

Neighbourhood Disputes Resolution Bill 2010

Explanatory Notes

Objectives of the Bill

The objectives of the Bill are to:

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

Reasons for the Bill

Relationships between neighbours are never static or predictable. Neighbours can be friendly or hostile, distant or close. The trend towards increased housing density, mobile populations and day to day financial and social pressures present new challenges to neighbours and government.

Generally, neighbours wish to live peacefully in their neighbourhood. In some cases this not possible. When conflict does arise most neighbours prefer to resolve their issues in an amicable way, privately and between themselves. Sometimes, despite best efforts by a neighbour, disputes can result in unhappy outcomes.

Neighbourhood disputes may seem a minor matter to some people, but if left unresolved these types of disputes can develop into very serious and distressing situations for neighbours.

The Review of Neighbourly Relations (the review) was conducted to find more efficient ways of assisting neighbours to resolve their disputes so that the friendly, tight-knit communities, which are one of Queensland's great strengths, might be supported by appropriate laws and dispute resolution processes.

The Review found that the *Dividing Fences Act 1953* (called "the 1953 Act") needed to be replaced with contemporary legislation in a modern

drafting style and that the application of the common law of nuisance to a neighbourhood dispute about trees did not provide a realistic solution for neighbours.

The Bill is the result of the review. A consultation draft of the Neighbourhood Disputes Resolution Bill 2010 was released for public comment over an eight week period from May to July 2010. The majority of community submissions supported the Bill and in particular the new statutory remedy dealing with trees affecting land in a neighbourhood.

The Bill addresses community concerns raised during three consultation processes. It modernises the dividing fences legislation, changes the common law of abatement in relation to overhanging tree branches, introduces a simplified remedy to deal with trees and confers jurisdiction on the Queensland Civil and Administrative Tribunal (QCAT) in relation to these matters.

Achievement of the Objectives

The Bill provides effective dispute resolution options for neighbours to resolve issues about trees and fences and reduce neighbourly disputes.

Chapter 2 Dividing Fences

The Bill replaces the 1953 Act. The term fence has been more widely defined to include, for example, hedges on urban land. The term sufficient dividing fence is given meaning including height and materials. For the first time, approved forms will be available for public use. Clearer rules have been developed for urban and rural areas and a distinction has been made between pastoral and agricultural land.

The Bill confirms that a dividing fence is owned equally by the adjoining owners if it is built on the common boundary.

The Bill establishes that there should be a sufficient dividing fence between two parcels of land if an adjoining owner requests one – even if one or both parcels of land are vacant. Generally, obligations are imposed that owners must contribute equally to the construction and maintenance of a sufficient

dividing fence and not attach something to a dividing fence that unreasonably and materially alters or damages it.

Under the Bill, adjoining owners are liable for equal contribution to the fencing work required to have a sufficient dividing fence. However, where one owner wants to have more work done than is necessary for a sufficient dividing fence then they will be liable to pay the extra expense. This does not mean that QCAT will order that a fence will be built according to their wishes. In those circumstances, QCAT would consider the wishes of each neighbour and other factors which QCAT is required to take into account.

Chapter 3 Trees

The Bill places paramount importance on the safety of any person. It will promote public safety.

The Bill provides greater choices for neighbours about trees affecting their property.

First, if a neighbour exercises the common law of abatement, (e.g. by lopping branches and roots to the boundary), the neighbour can decide whether or not to return the lopped branches or roots. When exercising the right of abatement, neighbours must take care to comply with any applicable tree or vegetation protection orders.

Second, if a neighbour wants the tree-keeper to take responsibility for lopping the branches of their tree hanging over the boundary, they can serve a notice for overhanging branches upon the tree-keeper. This notice can be used for branches which are more than .5m over the boundary and less than 2.5m above the ground. If the tree-keeper does not respond to the notice, the neighbour can proceed to have the lopping done and recover from the tree-keeper a maximum sum of \$300.00 per annum. The notice system cannot be used if there is a vegetation or tree protection order over the tree.

Finally, responsibility is placed on the tree-keeper to ensure that their neighbour's land is not affected by a tree growing on the tree-keeper's land. For the purposes of the Bill, land is affected by a tree if a neighbour can demonstrate that the tree caused serious injury to a person, serious damage

to a neighbour's land or property or substantial, ongoing or unreasonable interference with a person's use and enjoyment of the person's land. QCAT has jurisdiction to hear and decide any matter in relation to a tree in which it is alleged that the land is affected by the tree.

Chapter 3 contains eight parts.

Part 1 confirms that a tree-keeper is responsible for the proper care and maintenance of a tree-keeper's tree and establishes that principally the chapter applies to trees growing on residential land. This part provides an overview of Chapter 3 and sets out the three options available to deal with an issue about a tree affecting a person's land. These options are set out in Parts 3, 4 and 5 of Chapter 3.

Part 2 provides important definitions for the purposes of the Bill. The meaning of a *tree* and *tree-keeper* is defined as well as when land is *affected by a tree*.

The responsibilities, liabilities and rights of tree-keepers and neighbours are explained in Part 3 which establishes that the common law right of abatement in relation to a tree is not affected by the Bill except to the extent that a neighbour who exercises the common law right of abatement is not required to return the removed part of the tree to the tree-keeper. The review found there was general uncertainty in the neighbourhood about whether or not there is an obligation to return removed parts of the tree to the tree-keeper. Under the Bill, the neighbour can now choose to either return the removed parts to the tree-keeper or dispose of the parts themselves. The pruning of the tree is subject to any requirements of a vegetation protection order or other like order placed by the State or local government on the tree.

Part 4 provides a notice system to neighbours who want the overhanging branches of the tree cut and removed from their land at the cost of the tree-keeper. This part amends the common law of abatement. A statutory obligation is imposed on a tree-keeper to prune branches overhanging onto his or her neighbour's land upon the neighbour giving notice to the tree-keeper. If a tree-keeper fails to respond to the notice, the neighbour is able to carry out the work on the tree and recover reasonable costs up to \$300.00 per annum. Again, pruning of the tree is subject to any requirements of a vegetation protection order or other like order.

A new statutory framework giving QCAT jurisdiction to make orders on the application of a neighbour for the removal or pruning of a tree growing on adjoining land is established in Part 5. A statutory right of relief is

available on grounds outlined in the Bill which include risk of serious injury or serious damage. This may include payment of compensation.

QCAT is required to keep a register of orders made under Chapter 3. Part 6 sets out the procedures and mechanisms for keeping the register which will assist prospective buyers to search for orders that may affect the land in relation to a tree.

Part 7 provides mechanisms for ensuring that a seller discloses to a buyer the existence of an application or order affecting the land in relation to a tree and Part 8 establishes enforcement procedures which can be undertaken by a local government if the tree-keeper fails to carry out work on a tree under a QCAT order.

The Bill recognises the important contribution trees make to the environment. QCAT is required to consider several matters about the tree before deciding an application. Importantly, these matters include the value of the tree, its contribution to the local system and to the amenity of the land and any impact it has on soil stability. If a tree is ordered to be removed by QCAT, then the Bill provides that QCAT may order that another tree be planted in its place.

Alternative Ways of Achieving Objectives

A range of options were developed in response to the Review.

- for dividing fences - retaining the status quo, amending or repealing the 1953 Act;
- for trees - retaining the status quo and reliance on the common law, mandating that local councils regulate tree disputes (it is not mandatory for councils to make local laws on trees), amending the common law as it relates to trees and introducing laws regulating the planting of trees; and
- for remedies and enforcement - establishing a neighbourhood court, giving the Dispute Resolution Branch within the Department of Justice and Attorney-General the function of providing conciliation services in relation to tree and fence disputes, and making all mediation agreements enforceable in QCAT.

