



Queensland  
Law Reform Commission

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

Report



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Disputes (Dividing Fences and  
Trees) Act 2011***

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To: The Honourable Yvette D'Ath MP  
Attorney-General and Minister for Justice and Minister for Training and Skills

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its Report, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*.

[original signed]

[original signed]

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Chairperson

**Mr Peter Hastie QC**  
Member

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# Abbreviations and Glossary

<b>ADR</b>	Alternative (or Assisted) Dispute Resolution — an umbrella term for processes, other than judicial or tribunal decisions, in which an impartial person (a ‘dispute resolution practitioner’) assists the parties to resolve the issues between them.
<b>BCCMA</b>	<i>Body Corporate and Community Management Act 1997</i> (Qld)
<b>BUGTA</b>	<i>Building Units and Group Titles Act 1980</i> (Qld)
<b>DJAG</b>	Department of Justice and Attorney-General (Qld)
<b>DJAG Review</b>	Review of neighbourly relations conducted by the Department of Justice and Attorney-General (Qld). The review was launched in 2007 with the release of a Discussion Paper on dividing fences. This was followed by two further Discussion Papers, on trees and dispute resolution. The review was completed in 2010 with the introduction of the <i>Neighbourhood Disputes Resolution Act 2011</i> (Qld).
<b>DRB</b>	Dispute Resolution Branch, Department of Justice and Attorney-General (Qld), which administers the Dispute Resolution Centres established under the <i>Dispute Resolution Centres Act 1990</i> (Qld).
<b>LVA</b>	<i>Land Valuation Act 2010</i> (Qld)
<b>MCD</b>	Minor civil disputes, in which the claim in the dispute is no more than \$25 000. QCAT has original jurisdiction to hear and decide these disputes.
<b><i>Neighbourhood Disputes Act Discussion Paper (2015)</i></b>	Queensland Law Reform Commission, <i>Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i> , Discussion Paper, WP No 72 (June 2015)
<b><i>Neighbourhood Disputes Resolution Act 2011 (Qld)</i></b>	The name of the Act when it was first passed. The name of the Act was changed in 2013 — to <i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i> (Qld) — to clarify its scope.
<b>NSW</b>	New South Wales
<b>NSW Act</b>	<i>Trees (Disputes Between Neighbours) Act 2006</i> (NSW)
<b>NADRAC</b>	National Alternative Dispute Resolution Advisory Council
<b>QCAT / the tribunal</b>	Queensland Civil and Administrative Tribunal
<b>QCAT Act</b>	<i>Queensland Civil and Administrative Tribunal Act 2009</i> (Qld)
<b>QCAT Rules</b>	<i>Queensland Civil and Administrative Tribunal Rules 2009</i> (Qld)
<b>The Act / NDA</b>	<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i> (Qld)
<b>UCPR</b>	<i>Uniform Civil Procedure Rules 1999</i> (Qld)



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# Executive Summary

## TERMS OF REFERENCE

[1] The Commission has been requested to undertake a statutory review of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act').<sup>1</sup>

[2] The main purpose of the review is to decide whether the objects of the Act remain valid and whether the Act is meeting its objects, and to investigate other specific issues raised by the terms of reference.

[3] The Commission concludes that, overall, the objects of the Act remain valid, and that the Act is meeting its objects. There is a continuing need in the community for a State-wide statutory framework to assist neighbours to resolve issues and disputes in relation to dividing fences and trees. The Act generally provides clear rules about responsibilities for dividing fences and trees so that neighbours are generally able to resolve issues about dividing fences or trees, and effective and accessible mechanisms to facilitate the resolution of any disputes about dividing fences or trees that do arise.

[4] However, there are some aspects of the operation of the Act that can be improved. The Commission makes a number of recommendations in this Report to improve the simplicity, ease of use and clarity of the Act.

## KEY RECOMMENDATIONS

### Dividing fences

[5] The Commission recommends amendments to:

- limit the operation of section 25 of the Act so that it does not apply where an owner of land has constructed a dividing fence for adjoining land more than five years before a person acquired or acquires the adjoining land from the State;<sup>2</sup>
- remove doubt about the 'land' to which Chapter 2 of the Act applies;<sup>3</sup> and
- ensure that QCAT has sufficient and appropriate powers to resolve disputes about dividing fences by:<sup>4</sup>

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<sup>1</sup> The full text of the Act is available at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/N/NeighDisputesDFTA11.pdf>.

<sup>2</sup> Chapter 2, Rec 2-3.

<sup>3</sup> Chapter 2, Rec 2-1.

<sup>4</sup> Chapter 2, Recs 2-7, 2-9.

- providing that QCAT, when it is making an order under section 35(1)(a) about the line on which the fencing works are to be carried out or the line that is the common boundary of adjoining land, may also require the common boundary to be defined by a survey; and
- enabling QCAT to make an order under section 38(1), despite non-compliance with the procedural requirements in section 38(2), if it is necessary to do so to prevent the adjoining owner from constructing or demolishing a dividing fence.

## Trees

[6] The Commission recommends amendments to:

- restructure Chapter 3 of the Act, to more clearly outline the rights and responsibilities of a neighbour and a tree-keeper, focused on each of the various tree issues faced by a neighbour, and the remedies available;<sup>5</sup>
- extend the scope of Chapter 3 of the Act, in a limited way, to give a neighbour affected by a tree on land more than 4 hectares the right to apply to QCAT under Part 5 but not to access Part 4 (Notice for particular overhanging branches);<sup>6</sup>
- clarify a number of provisions of the Act, including amending:
  - section 42(5), to declare that Chapter 3 does not apply to land dedicated as a road for public use, including footpaths;<sup>7</sup>
  - sections 48(1)(a) and 49(1)(a), to provide that a lot owner includes a lot owner under the BCCMA and BUGTA;<sup>8</sup> and
  - example 3 under section 59, to provide that QCAT's jurisdiction to deal with overhanging branches more than 2.5 metres above the ground is limited to a situation where the threshold requirements in sections 46(a)(ii) and 66(2) are met;<sup>9</sup>
- enhance the remedies available to a neighbour by increasing the tree-keeper's liability under Part 4 of Chapter 3 from the current maximum contribution of \$300 up to a maximum of \$500 or any greater amount prescribed by regulation;<sup>10</sup>

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<sup>5</sup> Chapter 3, Rec 3-1.

<sup>6</sup> Chapter 3, Rec 3-2.

<sup>7</sup> Chapter 3, Rec 3-3.

<sup>8</sup> Chapter 3, Recs 3-5, 3-6.

<sup>9</sup> Chapter 3, Rec 3-13.

<sup>10</sup> Chapter 3, Rec 3-10.

- expand the matters QCAT must consider in making an order about a tree including whether the tree detracts from the amenity of the land affected by a tree;<sup>11</sup>
- limit the scope of QCAT's power to make an order about severe obstruction of sunlight under section 66(3)(b)(i), to sunlight that existed at the time the neighbour took possession of the land;<sup>12</sup> and
- further limit the scope of QCAT's power to make an order about severe obstruction of sunlight or severe obstruction of a view under section 66(3)(b), to sunlight or a view that existed when the neighbour took possession of the land or no longer than six years before the neighbour's application is made, whichever is the lesser.<sup>13</sup>

### **Dispute resolution processes, compliance, enforcement and penalties**

[7] The Commission recommends amendments to:

- provide a stronger focus on informal resolution by neighbours before approaching QCAT, including by providing examples of steps a neighbour could take to attempt to resolve an issue informally;<sup>14</sup>
- ensure greater procedural consistency between tree disputes and dividing fence disputes before QCAT, and to improve the accessibility of QCAT proceedings, by:<sup>15</sup>
  - extending the timeframe for making an application to QCAT for orders about fencing work, under sections 31 and 32 of the Act;
  - extending the right to apply to QCAT in circumstances of urgency in the absence of the other party to a tree dispute; and
  - removing the provision in section 34 of the Act for an adjoining owner to a dividing fence dispute to be represented in QCAT proceedings by a real estate agent; and
- shift the focus away from punishment and toward a practical approach to deal with non-compliance with QCAT orders by:<sup>16</sup>

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11 Chapter 3, Rec 3-12.

12 Chapter 3, Rec 3-14.

13 Chapter 3, Recs 3-15, 3-16.

14 Chapter 4, Recs 4-1 to 4-11.

15 Chapter 4, Recs 4-12 to 4-14.

16 Chapter 5, Recs 5-1, 5-2.

- making provision, in the event of non-compliance with a QCAT order requiring work to be carried out, for an application to be made to QCAT for an order allowing the non-defaulting party to carry out the work and recover reasonable expenses from the defaulting party; and
- removing the offence in section 77 of the Act for non-compliance with a tree order.

## **PUBLIC EDUCATION AND AWARENESS**

[8] To enhance community awareness and understanding of the Act, the Commission has made a number of suggestions about public education and awareness, to which consideration might be given by the appropriate agencies.

# List of Recommendations

## CHAPTER 2: DIVIDING FENCES

### *Land to which Chapter 2 of the Act does and does not apply*

- 2-1 Section 8 of the Act should be amended to add a provision which states that, to remove any doubt, it is declared that Chapter 2 of the Act does not apply to land dedicated as a reserve for a community purpose under the *Land Act 1994 (Qld)* or as a road for public use.

### *The definition of 'sufficient dividing fence'*

- 2-2 Section 13(1) of the Act should be amended to insert a note, immediately after section 13(1)(c)(ii), which states that QCAT may consider the circumstances set out in section 36 when it decides an application about whether a dividing fence is a sufficient dividing fence.

### *Section 25: liability to contribute to costs of dividing fence where particular land is first acquired from the State*

- 2-3 Section 25 of the Act should be amended to provide that it does not apply if the dividing fence was constructed more than five years before the person acquired or acquires an interest or title for all or part of the adjoining land from the State.

### *Using the notice procedure to resolve dividing fence issues informally*

- 2-4 The Director-General of the Department of Justice and Attorney-General should give consideration to including information about the role of assisted dispute resolution processes and the availability of free assisted dispute resolution services offered by the Dispute Resolution Branch in the forms approved under the Act for a Notice to contribute to fencing work and a Notice to contribute to urgent fencing work.

### *Procedure if common boundary not agreed*

- 2-5 The definition of 'cadastral surveyor' in section 40(7) of the Act should be amended to refer to 'a person who is authorised to carry out a cadastral survey under the *Surveyors Act 2003 (Qld)*'.
- 2-6 Section 40 of the Act should be redrafted so that it more clearly sets out the rights and responsibilities of the owner who gives the notice and the owner who receives the notice at each stage of the procedure.

***Orders about carrying out fencing work***

- 2-7 Section 35 of the Act should be amended to add a provision to the effect that, in making an order under section 35(1)(a) about the line on which the fencing works are to be carried out or the line that is the common boundary of adjoining land, QCAT may require that the common boundary be defined by a person who is authorised to carry out a cadastral survey under the *Surveyors Act 2003* (Qld).

***Sufficient dividing fence factors for the consideration of QCAT***

- 2-8 Section 36 of the Act should be amended to add ‘the privacy concerns of the adjoining owners’ and ‘the existence of any agreements or covenants that may affect either parcel of adjoining land’ to the existing list of factors mentioned in that section.

***Orders dealing with unauthorised construction or demolition***

- 2-9 Section 38 of the Act should be amended to include a new subsection to the effect that, despite non-compliance with section 38(2), QCAT may make an order under section 38(1) if it considers that it is necessary to do so to prevent the adjoining owner from constructing or demolishing the dividing fence.

***Disputes about retaining walls built on neighbouring properties’ boundaries***

- 2-10 The scope of the Act should not be expanded to include disputes about retaining walls built on neighbouring properties’ boundaries.

**CHAPTER 3: TREES*****The organisation of Chapter 3 of the Act***

- 3-1 Chapter 3 of the Act should be redrafted, to more clearly outline the rights and responsibilities of a neighbour and a tree-keeper, focused on each of the various tree issues faced by a neighbour, and the remedies available to a neighbour in each scenario, particularly in relation to overhanging branches and the jurisdiction of QCAT to resolve any tree disputes.

***What trees are subject to Chapter 3 of the Act***

- 3-2 The Act should be amended to provide that Part 5 of Chapter 3 of the Act applies to land more than 4 hectares to which Chapter 3 otherwise applies but that Part 4 of Chapter 3 of the Act does not apply to such land.



- 3-3 Section 42(5) of the Act should be amended to provide that, to remove any doubt, it is declared that Chapter 3 does not apply to land dedicated as a road for public use, including footpaths.

*Definition of 'tree'*

- 3-4 Section 45(2) of the Act should be amended to add that 'tree' includes 'a root or the roots of any living or dead tree'.

*Definition of 'neighbour'*

- 3-5 Section 49(1)(a) of the Act should be amended to provide that a lot owner includes a lot owner under the BCCMA and BUGTA.
- 3-6 Section 48(1)(a) of the Act should be amended to provide that a lot owner includes a lot owner under the BCCMA and BUGTA.
- 3-7 Section 49(1)(b) of the Act should be amended to replace 'scheme land' with 'common property'.
- 3-8 Section 49(1)(c) of the Act should be amended to replace 'parcel of land the subject of the plan' with 'common property'.

*Notice to remove overhanging branches 2.5 metres or less above the ground*

- 3-9 Section 57(3) of the Act should be amended to require that a notice to cut and remove overhanging branches under section 57(2) must be in the approved form.
- 3-10 Section 58(4) of the Act should be amended to delete the amount of \$300 and replace it with '\$500 or any greater amount prescribed by regulation'.

