Queensland

Law Reform Commission

**Review of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)**

Discussion Paper: Questions

WP No 72

June 2015

**SUBMISSIONS**

This document contains the questions posed by the Commission in its Discussion Paper and on which it invites submissions. Respondents are invited to use this document as a template for submissions on any or all of the issues raised in the Discussion Paper.

Submissions should be sent to:

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**Closing date: 10 August 2015**

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# Chapter 2

## Dividing Fences

### Preliminary matters

#### Liability of State and Local Governments to contribute to fencing work

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| 2-1 Is the present application of Chapter 2 of the Act, particularly as it relates to the liability of the State and local governments, adequate and appropriate? If not, what changes should be made? |

#### The meaning of ‘dividing fence’, ‘fence’ and ‘fencing work’

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| 2-2 Are the definitions of ‘dividing fence’, ‘fence’ and ‘fencing work’ clear and easy to apply in practice? Are there are changes that should be made to clarify or improve those definitions? |

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| 2-3 Does the Act adequately provide for the situation where a fence that is intended to serve the purpose of a dividing fence is not, or cannot, be built on the common boundary for a reason other than it is impracticable to do so because of the natural physical features of the land? Generally, how should such fences be dealt with under the Act? |

#### The definition of ‘sufficient dividing fence’

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| 2-4 Does the definition of ‘sufficient dividing fence’ in the Act provide adequately for the minimum standard required for a sufficient dividing fence in the context of urban and rural land? Are there any changes that should be made to the definition? |

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| 2-5 Should the Act be amended to provide that adjoining owners, when considering whether a dividing fence is a ‘sufficient dividing fence’, may have regard to the same non-exhaustive list of factors that QCAT may consider when deciding whether a dividing fence is a ‘sufficient dividing fence’? |

### Neighbours’ responsibilities

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| 2-6 Do the rules about neighbours’ responsibilities contained in Part 3 of Chapter 2 of the Act adequately promote the resolution of dividing fence issues by adjoining owners? |

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| 2-7 If not, how could the statement of those rules be changed or better expressed so that they do promote the resolution of dividing fence issues by adjoining owners? |

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| 2-8 Should section 25 of the Act (which makes the owner who first acquires the freehold of land controlled by the State liable to contribute to half of the costs of an already constructed fence) be changed or repealed? |

### Procedure for obtaining a contribution for fencing work

#### Notice to contribute

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| 2-9 Are there any changes that should be made to improve the procedure under the Act for obtaining a contribution to fencing work for a dividing fence? |

#### Approved forms

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| 2-10 Are the approved forms of the notice to contribute and the notice to contribute for urgent fencing work accessible and easy to understand and use? Are there any changes that should be made to improve either form? |

### Procedure if common boundary not agreed

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| 2-11 Does the procedure for resolving disputes between adjoining owners about the position of the common boundary for the purposes of carrying out fencing work:(a) clearly define their obligations and the steps they are required to follow; and(b) provide for the fair apportionment of the costs of a registered surveyor? |

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| 2-12 Are there any changes that should be made to improve the procedure? |

### QCAT: Jurisdiction and powers

#### Orders about carrying out fencing work

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| 2-13 Are there any changes that should be made in relation to the powers conferred on QCAT by section 35(1) of the Act? |

#### Order for work for a retaining wall

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| 2-14 Are there any changes that should be made in relation to the power conferred on QCAT by section 35(1)(f) of the Act to order work for a retaining wall that is necessary to carry out fencing work for a dividing fence ordered under section 35? |

#### Orders about the removal of a fence in certain circumstances

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| 2-15 Are there any changes that should be made in relation to the powers conferred on QCAT by section 33(2) and (3) of the Act to order the removal of a fence? |

#### Sufficient dividing fence matters

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| 2-16 Is the non-exhaustive list of factors that QCAT may consider when deciding whether a fence is a sufficient dividing fence appropriate? Should the list be changed in any way (for example, by adding a new factor or changing or removing an existing factor)? |

#### Orders dealing with unauthorised construction or demolition

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| 2-17 Are the procedures set out in sections 38 and 39 of the Act sufficient to deal with any issues relating to the construction or demolition of a dividing fence that occurs without authorisation? Are there any changes that should be made to improve them? |

### Other matters

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| 2-18 Are there any other matters that you wish to raise in relation to how issues about dividing fences are dealt with under the Act, or under any other Act or law? |

# Chapter 3

## Trees

### What trees are covered?

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| 3-1 Does the Act appropriately deal with trees on different types of land across Queensland? |

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| 3-2 Should there be any changes to the current exemptions in respect of the State and/or local governments? |

### Key definitions

#### When is land ‘affected by a tree’?

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| 3-3 Should the definition of land ‘affected by a tree’ in section 46 of the Act be changed in any way? |

### Options for resolving tree disputes with a neighbour

#### Exercise the common law right of ‘abatement’ (or ‘self-help’)

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| 3-4 The Act specifically preserves the common law right of abatement in relation to a tree. Should this right be modified, and if so how? |

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| 3-5 Should a neighbour of the State or a local government have the benefit of the modification to the common law? |

#### Notice to tree-keeper to cut overhanging branches

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| 3-6 Should the Act expressly deal with questions of liability arising from a person going onto a neighbour’s land pursuant to a notice under section 57 of the Act? |

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| 3-7 Are the height and depth triggers for the notice appropriate? |

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| 3-8 Is the prescribed maximum contribution of $300 appropriate? |

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| 3-9 Is the prescribed frequency restricting a neighbour to issue only one notice to the ‘tree-keeper’ per year appropriate? |