Estimated Cost for Government Implementation

The Bill does not impose any additional obligations on Government agencies that cannot be met from existing appropriations.

Consistency with Fundamental Legislative Principles

The statutory remedies in the Bill do not limit neighbours invoking common law actions such as abatement or negligence. Neighbours will have a choice – they can cut and remove overhanging branches, give notice to the tree-keeper to cut and remove overhanging branches at the tree-keeper's costs, apply to QCAT for relief, or seek a remedy through the superior Courts.

The provisions of the Bill are generally consistent with fundamental legislative principles of the *Legislative Standards Act 1992* (LSA). The provisions that have been identified as representing a possible breach of a fundamental legislative principle are discussed below:

1. *Whether the legislation has sufficient regard to the rights and liberties of individuals—LSA, s 4(2)(a):-*

Chapter 3 Part 8 Assistance from local Government

The Bill includes provision for an authorised officer from a local government to enter private land to determine if work has been carried out as required by a QCAT order and, if the work has not been carried out, to carry it out. The cost of the work is then recoverable by the local government from the person responsible for the tree. This is justified on the basis that the powers to enter contain several safeguards around the system of entry which adequately protect the rights of the landowner.

Chapter 4 Part 1 Clause 94 Right to enter land for work under this Act

This clause provides for a person (including the person's employees or agents) who carries out work under the Act to enter the other owner's land at a reasonable time for the purpose of carrying out the work under the Bill. This right is conditional upon the person giving the land owner and any lessee of the land at least 7 days notice of the intention to enter. The right does not authorise the person to enter premises on the land. This is justified on the basis that there are adequate protections provided for the landowner in the provision. This clause does not apply if a neighbour gives permission to the treekeeper (or their contractor) to enter in the Notice for particular overhanging branches.

Whether the legislation is consistent with the principles of natural justice—LSA, s 4(3)(b):-

Chapter 2 Part 4 Div 3 Clause 37 Application for order in absence of adjoining owner

This clause provides for the making of a judicial order without the adjoining owner being heard. An order under this section may only be made if QCAT is satisfied the applicant has made reasonable inquiries to locate the adjoining owner. If the applicant later locates the adjoining owner, the applicant may give a copy of the order to the respondent and seek a contribution for the work done. The respondent, if given a copy of the order may apply for a variation of the order. The protections contained in the provision provide safeguards for the respondent. It will be a matter for QCAT to determine whether the applicant has made an adequate attempt to locate the respondent based on the facts of the particular case. A similar provision was contained in the *Dividing Fences Act 1953*.

This is justified on the basis that QCAT must be satisfied that the owner could not locate the adjoining owner. If a copy of the order is not given to the adjoining owner by the applicant in accordance with the clause the adjoining owner is unable to recover contribution.

Chapter 2 Part 5 Clause 38 Application before unauthorised construction or demolition

This Clause anticipates the situation where an adjoining owner is constructing or demolishing an existing fence on the common boundary without the permission of the other owner.

The clause provides for the owner to apply for an order to remove, modify or rectify the fence. The owner must give the adjoining owner a copy of the application at least 1 day before the application is heard. The short period of notice is justified because of the urgent nature of an application under this provision particularly where the existing fence is being demolished without permission.

Whether the legislation adversely affects rights and liberties or imposes obligations retrospectively—LSA, s 4(3)(g):-

Chapter 2 Part 3 Clause 26 Contribution – negligent or deliberate act or omission

This clause allows for an adjoining owner to seek a contribution for fencing work needed because of damage or destruction caused by the other adjoining owner. The section applies to damage or destruction caused

before the commencement. Given that an object of the Act is to minimise disputes between neighbours, the retrospective operation of this provision is justified on the basis that it will prevent any ongoing disputation that might occur between neighbours about who should pay for the damage or destruction of the dividing fence in circumstances contemplated by this clause.

Whether the legislation has sufficient regard to the institution of Parliament by authorising the amendment of the Act only by another Act—LSA, s 4(4)(c):-

Chapter 3 Part 1 Clause 42 Trees to which this chapter applies

This clause provides for a regulation to exclude, from the application of chapter 3, trees within a particular local government area or trees situated on particular land. This clause is justified because there may be trees or other tree like vegetation which are not considered in the current Bill. The use of the regulation in this section allows for unidentified trees to be removed quickly and efficiently from the framework of the Bill.

Other regulations in the Bill

Chapter 2 – Dividing Fences

Clause 8 sets out the land to which Chapter 2 applies. Clause 8 (2)(d) provides that the Bill does not apply to land prescribed under regulation. This is justified because it allows for flexibility to deal with interests that might arise which need to be excluded from the Bill.

Clause 23 provides for contribution to fencing work for prescribed land adjoining residential development. In sub-clause (3) it states that for this section, *prescribed land* means land greater than a size prescribed by regulation. This is justified because as South East Queensland becomes more densely settled there is a trend to smaller and smaller lots.

This means that the size of a single parcel of land impacted by small lot development could reduce even further over time. This power is needed to provide flexibility to deal with high density living conditions.

Chapter 3 Trees

Clause 45 defines the meaning of tree. Sub-clauses (1)(d) and Clause 45 (3) provide for regulations to include plants or exclude plants from being a tree under the Bill. These are based on the New South Wales experience under the *Trees (Disputes Between Neighbours) Act 2006* NSW, and are justified because cases may arise involving plants that have not been

contemplated by the Act, but about which an application to QCAT should properly be made.

Clause 79 provides for records that must be kept by the registrar at QCAT. Clause 80(2) provides that a regulation may prescribe information that must be entered in the register. This is justified on the basis that it allows for administrative flexibility.

Consultation

Community

Extensive community consultation was undertaken during the Review. While there were a variety of views it was clear that community stakeholders were overwhelmingly supportive of the replacement of the 1953 Act and the introduction of state-wide legislation to deal with trees in the neighbourhood.

A consultation draft of the Bill was published on the Department of Justice and Attorney General website at www.justice.qld.gov.au for an eight week period from May to July 2010. The Bill was generally supported by the submissions. Changes to the Bill were made as a direct result of consultation.

Government

Ongoing consultation with all government agencies occurred in the development and drafting of the Bill.

Chapter 1 Preliminary

Clause 1

Short title

Establishes the short title of the Bill as the Neighbourhood Disputes Resolution Bill 2010.

Clause 2

Commencement

Provides for the commencement of this Bill on a day to be fixed by proclamation.

Clause 3

Objects of Act

The objects of the Bill are to provide rules about each neighbour's responsibility for dividing fences and trees so that neighbours are able to resolve issues about fences or trees without a dispute arising and to facilitate the resolution of any disputes about dividing fences or trees that do arise between neighbours.

Clause 4

Definitions

The dictionary in Schedule 2 defines particular words used in the Bill.

The meaning of important words for the provisions dealing with dividing fences are contained in chapter 2, part 2 with cross-references given in the dictionary for ease of reference.

The meaning of important words for the provisions dealing with trees are contained in chapter 3, part 2 with cross-references given in the dictionary for ease of reference.

Clause 5

Relationship with other Acts or laws

Unless otherwise expressly provided for in this Bill, the Bill does not affect the operation of another Act or law.

Clause 6

Act binds all persons

This Bill binds all persons, including the State and as far as the legislative power of the Parliament permits, the Commonwealth.