*Matters for QCAT to consider*

- 3-11 Section 73(1)(i) of the Act should be amended to provide that QCAT must consider any risks associated with the tree in the event of a cyclone or other weather event.
- 3-12 Section 73(1) of the Act should be amended to add to the matters that QCAT must consider 'whether the tree detracts from the amenity of the land affected by the tree'.

*Overhanging branches in QCAT*

- 3-13 To avoid confusion, the words 'to prevent serious injury to any person or to remedy, restrain or prevent serious damage to the neighbour's land or any property on the neighbour's land or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land' should be added at the end of Example 3 under section 59 of the Act.

***Severe obstruction of sunlight to a window or roof***

- 3-14** Section 66(3)(b)(i) of the Act should be amended to limit its scope, consistent with the limitation placed on a 'view' under section 66(3)(b)(ii) of the Act, to 'severe obstruction of sunlight, to a window or roof of a dwelling on the neighbour's land, that existed when the neighbour took possession of the land'.
- 3-15** Section 66(3)(b)(i) of the Act should be amended to further limit its operation to a 'severe obstruction of sunlight, to a window or roof of a dwelling on a neighbour's land, that existed when the neighbour took possession of the land, or no longer than six years before the application to QCAT is filed, whichever is the lesser'.

***Severe obstruction of a view***

- 3-16** Section 66(3)(b)(ii) of the Act should be amended to further limit its operation to a 'severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land, or no longer than six years before the application to QCAT is filed, whichever is the lesser'.

***Sale or proposed sale of land affected by an application or order***

- 3-17** Section 83 of the Act should be amended to require a person selling land affected by an application to, or order made by, QCAT to also provide to the buyer (in addition to the application or order) any additional material filed.
- 3-18** Section 84 of the Act should be amended to require the person selling the land to notify QCAT that there is a new party to the application as a result of a buyer entering into a contract of sale.
- 3-19** Any reform of the seller's obligations under Part 7 of Chapter 3 of the Act should be considered in the context of the specific review of sellers' obligations being undertaken by the Commercial and Property Law Centre, Queensland University of Technology Law, on behalf of the Queensland Government.

**CHAPTER 4: DISPUTE RESOLUTION PROCESSES*****Informal resolution as an appropriate objective***

**4-1** The provisions in the Act that encourage neighbours to attempt to resolve issues informally should be retained, and modified in accordance with Recommendations 4-3, 4-5, 4-7, and 4-11 below.

***Clarifying what ‘informal’ resolution means***

**4-2** Section 41 of the Act should be amended to include a new provision, modelled on section 7(3) and (4), to the general effect that:

- (a)** Chapter 3 of the Act encourages the tree-keeper and neighbour to attempt to resolve issues about trees informally;
- (b)** However, if the tree-keeper and neighbour cannot resolve a tree issue, the dispute may be taken to QCAT for resolution.

**4-3** Sections 7 and 41 of the Act should be amended to include a non-exhaustive list of examples of steps that could be taken by a person to attempt to resolve an issue informally, including:

- (a)** approaching the other person, directly or in writing, to notify them of the issues and offering to discuss them;
- (b)** providing information to the other person to help them understand the issues and how they might be resolved, such as a quotation for any proposed work or a letter from a tree expert about the danger posed by the tree;
- (c)** inviting the other person to take part in a form of assisted dispute resolution, such as negotiation or mediation; and
- (d)** if the local council has a relevant process for dealing with nuisance trees, taking steps to follow that process.

**4-4** The list of examples in Recommendation 4-3 above should include a note referring, relevantly, to the notice to contribute to fencing work (in sections 31 and 32 of the Act) and the notice for particular overhanging branches (in Chapter 3, Part 4 of the Act), which might be used as part of an attempt to resolve an issue informally.

**4-5** Subsequent provisions of the Act that encourage neighbours to attempt to resolve the issue informally (sections 30(1), 56(1) and 60(1)) should include a note referring to the list of examples in Recommendation 4-3 above.

***Mediation and the Dispute Resolution Branch***

- 4-6 A note referring to mediation provided by a Dispute Resolution Centre under the *Dispute Resolution Centres Act 1990* (Qld) should be included in the Act as part of the non-exhaustive list of examples in Recommendation 4-3 above.

***Encouragement and requirement***

- 4-7 The provisions in the Act that encourage neighbours to resolve issues informally should use consistent language and, accordingly, sections 30(1), 56(1) and 60(1) should be amended to provide that neighbours are encouraged 'to attempt to resolve the issue informally'.
- 4-8 Chapter 2 of the Act should be amended to include a new provision, based on section 65(a), to the general effect that QCAT may make an order under section 35 if it is satisfied that the neighbour has made a reasonable effort to reach agreement with the adjoining owner.
- 4-9 The Act should be amended to include a new provision to the general effect that, in deciding whether to award costs against a party to a proceeding in the interests of justice, QCAT may have regard to the steps the party has taken to attempt to resolve the issue informally. This provision should be expressed to apply without limiting the provisions about costs in the QCAT Act.
- 4-10 Each of the following provisions should include a note referring to the non-exhaustive list of examples in Recommendation 4-3 above:
- (a) section 65(a)–(b), for tree disputes;
  - (b) the new section based on section 65(a), for dividing fence disputes, in Recommendation 4-8; and
  - (c) the new section about costs in Recommendation 4-9.
- 4-11 The initial references in the overview provisions of Chapter 2 and Chapter 3 of the Act to the encouragement of informal resolution (section 7(3) and section 41 as amended by Recommendation 4-2 above) should include a note referring to the following provisions:
- (a) section 65(a)–(b), and the new section based on section 65(a) in Recommendation 4-8; and
  - (b) the new section about costs in Recommendation 4-9.

***Application timeframes***

- 4-12 Sections 31(6) and 32(6) of the Act should be amended to extend the existing timeframes so that:
- (a) if, within two months (rather than one month) after the notice to contribute for fencing work is given, the adjoining owners cannot agree;
  - (b) either adjoining owner may, within three months (rather than two months) after the notice is given, apply to QCAT.

***Applications in the absence of the other party***

- 4-13 Chapter 3 of the Act should be amended to include a provision, modelled on section 37, to:
- (a) allow a neighbour whose land is affected by a tree to apply to QCAT for an order, in the absence of the tree-keeper, authorising urgent work to be carried out on the tree; and
  - (b) allow QCAT to make an order if it is satisfied that:
    - (i) the affected neighbour could not locate the tree-keeper after making all reasonable inquiries; and
    - (ii) an urgent order is necessary to prevent serious injury to a person or to remedy, restrain or prevent serious damage to the neighbour's land or property on the neighbour's land.

***Representation of parties***

- 4-14 The Act should be amended to omit section 34.

**CHAPTER 5: COMPLIANCE, ENFORCEMENT AND PENALTIES*****Provision for the non-defaulting party to carry out the work***

- 5-1 The Act should be amended to include provisions to the general effect that:
- (a) On application by a party (the 'non-defaulting party'), if QCAT is satisfied that an order made under the Act about fencing work or work relating to trees (the 'original order') has not been complied with in the time stated in the order by the party required to do so (the 'defaulting party'), QCAT may order that:

- (i) the non-defaulting party may carry out the work required under the original order (personally or by an employee or agent); and
  - (ii) the non-defaulting party may recover as a debt the reasonable expenses of carrying out the work, and the costs of the application, from the defaulting party;
- (b) An application for such an order may be made not less than 14 days after the time for compliance with the original order has ended; and
  - (c) A copy of the original order is to be filed with the application.

***Penalties***

**5-2** The Act should be amended to omit section 77.

# Chapter 1

## Introduction

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### INTRODUCTION

1.1 The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act')<sup>1</sup> deals with dividing fences and trees on neighbouring properties. It was introduced to provide 'effective dispute resolution options for neighbours to resolve issues about trees and fences and [to] reduce neighbourly disputes'.<sup>2</sup>

1.2 The Act was the result of an extensive five year review conducted by the Department of Justice and Attorney-General ('DJAG') into 'neighbourly relations' ('the DJAG review').<sup>3</sup> Its focus was on finding more efficient ways of assisting neighbours to resolve disputes about dividing fences and nuisance caused by trees on neighbouring properties.<sup>4</sup>

1.3 The Act repealed the former dividing fences legislation — the *Dividing Fences Act 1953* (Qld) — and replaced it with new provisions aimed at modernising the legislation and clarifying the rights and responsibilities of adjoining owners in relation to dividing fences.<sup>5</sup>

1.4 The Act also introduced new provisions as to the responsibilities of a 'tree-keeper' in relation to the effect of a tree on neighbouring property, and to provide a statutory remedy for the cutting and removal of certain overhanging branches.<sup>6</sup>

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1 The full text of the Act is available at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/N/NeighDisputesDFTA11.pdf>.

2 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2.

3 See generally Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2, 9; Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Dividing Fences' (Discussion Paper, May 2007); Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Trees' (Discussion Paper, July 2008); Department of Justice and Attorney-General (Qld), 'Review of Neighbourly Relations: Resolving Neighbourhood Disputes' (Discussion Paper, July 2008).

4 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 1–2.

5 Ibid 2–3.

6 Ibid 3–4.

1.5 It also conferred jurisdiction on the Queensland Civil and Administrative Tribunal ('QCAT') to deal with disputes between neighbours about dividing fences and trees that cannot otherwise be resolved.<sup>7</sup>

1.6 The Act contains a statutory review requirement. Section 97 of the Act imposes an obligation on the Minister (namely, the Attorney-General and Minister for Justice) to 'review the operation and effectiveness' of the Act, and to begin the review within three years of the Act's commencement on 1 November 2011. The then Attorney-General referred the review to the Commission on 27 October 2014.

## THE COMMISSION'S VIEW

1.7 The terms of reference for the review require the Commission to determine whether the objects of the Act remain valid and whether the Act is meeting its objects.

1.8 The objects of the Act are set out in section 3 of the Act. They are:

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

1.9 The terms of reference also require the Commission to examine the following issues:

- whether the allocation of responsibilities, liabilities and rights under the Act promotes resolution by neighbours of issues relating to dividing fences and trees;
- whether the dispute resolution processes under the Act are fair, just and effective;
- the simplicity and ease of use of the Act for members of the community, including clarity of the legislative provisions;
- whether the Act provides QCAT with sufficient powers to resolve issues;
- the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders;
- the operation of the Act in relation to other Acts or laws;
- the operation and effect of QCAT's power under section 66(3)(b)(ii) of the Act to make an order dealing with the severe obstruction of a neighbour's view caused by a tree affecting the neighbour's land;
- the operation and effect of section 57 of the Act, which enables a neighbour to give a written notice to a tree-keeper to cut and remove certain overhanging branches; and

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<sup>7</sup>

ibid.



- whether the scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.

1.10 The terms of reference are set out in full in Appendix A.

## METHODOLOGY OF THIS REVIEW

### The Discussion Paper

1.11 In June 2015, the Commission produced a Discussion Paper examining the provisions of the Act and seeking submissions from the public on the issues raised by the terms of reference.

### Consultation process

1.12 The Discussion Paper was informed by issues identified in preliminary consultation with a wide range of organisations and individuals.

1.13 Following the release of the Discussion Paper, the Commission wrote to more than 200 organisations and individuals inviting submissions on the issues raised in the Discussion Paper. They included members of the judiciary, legal profession bodies, community legal centres, legal academics, government departments and local governments.

1.14 An advertisement calling for submissions in response to the Discussion Paper was placed in *The Courier Mail* newspaper and in nine Queensland regional newspapers on 4 July 2015.<sup>8</sup> A similar advertisement was placed in 13 local newspapers servicing the South-East Queensland area, appearing on the weekend of 8 and 9 July 2015.<sup>9</sup>

1.15 A media statement to publicise the release of the Discussion Paper and the call for submissions was issued to the print and electronic media on 2 July 2015. The review was given coverage in several Queensland newspapers<sup>10</sup> and on radio.<sup>11</sup>

1.16 Notices calling for submissions were also placed on the Commission's website, on the Queensland Government 'qld.gov.au' and 'Get Involved' websites, and in *QLS Update*, an electronic newsletter of the Queensland Law Society.

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<sup>8</sup> Namely, the *Bundaberg NewsMail*, *Cairns Post*, *Fraser Coast Chronicle*, *Gold Coast Bulletin*, *Mackay Daily Mercury*, *Rockhampton Morning Bulletin*, *Sunshine Coast Daily*, *Toowoomba Chronicle* and *Townsville Bulletin*.

<sup>9</sup> Namely, the *Albert and Logan News*, *Caboolture Herald*, *City North News*, *City South News*, *North West News*, *Northside Chronicle*, *Pine Rivers Press*, *Redcliffe and Bayside Herald*, *South East Advertiser*, *South West News*, *Southern Star (Qld)*, *Westside News* and *Wynnum Herald*.

<sup>10</sup> K Morris, 'Mend Your Fences with Neighbours', *Weekend Post* (Cairns), 11 July 2015, 33; 'Law Reform Experts Not Sitting on the Fence Over Act's Future', *Fraser Coast Chronicle* (Hervey Bay), 11 September 2015, 4; 'Law Reform Experts Not Sitting on the Fence Over Act's Future', *Gympie Times* (Gympie), 11 September 2015, 4; 'Law Reform Experts Not Sitting on the Fence Over Act's Future', *Queensland Times* (Ipswich), 11 September 2015, 7; A Pitt and S Hotton, 'Turning Over a New Leaf: Review of Current Tree Legislation' *Hopgood Ganim Lawyers* (online), 21 July 2015, <<http://www.lexology.com/library/detail.aspx?g=facc1346-1a9b-4edb-829e-1ba271357160>>.

