have sought demolition and construction of a new fence). This has reportedly happened in this State. To avoid this situation, the New South Wales Law Reform Commission proposed that a single definition of fencing work should be the basis of the procedure for determining disputes.

The new definition will allow a single step for design, construction, modification, replacement and repair. When an adjoining owner wants to seek contribution for a new fence or the repair of an existing fence, they will use a single form.

'Fencing work' is defined to mean:

- the design, construction, modification, replacement, removal, repair or maintenance of the whole or part of a dividing fence; and
- the surveying or preparation of land, including the trimming, lopping or removal of vegetation, along or on either side of the common boundary for a purpose mentioned above,

and includes:

- planting, replanting and maintaining a hedge or similar vegetative barrier as the dividing fence;
- cleaning, deepening, enlarging or altering a ditch, embankment or watercourse that serves as the dividing fence; and
- obtaining any required approval (**cl 15**).

In terms of the liability of neighbours for fencing work, if there is no sufficient dividing fence then each neighbour must contribute to the cost of the fencing work required to have a sufficient dividing fence (**cl 20(1)**).

Some of the provisions in the [draft Bill](#) stating the contributions required of neighbours in various scenarios are discussed below.

## **Contributions - generally**

The general position regarding the contribution of neighbours to the cost of fencing work is that:

- each neighbour is liable for half of the cost required to have a sufficient dividing fence; and
- a person who wants to have more fencing work done than necessary for a sufficient dividing fence will also be liable for all of the additional cost (**cl 21**).

The example provided in **clause 21** is as follows:

One adjoining owner wants a dividing fence of a higher standard than a sufficient dividing fence or wants to do more preparation of land, including by trimming, lopping or removing more vegetation, than is necessary for the construction of a sufficient dividing fence. This owner will be liable for half the cost of fencing work for a sufficient dividing fence plus all the cost of fencing work beyond what is required for a sufficient dividing fence.

The [draft Explanatory Notes](#), p 12, state:

It should not be assumed that QCAT would allow a dividing fence to be built to one owner's specifications.

A sufficient dividing fence should be the bare minimum required to divide, so that the contribution required from each owner is kept to a minimum. This is a fair system which will provide equitably for the economically disadvantaged members of the community.

## **Contributions - where certain rural land adjoins residential development**

**Clause 22** of the [draft Bill](#) governs the situation where certain rural land ('agricultural land',<sup>39</sup> 'pastoral land'<sup>40</sup> or 'rural residential land')<sup>41</sup> adjoins all or part of a residential development that was previously also rural land (agricultural land, pastoral land or rural residential land).

It provides that the owner of the rural land is required to contribute only to the cost of a dividing fence that would have been sufficient for the purposes for which the two parcels of rural land had been used (i.e. prior to the residential development proceeding).

The [draft Explanatory Notes](#), p 12, state:

As Queensland increasingly develops, it is more common that a parcel of rural land is adjacent to a residential development. Ordinarily the obligation to fence the boundary between the residential development and the rural land should be dealt with in the planning instrument. Where that is silent, this clause ensures the owner of rural land is only liable for the cost of a dividing fence sufficient for rural purposes for which the parcel of land has been used.

This kind of situation has arisen in the past and this clause will provide welcome certainty to the owners of a parcel of rural land as defined in the Bill.

It is not intended that the owner of agricultural land should be liable to contribute to a fence at all, if a fence has not been needed previously.

## **Liability for damage or destruction caused by invitees**

**Clause 26** of the [draft Bill](#) provides that where, whether before or after the commencement of the provision, a dividing fence is damaged or destroyed by a negligent or deliberate act or omission of an owner of land or a person who has entered the owner's land with their consent, the owner will be required to restore the dividing fence to a reasonable standard, having regard to the state it was in before the damage or destruction.

## **How to obtain a contribution towards the cost of fencing work and resolve any disputes**

The [draft Bill](#) is premised upon neighbours being encouraged to attempt to resolve any issues about fencing work to avoid a dispute arising (**cl 30(1)**).

### **A new draft notice for use when seeking a contribution to fencing work costs**

If a person wants their neighbour to contribute to the cost of fencing work, they will be required to give the neighbour a 'notice to contribute' (**cl 30(2)**). The requirements for such a notice are set out in **clause 31**.

A [draft 'Notice for contribution to fencing work'](#) was released as part of the consultation on the [draft Bill](#).<sup>42</sup>

If, within one month of giving this notice, the neighbours have not agreed about the proposed fencing work and their contributions to the cost of such work, either neighbour may, within two months of the notice being given, apply to [QCAT](#) for an appropriate order (**cl 31(7)**).

Until the neighbours have agreed about the proposed fencing work and their contributions to the cost, the fencing work should not proceed (**cl 31(8)**), unless urgent fencing work is required (cl 29).

### ***Resolving a dividing fence dispute***

[QCAT](#) has jurisdiction to hear and decide any matter arising under the [draft Bill](#) concerning a dividing fence (**cl 33(1)**).<sup>43</sup>

In addition, the [draft Bill](#) specifically provides that, without limiting section 43 of the [Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#),<sup>44</sup> a party to a dividing fence dispute before [QCAT](#) may be represented by a real estate agent (**cl 34**). The [draft Explanatory Notes](#), p 16, state that this is:

Because an owner may use a real estate agent to manage a property ... .

[QCAT](#) may make an order in relation to a dividing fence dispute which decides any one or more of the following:

- the line on which the fencing work is to be carried out (which may or may not be the common boundary);
- the fencing work to be carried out, including the kind of dividing fence involved;
- how contributions for the fencing work are to be apportioned or reapportioned, or the amount that each neighbour is liable to pay for the fencing work;
- the portion of the dividing fence to be constructed or repaired by each neighbour;
- the time by which the fencing work is to be carried out;
- the amount of any compensation, in the form of an annual payment to either neighbour, for loss of occupation of any land where the dividing fence is not on the common boundary; and
- that, in the circumstances, no dividing fence is required for all or part of the boundary of the adjoining lands (**cl 35**).

### **Constructing or changing swimming pool fences**

Current information about Queensland's swimming pool fence requirements is available in the following publication: Queensland Government (Department of Infrastructure and Planning). [Swimming Pool Safety Guidelines](#), 4<sup>th</sup> edn, April 2010.

#### ***When no notice or consultation with a neighbour is required***

The [draft Bill](#) allows a swimming pool owner to make certain changes to a dividing fence which is also a swimming pool fence without notifying or consulting with their neighbour. These changes include:

- 'minor changes', such as moving a rail or fence post; or
- increasing the height of an existing dividing fence to not more than 1.8 metres, using the same materials and colours (**cl 28(2)**).

#### ***When a swimming pool owner must notify and consult with their neighbour***

In other circumstances, the [draft Bill](#) requires a swimming pool owner to:

- give their neighbour seven days notice before constructing an outdoor swimming pool fence that is a dividing fence or part of a dividing fence, or making any 'significant change', such as changing the colour or material of which the dividing fence is constructed; and
- consult with their neighbour about the construction or significant change (**cl 28(1)**).

The swimming pool owner and their neighbour are encouraged to make a reasonable effort to reach agreement about the work and act reasonably in attempting to reach an agreement (**cl 28(5)**).

Until the neighbours have agreed about the construction of, or any significant change to, the dividing fence, the

fencing work should not proceed (cl 28(6)).

A dispute may be resolved by [QCAT](#), which can conduct an expedited hearing on the matter (cl 28(7)-(8)).

In deciding such a dispute, the primary consideration for [QCAT](#) is the safety of any person (cl 28(9)).

The Minister must, after five years, review this provision to decide whether the purpose of the section remains valid and whether the terms of the section are appropriate for achieving that purpose (cl 96).

The purpose of the provision is to promote swimming pool safety by allowing swimming pool owners to construct or alter swimming pool fences that are also dividing fences in order to comply with the requirements of the [Building Act 1975 \(Qld\)](#), Chapter 8 ('Swimming pool safety'), as quickly as possible and at the minimal cost to the pool owner (cl 96(4)).

The [draft Explanatory Notes](#), p 14, also state:

These proposals are intended to promote the safety of children around swimming pools.

## **A new process for dealing with unauthorised construction or demolition of dividing fences**

The [draft Bill](#) provides a new process for neighbours when unauthorised construction or demolition of a dividing fence is anticipated to occur, or has occurred.

### ***If unauthorised construction or demolition is anticipated***

A person who believes on reasonable grounds that their neighbour intends to construct or demolish a dividing fence without their agreement or an order from [QCAT](#) may apply to [QCAT](#) for an order to prevent their neighbour from doing so (cl 38).