Chapter 2 Dividing Fences

Part 1 Introduction

Clause 7

Overview

This clause provides an overview of this chapter. It is a principle of the legislation that there should be a sufficient dividing fence between 2 parcels of land, if an adjoining owner requests one. A sufficient dividing fence is required even if 1 or both parcels of land are vacant land.

The Bill establishes a presumption that adjoining owners must contribute equally to building and maintaining a sufficient dividing fence, provided that they agree or QCAT so orders. The same rule applied under the 1953 Act, however, the new Bill provides more guidance as to the meaning of a “sufficient dividing fence”. The use of the word “contribution” emphasises the importance of factoring in how each neighbour can contribute – this may be by meeting some of the cost or by providing material or labour.

The Bill establishes a new rule that neighbours must not attach something to a dividing fence that materially alters or damages the fence. Both neighbours own the dividing fence, so it should be kept in its original form unless otherwise agreed. Items are sometimes added to the dividing fence, for example, tarpaulins or part of the structure of a car port which affect the integrity of the fence structure. The Bill provides relief when this occurs.

The Bill encourages neighbours to resolve a dividing fence issue informally, but when this does not occur provides for resolution by QCAT

Clause 8

Application of chapter

This clause sets out the land to which the Act does and does not apply.

A sufficient dividing fence is not required for certain lands mentioned in Clause 8. This includes when either parcel is unallocated State land, a stock route within the meaning of the *Land Protection (Pest and Stock*

Route Management) Act 2002, South Bank public land within the meaning of the *South Bank Corporation Act 1989*, a State plantation forest, including a licence area in a State plantation forest; land prescribed under a regulation and where 2 parcels of agricultural land are adjoining.

This provision replaces the previous s.4 of the 1953 Act dealing with unalienated Crown land.

Originally dividing fences legislation came into being as the land was developed. Upon settlement of Australia by the United Kingdom, all land was treated as owned by the Crown. In *Mabo v Queensland (No.2)*, delivered by the High Court of Australia on 3 June 1992, it was recognised that native title existed at common law.

As land was “alienated” from the Crown, interests (leases, freehold titles) were established and conferred on other persons.

At common law there was no obligation to fence, however in the settlement of Australia by the United Kingdom requirements to fence became established by law.

Generally, as people acquired interests in the land, they were responsible for the fencing. If, however, they fenced and then their neighbouring property also became alienated from the Crown, they could recover half the fencing costs from their neighbour.

As time has passed, much of the state has been developed. Much of the land owned by the state is now held as freehold title, and is subject to the 1953 Act.

This clause deals with much of the rest of the land which is owned by the State, but is generally held for public interest purposes. In relation to this land, limited by this clause, the obligations under the Bill do not apply. However, the holders of some interests in land (which is owned by the State) may be considered to be owners of land under the Bill.

Although lands held by the State under the *Forestry Act 1959* and the *Nature Conservation Act 1992* have not been exempted from the Bill in this clause, the obligations of the Bill do not apply to the State in relation to these lands. However, the obligations of the Bill do apply to the holders of certain interests over these lands, as the interest holders are defined as the owner of the land for the purposes of the Bill.

Generally, when land is solely used for agriculture (for example, cane farming), it is not necessary to fence, as it is not necessary to restrain stock and fencing reduces the amount of land available for farming. The practice

under the 1953 Act was to consider the purposes for which the land was used, and in considering this, the conclusion could be reached that no fence was necessary.

Clause 9

Non-application of provisions to barrier of regulated pool

This clause establishes that Parts 3 to 6 do not apply in relation to a fence or part of a fence that is a barrier of a regulated pool under the *Building Act 1975*. This is because under recent amendments to that Act, which commence on 1 December 2010, very specific obligations are imposed upon the owner of land upon which a regulated pool is situated. These differ greatly from the obligations of an owner under this chapter. As a result, it is not practicable to apply this chapter to barriers for a regulated pool.

Clause 10

No effect on agreements or particular law

This clause states that Chapter 2 does not affect any covenant or agreement made between adjoining owners about a dividing fence before or after the commencement of the section, or any by-law under the *Body Corporate and Community Management Act 1997* or the *Building Units and Group Titles Act 1980* about a dividing fence.

An agreement made under this Chapter can be affected by it.

Any law about retaining walls or rights of support including easements of support is not affected by Chapter 2.

Chapter 2 does not prevent the State, a local government or other entity from entering into an agreement to contribute to fencing work.

Part 2 Interpretation

Clause 11

Meaning of *fence*

This clause provides the meaning of a fence.

The definition of a fence includes hedges or vegetative barriers for the first time.

There is another improvement on the definition in the 1953 Act, because this Bill distinguishes what is a foundation for a fence from a retaining wall. It is meant to overturn the decision in *Jackson v Randall* [2002] 2 Qd R 31.

The clause contains a definition of retaining wall. A retaining wall is not a fence. It serves a different purpose which is to support excavated or filled earth.

As the NSW Law Reform Commission explained in its Report 59 (1988) Community Law Reform Program: Dividing Fences, 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 usually 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.

However, the kinds of orders which QCAT can make about carrying out fencing work include work for a retaining wall if the repair of the fence is dependent upon the work for the retaining wall.

Clause 12

Meaning of dividing fence

A dividing fence means a fence constructed on the common boundary of adjoining lands.

However, to the extent it is impractical to construct a fence wholly on the common boundary line of the adjoining lands because of physical features

or the adjoining lands comprise 1 or more parcels of pastoral land separated by a watercourse, lake or other natural or artificial feature insufficient to stop passage of stock, a fence constructed on a line other than the common boundary is also a dividing fence.

Clause 13

Meaning of sufficient dividing fence

This clause provides more guidance than the 1953 Act as to what is a sufficient fence.

It provides a basic rule of height for a sufficient fence between 0.5 m and 1.8 m for 2 parcels of residential land and refers to types of construction material. While generally a provision of this nature would be considered to be a matter for local councils, given the number of councils and the degree of inconsistency between local laws, it has been included in the Bill.

The basic rules stated for a fence are not intended to imply that any dividing fence less than that 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.

In the case of 2 parcels of pastoral land, the fence must be sufficient to restrain livestock of the type run on each of the parcels.

In addition, the adjoining owners can agree or QCAT can order that a particular fence is a sufficient dividing fence. The Bill specifies the matters which QCAT may consider when deciding what a sufficient dividing fence is.

In some cases, an adjoining owner will build a fence within their own boundary, in order to have the kind of fence they choose. This can create many difficulties, including that of maintaining the dividing fence.

There have been inconsistent decisions in the past about the appropriate treatment of such a fence, so the Bill clarifies the matter. Under the Bill, in deciding whether there is a sufficient dividing fence, the existence of a fence, other than a dividing fence, on adjoining land, is not to be taken into

account. If there is such a fence on adjoining land, and it is necessary for it to be removed for fencing work to occur, QCAT can order its removal and may also make orders about its restoration.

Clause 14

Meaning of *owner* for land

The meaning of an owner is central to this chapter of the Bill.

An owner only includes the holders of the property interests specified in this clause.

For example, if land is owned by the State, but is the subject of a lease or license under the *Land Act 1994*, then the lessee or licensee is the owner for the Chapter. The State is not responsible under the Chapter as an owner under the *Land Act 1994*, the *Forestry Act 1959* or the *Nature Conservation Act 1992*.

The clause excludes local governments where they are the registered owner of land used as a public park and plantation licensees or plantation sublicensee of a State plantation forest where the licensee or sublicensee holds an interest under the *Forestry Act 1959*.