<sup>11</sup> 612 ABC Brisbane, Interview with Samantha Traves, Member, Queensland Law Reform Commission, about the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, *Breakfast*, 7 July 2015 (Tim Cox); 612 ABC Brisbane, *7:45am News*, 4 July 2015.

1.17 The closing date for submissions was Monday 10 August 2015.<sup>12</sup>

1.18 The Commission received submissions from 64 organisations and individuals. They included: the Chief Magistrate of Queensland; QCAT; various government departments; the Dispute Resolution Branch of DJAG ('DRB'); the Local Government Association of Queensland; various local governments; the Queensland Law Society; community legal centres, the Surveyors Board of Queensland; representative bodies for surveyors; the Queensland Building and Construction Commission; Master Builders Queensland; the Queensland Arboricultural Association; body corporate representatives and several members of the public. The full list of respondents to the review is set out in Appendix B.

1.19 In addition, the Commission held consultation meetings with a number of key stakeholders including: QCAT; the Department of National Parks, Sport and Racing; the Department of Natural Resources and Mines; DRB; the Supreme, District and Land Courts Service, Brisbane; the Magistrates Courts Service, Brisbane; the Queensland Public Interest Law Clearing House Self Representation Service; and the Queensland Association of Independent Legal Services Inc. The Commission also received assistance from the Courts Reporting and Performance Unit of DJAG.

1.20 The Commission would like to thank all those organisations and individuals who participated in the review for their contribution to this Report. As well as providing their views on the issues raised, a number of consultees provided factual information and data that have assisted in the review.

## Structure of this Report

1.21 Chapter 2 deals with Chapter 2 of the Act which sets out adjoining owners' rights and responsibilities in relation to dividing fences, and provides mechanisms for the resolution of disputes about dividing fences. It also considers whether the scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.

1.22 Chapter 3 examines Chapter 3 of the Act which sets out the responsibilities of a tree-keeper for a tree and the rights of a neighbour whose land is affected by a tree, and provides mechanisms for the resolution of disputes about trees.

1.23 Chapter 4 considers whether the dispute resolution processes provided under and in relation to the Act are fair, just and effective, including informal and formal resolution processes.

1.24 Chapter 5 deals with matters relating to compliance, enforcement and penalties, particularly in relation to non-compliance with QCAT orders.

1.25 Chapter 6 contains the Commission's conclusions as to whether the objects of the Act remain valid and whether the Act is meeting its objects. It also summarises the Commission's key recommendations to improve the operation and effectiveness of particular aspects of the Act, and briefly discusses some measures that might be taken to increase public education and awareness about the Act.

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<sup>12</sup> The Commission received a total of 19 submissions and supplementary submissions after the closing date.

**TERMINOLOGY**

1.26 A list of Abbreviations and Glossary of terms commonly used in this Report is set out at the front of this Report.



# Chapter 2

## Dividing Fences

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## INTRODUCTION

2.1 Chapter 2 of the Act deals with dividing fences.

2.2 This chapter considers various matters relating to dividing fences arising under the terms of reference. It also considers whether the scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.

## OVERVIEW OF CHAPTER 2 OF THE ACT

2.3 Parts 1 and 2 of Chapter 2 of the Act deal with preliminary matters. Those parts include the application provisions and key definitions for Chapter 2.

2.4 Part 3 sets out rules about the responsibilities of neighbours (adjoining owners) in relation to a dividing fence.

2.5 Parts 4 to 6 contain provisions to facilitate the resolution of issues and disputes between adjoining owners about dividing fences. Part 4 sets out a procedure to be followed when seeking a contribution to fencing work for a dividing fence. Parts 4 and 5 also give QCAT a broad jurisdiction to deal with disputes about any matter arising under Chapter 2 of the Act that cannot otherwise be resolved.

2.6 Part 6 provides a procedure for adjoining owners to follow if they do not agree on the position of the common boundary.

## THE APPLICATION OF CHAPTER 2 OF THE ACT

2.7 The provisions of Chapter 2 of the Act that impose liabilities to contribute to fencing work for dividing fences generally apply to 'adjoining owners' of land.<sup>1</sup>

<sup>1</sup>

See, eg, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(1), 20(1), 21–27.

'Adjoining owners' are the 'owners' of the 'land' on either side of a common boundary.<sup>2</sup>

## Land to which Chapter 2 of the Act does and does not apply

2.8 Section 8 of the Act sets out particular types of land to which Chapter 2 of the Act does and does not apply. It provides:

### 8 Application of chapter

- (1) Subject to subsections (2) to (4), this chapter applies to the following—
- (a) land recorded in the freehold land register;<sup>3</sup>
  - (b) land subject to a lease or licence under the *Land Act 1994*;
  - (c) land subject to an occupation permit or stock grazing permit under the *Forestry Act 1959*, section 35;<sup>4</sup>
  - (d) land subject to a stock grazing permit under the *Nature Conservation Act 1992*.<sup>5</sup>
- (2) This chapter does not apply to the following—
- (a) a stock route within the meaning of the *Land Protection (Pest and Stock Route Management) Act 2002*;<sup>6</sup>
  - (b) South Bank public land within the meaning of the *South Bank Corporation Act 1989*;<sup>7</sup>

<sup>2</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 15(1). The owners of agricultural land or pastoral land on either side of a road are also 'adjoining owners' for the Act, if they agree to be adjoining owners under ch 2 of the Act or QCAT decides a fence has been used, or could reasonably be used, as a dividing fence for the two parcels of land: s 15(2).

<sup>3</sup> The freehold land register is maintained under the *Land Title Act 1994* (Qld). It records specified particulars, including particulars necessary to identify every lot brought under the *Land Title Act 1994* (Qld), every interest registered in the register and all instruments registered in the register: *Land Title Act 1994* (Qld) s 28.

<sup>4</sup> See *Forestry Act 1959* (Qld) s 35, under which an occupation permit or a stock grazing permit may be granted over any land comprised in any State forest. An occupation permit allows the permit holder to occupy the land for a fixed term: s 35(1)(a). A stock grazing permit allows the permit holder to graze stock for a term of generally no more than 10 years, or if the relevant land is in an SEQFA forest reserve, for a term ending no later than 31 December 2024: s 35(1)(c). For the purposes of s 35 of the *Forestry Act 1959* (Qld), an 'SEQFA forest reserve' is a forest reserve under the *Nature Conservation Act 1992* (Qld) the dedication of which was in force immediately before the commencement of s 35(7) on 18 November 2005: s 35(7).

<sup>5</sup> See generally, *Nature Conservation Act 1992* (Qld) s 34; *Nature Conservation (Administration) Regulation 2006* (Qld) s 10(c); *Nature Conservation (Protected Areas Management) Regulation 2006* (Qld) s 56.

<sup>6</sup> A stock route is a road or route that is ordinarily used for travelling stock or that has been declared under a regulation to be a stock route: *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) sch 3 (definition of 'stock route'). The State and local governments share responsibility for administering the stock route network under the Act: pts 2–4. Chapter 2 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) does not apply in relation to a declared pest fence: s 7.

<sup>7</sup> 'South Bank public land' is land that is under the *Land Title Act 1994* (Qld), within the corporation area and held in fee simple by a public authority: *South Bank Corporation Act 1989* (Qld) s 3 (definition of 'South Bank public land'). A 'public authority' is the Southbank Corporation, the Brisbane City Council or a public agency: s 3 (definitions of 'corporation', 'council' and 'public authority').

- (c) a State plantation forest, including a licence area in a State plantation forest;<sup>8</sup>
  - (d) land prescribed under a regulation.<sup>9</sup>
- (3) For adjoining land consisting of 2 parcels of agricultural land, this chapter does not apply to each parcel of land for the common boundary between the parcels of land.<sup>10</sup>
- (4) To remove any doubt, it is declared that this chapter does not apply to unallocated State land.<sup>11</sup> (notes added)

2.9 Only the land referred to in section 8(1) falls within the scope of Chapter 2 of the Act.

2.10 The land mentioned in section 8(2)–(4) falls outside the scope of Chapter 2 of the Act. Other types of land that are not included in section 8(1) as land to which the Act applies — for example, land which is dedicated as a reserve for a community purpose under the *Land Act 1994* (Qld) or as a road for public use<sup>12</sup> — are also outside the scope of Chapter 2 of the Act.

### Who is an ‘owner’ of land

2.11 Section 14 of the Act defines who is an ‘owner’, for land, for Chapter 2 of the Act. It provides:

#### 14 Meaning of owner for land

- (1) An owner, for land, is—
- (a) if the land is a lot recorded in the freehold land register under the *Land Title Act 1994*—the registered owner of the lot under that Act; or
  - (b) if the land is subject to a lease or licence under the *Land Act 1994*—the lessee or licensee under that Act; or

<sup>8</sup> An area of land that is a State forest may be declared by regulation to be a State plantation forest (although such a declaration does not affect the status of the land as a State forest): *Forestry Act 1959* (Qld) s 32A(1), (3).

<sup>9</sup> To date, no regulations have been prescribed.

<sup>10</sup> ‘Agricultural land’ is rural land of more than half a hectare used for cultivating crops on a commercial basis regardless of whether the land is also used for residential purposes: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(1). ‘Rural land’ means rural land under the *Land Valuation Act 2010* (Qld): sch (definition of ‘rural land’). Historically, agricultural land has been excluded from the application of dividing fences legislation. Generally, when land is used solely for agriculture, it is not necessary to fence, as fencing reduces the amount of land available for farming: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

<sup>11</sup> ‘Unallocated State land’ is land that is not freehold land or land contracted to be granted in fee simple by the State, a road, a reserve, a national park, a conservation park, a State forest, a timber reserve, or subject to a lease, licence or permit issued by or for the State, other than a permit to occupy under the *Land Act 1994* (Qld): *Land Act 1994* (Qld) sch 6 (definition of ‘unallocated State land’). If an existing fence of a property not owned by an applicant for a permit to occupy under the *Land Act 1994* (Qld) is to be used as a boundary fence for the permit, the owner of the fence and the applicant must enter into a written agreement on conditions about the maintenance of the fence before the permit is issued: *Land Act 1994* (Qld) s 179.

<sup>12</sup> Unallocated State land may be dedicated under s 31 of the *Land Act 1994* (Qld) as a reserve for one or more community purposes. It may also be dedicated under s 94 of the *Land Act 1994* (Qld) as a road for public use.



- (c) if the land is subject to an occupation permit or stock grazing permit under the *Forestry Act 1959*, section 35—the grantee for the permit; or
  - (d) if the land is subject to a stock grazing permit under the *Nature Conservation Act 1992*—the grantee for the permit; or
  - (e) if the land is scheme land under the *Body Corporate and Community Management Act 1997*—the body corporate for the community titles scheme;<sup>13</sup> or
  - (f) if the land is a parcel of land the subject of a plan under the *Building Units and Group Titles Act 1980*—the body corporate for the plan;<sup>14</sup> or
  - (g) if the land is let or may be let—a person who is entitled to, or would be entitled to, the rents and profits of the land whether as a beneficial owner, trustee, mortgagee in possession or otherwise.
- (2) However, if the land is—
- (a) used as a public park and the registered owner of the land is a local government, the local government is not an owner for the land; or
  - (b) a State plantation forest and a plantation licensee holds an interest under the *Forestry Act 1959* over the land, the plantation licensee is not an owner for the land; or
  - (c) a State plantation forest and a plantation sublicensee holds an interest under the *Forestry Act 1959* over the land, the plantation sublicensee is not an owner for the land. (notes added)

2.12 Section 14 is an exhaustive definition. Only the holders of the interests in land listed in section 14(1) are ‘owners’ of land for Chapter 2 of the Act.<sup>15</sup> Section

<sup>13</sup> A ‘community titles scheme’ is a single community management statement recorded by the registrar identifying land (the scheme land) and the scheme land: *Body Corporate and Community Management Act 1997* (Qld): s 10(1), sch 6 (definition of ‘community titles scheme’). Land may be identified as scheme land only if it consists of 2 or more lots and other land (the common property for the community titles scheme) that is not included in a lot: s 10(2). Section 311(1) of the *Body Corporate and Community Management Act 1997* (Qld) provides that for the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), the body corporate for a community titles scheme is taken to be the owner of the scheme land. Section 311(3) provides, however, that for the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), the owners of adjoining lots included in a community titles scheme are taken to be the owners of adjoining land. Section 311 also gives examples of its application in different scenarios. See also *Cleveland Mews* [2000] QBCCMCmr 45; *The Gardens* [2003] QBCCMCmr 401; *Newmarket Mews* [2003] QBCCMCmr 449; *Barrington Place* [2004] QBCCMCmr 350.

<sup>14</sup> A ‘parcel’ of land is land that is comprised in a building units plan or a group titles plan: *Building Units and Group Titles Act 1980* (Qld) s 7 (definitions of ‘parcel’ and ‘plan’). Section 123(1) of the *Building Units and Group Titles Act 1980* (Qld) provides that for the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), the body corporate for a building units plan or a group titles plan is deemed to be the owner of the parcel of land the subject of that plan (other than any part subject to a lease accepted or acquired by the body corporate under s 21 of the *Building Units and Group Titles Act 1980* (Qld)). Section 123(2) provides that the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) applies to the common boundaries between lots in a group titles plan as if the proprietors of the lots were the owners of adjoining land. See also *Lowe v BGC Technical Ltd* [2015] QCAT 408.

<sup>15</sup> Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 16.

14(2) contains several exceptions. In particular, a local government is not an ‘owner’ for land it holds as freehold that is used as a public park.