### ***After unauthorised construction or demolition has occurred***

A person may apply to [QCAT](#) for an order that their neighbour remove, modify or rectify a dividing fence in circumstances where the neighbour has constructed or demolished the dividing fence without their agreement or an order from [QCAT](#). [QCAT](#) can also order the neighbour to bear the costs of the removal, modification or rectification (cl 39).

## **DANGEROUS OR INTRUSIVE TREES**

People can be affected by a neighbour's tree in a variety of ways, for example:

- by roots, which cause structural damage to their property (for example, to fences, driveways or underground pipes);
- by overhanging branches, which are a potential danger to them and/or their property;
- by large numbers of leaves, which can clog gutters or blow into swimming pools;
- by excessive shade, which can affect the operation of solar panels; or
- where a vigorously or densely growing tree or shrub blocks light to their house or a pre-existing view.

A recent article described the situation of neighbourhood tree disputes as follows:

While trees are attractive and provide welcome shade, they are also the cause of some of the biggest disagreements between neighbours. Tales abound of illegal lopping and even poisoning of trees in some neighbourhoods, not to mention the practice of growing "spite hedges" – dense shrubbery grown deliberately to block a neighbour's view or sunlight.<sup>45</sup>

## **EXISTING REGULATION OF DANGEROUS OR INTRUSIVE TREES IN QUEENSLAND**

The Trees discussion paper, p 5, stated:

The nuisance of trees on private property presents a special challenge to state and local government and other public authorities in terms of issues of access, abatement costs, resources, liability, responsibility and balancing the rights of parties and the community.

It also noted, p 1:

There is currently no specific statutory law in Queensland which addresses the nuisance of trees.

The options currently available to Queenslanders affected by the dangerous or intrusive trees of their neighbours are generally limited to:

- abatement;
- an action in nuisance; or
- where available, recourse under the local laws of the relevant local government.

These options are briefly discussed below.

## Abatement

The *Queensland Law Handbook*<sup>46</sup> describes abatement, in the context of overhanging tree branches, as follows:

... the most commonly used remedy for a person affected by a neighbouring tree ... overhanging their property is to cut the tree back to the boundary line and tidily return the branches to the tree owner.

A person who exercises this 'self-help' remedy is generally not able to recover from their neighbour the cost of doing that work.

In this regard, the Trees discussion paper, p 3, stated:

If a neighbour removes tree roots which are intruding onto their land they are unable to recover the costs of abatement unless damage has occurred. However, a neighbour may be able to claim any damages that accrued to them or their property prior to removing the nuisance tree.

The costs of abatement can be recovered, where damage has occurred, only if it can be demonstrated that the abatement constituted a reasonable step taken in mitigation of damages. The abatement must not have taken the neighbour onto his neighbour's land or caused any damage to the land or property on it.

## An action in nuisance

The Trees discussion paper, p 2, explained the law of nuisance as follows:

Nuisance occurs when one neighbour's activities cause damage or interference with another's enjoyment of their land to an unreasonable extent. In order for there to be a nuisance there must be:

- an invasion of a neighbour's use and enjoyment of their land; and
- a harmful interference.

The harmful interference can consist of physical damage to the land or structures on it, or a disturbance of the comfort, health or convenience of the neighbour. ...

The Trees discussion paper, p 3, also emphasised that in order to be actionable in nuisance, a tree must not only invade a neighbour's use and enjoyment of their land, but the invasion must be to such an extent that it is considered substantial and unreasonable.

In order to obtain redress for the nuisance caused by their neighbour's tree, a person must take their neighbour to court. The remedies the court may grant include:

- an injunction, requiring the neighbour to stop the nuisance (for example, by cutting down the tree or branches, or removing the roots);
- damages to compensate for the nuisance; and
- allowing the person to abate the nuisance (for example, by cutting back the branches or roots (Trees discussion paper, p 3)).

The competing interests which must be balanced have been explained as follows:

The law of nuisance attempts to balance the competing interests between the person who has a right to use their land as they see fit and the person who has the right to enjoy their land without interference.<sup>47</sup>

In the situation of a person who buys a property with an existing dangerous or intrusive tree, the Trees discussion paper, p 3, described the liability of the purchaser for the nuisance as follows:

There are circumstances where a nuisance originates from a neighbour's property, although they did not cause it to occur. The most common example of this is when the neighbour buys the property from someone else and the overhanging branches or intruding tree roots already exist. The new owner has, in effect, 'inherited' the nuisance.

Usually a new owner will not be liable in nuisance for trees on their property unless they are made aware of

the nuisance and then take no action to prevent it from occurring. They must know or ought to have known of the nuisance but allow it to continue. An owner will be considered to 'ought to have known' of the nuisance if a reasonable inspection of the property would have revealed the existence of the overhanging tree branches or intruding roots.

The damage that has occurred to a neighbour's property must be a reasonably foreseeable consequence of the nuisance. This means that the harm suffered by the neighbour must be a logical consequence of the overhanging tree branches or intruding tree roots. While there does not need to be negligence on the part of the owner, some degree of fault is required.

The following observations were made in the Trees discussion paper about the practicality, and limitations, of an action in nuisance for a neighbour's dangerous or invasive tree:

The law in relation to the nuisance of trees is a source of much confusion for many Queensland neighbours. There are landowners and neighbours who are unaware of what laws, if any, exist. This lack of knowledge can have an adverse effect on neighbours and on their ability to resolve any disputes that arise with regard to trees (p 1).

The common law does not generally recognise a neighbour's right to light unless access to the sun is protected by an easement. This could have implications for neighbours with solar panels on their roof.

The law of nuisance also does not provide a remedy where trees block out a neighbour's view. This could have implications for loss of value of the property (p 2).

The court process is expensive and not a practical option for most neighbours (p 3).

In terms of obtaining an injunction, the Resolving Neighbourhood Disputes discussion paper, p 12, noted:

Injunctions are very expensive to obtain and can only be granted by the Supreme Court. A temporary injunction can be granted by the District Court. The cost of obtaining an injunction is beyond the reach of most neighbours and usually out of proportion to the damage and interference suffered by the neighbour.

The [draft Explanatory Notes](#), p 1, also state:

The Review [of the law of neighbourly relations] ... found that the application of the common law of nuisance to a neighbourhood dispute about trees did not provide a realistic solution for people living in closely settled communities in Queensland.

## **Local government regulation**

### ***Local laws directed at nuisance trees***

The Trees discussion paper, p 1, recognised that:

There is ... no specific requirement for Queensland local government bodies to have laws relating to the issue of trees ...

However, where such local laws do exist, the Trees discussion paper, p 4, noted that they generally consist of a number of standard clauses which outline the circumstances and procedures for rectifying the problem.

These local laws were noted as typically being structured as follows:

- 'authorised persons' can require the occupier of land on which a dangerous or intrusive tree grows to remove the tree or cut it back;
- where a tree gives rise to personal injury or damage to property and the danger is serious and imminent, the authorised person may enter the land to remove the danger; and
- in these circumstances, notice to the owner is not required and the cost of the work may be recovered as a debt against the owner of the tree (Trees discussion paper, p 4).

The Trees discussion paper, p 4, noted that local governments will only intervene where there is an imminent threat to property or public safety. In other cases, a notice will be issued to require the owner to undertake the required work.

### ***Tree protection and tree preservation orders***

The Trees discussion paper, p 5, noted that many local governments in Queensland have local laws and codes to protect and manage the trees and vegetation on public and privately owned land. Under these laws and codes, the local government's approval must be sought to remove or prune a tree of a particular size or

species. Failure to obtain such approval is an offence.

The Trees discussion paper, p 5, also noted that:

- usually, the owner of the tree must engage an arborist for an opinion on the tree before submitting an application to the local government to carry out work on the tree;
- local governments are reluctant to approve the pruning or removal of a protected/preserved tree by anyone but the owner of the tree; and
- approval might be given to the owner for pruning or removal if:
  - the tree is dead or damaged and likely to cause damage to property or a person;
  - the roots of the tree are blocking sewerage or other pipes;
  - the tree is on a boundary and may cause problems with the erection of a dividing fence;
  - the overhanging branches are causing a nuisance and are damaging structures; and
- where the protected/preserved tree is on a neighbouring property and is causing a nuisance, the local government may require the person to seek the permission of their neighbour to prune or remove the tree, subject to the local government's approval of the work. If such permission is not provided, then, in the absence of local laws, the affected neighbour may have no option but to commence expensive court proceedings.