Clause 15

Meaning of *adjoining owners* and *adjoining land*

This clause also introduces the concept of *adjoining owners*. These are the owners of land on either side of a common boundary.

The concept also includes the owners of agricultural land or pastoral land on either side of a road or a watercourse, if QCAT is of the opinion that there is a fence that has been or could be used as a dividing fence for the 2 parcels of land.

This clause also contains the definition of *adjoining land* which is the land on either side of a common boundary.

Clause 16

Meaning of *fencing work*

The Bill introduces a single definition of fencing work. This includes design construction, modification, replacement, removal, repair or maintenance of the whole or part of a dividing fence. It also includes obtaining approval for fencing work.

Under the previous legislation, there were separate procedures for the construction of a dividing fence and for the repair of a dividing fence. 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.

The new definition of fencing work is significantly expanded from the 1953 Act. It clarifies that fencing work includes other activities, which are necessary for fencing work, including surveying, preparation of land (including trimming, lopping or removal of vegetation). It also includes planting, replanting and maintenance of a hedge or other vegetative barrier as a dividing fence and the cleaning of a ditch, embankment or watercourse that serves as the dividing fence.

Clause 17

Meaning of *authorisation*

There is a new concept of authorisation in relation to the construction or demolition of a dividing fence which includes an agreement between adjoining owners or a QCAT order.

Clause 18

Meaning of *agricultural land, pastoral land, prescribed rural land and residential land*

This clause defines these types of land uses, which are important for other clauses of the Bill. It is clear that a fence which suffices to divide 2 relatively small residential blocks can be quite different from the fence required for vast kilometres of pastoral land.

These definitions are needed so that this Bill will serve the needs of all Queenslanders.

Part 3 Neighbours' responsibilities

Clause 19

Ownership of dividing fence

This clause states the common law which is that a dividing fence is owned by the adjoining owners equally, to the extent that it is on the common boundary.

Clause 20

Liability for fencing work

This clause states that if there is no sufficient dividing fence between 2 parcels of adjoining land, that each owner must contribute to the fencing work and that the contribution of each is to be decided in accordance with this part. This clause also provides that the fence must be built on the common boundary except in the circumstances specified in the clause. A sufficient dividing fence is required even if one or both parcels of land are vacant.

Clause 21

Contribution between adjoining owners– generally

This clause establishes that as a general rule the adjoining owners are each liable for half the cost of the fencing work required to have a sufficient fence. This rule will not apply where one adjoining owner wants a standard higher than a sufficient dividing fence. In this case, that owner is liable for any difference in cost or contribution. 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. An example of this would be trimming vegetation more than is necessary for the fencing work for a sufficient dividing fence.

This is a fair system which will provide equitably for the economically disadvantaged members of the community.

Clause 22

Contribution – parcel of prescribed rural land adjoining residential development

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 prescribed rural land should be dealt with in the planning instrument. Where that is silent, this clause ensures that the owner of the parcel of prescribed land is only liable for the cost of a dividing fence sufficient for the purposes for which the parcel of prescribed rural 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 prescribed 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.

Clause 23

Contribution – prescribed land adjoining residential development

This clause ensures that if adjoining land consists of a parcel of land greater than a size prescribed by regulation and all or part of a residential development but the adjoining land previously consisted of 2 parcels of prescribed land then the owner of the parcel of prescribed land is required to contribute only to the cost of a dividing fence that would have been sufficient for the purposes for which the 2 parcels of prescribed land had been used. This is so that owners of larger properties in urban areas, who adjoin an area which is subdivided into residential lots, are not responsible for contributing to multiple, different dividing fences.

Clause 24

Liability of lessee

This clause provides for contribution to fencing work by a long term lessee, if they have been given notice by the lessor. It does not apply to leases under the *Retail Shop Leases Act 1994*.

Clause 25

Contribution - particular State land

This clause caters for the owner of land adjoining a parcel of unallocated state land. If unallocated state land becomes freehold land, then the adjoining owner can recover the relevant contribution to the fencing work for a sufficient dividing fence (already constructed) from a subsequent owner. The State must notify the new owner of this obligation.

Clause 26

Contribution -negligent or deliberate act or omission

There are occasions in which the dividing fence is damaged or destroyed by an adjoining owner or a person who enters land with their express consent. This clause requires the owner to restore the fence to a reasonable standard, and if they do not, allows the adjoining owner to cause this to happen by giving a Notice to contribute to fencing work.

Clause 27

Attaching things to a dividing fence

This section prevents unreasonable and material alteration of a dividing fence by the attachment of something to it without consent. Examples are provided in the section, for instance, a carport, a shade sail and lattice-work. As the dividing fence is owned equally, it is inappropriate for one adjoining owner to unreasonably or materially alter or damage it. If this occurs, the other adjoining owner can apply to QCAT for an order restoring the fence to a reasonable standard having regard to its state before the attachment.

Clause 28

Urgent fencing work

There will be occasions in which it is necessary to undertake fencing work urgently, for example, when the dividing fence is damaged during a flood or fire or other catastrophic event. This provision outlines the circumstances in which an owner may act without notice to the other adjoining owner. When that occurs, the owner may recover the costs of carrying out the fencing work, by giving a notice to contribute for urgent fencing work to the adjoining owner.

Clause 29

Agreement does not affect title or possession

This clause provides for the sake of certainty that occupation of land on either side of a dividing fence, because of an agreement made under this Chapter, does not affect title to or possession of the occupied land.

Part 4 Process for obtaining contribution and resolving disputes

Division 1 Introduction

Clause 30

Overview

This clause confirms that adjoining owners have a responsibility to attempt to resolve issues about fencing work without a dispute arising. The clause describes the process of notice to be used if an owner wants an adjoining owner to contribute to fencing work and describes which disputes can be brought to QCAT.

Division 2 Notice to contribute

Clause 31

Notice to contribute for fencing work

This clause outlines how an owner can give written notice to an adjoining owner to contribute to the carrying out of fencing work on a dividing fence.

For the first time, there will be an approved form for the notice. During consultations for the preparation of this Bill, there was strong community support for the use of a notice in an approved form.

Because an owner might make a minor error or omission in compiling the notice, the clause provides that only substantial compliance is necessary.

The clause details certain important matters which must be included in the notice, including the description of the land.

If it is proposed that the cost of fencing work should be borne other than in equal proportions, then the proposed proportions should be included in the notice.

Unlike the 1953 Act, it is only necessary to attach one written quotation to the notice.

If within 1 month after the notice is given the adjoining owners have not agreed about the proposed fencing work or their contributions to it, then either owner may apply to QCAT. There is a time limit of 2 months after the notice is given within which to apply to QCAT.

Unless there is a need for urgent fencing work, neither adjoining owner can undertake fencing work until agreement is reached about the proposed fencing work or QCAT has made an order.

Clause 32

Notice to contribute for urgent fencing work

This clause provides for the written notice to be given when one adjoining owner has acted to carry out urgent fencing work. The process is very similar to the process for a Notice for contribution to fencing work.

Division 3 Resolving Disputes

Clause 33

Jurisdiction

This clause confers jurisdiction on QCAT to hear and decide any matter arising under this chapter.

A new jurisdiction is conferred upon QCAT to decide which of 2 or more fences on the boundary of adjoining lands is the dividing fence and to order the removal of the other fences.

Further, QCAT is given express jurisdiction where there is a fence other than a dividing fence on adjoining lands to order its removal if QCAT considers that its removal is necessary to allow fencing work for a dividing fence.

Clause 34

Representation

This clause allows a party to be represented by a real estate agent. This may occur if the party is absent or the real estate agent is given authority to act on behalf of the owner.