2.13 Where land is subject to a lease or licence under the *Land Act 1994* (Qld), an occupation permit or stock grazing permit under the *Forestry Act 1959* (Qld) or a stock grazing permit under the *Nature Conservation Act 1992* (Qld), the lessee, licensee or grantee of the permit (as the case may be) is deemed by section 14(1)(b), (c) or (d) to be the ‘owner’ of the land. The general effect of these provisions is to make those interest-holders liable to contribute to fencing work for dividing fences under the Act, instead of the State (although, in some cases, the State itself may be the interest-holder).<sup>16</sup>

2.14 Most of the owners to whom Chapter 2 of the Act applies are freehold lot owners. At present, there are more than 1.6 million freehold parcels in Queensland (covering 28% of the area of the State). The State itself holds an additional 399 parcels of freehold land (covering less than 1% of the area of the State).<sup>17</sup> There are also 22 000 leasehold parcels of land (covering 64% of the area of the State) issued under the *Land Act 1994* (Qld).<sup>18</sup> A large proportion of the leasehold land is used for grazing or agricultural purposes.

2.15 A dividing fence is not required between two parcels of adjoining land if there is no ‘owner’, as defined under section 14, for either parcel.

### The position of the State and local governments

2.16 Where the State holds land in freehold, or is the holder of one of the other interests in land mentioned in section 14(1), it is the ‘owner’ of the land for the purposes of Chapter 2 of the Act. The State is not otherwise subject to Chapter 2 of the Act.

2.17 This approach generally continues the policy under the former *Dividing Fences Act 1953* (Qld). It is informed by the consideration that it would be a financial burden for the State to be generally liable for fencing obligations under dividing fences legislation.<sup>19</sup>

2.18 The Department of National Parks, Sport and Racing (‘DNPSR’) has estimated that if it were liable to contribute to half of the cost of all external fencing

<sup>16</sup> Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12.

<sup>17</sup> Queensland Government data, *Land Tenure Statistical Information* (20 August 2015) <<https://data.qld.gov.au/dataset/land-tenure-statistical-information/resource/eb4ea8ab-1d4d-4f1d-9c69-72987d8ead3f>>.

<sup>18</sup> Ibid.

<sup>19</sup> Queensland, Parliamentary Debates, Legislative Assembly, 23 September 1953, 154 (W Power), 449 (GFR Nicklin). See also New South Wales Law Reform Commission, *Community Law Reform Program: Dividing Fences*, Report No 59 (1988) [3.54], [3.63]; Law Reform Committee, Parliament of Victoria, *Review of the Fences Act 1998*, Report No 37, (1998) [4.34].

of the land under its management, it would potentially incur fencing costs of at least \$132 million.<sup>20</sup>

2.19 Where a local government holds land in freehold, or is the holder one of the other interests in land mentioned in section 14(1), it is the ‘owner’ of the land for the purposes of Chapter 2 of the Act. Such land includes freehold land held on trust and under a deed of grant in trust.<sup>21</sup> Where a local government holds freehold land that is used as a public park, the local government is not the ‘owner’ of the land for the purposes of Chapter 2 of the Act.

2.20 Local governments are not otherwise subject to the provisions of Chapter 2 of the Act. That includes where local governments have been appointed as trustees to manage reserves for a community purpose.<sup>22</sup>

2.21 This approach generally continues the policy of the former *Dividing Fences Act 1953* (Qld).<sup>23</sup>

### **Public park**

2.22 The Act does not define ‘public park’. QCAT has held that land that has the facilities expected in a park (including playground equipment, playing fields, courts and picnic facilities), and is open to the public is a ‘public park’.<sup>24</sup>

### **State and local governments may enter into agreements to fence**

2.23 Notwithstanding the limited application of Chapter 2 of the Act to the State and local governments, the Act does not prevent the State, a local government or another entity from entering into an agreement to contribute to fencing work with an adjoining owner.<sup>25</sup>

<sup>20</sup> The Department’s estimate was based on 2011 costings for the construction or repair of 44 000 kilometres of external boundary fencing at \$3000/kilometre (for a standard three strand fence on flat, accessible terrain): Submission 53.

<sup>21</sup> Unallocated State land may be granted in fee simple in trust (as a deed of grant in trust) under the *Land Act 1994* (Qld): *Land Act 1994* (Qld) ch 3 pt 1.

<sup>22</sup> A ‘community purpose’ means a purpose in sch 1 of the *Land Act 1994* (Qld). The community purposes listed in sch 1 of the *Land Act 1994* (Qld) are: Aboriginal purposes, beach protection, buffer zones, cemeteries, coastal management, crematoriums, cultural purposes, drainage, environmental purposes, gardens, heritage purposes, historical purposes, jetties, landing places, mortuaries, natural resource management, navigational purposes, open space, parks, provision of services beneficial to Aboriginal people particularly concerned with land, provision of services beneficial to Torres Strait Islanders particularly concerned with land, public boat ramps, public halls, public toilet facilities, recreation, roads, scenic purposes, scientific purposes, showgrounds, sport, strategic land management, Torres Strait Islander purposes, travelling stock requirements and watering-places. Most reserves for a community purpose in Queensland — about 18 660 covering approximately 704 740 hectares — are held by local governments as trustees: Department of Natural Resources and Mines, *Queensland State Land — Strengthening our Economic Future*, Discussion Paper (2014) 15, 40.

Title to land for a reserve for a community purpose is not divested from the State. However, land in a reserve is no longer unallocated State land under the *Land Act 1994* (Qld), and the State has no more than a bare title to the land unaccompanied by the rights of use and enjoyment ordinarily associated with ownership of land: *BMG Resources Ltd v Pine Rivers SC* [1989] (2) Qd R 1, 3, 5 (McPherson J).

<sup>23</sup> See *Dividing Fences Act 1953* (Qld) ss 4, 6 (definition of ‘owner’) (repealed). The position is generally similar in other Australian jurisdictions.

<sup>24</sup> *Guardrite Security and Traffic Management Qld Pty Ltd v Gold Coast City Council* [2014] QCAT 199, [4]–[5].

<sup>25</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(2).

2.24 A number of State government departments and local governments have implemented administrative policies about cost-sharing agreements for fencing. For example, at a State level, the policy applied by the Queensland Parks and Wildlife Services ('QPWS')<sup>26</sup> states that:<sup>27</sup>

Although QPWS is not required to contribute to boundary fencing in most instances, where a need exists QPWS will continue to work with neighbours to construct or improve boundary fencing on a case-by-case basis. Contribution to the construction or maintenance of a fence may be shared through meeting some of the cost or by providing materials or labour. Details of cost sharing arrangements will be addressed via the development of fencing agreements.

## Discussion Paper

2.25 In the Discussion Paper, the Commission sought submissions on whether the provisions that deal with the application of Chapter 2 of the Act, particularly as they apply to the State and local governments, are adequate and appropriate.<sup>28</sup>

## Submissions

2.26 The Queensland Civil and Administrative Tribunal ('QCAT') submitted that the current policy approach to the application of Chapter 2 of the Act is adequate.

2.27 DNPSR submitted that the exemptions under the Act that apply to the State are justified, and recognise the 'practical and financial difficulties' that the State would otherwise incur if those exemptions did not apply. The department cautioned that any removal or reduction of those exemptions would create a 'high level of financial liability' for it and more broadly for the State in relation to other lands.

2.28 The Department of Housing and Public Works commented that it does not always seek a contribution to fencing work from an adjoining owner, notwithstanding that it may be entitled to do so as an 'owner' under the Act:

The department also manages and provides maintenance activities for its social housing portfolio and is required to abide with the ND Act when performing fencing work and maintaining trees on properties covered by the ND Act.

Provisions under the ND Act allow a property owner to seek half costs for repairs, replacements and upgrades to dividing fences from the adjoining owner. Half costs are not currently sought by the department from adjoining owners for fencing work, as the administrative and resourcing costs for the department to manage such a process, would typically outweigh the cost. The exception is where the adjoining property owner is another government department, in which case half costs through financial contribution are requested. Half costs are provided by the department to adjoining owners who request reasonable upgrades or replacements to existing dividing fences.

<sup>26</sup> Queensland Parks and Wildlife Services is administered by the Department of National Parks, Sport and Racing.

<sup>27</sup> Department of National Parks, Recreation, Sport and Racing, *Boundary Fencing* (9 September 2015) <<http://www.nprsr.qld.gov.au/policies/>>.

<sup>28</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.18]–[2.30], Question 2-1.

The department incurs significant costs each year on new fencing or the full or part replacement of existing fencing with the same type of fencing and undertaking repairs.

2.29 The Department of Natural Resources and Mines ('DNRM') submitted that the exemptions from liability under the Act that apply to the State should also apply to local governments in relation to State land under their management, irrespective of the use, size and location of the land involved.

2.30 The Cairns Regional Council and the Local Government Association of Queensland ('LGAQ') commented that the lack of a definition of 'public park' caused uncertainty for local governments.

2.31 The Ipswich City Council considered the application provisions for Chapter 2 of the Act to be appropriate.

2.32 The Brisbane City Council ('BCC') considered that, generally, the application of Chapter 2 of the Act is adequate and appropriate, but also commented that:

The scheme of the Act largely exempts public land and that is consistent with its purpose which is to facilitate the resolution of disputes between neighbouring private owners and occupiers, which does not include Council or the State.

2.33 The LGAQ submitted that, as a matter of principle, the Act should be amended to provide that, for the purposes of Chapter 2 of the Act, a local government is not an 'owner' of any land (including freehold land) that is used for a community purpose listed in Schedule 1 of the *Land Act 1994* (Qld).

2.34 The LGAQ explained that:

Councils will either hold land in freehold title or leasehold, be legislatively responsible for roads and foreshores or be Trustee for many Reserves, many or most of which are used for Community Purposes but are not 'public park' as it is traditionally understood — cemeteries, beach protection, environmental, drainage, cultural purposes and the like are uses that are extremely common, all of which seem not to be caught by the 'public park' exclusion.

Councils should not be obliged to resource (or share the cost of resourcing) dividing fences between these lands used for public or community purposes and their neighbours.

2.35 The Mackay Regional Council submitted:

All property whether reserve, leasehold or freehold where Council is considered the owner is for the benefit of the public and/or used for a public purpose therefore local government should be excluded under the definitions of an Owner.

...

[The] definition of Owner [should be amended] to exclude Local Government as properties held either as freehold or in trusteeship are held for the benefit of the public and/or used for a public purpose.

2.36 The Cairns Regional Council suggested that the term ‘public park’ be replaced with ‘public use land’ and incorporate all land used for a public purpose. It also considered that:

Additionally, if the local government has a lease or other tenure arrangement in place, the obligation for contributing to fencing should transfer to the occupant of the land.

If the local government is exempt from contributing under the Act, so should the occupant [be exempt]. However, if the tenure arrangement between the local government and the occupant require the occupant to erect fencing, then the occupant should be responsible for contributing to the fencing. The basis for the position that local governments should be exempt irrespective of land tenure is that land purchased or acquired by local governments is generally done so to support a community use. Ratepayers should not have to contribute to fencing for community use land.

2.37 A member of the public commented that the State and local governments should not be exempt from fencing obligations under the Act, unless there is a ‘demonstrable community benefit’ to justify such an exemption.<sup>29</sup>

### ***Drafting issues***

2.38 DNPSR considered that the application provisions for Chapter 2 of the Act should set out a ‘clear and transparent approach’ as to the exemptions that apply to the State.

2.39 The LGAQ submitted that that the Act should include ‘clear statements’ about the types of land owned or managed by local government that fall within Chapter 2 of the Act and for which local government is liable to contribute to fencing work for a dividing fence.

### ***Heritage fences***

2.40 Caxton Legal Centre Inc suggested that the State or local governments should bear the cost of heritage fences (including walls) located on footpath boundaries adjoining private property. Noting that those fences ‘add to the public amenity’ of an area, this respondent commented that the maintenance costs for these types of fences are prohibitive for normal home owners:

We are aware of one individual home owner who was initially asked to pay approximately \$50 000 towards a heritage stone wall. He did not have any capacity to make such a payment.

## **The Commission’s view**

### ***The liability of the State and local governments***

2.41 The State has a limited liability under Chapter 2 of the Act to contribute to fencing work for dividing fences. The government departments that addressed the

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issue of the State's fencing obligations under the Act have not sought any further limitations to their liability.

2.42 In the Commission's view, the current policy setting under the Act for dealing with land owned or managed by the State is appropriate and should be continued.

### **Local government**

2.43 The Commission considers that the current exemption from fencing obligations for local governments under section 14(2)(a) of the Act is reasonable and should be retained.

2.44 An issue raised in consultation was whether the current exemption for local governments in section 14(2)(a) should be extended to all types of land that are used for any 'community purpose', as defined under Schedule 1 of the *Land Act 1994* (Qld).

2.45 The Act reflects a policy decision that land owned by local governments and used as a park should be exempt from the Chapter 2 of the Act.<sup>30</sup>

2.46 The Commission does not consider that the current exemption for local governments in section 14(2)(a) should be extended to all types of land that are used for any 'community purpose', as defined under Schedule 1 of the *Land Act 1994* (Qld). There are a wide range of 'community purposes' listed under the Schedule including beach protection, cemeteries, cultural and environmental purposes, drainage, gardens, heritage purposes, jetties, parks, public boat ramps, recreation, public halls, public amenities, showgrounds and sport. The Commission does not consider that there is any general reason for extending the current exemption for a public park to all of those purposes or land uses. Some of those purposes or uses might require a dividing fence on safety or other grounds where a public park does not. Some of them are uses that generate revenue that might be used to meet the cost of contributing to fencing work. There is no general uniformity of purpose that can be equated to use as a 'public park'.