## KEY CHANGES FOR DANGEROUS OR INTRUSIVE TREES PROPOSED BY THE DRAFT BILL

Matters concerning dangerous or intrusive trees are set out in **Chapter 3** of the [draft Bill](#). A selection of the key changes proposed is discussed below. In summary, these include:

- legislatively stating that people have a responsibility to properly care for and maintain their trees;
- a new statutory remedy for people affected by the dangerous or intrusive trees of their neighbours (the common law right of abatement is preserved,<sup>48</sup> however an action in nuisance may be brought only with the leave of a court);
- a formal process for the resolution of particular issues relating to overhanging branches, where a neighbour wants only the branches to be cut and removed;
- a process for application to be made to [QCAT](#) to resolve other issues about trees;
- requiring [QCAT](#) to keep a register of the orders it makes in relation to trees, which can be searched by the public;
- requiring the seller of land affected by an application or order of [QCAT](#) concerning a tree to give a buyer a copy of the application or order before entering into a contract of sale, with certain consequences arising for the buyer and seller depending on whether or not the requirement is fulfilled; and
- providing local governments with the ability to carry out any unperformed work on a tree required under a [QCAT](#) order, if they elect to carry out such work.

## Basic principles for dangerous or intrusive trees

The following basic propositions underlie the draft provisions on dangerous or intrusive trees:

- a 'tree keeper'<sup>49</sup> is responsible for the proper care and maintenance of their trees,<sup>50</sup> and
- there is a presumption against the removal or destruction of a living tree (**cl 41**).

Similar to the provisions in the [draft Bill](#) regarding dividing fences, neighbours are encouraged to attempt to resolve issues about trees informally (**cl 53(3)**). Failing that, provision is made for the resolution of such issues, with different processes applying for:

- particular issues about overhanging branches; and
- other issues about trees (**cl 53(4)**).

## Application of the proposed new provisions

The proposed new provisions will not apply to:

- a tree that is situated on land that is greater than five hectares in size,<sup>51</sup> unallocated State land or land prescribed by regulation; or
- a tree that is prescribed by regulation (**cl 42 and 51**).

A regulation may also provide that all or some of the new provisions do not apply to a tree that is situated on land within a particular local government area (**cl 43**).

Importantly, if **Chapter 3** of the [draft Bill](#) requires a person to carry out work in relation to a tree, other than under a [QCAT](#) order, and another law requires a consent or authorisation to be given before the work is carried out, that consent or authorisation must first be obtained (**cl 44**).

### **Tree keeper's responsibilities**

People will have the following responsibilities in relation to their trees:

- cutting and removing any branches that overhang their neighbour's land; and
- ensuring that a tree does not cause:
  - injury to a person;
  - damage to a person's land or any property on the person's land; or
  - substantial, ongoing and unreasonable interference with a person's enjoyment of their land (**cl 53**).

### **Recourse available for dangerous or intrusive trees**

**Chapter 3** of the [draft Bill](#):

- provides a new statutory remedy for people affected by their neighbour's dangerous or intrusive tree (discussed below);
- preserves the common law right of abatement in relation to a tree, however a person who exercises this right will no longer be obliged to return any branches, roots or fruit to their neighbour (**cl 55**); and
- requires the leave of the court for the bringing of any action in nuisance for a neighbour's dangerous or intrusive tree (**cl 45**).

### **Resolving particular issues about overhanging branches**

**Chapter 3, Part 5** of the [draft Bill](#) will apply if:

- an issue about a tree relates only to overhanging branches; and
- a neighbour wants only the branches cut and removed (**cl 56**).

The tree keeper and neighbour are encouraged to resolve the issue informally; however, the neighbour may:

- exercise the common law right of abatement (any associated costs will not be recoverable by the neighbour);<sup>52</sup> or
- use the formal process set out below (**cl 57**).

The formal process involves:

- the neighbour giving a written notice to the tree keeper in the prescribed manner (a [draft 'Notice for overhanging branches'](#) was released as part of the consultation on the [draft Bill](#)), asking that the overhanging branches be cut and removed within 30 days and giving permission to enter the neighbour's land to do so (**cl 58**); and
- the tree keeper responding within this notice period, stating who will do the work and when it will be carried out (**cl 59**).

If the overhanging branches are not cut and removed within the 30 day notice period, the neighbour may carry out the necessary work. In doing so:

- the neighbour is not obliged to return the branches or fruit from the tree to the tree keeper;
- the tree keeper is liable for the neighbour's reasonable expenses in carrying out the work; and

- the neighbour may recover in a court the amount of the reasonable expenses as a debt (cl 60).

Note that there is an underlying requirement that a person not cut branches under these provisions without obtaining any consent or authorisation that may be required by another law, such as a vegetation protection order (cl 44).

## Resolving other issues about trees

Chapter 3, Part 6 of the [draft Bill](#) will apply if:

- an issue about a tree relates to overhanging branches, but the neighbour seeks more than the cutting and removal of the branches (for example, where overhanging branches regularly fall on the neighbour's property and cause damage or fear of damage or injury); or
- the issue about a tree does not relate only to overhanging branches (for example, where damage is caused by tree roots, or where a tree is so high or thick that it blocks light to the neighbour's property for most of the day (cl 61)).<sup>53</sup>

The tree keeper and neighbour are encouraged to resolve the issue informally,<sup>54</sup> however the neighbour may:

- exercise the common law right of abatement; or
- apply to [QCAT](#) for resolution of the dispute (cl 62).

### ***Matters QCAT has jurisdiction to hear and decide***

[QCAT](#) will have jurisdiction to hear and decide any matter in relation to a tree in which it is alleged the tree:

- has caused, is causing, or is likely to cause, injury to any person;
- has caused, is causing, or is likely in the near future to cause, damage to the neighbour's land or any property on the neighbour's land; or
- has caused or is causing substantial, ongoing and unreasonable interference with the enjoyment of the neighbour's land (for example, interference with television or satellite reception, loss of light, interference with the proper functioning of solar panelling, or interference with a previously existing view, which diminishes the value of land) (cl 63).

In terms of tree litter, and what might constitute substantial, ongoing and unreasonable interference, the [draft Explanatory Notes](#), p 26, state:

Normal tree litter such as leaves, flowers, fruit, seeds or small elements of deadwood would ordinarily not provide the basis for ordering removal of or intervention with a tree. However, there may be cases where substantial and ongoing accumulation of tree litter may be found to be unreasonable by QCAT. For example, fine leaves from particular species of trees that intrude through mesh in gutters and water tanks may be shown to regularly block the gutters or spoil the tank water for drinking purposes.

The procedure to be followed by a neighbour in having a matter heard and decided by [QCAT](#) is as follows:

- an application must be made to [QCAT](#) for an order (cl 64); and
- generally, at least 21 days before the application is to be heard, the neighbour must give a copy of the application to various persons, including the tree keeper and any relevant authority that would be entitled to appear in the proceedings on the basis of their consent or authorisation being required to the work (e.g. where the local government has a vegetation protection order over the tree, or where the tree is classed as a significant landscape tree) (cl 65(1) and 66).<sup>55</sup>

These notice requirements may be waived or varied by [QCAT](#) in appropriate circumstances, such as where a tree poses an imminent threat of injury to a person or damage to a neighbour's land or any property on the neighbour's land (cl 65(2)).

With regard to the making of an application to [QCAT](#), the [draft Explanatory Notes](#), p 28, state:

It is intended that if there is an alternative administrative process available for resolution of a dispute about a tree, then that process should be undertaken before an application is made to QCAT. For example, if a local government has local laws which would allow concerns about an alleged dangerous tree to be addressed, then the process under the local law should be used first to try to resolve the issue.

### ***Orders QCAT may make***

[QCAT](#) may make the orders it considers appropriate in relation to a tree to:

- prevent injury to any person;
- remedy, restrain or prevent damage to a neighbour's land; or
- remedy, restrain or prevent substantial, ongoing and unreasonable interference with the enjoyment of a neighbour's land (**cl 68(2)**).

The orders [QCAT](#) may make include:

- requiring or allowing a tree keeper or a neighbour to carry out 'work'<sup>56</sup> on a tree on a particular occasion or on an ongoing basis;
- requiring that a survey be undertaken to clarify the location of a tree if there is doubt about its location in relation to the common boundary;
- requiring a person to make an application to obtain a consent or other authorisation from a relevant agency in relation to a tree;
- authorising a person to enter a tree keeper's land to carry out an order of [QCAT](#), including to obtain a quote for carrying out an order;
- requiring a tree keeper to pay the costs associated with carrying out an order of [QCAT](#);
- requiring a tree keeper to pay compensation to a neighbour for damage to the neighbour's land and any property on it; and
- requiring a report by an arborist (**cl 68(4)**).