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| 3-10 Is the procedure under Part 4 of Chapter 3 appropriate to give effect to the rights and responsibilities of the ‘tree-keeper’ under section 52 of the Act? |

### Bringing an application to QCAT

#### Jurisdiction of QCAT – what issues can QCAT determine?

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| 3-11 Should QCAT’s jurisdiction in relation to trees be changed? |

#### What orders can QCAT make?

##### Severe obstruction of a view

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| 3-12 Should section 66(3)(b)(ii) of the Act be changed to limit its operation to a view that existed at or after the commencement of the Act (i.e. 1 November 2011)? |

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| 3-13 Should section 66(3)(b)(ii) of the Act be changed to limit its operation to, for a particular owner, a view that existed when that person became an owner? |

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| 3-14 Should section 66(3)(b)(ii) of the Act be changed to limit its operation to a view that existed no longer than five years, or some other period, before the application is made? |

#### Responsibility for the costs of a tree assessor

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| 3-15 Should the Act provide for cost arrangements for meeting / sharing the costs of reports from arborists or other experts, and if so in what way? |

#### QCAT order in relation to a tree that has been removed

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| 3-16 Should liability under section 68 of the Act for damages caused by trees that have been removed, be extended to a former owner? |

#### Matters for QCAT to consider when deciding an application

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| 3-17 Are there any additional matters which it is appropriate that QCAT must consider under section 73 of the Act? |

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| 3-18 Should section 75 of the Act be changed to include a further matter QCAT may consider for interference which is an obstruction of sunlight or a view, namely when the obstruction / interference arose? |

#### Failure to comply with a QCAT order

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| 3-19 Have any difficulties arisen in respect of non-compliance with QCAT orders about trees? |

### Sale or proposed sale of affected land

#### Person must give the buyer a copy of the application or order before the buyer enters into a contract of sale

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| 3-20 Should the person selling the land (the tree-keeper) also provide to the buyer (in addition to the application) any additional material filed? |

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| 3-21 Should the Act be changed to require that the person selling the land (the tree-keeper) notify QCAT that there is a new party to the application as a result of the buyer being joined as a party to the QCAT proceeding when the buyer enters into the contract of sale pursuant to section 84? |

#### Where the application is filed after the contract is entered but before settlement

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| 3-22 Should the Act be changed to cover the situation where an application is filed after the contract is entered but before settlement? If so, what rights and responsibilities should the Act provide? |

#### Consequences after transfer if a copy of the order is not given to the buyer

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| 3-23 Is it appropriate that the person who is acting for the seller and prepared the contract, be liable under section 87 of the Act to reimburse the buyer for legal and other expenses incurred by the buyer in relation to the contract? |

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| 3-24 If it is appropriate that the person who is acting for the seller and prepared the contract be liable, should that person be jointly and severally liable? |

### Other matters

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| 3-25 How do the responsibilities imposed on a tree-keeper affect the resolution of issues between neighbours about trees? |

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| 3-26 Are there any other matters that you wish to raise in relation to how trees are dealt with under the Act or under any other Act or law? |

# Chapter 4

## Dispute Resolution Processes, Compliance and Enforcement

### Relevant legislation and reviews

#### Relationship between the Act and the Queensland Civil and Administrative Tribunal (QCAT) Act

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| 4-1 Should the Act provide for any particular matters that are otherwise dealt with by the QCAT Act, regulation, rules and practice directions? If so, how? |

### Informal resolution of issues without the assistance of a third party

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| 4-2 Should the provisions which encourage neighbours to resolve their issue ‘informally’ be retained? |

### Informal resolution of disputes with the assistance of a third party

#### Dispute Resolution Branch (DRB) Mediation

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| 4-3 Should the Act provide for DRB mediation? If so, how? |

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| 4-4 Should all agreements about dividing fence and tree disputes reached at DRB mediation be enforceable in QCAT? Or should such an agreement be enforceable in QCAT only if the neighbours agree in writing that it be enforceable? |

### Formal dispute resolution processes: applying to QCAT

#### Initiating a proceeding in QCAT

##### Applications concerning contributions for fencing work

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| 4-5 Are the timeframes in sections 31(6) and 32(6) of the Act, which apply to applications for contribution for fencing work, appropriate? |

#### Alternative Dispute Resolution (ADR) for neighbourhood disputes in QCAT

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| 4-6 Should there be one form of ADR process used for all disputes under the Act? If so, which process and why? |

#### Features of minor civil disputes

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| 4-7 Should there be any change to QCAT’s minor civil disputes jurisdiction for matters arising under the Act? |

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| 4-8 Specifically, should QCAT’s minor civil disputes jurisdiction (a) include all dividing fence and tree disputes for any amount, or (b) exclude all dividing fence and tree disputes? Why or why not? |

#### Representation before QCAT

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| 4-9 Should a party to a dividing fence or tree dispute be entitled to appoint an agent to represent them in proceedings before QCAT? |

### Non-compliance under the QCAT Act

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| 4-10 Should the Act contain provisions about compliance and enforcement of QCAT orders regarding dividing fences and trees? If so, what provisions should apply? |

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| 4-11 Should there be a simplified process for the enforcement of non-monetary orders? |

### Other matters

#### Fair, just and effective

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| 4-12 What changes should be made to the Act’s dispute resolution processes to better promote fairness, justice and effectiveness? |

#### Remedies and penalties

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| 4-13 What changes should be made to the Act to improve the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders? |

#### General

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| 4-14 Are there any other matters that you wish to raise in relation to dispute resolution processes, compliance and enforcement under the Act? |