2.47 In light of the Commission's view that the current exemption under section 14(2)(a) should be retained, there is a question of whether the term 'public park' should be defined in the Act. The term has not been defined previously in dividing fences legislation in Queensland or in other Australian jurisdictions. Nevertheless, the Commission considers that it is unnecessary to define 'public park'. The term is not intended to have a special or technical meaning in the context in which it is used in Chapter 2 of the Act.

### **Drafting issues**

2.48 Some respondents considered that the application provisions are difficult to interpret, particularly in relation to how the provisions apply to the State and local governments. The Commission agrees to the extent that it considers that section 8 of the Act should be amended to add a new provision which states that, to remove any doubt, it is declared that Chapter 2 of the Act does not apply to land dedicated

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<sup>30</sup> Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 5.

as a reserve for a community purpose under the *Land Act 1994* (Qld) or as a road for public use.

### ***Liability for heritage fence***

2.49 The Commission does not consider that the Act should be amended to require the State or a local government to bear the cost of a heritage fence located on the boundary between a footpath and adjoining private property.

2.50 Footpaths form part of the land dedicated as a road, and are usually controlled by local governments. Because Chapter 2 of the Act does not apply to that land, neither the State nor local governments are required to contribute to fencing works for a dividing fence on the boundary between a footpath and private property.

2.51 A requirement that a local government bear the cost of a heritage fence located on a boundary between a footpath or road and private property would create a benefit for the owners of the private property which does not apply to any other owners under Chapter 2 of the Act.

2.52 The Commission appreciates that significant costs may be involved in repairing and maintaining a heritage fence, but considers that the issue of who should ultimately bear the costs of heritage fences is a matter that should be dealt with under State or local government heritage laws or administrative policies rather than under the Act. The Commission notes that there is a publicly funded grants scheme available through the Department of Environment and Heritage Protection to assist the owners of heritage-listed places with the costs of restoration work, which may include work for a heritage fence.<sup>31</sup>

### **Recommendation**

**2-1 Section 8 of the Act should be amended to add a provision which states that, to remove any doubt, it is declared that Chapter 2 of the Act does not apply to land dedicated as a reserve for a community purpose under the *Land Act 1994* (Qld) or as a road for public use.**

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Queensland Government, *Everyone's Environment grants program* (23 March 2015) <<http://www.qld.gov.au/environment/pollution/funding/everyones/>>.



## Other matters

### *Pool fencing*

2.53 Parts 3 to 6 of Chapter 2 of the Act do not apply to a dividing fence that forms part of a pool safety barrier of a 'regulated pool' within the meaning of the *Building Act 1975* (Qld).<sup>32</sup>

### **No effect on private agreements or particular laws**

2.54 Chapter 2 of the Act does not affect:

- a covenant or agreement, other than an agreement under that Chapter, made between adjoining owners about a dividing fence, before or after the commencement of the Act;<sup>33</sup>
- a by-law under the *Body Corporate and Community Management Act 1997* (Qld) or the *Building Units and Group Titles Act 1980* (Qld) about a dividing fence;<sup>34</sup> or
- a law about retaining walls or rights of support, including easements of support.<sup>35</sup>

## THE DEFINITIONS OF 'FENCE', 'DIVIDING FENCE' AND 'FENCING WORKS'

### The definition of 'fence'

2.55 A 'fence' is defined under the Act as a structure, ditch or embankment, hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the entire boundary separating the land of adjoining owners. It includes a gate, a cattle grid or apparatus necessary for the operation of the fence, a watercourse separating the adjoining land and a foundation or support built solely for the support and maintenance of the fence.<sup>36</sup>

2.56 The definition of 'fence' excludes a retaining wall and a wall that is part of a house, garage or other building.<sup>37</sup> As a result, disputes about these types of walls

<sup>32</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 9. Pool fences are regulated under ch 8 of the *Building Act 1975* (Qld). Chapter 8 Part 2A of that Act modifies the responsibilities of neighbours under pts 3–6 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) in relation to a dividing fence, or a part of a dividing fence, forming part of a pool barrier and provides for a pool owner to construct a pool barrier along the common boundary of adjoining land. It also provides for QCAT to make orders to resolve disputes about dividing fences forming part of a pool barrier, including powers similar to those conferred under s 35(1) of the Act.

<sup>33</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(a). The covenant or agreement must be a legally binding covenant or agreement: *Stilgoe v Llowarch* [2005] NSWSC 520. See also, I Wallace, 'The Law of Dividing Fences' (1981) 19(7) *Law Society Journal* (NSW) 539, 541, 543, discussing the equivalent provision in the NSW dividing fences legislation.

<sup>34</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(b).

<sup>35</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(c).

<sup>36</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 11(1).

<sup>37</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 11(2).

are not regulated by the Act, although, in some circumstances, QCAT has power to make an order about work for a retaining wall.<sup>38</sup>

2.57 It has been observed, in relation to the definition of 'fence' in the NSW legislation<sup>39</sup> (which is drafted in similar terms to the Queensland definition), that:<sup>40</sup>

The opening words of the definition of 'fence' in the ... Act are 'a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land' ... It is the function of enclosing or bounding land which characterises such a structure or barrier as a fence.

### **Discussion Paper**

2.58 In the Discussion Paper, the Commission sought submissions on whether the definition of 'fence' should be changed in any way.<sup>41</sup>

### **Submissions**

2.59 QCAT submitted that the definition of 'fence' did not raise any problems in practice.

2.60 One member of the public raised the possibility of treating hedges and fences separately under the Act, on the basis that a hedge (which is a living thing) is distinguishable from a fence (which is a man-made structure):<sup>42</sup>

A common view of a fence is an artificial structure purpose built to prevent/impede humans or animals from entering or exiting.

A hedge is a living object that may approximately define or delineate a boundary but is not a structure. Perhaps these need to be treated separately. For example if one neighbour (or a natural event) damages a hedge how can this be repaired in a manner similar to that of a man-made structure? How can a hedge permanently define the common boundary? What happens when the hedge's roots or foliage causes damage?

2.61 The Cairns Regional Council suggested that the Act should more clearly define the term '[similar] vegetative barrier' in the definition of 'fence'.

<sup>38</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 35(1)(f), discussed at [2.184]–[2.188] below.

<sup>39</sup> *Dividing Fences Act 1991* (NSW) s 3 (definition of 'fence').

<sup>40</sup> *Brown v Doyle* (2010) 179 LGERA 449, in which the court, at [14], held that a mound of dirt and trees on the boundary between adjoining properties was capable of constituting a 'fence' for the purposes of the *Dividing Fences Act 1991* (NSW). See also *Warringah Properties Pty Ltd v Babij (Snr)* 2006 NSWSC 702, in which the court observed, at [14], that 'The definition of 'fence' can be seen to be one of great width. Save for the exclusions, it would appear to be contemplated to pick up inter alia any structure that has the characteristics of enclosing or bounding land'.

<sup>41</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.37], Question 2-2.

<sup>42</sup> Submission 49.

### **The Commission's view**

2.62 In the Commission's view, the definition of 'fence' is appropriate and should be retained without amendment. The width of the definition informs the definition of 'dividing fence' in the Act and thereby sets an important parameter for the scope of the operation of the fencing obligations under Chapter 2 of the Act.

2.63 The definition included hedges or similar vegetative barriers for the first time.<sup>43</sup> The Commission considers that their inclusion is appropriate, particularly as it is not uncommon for adjoining owners to use hedges to enclose property boundaries. The Commission also notes that the maintenance of hedges and similar vegetative barriers is expressly addressed in the Act by the definition of 'fencing work', which includes the planting, replanting and maintenance of a hedge or similar vegetative barrier.

### **The meaning of 'dividing fence'**

2.64 A 'dividing fence' is defined to mean a fence on the common boundary of adjoining lands.<sup>44</sup>

2.65 The definition of 'dividing fence' also includes a fence separating the land of adjoining owners constructed on a line other than the common boundary if:<sup>45</sup>

- it is impracticable to construct the fence entirely on the common boundary of the adjoining land because of natural physical features;<sup>46</sup> or
- the adjoining land includes one or more parcels of pastoral land separated by a watercourse, lake or other natural or artificial feature insufficient to stop the passage of stock at all times.

2.66 Section 20(2) of the Act reinforces the general requirement to locate a dividing fence on the common boundary.<sup>47</sup> It provides that, if carrying out fencing work includes the construction or replacement of a sufficient dividing fence, the fence

<sup>43</sup> Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 14.

<sup>44</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(1). 'Common boundary', for ch 2 of the Act, in relation to adjoining land consisting of one or more parcels of land separated by a watercourse, lake or other natural or artificial feature insufficient to stop the passage of stock at all times, includes the bed and banks of the watercourse, lake or other feature separating the lands: sch (definition of 'common boundary').

<sup>45</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(2). The occupation of land on either side of a dividing fence, as a result of an agreement under ch 2 of the Act, or an order made by QCAT, that fencing work is to be carried out on a line other than on the common boundary of the adjoining land, does not affect the title to or possession of the land: ss 29, 35(2).

<sup>46</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 12(2)(a). In *Drinan v Dawson* [2014] QCATA 168, Thomas P observed, at [8], that s 12(2)(a) of the Act is directed to particular situations where a fence cannot be built on the common boundary (for example, if there is a significant tree and the fence needs to be diverted around it). His Honour further observed that 'The mere fact that the fence is built on some other line does not mean that section 12(2) operates to deem it a dividing fence'.

<sup>47</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(2). The surveyed boundary is a line; consequently, a fence straddling the common boundary of land is jointly owned. In an appropriate case, the legal maxim *de minimis lex non curat* may be applied to allow an insignificant or trifling encroachment on adjoining land to be excused: see, eg, *Glover v Pedersen* [2014] QCATA 112 [1], [7].

must be constructed or replaced on the common boundary other than to the extent it is impracticable to do so because of natural physical features.<sup>48</sup>

2.67 The definition of 'dividing fence' is central to the operation of the legislative scheme for dividing fences. Reference is made to a 'dividing fence' in most of the provisions in Chapter 2. For example:

- Section 19 states the Act does not affect the common law position that a dividing fence, to the extent it is on the common boundary, is owned by the adjoining owners equally;
- Section 20(1) states that if there is no sufficient dividing fence between land consisting of two parcels of adjoining land, an adjoining owner is liable to contribute to carrying out fencing work for a sufficient dividing fence;
- Section 33(2) empowers QCAT, if there is more than one fence on the boundary of adjoining land, to decide which fence is the dividing fence and order the removal of the other fence or fences. Section 33(3) empowers QCAT, if there is a fence other than a dividing fence on adjoining land, to order that the fence be removed if QCAT considers its removal is necessary to allow fencing work for a dividing fence.
- Section 35 empowers QCAT to make orders about fencing work for a dividing fence, including, under section 35(1)(a), about the line on which the fencing work is to be carried out, whether or not that line is on the common boundary of the adjoining land and, under section 35(1)(g), that, in the circumstances, no dividing fence is required for all or part of the boundary of the adjoining land.

### **Discussion Paper**

2.68 In the Discussion Paper, the Commission sought submissions on whether the definition of 'dividing fence' should be changed in any way. The Commission also sought submissions on whether fences that are intended to serve the purpose of a dividing fence, but are not built on the common boundary other than because it is impracticable to do so because of the natural physical features of the land, are adequately dealt with under the Act.<sup>49</sup>

### **Submissions**

2.69 QCAT submitted that the definition of 'dividing fence' is adequate to deal with the circumstances in which dividing fences are constructed.<sup>50</sup>

<sup>48</sup> A similar policy was adopted under the *Dividing Fences Act 1953* (Qld): ss 6 (definition of 'dividing fence'), 8(3) (repealed). See *Cullen v Maginn* [2011] QCATA 21, [19]–[20], in relation to the operation of those provisions.

<sup>49</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.34]–[2.36], Questions 2-2, 2-3.

<sup>50</sup> See, eg, *Portelli v James* (Application No 2156/10, Member Stilgoe, 17 December 2010); *James v Portelli* [2011] QCAT 705.

2.70 The Cairns Regional Council suggested that it might be useful if the definition of ‘dividing fence’ included examples of when a dividing fence may be sited off the common boundary:

eg, property boundary in waterway, may have been eroded, too steep, impractical.

2.71 The LGAQ and the Ipswich City Council commented that, if the Act were amended to deal with retaining walls generally, it might capture a fence that is not built on the common boundary.

2.72 The Townsville Community Legal Service Inc raised the option of providing a procedure for defining an alternative fencing line (similar to that provided by section 40 of the Act for defining the common boundary).

2.73 One member of the public suggested that where a (dividing) fence is constructed on land beyond the common boundary, there should be an ‘automatic compensatory mechanism to the loser (monetary or other) determined by the area or economic loss experienced’.<sup>51</sup>

### **The Commission’s view**

2.74 The Act, through the definition of ‘dividing fence’ and the liability to contribute to ‘fencing work’ if there is no ‘sufficient dividing fence’, establishes that adjoining owners are each entitled to have a dividing fence placed on the boundary between their lands. It also recognises an exception where it is impracticable to build a fence on the boundary because of natural physical features. To the extent that it is impracticable to construct or replace the fence on the common boundary, the liability may be to contribute to a fence not on the common boundary as a ‘dividing fence’.