Note that the [draft Bill](#) expressly states that, despite section 178 of the [Property Law Act 1974 \(Qld\)](#),<sup>57</sup> [QCAT](#) may make an order that is intended to result in the access of light to land (**cl 68(3)**).

If [QCAT](#) orders the destruction or removal of a tree, it may also order that the tree be replaced with another appropriate tree, and that the replacement tree be situated in a different place (**cl 71**).

The [draft Explanatory Notes](#), p 30, state that this provision "acknowledges that trees have an important role in countering the effects of air pollutants in the atmosphere and should be replaced where possible".

Failure to comply with an order of [QCAT](#), in the absence of a reasonable excuse, will attract a maximum penalty of 1,000 penalty units (currently \$100,000)<sup>58</sup> (**cl 76**).

The [draft Explanatory Notes](#), p 32, state that this "serious penalty is meant to provide a real, financial deterrent to ignoring these requirements".

[QCAT](#) will be required to keep a register of the orders it makes in relation to trees, which must be kept in electronic form and be searchable in terms of identifying any order affecting particular land (either the tree keeper's land or the neighbour's land) (**cl 78-80**).

### **Scope of QCAT orders**

[QCAT](#) will not be able to order a person to carry out work on a tree if the work is prohibited under another Act of the Queensland Parliament (**cl 69(1)**).<sup>59</sup>

However, if [QCAT](#) is satisfied that an application was made because of a genuine dispute, it may order work on a tree if:

- the work is restricted or prohibited under a local law; or
- consent is withheld by a local government or a tree keeper under a vegetation protection order or other similar order (**cl 69(2)**).

### **Matters for QCAT's consideration in making an order**

There are certain matters [QCAT](#) must have regard to, and other matters [QCAT](#) may have regard to, in making orders about trees (**cl 68(1)**).

[QCAT](#) must have regard to:

- the safety of any person (this is the primary consideration);
- the location of the tree in relation to the boundary and any premises, fence or other structure

affected by the location of the tree;

- whether carrying out work on the tree would require any consent or other authorisation under another Act and, if so, whether it has been obtained;
- whether the tree has any historical, cultural, social or scientific value;
- any contribution the tree makes to the local ecosystem and to biodiversity;
- any contribution the tree makes to the natural landscape and the scenic value of the land or locality;
- any contribution the tree makes to public amenity;
- any impact the tree has on soil stability, the water table or other natural features of the land or locality; and
- the type of tree, including whether the species is a pest or weed (**cl 72(2)**).

If injury to any person, or damage to the neighbour's land or any property on the neighbour's land, is alleged, [QCAT](#) may consider:

- anything other than the tree that has contributed, or is contributing, to the injury or damage, or the likelihood of injury or damage, including any act or omission by the neighbour and the impact of any tree situated on the neighbour's land; and
- any steps taken by the tree keeper or neighbour to prevent or rectify the injury or damage, or the likelihood thereof (**cl 73(1)**).

In ordering work that involves destroying a tree, [QCAT](#) may consider:

- how long the neighbour has known of the injury or damage;
- any steps taken by the tree keeper or the neighbour to prevent further injury or damage;
- anything other than the tree that may have caused, or contributed to, the injury or damage; and
- any other matter [QCAT](#) considers relevant (**cl 73(2)**).

If substantial, ongoing and unreasonable interference with the enjoyment of the neighbour's land is alleged, [QCAT](#) may consider:

- anything other than the tree that has contributed, or is contributing to, the interference;
- any steps taken by the tree keeper or the neighbour to prevent the interference;
- the size of the neighbour's land; and
- whether the tree was planted before or after the neighbour acquired the land (**cl 74**).

### **Sale or proposed sale of affected land**

**Chapter 3, Part 8** of the [draft Bill](#) contains provisions concerning the sale of land affected by an application or order of [QCAT](#) in relation to a tree.

'Land affected by an application or order' means:

- land on which a tree the subject of an application or order is situated; or
- other land mentioned in the application or order as affected by the tree (**cl 81**).

A person selling land affected by an application or order will be required to give the buyer a copy of the application or order before the buyer enters into a contract of sale for the land, unless the person has a reasonable excuse. A maximum penalty of 500 penalty units (currently \$50,000)<sup>60</sup> will apply for a failure to do so (**cl 82**).

Certain consequences will follow for a buyer, depending on whether or not the seller fulfils this requirement.

#### ***If the seller fulfils the requirement***

If a copy of an [application](#) is given to a buyer as required, the buyer is joined as a party to the [QCAT](#) proceeding (**cl 83**).

If a copy of an [order](#) is given to a buyer as required then, on settlement, the buyer becomes, to the extent the

seller has not carried out the work required under the order, bound by the order as if:

- the buyer were the seller; and
- any period mentioned in the order for carrying out the order commenced at settlement (**cl 84**).

### ***If the seller fails to fulfil the requirement***

If a copy of an application or order is not given to a buyer as required then, before settlement, the buyer may terminate the contract at any time (**cl 85**).

If a copy of an order is not given to a buyer as required and, before settlement, the seller has not carried out all the work they are required to carry out under the order, then despite ownership of the land being transferred to the buyer, the seller will remain liable for the work under the order (**cl 86**).

### **Option for local governments to carry out any unperformed work**

The draft Bill makes provision for local governments, if they elect, to carry out work on a tree that a person responsible for the work under a QCAT order fails to carry out (**Chapter 3, Part 9**).

The decision whether to carry out such work will rest solely with the applicable local government, and it will not be compelled to take any action (**cl 87(2)**).

In order for the local government to take action, the following requirements will have to be met:

- QCAT has made an order requiring a tree keeper to carry out work on a tree within a stated period;
- the stated period has ended;
- at least seven days after the end of the stated period the neighbour advises the local government of the situation and requests it to take action; and
- the local government decides to take action (**cl 87(1)**).

A person authorised by the local government will be permitted to enter the tree keeper's land to:

- inspect the tree to determine if the work has been carried out as required by the order; and/or
- carry out the work, if the work has not been carried out as required (**cl 87(3)**).

In most cases, the local government must first give appropriate notice of the proposed entry to the tree keeper (**cl 87(4)-(5), 88**).

The costs incurred by a local government in carrying out such work, and any administrative fee charged by the local government for carrying out the work, will be charges on the tree keeper's land as if they were unpaid amounts under section 95 of the Local Government Act 2009 (Qld).<sup>61</sup>

## **NEW SOUTH WALES**

The discussion below provides some brief comparative information on the regulation of dividing fences and dangerous or intrusive neighbourhood trees in one other Australian jurisdiction, namely New South Wales.

The relevant legislation is:

- the Dividing Fences Act 1991 (NSW); and
- the Trees (Disputes Between Neighbours) Act 2006 (NSW).

### **DIVIDING FENCES ACT 1991 (NSW)**

Some of the key features of the Dividing Fences Act 1991 (NSW) are as follows:

- **Inclusion of hedges and other vegetative barriers in the meaning of 'fence'** – The definition of 'fence' (s 3) includes hedges and similar vegetative barriers, as is proposed in Queensland under the draft Bill. The definition of 'fencing work' (s 3) also includes the planting, replanting and maintenance of a hedge or similar vegetative barrier, as is proposed in Queensland under the draft Bill.
- **Inclusion of particular retaining walls in the meaning of 'fence'** - The definition of 'fence' (s 3) largely reflects the proposed definition of 'fence' in Queensland under the draft Bill. An

important point of difference, however, relates to the treatment of retaining walls.

In Queensland, the [draft Bill](#) includes in the meaning of fence “any foundation or structure *built solely* for the support and maintenance of the fence” (emphasis added). Retaining walls are expressly excluded from the meaning of ‘fence’.

In New South Wales, however, ‘fence’ has, since 1 February 2009,<sup>62</sup> included “any foundation or support necessary for the support and maintenance of the fence”, with retaining walls being excluded “except as provided by” the previous statement.

The result is that in New South Wales a person can seek a contribution from their neighbour for the carrying out of work to a retaining wall, where the retaining wall is necessary for the support and maintenance of a dividing fence. In addition, appropriate orders relating to such work can also be made.

It is important to note that a person seeking a contribution from their neighbour for the work associated with a retaining wall is limited to the work required for the support and maintenance of a dividing fence, and any work on a retaining wall required to provide support for land will not be recoverable.<sup>63</sup>

Prior to 1 February 2009, retaining walls were specifically excluded from the definition of ‘fence’ in New South Wales, as is proposed in Queensland under the [draft Bill](#).