Clause 35

Orders about carrying out fencing work

This clause outlines the kinds of orders QCAT may make in an application in relation to fencing work.

The clause continues to clarify that occupation of land on either side of a dividing fence as a result of a QCAT order that fencing work be carried out on a line other than the common boundary, does not affect title to or possession of the land.

The clause allows QCAT to make any order for any other work to be carried out that is necessary to carry out fencing work including work for a retaining wall. This would be necessary when the structure of the dividing fence is or would be compromised by the failure of a retaining wall and cannot be repaired or constructed unless the retaining wall is repaired. It would also cover works such as drainage which are necessary for repairing a dividing fence.

Clause 36

Sufficient dividing fence matters for QCAT consideration

This clause lists some of the matters QCAT may consider in deciding whether a dividing fence is a sufficient dividing fence.

Most of these are in common with the *Dividing Fences Act 1991* (NSW).

A factor listed for consideration is 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 short paling or chain wire fence has been used as a dividing fence is a highly relevant consideration in deciding what is sufficient. A related factor is the kind of dividing fence normally used in the area.

The clause also refers to whether the dividing fence is capable of being maintained by the owners. 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.

Where one adjoining owner seeks to have more than a sufficient dividing fence, QCAT must consider all of these objective factors.

QCAT should also consider whether obligations as to fencing were part of a development approval and any written agreement of the owners.

Clause 37

Application for order in absence of adjoining owner

In some circumstances, an owner may be unable to give notice to the other adjoining owner. During the Review, some owners spoke of encountering absent adjoining owners who constantly change real estate agents and are unable to be located. In another case, the adjoining land was vacant and the adjoining owner resided overseas, making the giving of notice impractical.

In those circumstances, an owner may apply to QCAT for the relevant order authorising fencing work. QCAT must be satisfied that the owner has made reasonable inquiries but has been unable to locate the adjoining owner.

The clause allows an agent to appear in the absence of the owner.

The owner who carries out the fencing work authorised by QCAT may at a later date give notice to the other adjoining owner and is entitled to seek contribution. The other adjoining owner is given an entitlement to apply to QCAT for a variation of the order.

The clause applies even though the adjoining owner or owner has ceased to own the relevant parcel of land.

Examples of reasonable inquiries are given, for instance, searching the electoral roll and inquiring of other neighbours or contacting the local council.

Part 5 Process for dealing with unauthorised construction or demolition

Clause 38

Application before unauthorised construction or demolition

This clause provides relief in the situation where an owner apprehends that an adjoining owner intends to construct or demolish a dividing fence without authorisation.

The owner may apply to QCAT for an order preventing the construction or demolition and must give a day's notice of the application. The owner

should attempt to negotiate with the adjoining owner before bringing the application.

Clause 39

Application after unauthorised construction or demolition

This clause provides relief if an owner constructs or demolishes a dividing fence without authorisation. An adjoining owner may apply to QCAT, upon 3 days notice. QCAT may make orders requiring the removal, modification or rectification of the fence and requiring the owner to bear the costs.

Part 6 Process if common boundary not agreed

Clause 40

Process if common boundary not agreed

This clause outlines the process to apply if the adjoining owners do not agree on the position of the common boundary line.

Chapter 3 Trees

Part 1 - Introduction

Clause 41

Overview

This clause provides an overview of the chapter and states that a tree-keeper is responsible for the proper care and maintenance of the tree-keeper's tree. The tree-keeper's specific responsibilities are set out below.

Clause 42

Trees to which this chapter applies

This clause sets out the trees to which the chapter applies and does not apply. A regulation may provide that this chapter or a stated provision of this chapter does not apply to a tree situated on land within a stated local government area.

The chapter is not to apply to a tree situated on rural land, a parcel of land that is more than 4 hectares, unallocated State land, a tree grown for a commercial purpose, or a tree which is planted or required to be planted or maintained under a court order or a condition of a development approval.

Clause 43

Requirements under other laws

If a person is required under this chapter 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 may be carried out, the person must not carry out the work until the person obtains the consent or authorisation.

Clause 44

Action may be taken in relation to more than 1 tree

This clause clarifies that if Chapter 3 provides for doing a thing in relation to a tree, the thing may be done in relation to 2 or more trees.

Part 2 Interpretation

Clause 45

Meaning of tree

The meaning of tree for the purposes of this Bill is defined in this clause. A regulation may prescribe any other plant to be a tree to which this chapter applies.

A tree includes a vine and other plants resembling a tree such as cactus, bamboo, banana or palm.

Clause 46

When is land *affected by a tree*

Land is affected by a tree if branches from the tree overhang the land; or the tree causes serious injury to a person on the land, serious damage to the land or any property on the land, or there is substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land. There are specific requirements in relation to light and views outlined in Clause 66(3). The land must adjoin the land on which the tree is situated or be separated by a road.

Clause 47

When is a tree *situated on land*

A tree is situated on land if the tree or the base of the tree trunk is, or was previously, situated wholly or mainly on the land. This clause may apply in a situation where a tree is removed prior to an application being filed by the neighbour for serious damage or serious injury, or an application is filed but not yet dealt with by QCAT and the tree-keeper removes the tree. A tree that is removed following serious damage or injury that gave rise to an application under this Chapter is still taken to be situated on land for the purpose of the application.

Clause 48

Who is a *tree-keeper*

The meaning of a tree-keeper is central to this chapter of the Bill. A tree-keeper is limited to the holders of the property interests specified in this clause. To clarify, the State is not considered a tree-keeper for the purposes of the Bill in respect of certain types of land that have not been excluded from the application of the Bill (for example State lands held under the *Forestry Act 1959* or the *Nature Conservation Act 1992*). However, the holders of certain types of interests in respect of these lands are defined as tree-keepers in this clause.

Clause 49

Who is a *neighbour*

A neighbour is a person or other entity that is a registered owner of land affected by the tree or taken under another Act to be the owner, for this Bill, of land affected by the tree. Neighbour includes an occupier of land affected by the tree, except for Part 4. An occupier can bring an application to QCAT in circumstances outlined in Part 5 where it can be demonstrated

by the occupier that the landlord has refused to bring an application. Councils are not owners, to the extent property is used as a park.

Clause 50

Meaning of *work*

Work for a tree in this chapter includes cutting and removing any part of the tree including its branches or roots, netting the tree, destroying the tree, and removing the destroyed tree.

Clause 51

Meaning of *destroy*

Destroy means destroying the tree by any means and includes the removal of the tree and its stump.

Part 3 Responsibilities, liabilities and rights

Part 3 sets out the responsibilities, liabilities and rights of a neighbour and tree-keeper in relation to a tree to which this Bill applies in circumstances outlined in Part 4 and Part 5.

Clause 52

Responsibilities of a tree-keeper

A tree-keeper is responsible for cutting and removing any branches of the tree that overhang a neighbour's land.

A tree-keeper is also responsible for ensuring that the tree does not cause serious injury to a person; serious damage to a person's land and any property on the person's land (this may include property of a person on the neighbour's land); or substantial, ongoing and unreasonable interference with the person's use and enjoyment of the person's land. There are obligations as to views and light and other matters that might be demonstrated to interfere with the use and occupation of the land.

Non-compliance with these obligations does not create a civil cause of action.

Clause 53

More than 1 tree-keeper

If there is more than 1 tree-keeper the liability of the tree-keepers is joint and several.

Clause 54

Common law right of abatement

The right of a landowner to exercise the common law right of abatement in relation to a tree is not affected by this Bill except to the extent that there is no obligation under this Bill for the adjoining landowner to return the cut branches, roots or fruit to the tree-keeper.