2.75 In the Commission’s view, the definition of ‘dividing fence’ currently in the Act is appropriate, and does not need any amendment. In particular, the definition should not be extended to broaden the circumstances in which a fence that is not built on the common boundary is treated under the Act as a dividing fence.

2.76 It is important that the Act’s provisions about the placement of dividing fences are clear, particularly with the increase of small lot development in residential areas. Where dwellings or other buildings are constructed in close proximity, fences should be constructed or replaced on the common boundary.<sup>52</sup>

### **The definition of ‘fencing work’**

2.77 ‘Fencing work’, for a dividing fence, is defined in the Act to mean the design, construction, modification, replacement, removal, repair or maintenance of the whole or part of the dividing fence, and the surveying or preparation of land, including the trimming, lopping or removal of vegetation along or on either side of the common boundary, for one or more of those purposes.<sup>53</sup>

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51 Submission 49.

52 See, eg, *McKeown v Reid* [2013] QCAT 345, [19]–[20].

53 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 16(a)–(b).

2.78 The definition includes the planting, replanting and maintenance of a hedge or similar vegetative barrier as the dividing fence, and the cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as the dividing fence.<sup>54</sup>

2.79 It also includes 'obtaining an approval required for fencing work'.<sup>55</sup> Examples of approvals that may be required for fencing work include a requirement for fencing work in a development approval for an adjoining owner's land, and a development approval for the alteration of a fence listed in the Queensland Heritage Register.

### **Discussion Paper**

2.80 In the Discussion Paper, the Commission sought submissions on whether the definition of 'fencing work' should be changed in any way.<sup>56</sup>

### **Submissions**

2.81 QCAT submitted that the definition of 'fencing work' does not raise any problems in practice.

2.82 A member of the public considered that, although that definition refers to the preparation of land on either side of a common boundary by trimming, lopping or removal of vegetation, it 'fails to adequately define an appropriate maintenance corridor' on both sides of a dividing fence.<sup>57</sup>

2.83 The Townsville Community Legal Service Inc commented that the costs associated with heritage work for a fence can be significant, especially where a separate heritage approvals process is required. This respondent submitted that while 'the positive inclusion of heritage fencing styles' is implied in the definition of 'fencing work', the definition could be made clearer by amending paragraph (e) of the definition to include an express reference to obtaining heritage approvals for a heritage fence.

### **The Commission's view**

2.84 The Commission considers that the definition of 'fencing work' is sufficient to cover any type of work that is likely be required in relation to a fence and does not need any amendment.

2.85 In particular, the Commission considers that it is not necessary to amend paragraph (e) of the definition of 'fencing work' (which refers to 'obtaining an approval required for fencing work') to include an express reference to obtaining approvals for a 'heritage fence'. The definition is wide enough to encompass an approval process required for fencing work to a heritage listed fence.

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54 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 16(c)–(d).

55 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 16(e).

56 *Neighbourhood Disputes Act Discussion Paper* (2015) [2.38], Question 2-2.

57 Submission 26.

## THE DEFINITION OF 'SUFFICIENT DIVIDING FENCE'

2.86 The Act establishes a general presumption that adjoining owners are liable to contribute equally to carrying out fencing work for a 'sufficient' dividing fence.<sup>58</sup> Section 13 of the Act prescribes the following circumstances in which a dividing fence is a 'sufficient dividing fence':<sup>59</sup>

- for adjoining land consisting of two parcels of 'residential land',<sup>60</sup> the dividing fence is to be between 50 centimetres and 1.8 metres in height and, subject to any restrictions on the use of a particular material arising from a requirement under a relevant local law, consisting substantially of wood, chain wire, metal panels or rods, bricks, rendered cement, concrete blocks, hedge or other vegetative barrier or other material of which a dividing fence is ordinarily constructed;<sup>61</sup>
- for adjoining land consisting of two parcels of 'pastoral land',<sup>62</sup> the dividing fence is to be sufficient to restrain livestock of the type grazing on each of the parcels;<sup>63</sup> or
- in any case in which:
  - the adjoining owners agree between themselves that the dividing fence is a sufficient dividing fence;<sup>64</sup> or
  - QCAT decides the dividing fence is a sufficient dividing fence.<sup>65</sup>

2.87 The basic rule that applies for adjoining land consisting of two parcels of residential land is not intended to imply that any dividing fence less than that standard is insufficient:<sup>66</sup>

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

<sup>58</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 21(1).

<sup>59</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1). There is no requirement for a sufficient dividing fence between two parcels of agricultural land: s 8(3). 'Agricultural land' is defined as 'rural land of more than half a hectare used for cultivating crops on a commercial basis regardless of whether the land is also used for residential purposes': s 18(1).

<sup>60</sup> 'Residential land' is defined as 'land, other than agricultural land and pastoral land, used primarily for residential purposes': *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(4).

<sup>61</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(a), (3).

<sup>62</sup> 'Pastoral land' is defined as 'rural land of more than half a hectare used for grazing stock on a commercial basis regardless of whether the land is also used for residential purposes': *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(2).

<sup>63</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(b).

<sup>64</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(c)(i).

<sup>65</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(1)(c)(ii).

<sup>66</sup> Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 15.

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.

2.88 The Act also provides that the existence of a fence, other than a dividing fence, on adjoining land must not be taken into account in deciding whether there is a sufficient dividing fence.<sup>67</sup>

### Sufficient dividing fence factors

2.89 When QCAT decides an application about whether a dividing fence is a sufficient dividing fence, it may consider all the circumstances of the application, including:<sup>68</sup>

- any existing or previously existing dividing fence;
- the purposes for which the adjoining parcels of land are used or intended to be used;
- the kind of dividing fence normally used in the area;
- whether the dividing fence is capable of being maintained by the adjoining owners;
- any policy adopted, or local law made, in relation to dividing fences by the local government for the area; and
- any requirement for fencing work in a development approval for the land of either adjoining owner.

2.90 There is no similar provision in the Act that applies to adjoining owners, in the context of their considerations as to whether a dividing fence is a 'sufficient dividing fence'.

### Discussion Paper

2.91 In the Discussion Paper, the Commission sought submissions on whether the definition of 'sufficient dividing fence' provides adequately for the minimum standard required for a sufficient dividing fence for both urban and rural land, or whether any changes should be made to the definition.<sup>69</sup>

2.92 The Commission also asked whether the Act should 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' under section 36.<sup>70</sup>

<sup>67</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 13(2).

<sup>68</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 36.

<sup>69</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.39]–[2.46], Question 2-4.

<sup>70</sup> *Ibid* Question 2-5.



## Submissions

### ***Definition of 'sufficient dividing fence'***

2.93 The Townsville Community Legal Service Inc considered the definition of 'sufficient dividing fence' to be generally adequate.

2.94 QCAT and the Cairns Regional Council both commented that the definition provides adequate minimum standards for a sufficient dividing fence for both urban land and rural land.

2.95 Several respondents favoured changing the maximum height for a 'sufficient dividing fence' for residential land.

2.96 Caxton Legal Centre Inc suggested reducing the maximum height from 1.8 metres to 0.9 metres:

A stated minimum standard of what amounts to a 'sufficient dividing fence' is set out in section 13 of the Act. ... [T]he Act should set a basic standard for a sufficient dividing fence which can be used as the basis for the calculation of fencing contribution liability. This is particularly important if cases are to be resolved by agreement rather than by orders made in QCAT.

[T]he basic standard for a fence should be linked to the costs associated with a basic and durable fence, (which we set as being a 3 feet (0.9 metre) chain-wire fence), with discretion to be granted to the relevant QCAT decision-maker to make other orders in appropriate cases.

The Act currently provides for an upper height of 1.8 metres. [T]his is too high ... a lower height of 0.9 (or 1.2) metre/s is more reasonable as the basic measure for a 'sufficient dividing fence'.

In older suburbs going through urban renewal/gentrification phases, we have noticed that it has been a problem for elderly clients when new neighbours try to bully these older neighbours into agreeing to a new 1.8 metre fence when there is a perfectly acceptable 0.9 metre chain wire fence still serving the purpose of a sufficient dividing fence.

2.97 In contrast, a member of the public considered that the maximum height of 1.8 metres is inadequate.<sup>71</sup>

2.98 Several respondents also commented on the list of prescribed materials for a sufficient dividing fence for residential land.

2.99 The Townsville Community Legal Service Inc suggested that the list should include 'a material prescribed by heritage approvals or requirements'. A member of the public considered that a hedge should not be included in the list, due to its potential to cause a neighbourhood dispute, for example, because of ongoing maintenance requirements or by causing damage to nearby building structures in urban areas.<sup>72</sup>

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71 Submission 49.

72 Ibid.

2.100 Several members of the public considered the impact of each adjoining owner's fencing requirements relative to the purposes for which they use their land.<sup>73</sup> One of those respondents commented that dividing fences for urban land may also have a purpose in addition to defining/dividing adjacent properties, for example, by enhancing amenity through noise suppression, view restriction (privacy) and fire restraint.<sup>74</sup>

An example could be where the Dividing Fence defines the property between neighbours, one of whom has a hobby involving car restoration. This involves the use of tools (welders, hammers etc) as well as retention of unsightly car bodies etc. The other neighbour seeks a dividing fence not just to delineate the property boundary, but to enhance amenity through reduction of visual and noise pollution. Clearly the list referred to allows a wire fence, a paling fence or a hedge as a 'sufficient fence' but these solutions would clearly not resolve a neighbourhood dispute.

2.101 Another of those respondents commented that where an adjoining owner's fencing requirements change so that the existing dividing fence is no longer sufficient, then that owner should be liable for any 'upgrade' to the dividing fence necessary to meet those particular requirements.<sup>75</sup>

#### ***'Sufficient dividing fence' factors***

2.102 QCAT, Caxton Legal Centre Inc and the Cairns Regional Council favoured amending the Act to provide that, when adjoining owners are considering whether a dividing fence is a sufficient dividing fence, they may consider the same factors that are currently set out in section 36.

2.103 The Townsville Community Legal Service Inc and Strata Community Australia (Qld) did not support such an amendment.

2.104 The Townsville Community Legal Service Inc considered that:

it might be that an adjoining owner's objections to QCAT is couched in those terms, however it would be inappropriate to provide adjoining owners with 'grounds' to refuse.

The grounds form the basis for the exercise of a discretion. It is unlikely that an adjoining owner would weigh the grounds and overall discretion in a balanced manner. Providing adjoining owners with a basis to object at the initial stages could well become a source for litigation antithetical to the objects.

2.105 Strata Community Australia (Qld) commented that adjoining owners could easily be made aware of the factors by listing them in the approved form of a notice to contribute to fencing works.

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73 Submissions 2, 49.

74 Submission 49.

75 Submission 2.

## The Commission's view

### *The definition of 'sufficient dividing fence'*

2.106 In the Commission's view, the definition of 'sufficient dividing fence' appears to be operating satisfactorily, and does not need any amendment.

2.107 In particular, the establishment of minimum standards for a sufficient dividing fence on residential land (in section 13(1)(a)) and on pastoral land (in section 13(1)(b)) allows for flexibility and choice by adjoining owners.

2.108 The Commission does not consider that the maximum height limit provided in section 13(1)(a) of the Act should be reduced. Dividing fences built up to the maximum height of 1.8 metres are becoming more common in residential areas. In areas of high density development on small lots, adjoining owners may consider a fence of that height is necessary to address privacy or other concerns.

### *Sufficient dividing fence factors*

2.109 When considering whether an existing or proposed dividing fence constitutes a sufficient dividing fence, adjoining owners may take into account various factors relevant to their particular circumstances. For example, whether there is an existing or previously existing dividing fence, the purposes for which the fence will be used, and the kind of fence normally used in the locality are all generally relevant factors for adjoining owners to consider. These and other factors are referred to in section 36 (which applies to QCAT when it is considering whether a dividing fence is a sufficient dividing fence).

2.110 The Commission considers that it would be useful to direct the attention of adjoining owners to the circumstances that QCAT may consider when it is deciding a dispute about whether a dividing fence is a sufficient dividing fence. Those factors are also generally relevant for adjoining owners to consider when they are deciding what type of fence will constitute a sufficient dividing fence in their particular circumstances. For this reason, section 13(1) of the Act should be amended to insert a note, immediately after section 13(1)(c)(ii), which states that QCAT may consider the circumstances set out in section 36 when it decides an application about whether a dividing fence is a sufficient dividing fence.

## Recommendation

**2-2 Section 13(1) of the Act should be amended to insert a note, immediately after section 13(1)(c)(ii), which states that QCAT may consider the circumstances set out in section 36 when it decides an application about whether a dividing fence is a sufficient dividing fence.**

## ADJOINING OWNERS' RESPONSIBILITIES

2.111 Part 3 of Chapter 2 of the Act deals with the rights, obligations and liabilities of adjoining owners (under the heading of 'Neighbours' responsibilities') in relation to dividing fences.

2.112 Its purpose is to provide some basic rules about adjoining owners' responsibilities for a dividing fence, including the type of fence to be maintained, the location and placement of the fence and the liability to contribute to carrying out fencing work, so that they are generally able to resolve dividing fence issues without a dispute arising.