A [factsheet](#) of the New South Wales [Land and Property Management Authority](#), the body charged with the administration of the [Dividing Fences Act 1991 \(NSW\)](#), states as follows:

The result of the exclusion of a retaining wall from the definition of a fence was that no order could be made ... affecting a retaining wall. The complete exemption of retaining walls from the operation of the Act meant that in making orders about a sufficient dividing fence, a local land board or a local court was often unable to fully resolve disputes between neighbours where a dividing fence consisted of a fence constructed on or near a retaining wall.

This led to dissatisfaction by the parties. It also hindered the effective dispute resolution capabilities of a local land board or a local court to resolve the matter.

...

The amendments will overcome these problems.

...

The amendments relating to retaining walls will not override other general laws applicable to the construction and maintenance of a retaining wall, including any requirements for development approval.

...

In the event that any relevant work on a retaining wall would require development approval under planning legislation, then a local board or a local court will need to see any required development approval before a final order regarding a dividing fence is made.<sup>64</sup>

- **What constitutes a ‘sufficient dividing fence’** – The definition of what constitutes a ‘sufficient dividing fence’ (s 4) is less detailed than the proposed definition in Queensland under the [draft Bill](#). No differentiation is made between various land uses (e.g. residential or pastoral land, as is proposed in Queensland), and some different factors apply in New South Wales for determining what constitutes a sufficient dividing fence.

In New South Wales, “all the circumstances of the case” must be considered when determining the standard for a sufficient dividing fence, including:

- any existing dividing fence;
  - the purposes for which adjoining lands are used or intended to be used;
  - the privacy or other concerns of the neighbours;
  - the kind of dividing fence usual in the locality;
  - any policy or code relating to dividing fences adopted by the relevant local government;
  - any relevant environmental planning instrument; and
  - if applicable, any order under section 18A of the [Western Lands Act 1901 \(NSW\)](#).
- **A general principle of equal contributions to the cost of a sufficient dividing fence** – Neighbours are liable to contribute equally to the cost of fencing work for a sufficient dividing

fence. A neighbour must pay the additional cost if they want a fence that is of a higher standard than what is required for a sufficient dividing fence (s 7).

- **Liability for full cost of restoration of a dividing fence damaged or destroyed by a deliberate or negligent act of a person on land with owner's consent** – Similar to the proposal in Queensland under the [draft Bill](#), an owner must pay the full cost of fencing work to restore a dividing fence that is damaged or destroyed by a negligent or deliberate act of a person who was on their land with their consent (ss 8 (1)-(2)).

Also similar to the proposal in Queensland, in determining an owner's liability for such damage or destruction, it does not matter if the negligent or deliberate act took place before the commencement of the provision (s 8(3)).

- **A single procedure for seeking contribution to fencing work costs** – A single procedure, of written notice, applies for neighbours seeking a contribution to the cost of constructing or repairing a dividing fence (Part 3).
- **Resolving fencing disputes** – When agreement is not reached about fencing work, the neighbours may attend a [Community Justice Centre](#) in an attempt to reach an agreement (s 12(1)). This involves mediation between the neighbours.

If the neighbours do not agree about the fencing work to be carried out within one month of the required notice being given, either of them may apply to the [local court](#) or a local land board for an order regarding the fencing work to be carried out (s 12(2)).

A [factsheet](#) of the New South Wales [Land and Property Management Authority](#) describes the process in relation to local land boards:

Local land boards consist of a chairperson and two local members with knowledge of local land management practices and are generally familiar with the local area. In most residential areas a chairperson may sit alone in an appropriate dividing fences matter. A local land board sits as a dispute resolution tribunal and conducts hearings in relation to a variety of matters including dividing fences. Applications should be lodged with local board registrars and cost \$61.00.<sup>65</sup>

- **Orders as to fencing work** - The orders in relation to fencing work that the [local court](#) or a local land board can make (s 14) largely reflect those it is proposed [QCAT](#) will be able to make under the [draft Bill](#).

## **TREES (DISPUTES BETWEEN NEIGHBOURS) ACT 2006 (NSW)**

The [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) provides for the resolution of disputes between neighbours about trees.

The legislation contains two main parts:

- Part 2: 'Court orders – trees that cause or are likely to cause damage or injury'.

These provisions enable a person to apply to the New South Wales [Land and Environment Court](#) for an order to remedy, restrain or prevent damage to property, or to prevent injury to any person, as a consequence of a tree situated on neighbouring land.

- Part 2A: 'Court orders – high hedges that obstruct sunlight or views'.

These provisions are directed at the resolution of disputes between neighbours about high hedges that block sunlight or views. An application can be made to the [Land and Environment Court](#), in certain circumstances, for an order to remedy, restrain or prevent a severe obstruction of sunlight or a view.

Both aspects of the legislation are discussed in greater detail below.

Comprehensive information to assist in understanding the operation of the legislation is also available on the [Land and Environment Court](#) website: see '[Tree Dispute Information](#)'.

A report on a review of the legislation (prior to the recent amendments which inserted Part 2A – discussed below), dated November 2009, is also available: New South Wales Government. [Review of the Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#), November 2009.

### **Application of the legislation**

The [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) applies to trees on privately owned land in a 'residential', 'village', 'township', 'industrial' or 'business' zone (s 4).

In terms of 'rural residential' land, Part 2 of the legislation applies, however Part 2A of the legislation does not

apply (ss 4 and 14A(2)(a)).

Part 2 of the legislation applies to trees on Crown land, with some restrictions on the [Land and Environment Court](#) dealing with such trees (s 11). Part 2A of the legislation does not apply to trees on Crown land (s 14A(2)(b)).

The legislation does not apply to trees on land owned or managed by a local government (s 4(2)(a)).

## **Abolition of action in nuisance**

The [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) states that no action may be brought in nuisance as a result of damage caused by a tree or obstruction of sunlight or views by a tree (s 5).

## **Authorisation of work or activity regulated by or under other Act**

In general, an order of the [Land and Environment Court](#) under the [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) does not authorise or require a person to do anything:

- for which a consent or authorisation must first be obtained under other legislation; or
- which is prohibited under any other Act (s 6(1)).

However, an order of the [Land and Environment Court](#) under Part 2 or Part 2A will have effect despite any requirement that would otherwise apply for a consent or other authorisation in relation to the tree to be obtained under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) or the [Heritage Act 1977 \(NSW\)](#) (e.g. a local government tree preservation order which might otherwise prevent or restrict interference with, or removal of, the tree).

## **Part 2 - Trees that cause or are likely to cause damage or injury**

Part 2 of the [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) commenced in February 2007.

The key features of Part 2 are as follows:

- **Ability to apply to Land and Environment Court for relevant orders** – An owner of land may apply to the [Land and Environment Court](#) for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree on neighbouring land (s 7).

The applicant must generally give at least 21 days notice of the application and the terms of any order sought to their neighbour, any relevant authority entitled to appear in the proceedings (e.g. the local government or Heritage Council, if applicable) and any other person who would be reasonably affected by the order (s 8).

- **Orders of the Land and Environment Court** – The [Land and Environment Court](#) may make such orders as it thinks fit to remedy, restrain or prevent the damage, or to prevent the injury, including:
  - requiring specified action to be taken to:
    - remedy damage;
    - restrain or prevent damage or further damage; or
    - prevent injury;
  - requiring application be made for any necessary consent or authorisation;
  - authorising the applicant to take specified action to:
    - remedy, restrain or prevent damage or further damage; or
    - prevent injury;
  - authorising entry to land for the purposes of carrying out an order;
  - requiring the payment of costs associated with carrying out an order;
  - requiring the payment of compensation for damage to property; or
  - requiring the replacement of a tree ordered to be removed and for the new tree to be maintained to a mature growth (s 9).

Before making an order, the [Land and Environment Court](#) must be satisfied of various things,

including:

- that the applicant has made a reasonable effort to reach agreement with their neighbour; and
- that the tree has caused, is causing or is likely to cause damage to the applicant's property, or is likely to cause injury to any person (s 10).

Before determining an application, the [Land and Environment Court](#) must also consider the following matters:

- the location of the tree in relation to the boundary and any premises;
- whether 'interference'<sup>66</sup> with the tree would generally require any consent or other authorisation under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) or the [Heritage Act 1977 \(NSW\)](#) and, if so, whether it has been obtained;
- whether interference with the tree would generally require approval under the [Native Vegetation Act 2003 \(NSW\)](#);
- the impact any pruning would have on the tree;
- any contribution of the tree to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which it is situated;
- any historical, cultural, social or scientific value of the tree;
- any contribution the tree makes to the local ecosystem and biodiversity, or to the natural landscape and scenic value of the land on which it is situated or the locality;
- the intrinsic value of the tree to public amenity;
- any impact of the tree on soil stability, the water table or other natural features of the land on which it is situated or the locality;
- in terms of any alleged damage due to the tree:
  - any other thing that has contributed or is contributing to the damage, including any act or omission by the applicant and the impact of any trees owned by the applicant; and
  - any steps taken by the applicant or their neighbour to prevent or rectify the damage;
- in terms of any alleged likelihood of injury:
  - any other thing that has contributed or is contributing to such likelihood, including any act or omission by the applicant and the impact of any trees owned by the applicant; and
  - any steps taken by the applicant or their neighbour to prevent such injury; and
- such other matters the [Land and Environment Court](#) considers relevant (s 12).