Under the common law, property owners have the right to trim the branches or roots of a neighbour's tree to the common boundary line at their own expense, but they must return the cut branches, roots and fruit to the tree-keeper.

The common law right of abatement is subject to vegetation protection orders and other orders imposed by local and State government for the protection of trees.

Part 4 Removal of overhanging branches

This part provides a process by which a neighbouring landowner can request the tree-keeper by notice to carry out the work on the tree at the cost of the tree-keeper.

Clause 55

Application of this part

This part applies if a neighbour's land is affected by a tree because branches from the tree overhang the land and the neighbour wants the overhanging branches cut and removed. This part does not apply to occupiers. This part does not apply when the tree is subject to a vegetation protection order.

Clause 56

Overview

The Bill encourages the tree-keeper and the adjoining landowner to resolve the issue about the tree informally.

The adjoining landowner has the option of exercising the common law right of abatement, or using the formal resolution process set out in this part.

Clause 57

Notice for particular overhanging branches

A neighbour may give a written notice to a tree-keeper if branches of a tree are overhanging the neighbour's land. The trimming is to be up to 2.5 metres from the ground level and the branches should extend at least 50cm over the boundary before the clause can be invoked. There is an upper limit of \$300.00 per notice recoverable by the neighbour from the tree-keeper.

The notice must ask the tree-keeper to carry out the work on the tree within 30 days of the day the notice is given to the tree-keeper, and give permission to the tree-keeper or any contractor engaged by the tree-keeper, to enter the neighbouring landowner's property to carry out the work on days and times to be agreed but within the notice period and between the hours of 8am and 5pm.

The notice must be accompanied by at least 1 written quotation from a contractor specifying the estimated cost of carrying out the work on the tree and a copy of this part of the Bill. A tree-keeper can obtain their own quote. They are not confined to the quote presented by the neighbour giving the notice.

Permission under subsection (3)(c) of this clause does not authorise the person to enter a dwelling on the neighbour's land.

A footnote to subsection (3)(c) of this clause reminds neighbours and tree-keepers to consider liability and insurance implications when engaging contractors and giving permission to enter their land for the purposes of carrying out work on the tree.

The neighbour may not give the notice if the tree-keeper has been given a notice for the tree within the previous 12 months.

Clause 58

Resolution by neighbour

This clause applies if the tree-keeper does not cut and remove the overhanging branches within the notice period contained in the Notice for particular overhanging branches.

The neighbour may cut and remove the overhanging branches or arrange for someone else to cut and remove the overhanging branches, and is not obliged to return the branches or fruit from the tree to the tree-keeper.

The tree-keeper is liable for the reasonable expenses incurred by the neighbour involved in cutting and removing the overhanging branches up to a maximum amount of \$300.00 in any 12 month period.

The neighbour may recover the amount of the reasonable expenses as a debt. A debt or liquidated demand of money, with or without interest, of up to the prescribed amount may be recovered in minor civil dispute proceedings under the QCAT Act.

Part 5 QCAT orders to resolve other issues about trees

The part enables an owner of land to apply to the Queensland Civil and Administrative Tribunal (QCAT) for an order to remedy, restrain or prevent serious damage to the owner's land or property on the land, serious injury to a person on the land, or substantial ongoing and unreasonable interference with the neighbour's use and enjoyment of their land as a consequence of a tree situated on adjoining land.

At common law an action in private nuisance may also be available in circumstances where a tree causes substantial and ongoing interference with a person's use or enjoyment of land.

Division 1 Preliminary

Clause 59

Application of this part

This part applies if the neighbour's land is affected by a tree and the neighbour can not resolve the issue by using the process in Part 4. For

example the branches may be more than 2.5m high and causing damage to the property by constantly dropping large branches on to the land.

Also, roots of the tree might be causing damage to the neighbour's driveway or blocking underground pipes on the neighbour's property or the tree might have grown to such height or thickness that it is blocking light to the windows or roof of a neighbour's property. Alternatively, the neighbour's concern might be about potential poisoning of their water supply, by the dropping of leaves into a water tank.

Clause 60

Overview

The tree-keeper and neighbour are encouraged to resolve the issue about the tree informally.

The neighbouring owner may exercise the common law right of abatement, or apply to QCAT for resolution of the dispute.

QCAT may make an order to resolve a dispute only if the neighbour has made a reasonable effort to reach agreement with the tree-keeper. If a council has a policy in place for resolving a dispute about a tree, that policy should be followed before an application is made to QCAT.

Clause 61

Jurisdiction

QCAT has jurisdiction to hear and decide any matter in relation to a tree in which it is alleged that as at the date of the application to QCAT, land is affected by the tree.

Examples of what might constitute unreasonable interference may include blocking of sunlight to solar panelling, blocking of light which causes mould growth in the home, or interruption to satellite reception.

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.

Division 2 Applying to QCAT

Clause 62

Neighbour may apply to QCAT

A neighbour may apply to QCAT as provided under the QCAT Act for an order under this Division, but if the neighbour is an occupier, but not a registered owner of land, they can only apply if the owner has refused to bring the application.

Clause 63

Giving a copy of an application

At least 21 days before the date an application is to be heard, the neighbour must give a copy of the application to the tree-keeper, any relevant authority that would be entitled to appear in proceedings in relation to the tree and any other person, including for example, an occupier of the tree-keeper's land, that the neighbour has reason to believe would be affected by the order.

QCAT may waive the requirement to give a copy of the application, or may vary the minimum period before the hearing of the application by which the application must be served, if it considers it appropriate in the circumstances thus allowing the application to be dealt with in a timely manner. This power allows QCAT to expedite an application where a tree poses an imminent threat of serious injury to a person or serious damage to the neighbour's land or any property on the neighbour's land.

Division 3 Making an Order

Clause 64

Government authority may appear

A government authority may appear in a proceeding under this part if carrying out the work on the tree would otherwise require the consent or authorisation of the relevant authority. An example of this might be where the local government has placed a vegetation protection order over the tree or where the tree is classed as a significant landscape tree. The local government might wish to make recommendations about the type of

pruning that it would prefer if QCAT decided to make an order in relation to the tree, for example, pruning for recovery of a view.

Clause 65

Requirements before order may be made

QCAT may make an order under clause 66 only if it is satisfied that the neighbour has made a reasonable effort to reach agreement with the tree-keeper; that the neighbour has made a reasonable effort to resolve the dispute under any relevant local law, local government scheme or local government administrative process and that the application has been given to all appropriate persons or entities (except to the extent that a requirement under that section has been waived by QCAT). Also, the tree which is the subject of the application must be a tree to which this clause applies.

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.

Clause 66

Orders QCAT may make

QCAT may make the orders it considers appropriate in relation to a tree to prevent serious injury to any person; to remedy, restrain or prevent serious damage to the neighbouring landowner's land or property on the land; to remedy, restrain or prevent substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.

Despite Section 178 of the *Property Law Act 1974*, QCAT may make an order under this clause that is intended to result in the access of light to land.

Without limiting powers of QCAT to make orders under this clause, a QCAT order may require or allow a tree-keeper or neighbour to carry out work on a tree; require a survey be undertaken to define the location of a tree if there is doubt about its location in relation to the common boundary; require a person to make an application to obtain a consent or other authorisation from a relevant agency in relation to a tree; authorise a person to enter the tree-keeper's land to carry out an order under this clause, including entering land to obtain a quotation for carrying out an order; require a tree-keeper to pay compensation to a neighbour for damage to the

neighbour's land and any property on the neighbour's land; require a report from an appropriately qualified arborist. Arborists who can provide reports are trained to a minimum 'AQF Level 5 in Arboriculture'.