### When a sufficient dividing fence is required

2.113 The Act provides that a sufficient dividing fence is required between two parcels of land if an adjoining owner requests a dividing fence.<sup>76</sup>

### Liability to contribute to carrying out fencing work

2.114 An adjoining owner is liable to contribute to carrying out fencing work for a sufficient dividing fence if there is no sufficient dividing fence between two parcels of adjoining land.<sup>77</sup> This applies even if there is an existing dividing fence that does not meet the standard of a sufficient dividing fence.<sup>78</sup> An adjoining owner may 'contribute' to fencing work by the payment of money or the provision of material or labour.<sup>79</sup>

2.115 Other than for urgent fencing work, the liability of an adjoining owner to contribute to fencing work is enforceable under the Act only if the adjoining owners have agreed under Chapter 2 of the Act about carrying out the fencing work,<sup>80</sup> or QCAT has ordered that the fencing work be carried out.<sup>81</sup>

### General rule of equal contribution

2.116 Generally, adjoining owners are liable to contribute equally to fencing work carried out for a sufficient dividing fence.<sup>82</sup> The intention is that a sufficient dividing fence should be the minimum standard required to divide the adjoining land, so that the contribution required from each owner is kept to a minimum.<sup>83</sup>

<sup>76</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 7(1).

<sup>77</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(1).

<sup>78</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(4)(a).

<sup>79</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 20(1), 31(6). See also Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 11.

<sup>80</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 20(3)(a). See ss 31–32 in relation to the procedures under the Act for obtaining a contribution to fencing work, discussed at [2.139] ff below.

<sup>81</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 20(3)(b).

<sup>82</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(2)(a), 21(1).

<sup>83</sup> Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 18.

### **Exceptions to the general rule of equal contribution**

2.117 There are exceptions to the general rule of equal contribution,<sup>84</sup> including:<sup>85</sup>

- If one owner wants to carry out fencing work for a dividing fence to a standard greater than that for a sufficient dividing fence, that owner will be liable for the extra expense involved.<sup>86</sup>
- Where a new residential development<sup>87</sup> was previously a parcel of prescribed rural land<sup>88</sup> and the adjoining parcel is prescribed rural land, the owner of the prescribed rural land is required to contribute only to the cost of a dividing fence that would have been a sufficient dividing fence for the two parcels of land before the residential development.<sup>89</sup>
- Where a new residential development was previously a parcel of prescribed land<sup>90</sup> and the adjoining parcel is prescribed land, the owner of the prescribed land is required to contribute only to the cost of a dividing fence that would have been a sufficient dividing fence for the two parcels of land before the residential development.<sup>91</sup>
- If a dividing fence is damaged or destroyed by a negligent act or omission of an owner of land, or a person who has entered the owner's land with the owner's express consent, the owner is required to restore the fence to a

<sup>84</sup> In addition, QCAT may, on an application in relation to fencing work for a dividing fence, make an order about the way in which contributions for fencing work are to be apportioned between adjoining owners or the amount that each adjoining owner is liable to pay for the fencing work: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 35(1)(c).

<sup>85</sup> See also *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 24, which provides that, in certain circumstances, a long-term lessee of an owner's land may be liable to contribute to the owner's share of fencing work for a sufficient dividing fence. Section 24 does not apply to a lessee under the *Retail Shop Leases Act 1994* (Qld), or where the owner is the State, a local government or is a lessee of a lease or licensee of a license granted under the *Land Act 1994* (Qld): s 24(1)(b), (6).

<sup>86</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 21(2).

<sup>87</sup> 'Residential development', for ch 2, means a subdivision of land creating allotments or lots intended for residential land: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'residential development').

<sup>88</sup> 'Prescribed rural land' is agricultural land, pastoral land or other rural land of more than half a hectare primarily used for residential purposes: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(3). 'Agricultural land', 'pastoral land' and 'residential land' are defined in *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 18(1)–(2), (4). 'Rural land' means rural land under the *Land Valuation Act 2010* (Qld): *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'rural land').

<sup>89</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 22. As a consequence, an owner of agricultural land is not liable to contribute to a fence at all, if a fence has not been required previously.

<sup>90</sup> 'Prescribed land' means land greater than a size prescribed by regulation: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 23(3). To date, no regulation has been prescribed.

<sup>91</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 23. This is intended to ensure 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: Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 19.

reasonable standard, having regard to its state before it was damaged or destroyed.<sup>92</sup>

**Section 25: liability to contribute to costs of dividing fence where particular land is first acquired from the State**

2.118 Section 25 creates a liability to contribute to the costs of an already constructed dividing fence where particular land is first acquired from the State. It provides:

**25 Contribution—particular State land**

(1) If—

- (a) an owner constructs a dividing fence, whether before or after the commencement of this section, for adjoining land consisting of the owner's land and a parcel of land mentioned in section 8(2) to (4); and
- (b) a person acquires an interest or title for part or all of the adjoining land from the State;

the person is liable for half of the relevant fencing cost.

(2) At the time the person acquires the interest for part or all of the adjoining land, the State must give the person notice of the person's liability under this section.

(3) In this section—

**relevant fencing cost** means the lesser of—

- (a) the cost, at the date the fence was constructed, of fencing work required to have a sufficient dividing fence; and
- (b) the cost, at the date the person becomes liable, of fencing work required to have a sufficient dividing fence.

2.119 The land mentioned in section 8(2)–(4) is excluded from the application of Chapter 2 of the Act.<sup>93</sup> As a consequence, before the new owner acquired the land, there was no 'owner' of that land liable to contribute to the construction of the dividing fence.

<sup>92</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 26. If the owner does not restore the dividing fence as required under s 26, the adjoining owner may give the owner a notice to contribute for fencing work under s 31 or carry out urgent fencing work and subsequently give the owner a notice to contribute for urgent fencing work under s 32. See also *Queensland Building and Construction Commission Act 1991* (Qld) pt 6, in relation to the Queensland Building and Construction Commission's power to give directions to a person who carries out building work at a building site to remedy consequential damage to residential property (including undermining a fence, retaining wall or other structure along the boundary of the property) caused by carrying out that work on adjacent property.

<sup>93</sup> Section 8(2)–(4) of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) is set out at [2.8] above.

2.120 Section 25 has its origins in dividing fences legislation that was enacted in the colony of NSW in 1828.<sup>94</sup> A similar provision is contained in the dividing fences legislation in the Northern Territory, South Australia and Victoria.<sup>95</sup>

### Ownership of a dividing fence

2.121 The Act expressly states that it does not affect the common law position that a dividing fence, to the extent it is built on the common boundary, is owned equally by the adjoining owners.<sup>96</sup>

2.122 An owner must not, without the consent of the adjoining owner, attach something to a dividing fence that unreasonably and materially alters or damages the fence.<sup>97</sup>

### Urgent fencing work

2.123 If urgent fencing work is required to restore a damaged or destroyed dividing fence, an owner may carry out fencing work to restore the fence to a reasonable standard, having regard to its state before the damage or destruction, without first giving the adjoining owner a notice to contribute to urgent fencing work, but only if it is impracticable to give the notice.<sup>98</sup>

### The location of a dividing fence

2.124 If carrying out fencing work includes the construction or replacement of a sufficient dividing fence, the fence must be constructed or replaced on the common boundary other than to the extent it is impracticable to do so because of natural physical features.<sup>99</sup>

### Agreement does not affect title or possession

2.125 The occupation of land on either side of a dividing fence, as a result of an agreement made under Chapter 2 of the Act that fencing work is to be carried out on a line other than on the common boundary of the adjoining lands, does not affect the title to or possession of the land.<sup>100</sup>

<sup>94</sup> *An Act to regulate the dividing Fences of adjoining Lands 1828*, 9 Geo IV 12, s 2.

<sup>95</sup> *Fences Act (NT)* s 11; *Fences Act 1975 (SA)* s 10; *Fences Act 1968 (Vic)* s 30H. In the ACT, a party may apply directly to the ACT Civil and Administrative Tribunal ('ACAT') for an unleased land determination: *Common Boundaries Act 1981 (ACT)* s 7. On the hearing of an unleased land determination, ACAT must determine whether it is reasonable for the party to contribute to the cost of the fence: s 13.

<sup>96</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 19.

<sup>97</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 27(1). If such alteration or damage occurs, the adjoining owner may apply to QCAT for an order to restore the fence, having regard to its state before the thing was attached: ss 27(2), 35(1)(j). Section 27 mentions a clothes line, carport, shade sail or sign as examples of an attachment that could unreasonably and materially alter or damage the fence.

<sup>98</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 28.

<sup>99</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 20(2).

<sup>100</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 29.

## Discussion Paper

2.126 In the Discussion Paper, the Commission sought submissions on whether the rules about adjoining owners' responsibilities contained in Part 3 of Chapter 2 of the Act adequately promote the resolution of dividing fence issues by adjoining owners and, if not, whether the statement of those rules could be changed or better expressed so that they do promote the resolution of those issues.<sup>101</sup>

2.127 The Commission also sought submissions on whether section 25 of the Act should be changed or repealed.<sup>102</sup>

## Submissions

### *Adjoining owners' responsibilities generally*

2.128 The Cairns Regional Council, the Townsville Community Legal Service Inc and a member of the public<sup>103</sup> considered that the provisions of Part 3 of Chapter 2 of the Act generally promote the resolution of dividing fence disputes. The Cairns Regional Council also commented that the rules about adjoining owners' responsibilities set out in those provisions are clear.

2.129 Caxton Legal Centre Inc specifically approved of section 22, which protects an owner of prescribed rural land from being forced to contribute to the costs of fencing for an adjoining residential development.

2.130 In contrast, another member of the public considered that Chapter 2 of the Act lacked a clear direction.<sup>104</sup>

### **Section 25**

2.131 DNRM did not support any change to section 25 which would result in the State becoming liable for any part of the costs of an already constructed dividing fence whenever State land is converted to freehold.

2.132 The Townsville Community Legal Service Inc submitted that the section is potentially unfair in its application to the new adjoining owner.

## The Commission's view

### *Adjoining owners' responsibilities generally*

2.133 Part 3 of Chapter 2 of the Act draws together the rights and liabilities of adjoining owners in relation to dividing fences. Prior to the enactment of the Act, many of those rules had been contained in the *Dividing Fences Act 1953* (Qld), but embedded in various provisions throughout the legislation, or in the common law.

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101 *Neighbourhood Disputes Act Discussion Paper* (2015) [2.47]–[2.60], Questions 2-6, 2-7.

102 *Ibid* Question 2-8.

103 Submission 49.

104 Submission 26.



2.134 In the Commission's view, Part 3 sets out those rules in a practical, clear and convenient way. The extent of their operation depends also on the definitions in Part 2 of Chapter 2.

2.135 In the Commission's view, with the exception of section 25 as discussed below, the provisions of Part 3 of Chapter 2 of the Act which set out adjoining owners' rights and liabilities for dividing fences are generally appropriate and should be retained.

***Section 25: liability to contribute to costs of dividing fence where particular land is first acquired from the State***

2.136 Ordinarily, the Act does not enable an owner to recover a contribution for the costs of an existing dividing fence from a person who becomes the subsequent owner of the adjoining land. Section 25 of the Act is an exception. It applies only where the adjoining land is land mentioned in section 8(2)–(4), and a person acquires an interest or title for part or all of the adjoining land from the State.

2.137 The Commission considers that section 25 should be retained, but made subject to a temporal limitation.

2.138 Section 25 presently applies whether the construction of the dividing fence occurred before or after the Act commenced on 1 November 2011. The Commission considers that section 25 should be amended to provide that it does not apply if the dividing fence was constructed more than five years before the person acquired or acquires an interest in or title for all or part of the adjoining land from the State.

**Recommendation**

**2-3 Section 25 of the Act should be amended to provide that it does not apply if the dividing fence was constructed more than five years before the person acquired or acquires an interest or title for all or part of the adjoining land from the State.**

**OBTAINING A CONTRIBUTION TO FENCING WORK**

2.139 Part 4 of Chapter 2 of the Act sets out procedures for obtaining a contribution to fencing work for a dividing fence under the Act. An owner may, by giving a 'notice to contribute' to the adjoining owner, require the adjoining owner to contribute to fencing work for a dividing fence.<sup>105</sup>

<sup>105</sup>

*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) s 31(1).*

## Notice to contribute

2.140 The notice to contribute must attach at least one written quote for the estimated cost of the fencing work, and state the following:<sup>106</sup>

- a description of the land on which the fencing work is to be carried out (and, if the fencing work is to construct or replace a dividing fence, the line on which it is proposed to construct or replace the fence);
- the type of fencing work to be carried out; and
- the estimated cost of the fencing work to be carried out, including the cost of labour and materials.

2.141 The owner giving the notice to contribute can propose that any cost of the fencing work is to be borne other than in equal proportions. If so, the notice must state the proposed proportions.<sup>107</sup>

2.142 If, in the circumstances, urgent fencing work is required to repair a damaged or destroyed dividing fence, an owner who restores the fence to a reasonable standard without first giving a notice to contribute (because it was impracticable to give the notice at that time) may later give a notice to contribute to urgent fencing work to the adjoining owner, requiring the adjoining owner to contribute to the reasonable cost incurred for the fencing work.<sup>108</sup>

2.143 The notice to contribute to urgent fencing work must attach a receipt for the cost of the fencing work and state:<sup>109</sup>

- a description of the land on which the fencing work was carried out;
- the reason urgent fencing work was required;
- the type of fencing work carried out; and
- any cost incurred for the fencing work.

2.144 The owner giving the notice to contribute to urgent fencing work can propose that any cost of the fencing work is to be borne other than in equal proportions. If so, the notice must state the proposed proportions.<sup>110</sup>

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<sup>106</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(2)–(3). Section 40 of the Act sets out a procedure that adjoining owners may use if they do not agree on the position of the common boundary for the purposes of carrying out fencing work for a dividing fence. See [2.165] ff below.

<sup>107</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(4)–(5).

<sup>108</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 32(1)–(2).

<sup>109</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 32(3).

<sup>110</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 32(4)–(5).