## Part 2A – High hedges that obstruct sunlight or views

Part 2A of the [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) commenced on 2 August 2010.

The provisions were inserted as a result of the [Trees \(Disputes Between Neighbours\) Amendment Act 2010 \(NSW\)](#) and were introduced in response to instances of 'hedge rage' or 'spite hedges'.

For some relevant discussion of this issue, see, for example:

- Kelsey Munro, 'Laws to trim 'spite hedges' down to size', *Sydney Morning Herald*, 22 May 2010;
- [Problem Hedges Australia](#), a community action group in New South Wales.

The key features of Part 2A are as follows:

- **Applies only to groups of two or more trees of a certain height** – Part 2A applies only to groups of two or more trees that are planted so as to form a hedge and which are at least 2.5 metres in height (s 14A(1)).

Accordingly, Part 2A does not apply to:

- single trees that obstruct sunlight or views;

- hedges less than 2.5 metres in height; and
- hedges that were self-sown rather than planted.
- **Grounds for application to Land and Environment Court** – An owner of land may apply to the [Land and Environment Court](#) for an order to remedy, restrain or prevent a severe obstruction of:
  - sunlight to a ‘window’ (defined below) of a dwelling situated on the land; or
  - any view from a dwelling situated on the land,

that occurs as a consequence of a hedge to which Part 2A applies (s 14B).

‘Window’ includes a glass sliding door, a door with a window, a sky light and any other similar thing (s 3(1)).

Note that in terms of obstructions of sunlight, the obstruction must be to a window in order for relief under Part 2A to be available, and an obstruction to other aspects of a property, such as to a balcony or garden, are irrelevant.

Note also that the obstructions to sunlight or a view must be ‘severe’ (s 14D(1)), which implies that the [Land and Environment Court](#) will not intervene if there is a moderate or even serious obstruction.

The applicant must generally give at least 21 days notice of the application and the terms of any order sought to their neighbour, any relevant authority entitled to appear in the proceedings (e.g. the local government or Heritage Council, if applicable) and any other person who would be reasonably affected by the order (s 14C).

- **Orders of the Land and Environment Court** – The [Land and Environment Court](#) may make such orders as it thinks fit to remedy, restrain or prevent the severe obstruction of sunlight or views, including:
  - requiring specified action to be taken to:
    - remedy, restrain or prevent the obstruction; or
    - maintain a tree or trees at a certain height, width or shape;
  - requiring the removal of a tree/s and replacement with a different species of tree;
  - requiring application be made for any necessary consent or authorisation;
  - authorising the applicant to take specified action to remedy, restrain or prevent the obstruction;
  - authorising entry to land for the purposes of carrying out an order; and
  - requiring the payment of costs associated with carrying out an order (ss 14D(1)-(2)).

Note that the [Land and Environment Court](#) does not have power to make an order that requires the payment of compensation in this circumstance (s 14D(3)).

Before making an order, the [Land and Environment Court](#) must be satisfied of various things, including:

- that the applicant has made a reasonable effort to reach agreement with their neighbour;
- that the trees are severely obstructing sunlight or a view; and
- the severity and nature of the obstruction is such that the applicant’s interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order (s 14E).

Before determining an application, the [Land and Environment Court](#) must consider the following matters:

- the location of the trees in relation to the boundary and the relevant dwelling;
- whether the trees existed prior to the dwelling or any relevant alteration to the dwelling;
- whether the trees grew to a height of 2.5 metres or more during the period that the applicant has owned or occupied the land;

- whether interference with the trees would generally require any consent or other authorisation under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) or the [Heritage Act 1977 \(NSW\)](#) and, if so, whether it has been obtained;
  - any other relevant development consent requirements or conditions relating to the applicant's land or their neighbour's land;
  - any historical, cultural, social or scientific value of the trees;
  - any contribution the trees make to the local ecosystem and biodiversity, or to the natural landscape and scenic value of the land on which they are situated or the locality;
  - the intrinsic value of the trees to public amenity;
  - any impact of the trees on soil stability, the water table or other natural features of the land or locality;
  - the impact any pruning would have on the trees;
  - any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated;
  - anything other than the trees contributing to the obstruction;
  - any steps taken by the applicant or their neighbour to prevent or rectify the obstruction;
  - the amount, and number of hours per day, of any sunlight lost due to the obstruction throughout the year and the time of the year during which sunlight is lost;
  - whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves;
  - the nature and extent of any view affected by the obstruction and any remaining view;
  - the part of the dwelling from which the view is obstructed or to which sunlight is obstructed; and
  - such other matters the [Land and Environment Court](#) considers relevant (s 14F).
- **Review of Part 2A** – Part 2A must be reviewed to determine whether the policy objectives of the Part remain valid and whether the terms of the Part remain appropriate for securing those objectives. The review must be undertaken as soon as possible after a period of two years after the commencement of part 2A, with a report on the outcome of the review tabled in Parliament (s 14I).

## Enforcement of orders

Failure to comply with an order under Part 2 or Part 2A attracts a maximum penalty of 1,000 penalty units (\$110,000)<sup>67</sup> (s 15).

## Implication of orders on successors in title

The implications of orders under the [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) on successors in title are as follows:

- for an order under Part 2 – if the owner of land on which a tree is situated is required to carry out work within a specified period and they cease to be the owner of the land before the work is carried out, a successor in title is required to carry out the work and, to that extent, is bound by the order in the same way as the original owner (s 16(1));
- for an order under Part 2A – if the owner of land on which two or more trees are situated is required to carry out work within a specified period and they cease to be the owner of the land before the work is carried out, the immediate successor in title is required to carry out the work and, to that extent, is bound by the order in the same way as the original owner (s 16(1A)).

Note that successors in title are only bound by an order as provided above if the applicant for the order (or, in the case of an order under Part 2, the immediate successor in title of the applicant entitled to the benefit of the order - see below) gives them a copy of the order (s 16(2)).

If the [Land and Environment Court](#) makes an order under Part 2, a person who is the immediate successor in

title to the applicant is entitled to the same benefits and rights as the applicant in respect of the order (s 16A).

### **Carrying out of work by local governments**

The [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) allows a local government, if requested by an applicant for an order, to carry out work in relation to a tree in accordance with an order under Part 2 or Part 2A where the owner of the land on which the tree is situated has failed to carry out the work (s 17).

The local government may recover in court the reasonable costs of carrying out such work and the administrative cost for arranging the carrying out of the work (s 17(8)).

The local government may also apply to the Registrar-General for registration of any associated judgment debt as a charge on the land (s 17A).

## LINKS TO FURTHER READING

### PUBLIC CONSULTATION DRAFTS

- [Neighbourhood Disputes Resolution Bill 2010 \(Qld\)](#)
- [Explanatory Notes](#)
- [Notice for Contribution to Fencing Work](#)
- [Notice for Overhanging Branches](#)

### DISCUSSION PAPERS - REVIEW OF NEIGHBOURLY RELATIONS

- Dividing Fences
- Trees
- Resolving Neighbourhood Disputes

### EXISTING LEGISLATION REGULATING DIVIDING FENCES

- [Dividing Fences Act 1953 \(Qld\)](#)

### OTHER RELEVANT LEGISLATION

- [Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#)
- [Building Act 1975 \(Qld\)](#) (for swimming pool fencing, see Chapter 8)

### MINISTERIAL MEDIA STATEMENTS

- Hon C Dick MP, Attorney-General and Minister for Justice, '[Last chance to have a say on neighbourhood dispute laws](#)', *Ministerial Media Statement*, 30 June 2010
- Hon C Dick MP, Attorney-General and Minister for Industrial Relations, '[Neighbourhood disputes over trees and fences to be easier to resolve](#)', *Ministerial Media Statement*, 12 May 2010
- Hon A Bligh MP, Premier and Minister for the Arts, and Hon C Dick MP, Attorney-General and Minister for Industrial Relations, '[New laws to help quell neighbourhood disputes](#)', *Ministerial Media Statement*, 19 July 2009
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, '[Shine launches kit aimed at resolving neighbourhood disputes](#)', *Ministerial Media Statement*, 17 February 2009
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, '[Gate shutting for fence law review feedback](#)', *Ministerial Media Statement*, 24 July 2007
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, '[Dividing fences public forum in Brisbane](#)', *Ministerial Media Statement*, 27 June 2007
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, '[Dividing fences public forums in Goondiwindi and Warwick](#)', *Ministerial Media Statement*, 27 June 2007
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, '[Don't sit on the fence about law review](#)', *Ministerial Media Statement*, 15 June 2007
- Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, '[Extension for fences review responses](#)', *Ministerial Media Statement*,