Clause 67

Scope of order to override other laws

QCAT may not make an order to carry out work on a tree if the work is prohibited under another Act.

If QCAT is satisfied the application is a genuine dispute it may order a person to carry out 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 protecting the tree.

Clause 68

Order in relation to a removed tree

QCAT may make an order under clause 66 even if the tree has been completely removed. A tree that is removed following serious damage or injury that gave rise to an application under this part is still taken to be situated on land for the purpose of the application if the tree was situated wholly or principally on the land immediately before the damage or injury occurred. This allows a neighbour to apply for an order requiring the tree-keeper to pay compensation or repair costs for damage caused by a tree even if the tree-keeper has completely removed the tree since the damage or injury occurred.

QCAT cannot make an order to remedy damage caused by a tree that has been completely removed if the tree-keeper has sold the land on which the tree was situated since the damage was caused.

Clause 69

Additional order if destruction or removal of tree ordered

This clause acknowledges that trees have an important role in countering the effects of air pollutants in the atmosphere and should be replaced where possible.

If QCAT makes an order for the destruction or removal of a tree, QCAT may also order that the tree be replaced with a tree appropriate to the environment and surroundings, and of a different maturity level. For example, a tree that is removed under a QCAT order may have been a

mature tree of a particular species. QCAT can order that a tree of less maturity and of a different species replace the removed tree. QCAT can also order that the replacement tree be situated in a place other than the place where the destroyed or removed tree was originally situated. This might occur where the destroyed or removed tree was situated close to the common boundary and overhanging the neighbour's house.

Division 4 Matters for QCAT consideration

Clause 70

Application of div 4

This clause states that this division states matters for QCAT to consider in deciding whether to make an order in an application under this Part and does not limit the matters QCAT may consider.

Clause 71

Safety

The primary consideration is the safety of any person.

Clause 72

Removal or destruction of living tree to be avoided

A living tree should not be removed or destroyed unless the issue relating to the tree can not otherwise be satisfactorily resolved. Alternatives to removal should be considered, for instance, pruning.

Clause 73

General matters to consider

QCAT must also consider several matters before deciding an application. These matters are listed in this clause and include the location of the tree in relation to the boundary of the land on which the tree is situated and any premises, fence or other structure affected by the location of the tree; protection of waterways or coastal foreshores; the impact any pruning (including the maintenance of the tree at a certain height, width or shape) would have on the tree; whether carrying out work on the tree would require any consent or other authorisation under another Act and if so, whether the consent or authorisation has been obtained; whether the tree has any historical, cultural, social or scientific value (this might include a

‘scar tree’ which is a tree of cultural significance to aboriginal people. Aboriginal people caused scars on trees by removing bark for various purposes. The scars expose the sap wood on the trunk or branch of a tree); 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; the type of tree including whether the species of tree is a pest or weed (however described) or falls under a similar category under an Act or local law.

This clause provides that no financial value or carbon trading value may be placed on a tree to which this Bill applies. Some local governments place monetary values on trees depending on the maturity level of the tree and the tree species. Sometimes these monetary tree valuations are assessed at many thousands of dollars. The process for valuing trees in the urban environment is unsettled and subject to varied and controversial valuing methods. This clause ensures that the object of the Bill, to provide a statutory remedy for a nuisance caused by trees growing in the neighbourhood, is not affected or frustrated by unsettled methods of calculating the monetary value of trees for natural asset purposes or carbon trading.

Clause 74

Other matters to consider if serious injury or damage alleged

If the neighbour alleges the tree has caused, is causing, or is likely to cause serious injury to any person or serious damage to the neighbour’s land or any property on the neighbour’s land, 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. This may include 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 the neighbour to prevent or rectify the injury or damage or the likelihood of injury or damage.

In making an order to carry out work that involves destroying a tree, QCAT may consider how long the neighbour has known of the injury or damage; any steps that have been 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, some or all of the injury or damage; or any other matter QCAT considers relevant.

Clause 75

Other matters to consider if unreasonable interference alleged

This clause sets out additional matters QCAT may consider if the neighbouring landowner alleges the tree has caused, or is causing, substantial, ongoing and unreasonable interference with the use and enjoyment of the landowner's property. These matters include whether anything other than the tree has contributed or is contributing to the substantial, ongoing and unreasonable interference with the enjoyment of the land; any steps taken by the tree-keeper or the neighbour to prevent substantial, ongoing and unreasonable interference with the use and enjoyment of the land; the size of the neighbour's land; and whether the tree was planted before or after the neighbour acquired the land. For interference that is an obstruction of sunlight or a view, QCAT may consider any contribution the tree makes to the protection or revegetation of a waterway or foreshore.

Division 5 Matters following the making of an order

Clause 76

Copy of order to be given to government authority

QCAT must give a copy of any order it makes in relation to a tree to the local government for the local government area in which the tree is situated and any relevant authority that appeared in the proceeding (which may include the local government for the area).

Clause 77

Failure to comply with order

A person must not fail to comply with a requirement imposed on the person under this chapter of the Bill unless there is a reasonable excuse. The maximum penalty for such failure is 1,000 penalty units. This high penalty will encourage compliance and highlights the serious consequences that might occur from failing to remedy the nuisance as ordered by QCAT.

Clause 78

When order lapses or may be revoked

An order made under this chapter lapses 10 years after the day on which the order was made unless the order expresses otherwise.

QCAT may revoke an order it considers has been satisfied on application or on its own initiative.

Part 6 Register of QCAT orders

Clause 79

Register

QCAT must keep a register of orders (other than obsolete orders) made under this chapter.

QCAT must keep the register in electronic form and in such a way that a search of the register for particular land will show the existence of any order affecting the land; the time for carrying out the order; and the person responsible for carrying out the order. For this section land is affected by an order about a tree if, at the time the order was made, an owner of the land was a tree-keeper or neighbour for the tree.

Clause 80

Records to be kept by registrar

QCAT must within 14 days of making an order under this chapter (other than an order revoking another order), enter into the register the prescribed information for the order. This is to facilitate searches by potential purchasers of land.

QCAT must within 14 days of making an order that revokes another order remove from the register the information for the other order.

Clause 81

Entitlement to search register

A person may search the register and obtain a certified copy of the register record in relation to any order made under this chapter.

A document purporting to be a certified copy of the register record is evidence of the register record.

Part 7 Sale or proposed sale of affected land

Clause 82

Definitions for pt 7

In this part, *application* means an application made under this chapter that has not been decided, dismissed, struck out or withdrawn by QCAT. *Land affected by an application or order* means the land on which a tree is situated which is the subject of an application or order.

An *order*, for a sale of a person's land affected by an order, means an order under this chapter (other than an obsolete order) requiring a person to carry out work in relation to a tree.

The meaning of *transfer day*, for land, means the day ownership of the land is transferred.

Clause 83

Person to give buyer copy of application or order

If a person intends to enter into a contract of sale for the land affected by an application or order, the person must 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. The buyer is then alerted of the application and is fully informed before signing the contract. Maximum penalty for failure to do this is 500 penalty units.

Clause 84

Consequences if copy of application given

If, a person selling land gives a copy of an application to a buyer before the contract of sale is entered into, the buyer is joined as a party to the QCAT proceeding when the buyer enters the Contract of Sale.

Clause 85

Consequences if copy of order given

If a seller gives a copy of an order to a buyer (before entry into a contract of sale), then, on the transfer day, the buyer becomes, to the extent that the seller has not carried out the work required under the order, bound by the order as if the buyer were the person. Any period mentioned in the order

for carrying out the order commenced on the transfer day of the contract of sale.

Clause 86

Consequences before transfer if copy of application or order not given

This clause sets out the buyer's rights if a copy of a QCAT order or application to QCAT is not given as required under this chapter, and outlines the process by which a buyer may terminate the contract of sale.

The buyer may terminate the contract at any time before the contract settles by giving a signed, dated notice of termination to the seller or the seller's agent.

The notice of termination must state that the contract is terminated under this clause.

If the contract is terminated, the seller must within 14 days after the termination, refund any deposit paid under the contract to the buyer. Failure to do this may result in a maximum penalty of 200 penalty units.

If the seller instructs a person who holds the deposit to refund the deposit paid under the contract to the buyer that person must immediately refund the deposit to the buyer. Failure to do this may result in a penalty of up to 200 penalty units.

If the contract is terminated under the Bill, the seller and the person acting for the seller who prepared the contract, are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.

If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.

An amount payable to the buyer under this clause is recoverable as a debt in a court of competent jurisdiction.

Clause 87

Consequences after transfer if copy of order not given

This clause applies if a person selling land affected by an order, fails to give to the buyer a copy of the order before the buyer enters into a contract of sale for the land and has not, before the transfer day, carried out all the work the person is required to carry out under the order. Despite ownership of the land being transferred to the buyer, the person remains liable to carry out the work required under the order.

Part 8 **Assistance from local government**

Clause 88

Local government may decide to carry out work

This clause applies if QCAT has made an order under this part requiring a tree-keeper to carry out work on a tree within a specified period and the work has not been carried out within that period.

Nothing in this clause requires a local government to take any action. The local government may elect to carry out the work on the tree as ordered by QCAT.

If the local government decides to take action as requested by the neighbour then this clause sets out the process to be followed by the local government.

A neighbour may advise the local government of the local government area in which the tree is situated, but not less than 7 days after the end of the specified period, that the tree-keeper has not carried out work on a tree as required by a QCAT order and request the local government of the local government area in which the tree is situated to act under this clause.

A person authorised by the local government (authorised person) may 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 carry out the work if the work has not been carried out as required by the order.

Before an authorised person enters the tree-keeper's land under this section, the local government must give the tree-keeper at least 7 days' notice of the intention to enter the land.

Notice is not required if the tree-keeper consents to entry, or entry to the land is required because of the existence or likelihood of a serious risk to safety, or entry is required urgently and the chief executive of the local government has authorised in writing entry without notice.

An authorised person may not enter the tree-keeper's land to inspect or carry out work on a tree without possessing an authority for this purpose. The authority must be produced, if required to do so by the tree-keeper.

The costs incurred by the local government in carrying out the work and any administration fee charged by the local government are charges on the

tree-keeper's land under the *Local Government Act 2009*, section 95 or the *City of Brisbane Act 2010*, section 97.

Clause 89

Requirements of notice of intention to enter land

The notice of intention to enter the land of the tree-keeper must be in writing. A copy of the relevant QCAT order and clause 88 must be attached to the notice. The notice must state the clause of this Bill under which the notice is given, the name of the tree-keeper to whom it is given, the land to which the notice applies, the purpose of the entry and the day on which the authorised person is to enter the land.

Clause 90

Requirements of authority to enter land

The authority to enter the tree-keeper's land must be in writing and be signed by the chief executive of the local government. The authority must state that it is issued under the Bill, the name of the person to whom it is issued, the land to which the authority applies, that the person has authority to enter the land, the purpose for which the land is being entered, whether the person has authority to carry out any work required under an order and the date, not more than 90 days from the date of the authority, on which it expires.

Chapter 4 General

Part 1 Provisions of general application

Clause 91

Substantial compliance is adequate

Substantial compliance with the terms of any agreement or order referred to in this Bill is sufficient for the purposes of this Bill.

Clause 92

Giving documents

A document may be given to a person by leaving it with a person who is apparently an adult living at the relevant address or leaving it at the relevant address in a position where it reasonably likely to come to the person's attention, or posting it to the relevant address.

Evidence of giving of a document may be given orally or by affidavit.

A justice of the peace is authorised to take and receive an affidavit whether or not any matter to which the affidavit relates is pending in any court or QCAT.

If there are 2 or more joint owners of land and a person is unable to give every owner the document, the document is deemed to have been given to all joint owners if the person gives the document to at least 1 of the joint owners.

The meaning of *relevant address* for an owner of land is the usual or last known place of residence or business for the owner and includes the owner's address according to the records held by the local government. The meaning of *document* is a notice or order made under this Bill. The *relevant local government* for an owner of land means the local government of the local government area in which the land is situated.

Clause 93

Descriptions in notice

The description of any land, fence, line, boundary or tree in a notice under this Bill is sufficient if it allows no reasonable doubt as to which land, fence, line, boundary or tree is concerned or if it is shown that the person served with the notice knew the relevant land, fence, line, boundary or tree.

Clause 94

Right to enter land for work under this Act

A person who intends to carry out work under this Bill (including the person's employees or agents) may, at any reasonable time enter the land for such purpose.

However this clause does not authorise the person to enter a dwelling on the land and the person may only enter land if the owner of the land, and any lessees of the land of which the person is aware, are given at least 7 days' notice of the person's intention to enter the land to carry out the work.

This clause does not apply if a person gives permission in a Notice for particular overhanging branches.

Part 2 Miscellaneous

Clause 95

Regulation making power

The Governor in Council may make regulations under this Bill.

Clause 96

Approved forms

The chief executive may approve forms for use under this Bill.

Clause 97

Review of Act

The Minister must review the operation and effectiveness of this Act no later than 3 years after the commencement of this section. The objects of the review include deciding whether the objects of the Act remain valid, whether this Act is meeting its objects, whether the provisions of the Act are appropriate for meeting its objects and investigating any specific issue recommended by the Minister. The Minister must, within 6 months after finishing the review table a report about its outcome in the Legislative Assembly.

Chapter 5 Transitional provisions

Clause 98

Notices, proceedings and orders under Dividing Fences Act 1953

The repealed 1953 Act applies in relation to an existing notice, a proceeding in relation to an existing notice, an existing proceeding or an existing order as if this Bill had not been enacted.

This clause defines certain words for the purpose of this clause.

Chapter 6 Repeal and amendment of this Act and other Acts

Part 1 Repeal

Clause 99

Repeal of Dividing Fences Act 1953

The 1953 Act is repealed.

Part 2 Amendment of Land Act 1994

Clauses 100, 101 and 102

These clauses amend the Land Act 1994 by inserting a new part which provides that in a document issued under the Land Act 1994, a reference to the repealed Dividing Fences Act 1953, is taken to be a reference to this Act.

Part 3 Amendment of Queensland Civil and Administrative Tribunal Act 2009

Clauses 103 to 104

These clauses amend the QCAT Act 2009 to include a specific rule-making power for conciliation, which is to be the alternative dispute resolution process used for dividing fences and tree matters under this Act.

Part 4 Amendment of this Act and other Acts.

Clause 105

Acts amended

Schedule 1 amends the Acts it mentions.

Schedule 1 Acts amended

Part 1 Amendment of this Act

This part amends this Act.

Part 2 Other amendments

This part amends the Acts it mentions to replace references to the 1953 Act with references to this Bill.

Schedule 2 Dictionary

This schedule defines terms used in the Bill, including the meaning of rural land.

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