5 June 2007

## DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL WEBSITE

- Queensland Government. Department of Justice and Attorney-General webpage, '[Neighbourhood Disputes Resolution Bill Consultation](#)':
  - [Consultation Questions and Answers](#)
  - [Fact Sheet](#)

## RELEVANT QUEENSLAND PARLIAMENTARY LIBRARY PUBLICATIONS

- Queensland Parliamentary Library (Nicolee Dixon), '[A Single Merits Review Tribunal: The Queensland Civil and Administrative Tribunal \(QCAT\)](#)', *Research Brief*, No 2009/32, November 2009
- Queensland Parliamentary Library (Renee Gastaldon), 'Towards More Neighbourly Relations: the Review of Queensland's Fencing Laws', *e-Research Brief*, No 2007/18, July 2007

## NEWSPAPER ARTICLES RELATING TO THE DRAFT LAWS

- Craig Johnstone, 'Fines to cut down disputes', *Courier Mail*, 15 May 2010, p 39
- Mark Oberhardt, 'Good laws make good neighbours', *Courier Mail*, 14 May 2010, p 28
- Daryl Passmore, 'New law for yard disputes', *Sunday Mail*, 19 July 2009, p 15
- Rae Wilson, 'Govt stops neighbours going off their tree', *Sunshine Coast Daily*, 20 July 2009

## OTHER NEWSPAPER ARTICLES RELEVANT TO NEIGHBOURHOOD DISPUTES

- Madonna King, 'Strife in the burbs', *Courier Mail*, 6 February 2010, p 66
- Melanie Christiansen, 'Talk to thy neighbour', *Courier Mail*, 23 December 2009, p 12
- Glenis Green, 'Grandpa spat ends in gunfire – Row over leaves escalated until I was shot, says neighbour', *Courier Mail*, 22 July 2009, p 13
- Glenis Green, 'Learning to loathe thy neighbour', *Courier Mail*, 24 January 2009, p 40
- Robyn Ironside, 'Noise feud ends in bullet-hole bust-up', *Courier Mail*, 13 January 2009, p 10
- Melanie Christiansen, 'Chat over the fence? Not for us, thanks', *Courier Mail*, 27 November 2008, p 9
- Kay Dibben, 'Barking dogs, gay slurs and a \$23,000 payout', *Sunday Mail*, 9 November 2008, p 3
- 'Battle for peace of mind in burbs', *Gold Coast Bulletin*, 26 July 2008, p 61
- Rosanne Barrett, 'What to do when driven barking mad – Council kit has all the doggone answers to growing problem', *Courier Mail*, 20 September 2007, p 26
- Rosemary Odgers, 'Review tackles urban conflict – Sharing the cost of putting up a fence can test being neighbourly', *Courier Mail*, 16 May 2007, p 7

## SUBMISSIONS ON THE DRAFT LAWS

- Local Government Association of Queensland Ltd (LGAQ), [Submission on the Draft Bill](#), 9 July 2010

(Note: As at mid-August 2010, the above submission, on the LGAQ website, was the only publicly available submission located after an internet search for relevant submissions on the [draft Bill](#).)

## PUBLICATIONS ON DIVIDING FENCES AND TREES

- Caxton Legal Centre Inc., [Dividing Fences – A Self-Help Kit to the Law of Building and Maintaining Fences Between Neighbours](#), December 2005

- QCAT webpage, [‘Dividing fence disputes’](#)
- Legal Aid Queensland webpages, [‘Fences and retaining walls’](#), [‘Trees and plants’](#)
- Queensland Government. Department of Justice and Attorney-General webpages, [‘Fences’](#), [‘Trees’](#), [‘Regional dispute resolution centres’](#), [‘Tips on how to manage conflict’](#), Factsheet; [‘Frequently asked questions about mediation’](#), Factsheet; [‘Neighbourhood mediation kit’](#)
- Choice, ‘Everybody needs good neighbours’, July 2010, pp 64-65
- Australian Property Investor, ‘Fence Wars’, No 112, June 2010, pp 66-69

## ENDNOTES

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- 1 Mirko Bagaric, 'Everybody needs good neighbours', *Courier Mail*, 3 October 2007, p 32.
- 2 See, for example, Melanie Christiansen, 'Talk to thy neighbour', *Courier Mail*, 23 December 2009, p 12.
- 3 Melanie Christiansen, 'Talk to thy neighbour'.
- 4 Melanie Christiansen, 'Talk to thy neighbour', citing an NRMA Insurance-sponsored survey of 2,100 households.
- 5 Madonna King, 'Strife in the burbs', *Courier Mail*, 6 February 2010, p 66; Rosanne Barrett, 'What to do when driven barking mad – Council kit has all the doggone answers to growing problem', *Courier Mail*, 20 September 2007, p 26.
- 6 Rae Wilson, 'Govt stops neighbours going off their tree', *Sunshine Coast Daily*, 20 July 2009.
- 7 Madonna King, 'Strife in the burbs'.
- 8 Madonna King, 'Strife in the burbs'; Glenis Green, 'Grandpa spat ends in gunfire – Row over leaves escalated until I was shot, says neighbour', *Courier Mail*, 22 July 2009, p 13; Glenis Green, 'Learning to loathe thy neighbour', *Courier Mail*, 24 January 2009, p 40; Robyn Ironside, 'Noise feud ends in bullet-hole bust-up', *Courier Mail*, 13 January 2009, p 10; Kay Dibben, 'Barking dogs, gay slurs and a \$23,000 payout', *Sunday Mail*, 9 November 2008, p 3; 'Battle for peace of mind in burbs', *Gold Coast Bulletin*, 26 July 2008, p 61.
- 9 'Battle for peace of mind in burbs'.
- 10 The [Dividing Fences Act 1991 \(NSW\)](#) and the [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#).
- 11 Queensland Government. Department of Justice and Attorney-General, 'Dividing Fences', Discussion Paper, May 2007, p 2.
- 12 This discussion paper was considered in: Queensland Parliamentary Library (Renee Gastaldon) 'Towards More Neighbourly Relations: the Review of Queensland's Fencing Laws', *e-Research Brief*, 2007/18, July 2007.
- 13 Queensland Government. Department of Justice and Attorney-General, 'Trees', Discussion Paper, May 2008.
- 14 Queensland Government. Department of Justice and Attorney-General, 'Resolving Neighbourhood Disputes', Discussion Paper, May 2008.
- 15 Hon C Dick MP, Attorney-General and Minister for Industrial Relations, '[Neighbourhood disputes over trees and fences to be easier to resolve](#)', *Ministerial Media Statement*, 12 May 2010.
- 16 Queensland Government. Department of Justice and Attorney-General webpage, '[Neighbourhood Disputes Resolution Bill consultation](#)'.
- 17 Hon C Dick MP, Attorney-General and Minister for Industrial Relations, '[Neighbourhood disputes over trees and fences to be easier to resolve](#)', *Ministerial Media Statement*, 12 May 2010.
- 18 '[Neighbourhood disputes over trees and fences to be easier to resolve](#)', Ministerial Media Statement.
- 19 '[Neighbourhood disputes over trees and fences to be easier to resolve](#)', Ministerial Media Statement.
- 20 Hon C Dick MP, Attorney-General and Minister for Justice, '[Last chance to have a say on neighbourhood dispute laws](#)', *Ministerial Media Statement*, 30 June 2010. Note that, as at mid-August

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2010, the following submission, on the Local Government Association of Queensland Ltd (LGAQ) website, was the only publicly-available submission located after an internet search for relevant submissions on the [draft Bill](#): LGAQ, [Submission on the Draft Bill](#), 9 July 2010.

21 Hon K Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, [‘Public invited to take part in review of fencing laws’](#), *Ministerial Media Statement*, 16 May 2007.

22 As indicated, this *e-Research Brief* does not discuss all of the changes the [draft Bill](#) proposes to the law of dividing fences in Queensland, but rather a selection of some of the proposed changes.

23 The Hon K Shine MP was also the Minister for Justice and Minister Assisting the Premier in Western Queensland.

24 Rosemary Odgers, ‘Review tackles urban conflict – Sharing the cost of putting up a fence can test being neighbourly’, *Courier Mail*, 16 May 2007, p 7.

25 Hon A Bligh MP, Premier and Minister for the Arts, and Hon C Dick MP, Attorney-General and Minister for Industrial Relations, [‘New laws to help quell neighbourhood disputes’](#), *Ministerial Media Statement*, 19 July 2009.

26 For example, the [Dividing Fences Act 1953 \(Qld\)](#) is silent where a neighbour constructs a dividing fence on their own behalf (which may or may not involve the demolition of an existing dividing fence), and covers the associated construction costs themselves.

27 For definitions of ‘State plantation forest’, ‘licence area’, ‘plantation licensee’ and ‘plantation sublicensee’, see the [Forestry Act 1959 \(Qld\)](#), schedule 3.

28 Dividing Fences discussion paper, p 13.

29 Dividing Fences discussion paper, p 4.

30 For further information about QCAT, see the [QCAT website](#), or the [dividing fence disputes](#) page on the QCAT website. QCAT was also considered in the following publication: Queensland Parliamentary Library (Nicolee Dixon), ‘A Single Merits Review Tribunal: The Queensland Civil and Administrative Tribunal (QCAT)’, *Research Brief*, 2009/32, November 2009. Also see: Angela Lowe, ‘All about QCAT’, *Proctor (Queensland Law Society)*, December 2009, pp 15-20.

31 [QCAT](#) hears dividing fence disputes which are valued up to and including \$25,000. See the following footnote for an explanation of [QCAT](#)’s jurisdiction in relation to dividing fence disputes.

32 The monetary limit for the civil jurisdiction of the Magistrates Court is currently set at \$50,000 ([Magistrates Court Act 1921 \(Qld\)](#), s 4). Under the [Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 \(Qld\)](#), ss 98 and 100, this limit was increased to \$150,000. The change will take effect on 1 November 2010 ([SL 2010, No. 236](#)).

33 A claim that is the subject of a dispute under the [Dividing Fences Act 1953 \(Qld\)](#) for an amount of not more than the ‘prescribed amount’ is a ‘minor civil dispute’, which [QCAT](#) has jurisdiction to hear and decide ([Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#), s 11 and definition of ‘minor civil dispute’ in the schedule 3 dictionary). ‘Prescribed amount’ is currently set at \$25,000 ([Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#), definition of ‘prescribed amount’ in the schedule 3 dictionary, and [Queensland Civil and Administrative Tribunal Regulation 2009 \(Qld\)](#), s 17).

34 ‘Excluded land’ means:

- (a) adjoining land consisting of two parcels of agricultural land;
- (b) unallocated State land;
- (c) a stock route within the meaning of the [Land Protection \(Pest and Stock Route Management\) Act 2002 \(Qld\)](#);

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- (d) South Bank public land within the meaning of the [South Bank Corporation Act 1989 \(Qld\)](#); or  
(e) land prescribed by regulation (**cl 17**).

35 'Agricultural land' means rural land of more than half a hectare used for cultivating crops on a commercial basis (**cl 18(2)**).

36 This scenario is further provided for in **clause 27**, which includes examples of possible attachments to dividing fences, such as carports, shade sails, lattice work, chicken wire, canvas and signs. A person will be prohibited from attaching something to a dividing fence that materially alters or damages it without the consent of their neighbour. If a person contravenes this prohibition, the neighbour may apply to [QCAT](#) for an order requiring the person to remove the attachment and restore the dividing fence to a reasonable standard, having regard to its state before the attachment.

37 This decision, of the Supreme Court of Queensland, held that a fence was a 'dividing fence' under the [Dividing Fences Act 1953 \(Qld\)](#) if it was erected for the purpose of marking the boundary of land, notwithstanding that it was also erected for another purpose, such as retaining soil.

38 New South Wales Law Reform Commission, [Community Law Reform Program Dividing Fences](#), Report No. 59, 1988.

39 For the meaning of 'agricultural land', see endnote 29.

40 'Pastoral land' means rural land of more than half a hectare used for grazing stock on a commercial basis (**cl 18(3)**).

41 'Rural residential land' means rural land of more than half a hectare used for residential purposes (**cl 18(4)**).

42 Currently, such a pro-forma notice does not exist in relation to the notice requirements under the [Dividing Fences Act 1953 \(Qld\)](#).

43 The notes to **clause 33** state that such a proceeding is not a 'minor civil dispute' under the [Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#), and that the parties to a dividing fence dispute may be directed to attend one or more conferences, a purpose of which may be to promote a settlement of the matter (see under the [Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#), ss 67 and 69(b)).

44 Section 43 of the [Queensland Civil and Administrative Tribunal Act 2009 \(Qld\)](#) concerns the representation of parties at [QCAT](#) proceedings. It states as its main purpose having parties represent themselves in proceedings, unless the interests of justice require otherwise (s 43(1)). Certain exceptions are provided in section 43(2), when a party may be represented by someone else.

45 Choice, 'Everybody needs good neighbours', July 2010, pp 64-65, at p 64.

46 Nikola Lusk (ed.), *The Queensland Law Handbook*, Caxton Legal Centre Inc., 10<sup>th</sup> edn, 2009, p 334.

47 Resolving Neighbourhood Disputes, Discussion Paper, p 12.

48 As noted in the [draft Explanatory Notes](#), p 23, the common law right of abatement is subject to vegetation protection orders and other orders imposed by local and state governments for the protection of trees.

49 'Tree keeper' means the holders of various property interests specified in **cl 47** of the [draft Bill](#), such as the registered owner of freehold land and the lessee or licensee of land under the [Land Act 1994 \(Qld\)](#).

50 'Tree' includes "any woody perennial plant, shrub, bush, vine, bamboo or herbaceous plant, and includes a bare trunk, a stump that remains rooted in the land and a dead tree, and any other plant prescribed under a regulation to be a tree to which this chapter applies" (**cl 46**).

51 Land less than five hectares in size will be captured by the [draft Bill](#). The [draft Explanatory Notes](#), p 21, state that the intention is that the provisions apply to large lots located in semi-rural and urban areas.

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52 [Draft Explanatory Notes](#), p 23.

53 The examples are from the [draft Explanatory Notes](#), p 25.

54 Note that [QCAT](#) can make an order only if it is satisfied that the neighbour has made a reasonable effort to reach agreement with the tree keeper (**cl 67(1)(a)**).

55 The examples are from the [draft Explanatory Notes](#), p 27.

56 ‘Work’ includes cutting and removing any part of a tree (including its branches and roots), netting a tree, destroying a tree (by any means, including uprooting, ringbarking or cutting down the tree, and includes removing the tree and its stump), or removing a destroyed tree (**cl 50**).

57 Section 178 of the [Property Law Act 1974 \(Qld\)](#) provides as follows:

From and after 1 March 1907, no right to the access or use of light or air to or for any building shall be deemed to exist, or to be capable of coming into existence, merely because of the enjoyment of such access or use for any period or of any presumption of lost grant based upon such enjoyment.

58 [Penalties and Sentences Act 1992 \(Qld\)](#), s 5. A penalty unit is currently \$100.

59 For the meaning of ‘Act’, see the [Acts Interpretation Act 1954 \(Qld\)](#), s 6.

60 [Penalties and Sentences Act 1992 \(Qld\)](#), s 5. A penalty unit is currently \$100.

61 Section 95 of the [Local Government Act 2009 \(Qld\)](#) provides that overdue rates and charges are a charge on land, which may be registered on the title to the land.

62 The relevant change was introduced as a result of the [Dividing Fences and Other Legislation Amendment Act 2008 \(NSW\)](#).

63 New South Wales Government. Land and Property Management Authority, ‘[Dividing Fences and Other Legislation Amendment Act 2008](#)’, *Factsheet*, May 2010, pp 1-2.

64 New South Wales Government. Land and Property Management Authority, ‘[Dividing Fences and Other Legislation Amendment Act 2008](#)’, *Factsheet*, May 2010, pp 1-2. See also, Ms S Hornery MP, ‘[Dividing Fences and Other Legislation Amendment Bill 2008 \(NSW\)](#)’, *Second Reading Speech*, Legislative Assembly Hansard (New South Wales Parliament), 11 April 2008, pp 6898-6901.

65 New South Wales Government. Land and Property Management Authority, ‘[Dividing Fences Law](#)’, *Factsheet*, May 2010, p 1.

66 ‘Interfere’ with a tree includes cutting down, felling, removing, killing, destroying, poisoning, ringbarking, uprooting or burning the tree or any part of it, including its roots ([Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#), s 3(1)).

67 [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#), s 17. One penalty unit is \$110.