## Requirement to use the approved form of notice

2.145 The Act requires a notice to contribute to fencing work (and a notice to contribute to urgent fencing work) to be in the approved form.<sup>111</sup> There was no requirement for an approved form of notice under the former *Dividing Fences Act 1953* (Qld). However, public consultation on the draft Bill prior to the introduction of the Act indicated ‘strong community support’ for the inclusion in the Act of a requirement to use a notice in an approved form.<sup>112</sup>

2.146 In addition to the information required to be included in the notice under the Act, the approved forms include information about the legal effect of the notice and about the legal consequences if the adjoining owners cannot reach an agreement within one month. The forms also include a template form of agreement, which can be used by the adjoining owners to record the terms of any agreement they may reach.

2.147 The approved forms are available on the Queensland Government website.<sup>113</sup> They are also available on the QCAT website and the Dispute Resolution Branch (‘DRB’) website.

## Procedure if adjoining owners cannot reach agreement after notice to contribute given

2.148 If, within one month after a notice is given, the adjoining owners have not agreed about the proposed fencing work and their contributions to it (or, in the case of urgent fencing work, their contributions to the fencing work that was carried out), either owner can apply to QCAT for an order under section 35.<sup>114</sup>

2.149 An application to QCAT must be made within two months after a notice is given, and QCAT may make orders about a range of matters, including the fencing work to be carried out and the way in which contributions for the fencing work are to be apportioned, or alternatively that, in the circumstances, no dividing fence is required.<sup>115</sup>

2.150 The Act expressly provides that, except where urgent fencing work is required, neither adjoining owner may carry out fencing work, or arrange to have fencing work carried out, for the dividing fence until they have agreed about the proposed fencing work and their contributions to it.<sup>116</sup> Any fencing work that is carried

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<sup>111</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 30(2), 31(2), 32(3). See *Cordingley v Jarvis* [2012] QCAT 701, in which it was held that QCAT had no jurisdiction to make the orders sought in relation to the construction of a dividing fence where a notice in the approved form had not been served.

<sup>112</sup> Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 21.

<sup>113</sup> The approved forms for the notice to contribute (*Form 2—Notice to Contribute for Fencing Work*) and the notice to contribute for urgent fencing work (*Form 1—Notice to Contribute for Urgent Fencing Work*) are available at Queensland Government, *Notices to neighbours regarding fences and trees* (29 October 2015) <<https://publications.qld.gov.au/dataset/notices-to-neighbours>>.

<sup>114</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 32(6), 35(b), (c), (g).

<sup>115</sup> The timeframes for making an application to QCAT about a dividing fence are discussed in Chapter 4 of this Report.

<sup>116</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(7).

out in the absence of such an agreement is done without authorisation for the purposes of the Act.<sup>117</sup> In that circumstance, QCAT may make an order requiring the owner to remove, modify or rectify the fence.<sup>118</sup>

### Significance of the notice procedure

2.151 In order to enforce an adjoining owner's liability under the Act to contribute to fencing work for a dividing fence, the notice procedures under the Act must be complied with. An important practical point about the Act is that:<sup>119</sup>

an owner who builds a dividing fence without giving the appropriate notice to his neighbour and then reaching agreement or obtaining an order, cannot demand a ... contribution to the cost of the fence. If this situation arises the common law applies and, in the absence of an enforceable [private] agreement or covenant, the adjoining owner will be under no liability.

2.152 An adjoining owner is not liable under the Act to contribute to the cost of any fencing work for a dividing fence carried out before a notice is given, or carried out after a notice is given but before an agreement is reached or, if no agreement is reached, before QCAT has made an order to resolve the dispute.

### Using the notice procedure to resolve dividing fence issues informally

2.153 The Act encourages adjoining owners to attempt to resolve issues about fencing work to avoid a dispute arising.<sup>120</sup> Giving a notice to contribute to an adjoining owner gives rise to a right to make an application to QCAT for an order if, within one month after the notice has been given, the adjoining owners have not reached an agreement about the proposed fencing work and their contributions to it. However, the notice procedure may also be used to assist in the 'informal' resolution of a dividing fence dispute. In this context, it has been suggested that it is prudent to use the statutory notice procedure even if adjoining owners agree about the proposed fencing works:<sup>121</sup>

Even where neighbours reach agreement as to the [proposed fencing works] it is prudent to use the statutory procedure. This will reduce the problem of proving the existence and terms of the agreement and will also make available the statutory remedies provided by the Act if a dispute later arises.

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117 'Authorisation', for a dividing fence, means the adjoining owners have agreed under ch 2 of the Act about fencing work to be carried out for the dividing fence or QCAT has ordered that fencing work be carried out for the dividing fence: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 17.

118 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39.

119 I Wallace, above n 33, 543. See, eg, *Creighton v Skull* [2012] QCAT 652; *Cordingley v Jarvis* [2012] QCAT 701.

120 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 30(1). See also s 7(3).

121 I Wallace, above n 33, 543.

## Discussion Paper

2.154 In the Discussion Paper, the Commission sought submissions on whether there are any changes that should be made to the procedure under the Act for obtaining a contribution to fencing work for a dividing fence.<sup>122</sup> The Commission also asked whether the approved forms for the notice to contribute and the notice to contribute for urgent fencing work are accessible and easy to use.<sup>123</sup>

## Submissions

2.155 The Cairns Regional Council, Queensland Association of Independent Legal Services Inc ('QAILS') and Caxton Legal Centre Inc variously considered the procedure under the Act for obtaining a contribution to fencing work for a dividing fence is 'sensible' and works well.

2.156 The Body Corporate for RSL Centre Surfers Paradise submitted that the procedures for obtaining a contribution to fencing work are not simple or easy to use for members of the public. This respondent commented that aggrieved landowners are required to have a pre-existing knowledge of the Act and be aware of the existence of [the notice procedures] prior to negotiating with their neighbour:

Whilst the approved form may be accessible on the QCAT website, people involved in neighbourhood disputes may not have regard to the legal implications of their dispute and often [are not aware] of the form's existence prior to approaching their neighbour about the fencing matter.

Consequently, aggrieved landowners, who often have already provided their neighbour with ample notice of their fencing concerns, are denied access to having their matters resolved by the tribunal until they have submitted the form and after waiting the mandatory one month time period. This is an unnecessary requirement as often an aggrieved neighbour has already made the adjoining landowner fully aware of the particulars and nature of the fencing dispute prior to seeking tribunal involvement. Also, by requiring aggrieved landowners to comply with this procedural requirement, the Act prevents neighbours from resolving their dispute in a timely manner as it forces the aggrieved landowner, regardless of how much time has already expired, to wait a further month to reach an agreement before bringing any further application.

2.157 This respondent suggested that 'to facilitate the objects of the Act and the purpose of the section', section 31 of the Act should be amended to provide that:

An aggrieved landowner need only satisfy the tribunal that it has brought notice of the fencing work to the attention of its neighbour;

Such notice should be not in approved form, but should be brought to the neighbour's attention and ensure that the neighbour is fully aware of the particulars and nature of the fencing dispute; and

Rather, prior to bringing an application, an aggrieved landowner must be able to show the tribunal that its neighbour was provided with a reasonable period of time in which to comply with their fencing concerns.

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<sup>122</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.61]–[2.66], Question 2-9.

<sup>123</sup> *Ibid* [2.67]–[2.69], Question 2-10.

2.158 One member of the public commented that the procedure for obtaining a contribution to fencing work was ‘unwieldy’, and that the forms are difficult to locate online.<sup>124</sup> This respondent also suggested that a separate procedure and notice form should apply where a contribution is sought for damage to a fence arising from vegetation on an adjoining owner’s land.

2.159 QCAT suggested that the approved forms could be enhanced to improve the accessibility and understanding of the information in the forms, including instructions for use, when they apply and the legal consequences of using them.

2.160 QAILS, Caxton Legal Centre Inc and Strata Community Australia (Qld) submitted that the approved forms are clear and easy to use.

### **The Commission’s view**

2.161 In the Commission’s view, the procedures set out in sections 31 and 32 of the Act for obtaining a contribution to fencing work are generally adequate and appropriate. These notice procedures are relatively simple and offer a streamlined process that covers any type of fencing work.

2.162 The Commission considers that, on balance, it is better to require the use of an approved form than to require only a written notice. Importantly, giving a notice commences the legal process for obtaining a contribution to fencing work for a dividing fence, and notifies the adjoining owner of the obligation to respond to the notice. The approved form requires an applicant to provide information about the relevant matters that are required by the Act to be included in the notice. To ensure that unjust results do not flow from minor errors or omissions in a completed form of notice, substantial compliance with the notice is adequate for the Act.<sup>125</sup>

2.163 The approved forms of notice contain a range of information about the legal requirements of the Act and the application process. In light of the general philosophy of the Act to encourage neighbours to resolve dividing fence issues informally,<sup>126</sup> it might also be useful if the approved forms included information about the role of assisted dispute resolution processes and the availability of free assisted dispute resolution services offered by DRB.

2.164 Finally, the Commission considers that issues in relation to community awareness of the notice procedures and how to access and use the approved forms are best addressed through the provision of public education and information in relation to the Act. The Commission has made suggestions about improving public education and awareness about the Act in Chapter 6 of this Report.

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<sup>124</sup> Submission 47.

<sup>125</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 91.

<sup>126</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(3), 30(1).

## Recommendation

**2-4 The Director-General of the Department of Justice and Attorney-General should give consideration to including information about the role of assisted dispute resolution processes and the availability of free assisted dispute resolution services offered by the Dispute Resolution Branch in the forms approved under the Act for a Notice to contribute to fencing work and a Notice to contribute to urgent fencing work.**

## PROCEDURE IF COMMON BOUNDARY NOT AGREED

2.165 Part 6 of Chapter 2 of the Act (section 40) sets out a procedure that adjoining owners can use to resolve a dispute about the position of the common boundary in the context of carrying out fencing work for a dividing fence, without the need to have recourse to QCAT.

2.166 The procedure requires only one boundary survey to be undertaken, and provides for the payment of the costs of the survey.

2.167 The survey must be conducted by a person who is a 'cadastral surveyor'. For the purposes of section 40, a 'cadastral surveyor' is a person who is registered as a cadastral surveyor under the *Surveyors Act 2003* (Qld).<sup>127</sup>

## Giving notice and engaging a surveyor to define the boundary

2.168 An owner can initiate the procedure by giving a written notice to the adjoining owner of the owner's intention to have the common boundary surveyed by a cadastral surveyor.<sup>128</sup>

2.169 Within one month of receiving the notice, the adjoining owner can give written advice of the common boundary to the owner who gave the notice or engage a cadastral surveyor to define the common boundary.<sup>129</sup>

2.170 If, after one month from the date the notice was given, the adjoining owner has not had the common boundary defined, the owner who gave the notice can engage a cadastral surveyor to define the common boundary.<sup>130</sup>

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<sup>127</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(7). A 'cadastral surveyor' is a surveyor who holds a registration endorsement for carrying out cadastral surveys: *Surveyors Act 2003* (Qld) sch 3 (definition of 'cadastral surveyor'). A 'registration endorsement' means an endorsement on a registrant's registration showing that the registrant has the relevant competency to carry out a particular type of survey or carry on a business providing surveying services: sch 3 (definition of 'registration endorsement').

<sup>128</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(2).

<sup>129</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(3).

<sup>130</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(4).

## Apportionment of survey costs

2.171 Generally, the reasonable costs of the survey are to be paid equally by the owners,<sup>131</sup> but there is an exception. If the adjoining owner advised the location of the common boundary, but the owner who gave the notice did not agree and had the boundary surveyed, and the survey shows that the location of the boundary is in about the same position as the adjoining owner advised, the adjoining owner is not required to contribute to the cost of the survey. In that case, the owner who gave the notice is required to bear the full cost.<sup>132</sup>

## Discussion Paper

2.172 In the Discussion Paper, the Commission sought submissions on whether section 40 of the Act provides a fair process for resolving disputes about the location of the common boundary and apportioning the costs of a survey to define the boundary.<sup>133</sup> The Commission also asked whether there are any changes that could be made to improve the procedure.<sup>134</sup>

## Submissions

2.173 The submissions that addressed this issue considered that the procedure set out in section 40 is generally satisfactory.<sup>135</sup> However, several submissions also suggested that the procedure could be improved.

2.174 The Spatial Industries Business Association submitted that section 40 may suggest that a survey by a cadastral surveyor is only warranted if the adjoining owners disagree on the position of the common boundary. It suggested redrafting section 40 so that it applies 'where the position for a dividing fence is not agreed, rather than where a common boundary is not agreed'.

2.175 The Townsville Community Legal Service Inc and the Spatial Industries Business Association considered that the procedure for recovering the survey costs is not sufficiently clear.<sup>136</sup>

2.176 QAILS commented that some adjoining owners consider the requirement to pay the costs of a survey to be unfair, even where it is found that the existing fence is not on the boundary.

2.177 The Queensland Spatial and Surveying Association suggested amending the definition of 'cadastral surveyor' in section 40 to specifically include a registered

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<sup>131</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(6)(a). If one of the owners pays the entire cost, the half payable by the other adjoining owner is recoverable as a debt by the first adjoining owner: s 40(6)(b).

<sup>132</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 40(5).

<sup>133</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.70]–[2.74], Question 2-11.

<sup>134</sup> *Ibid* Question 2-12.

<sup>135</sup> Submissions 20, 49, 52, 55, 57.

<sup>136</sup> Submissions 52, 55.



surveyor, who is ‘authorised to carry out cadastral surveys under the supervision of a cadastral surveyor’, to conduct a boundary survey.

### The Commission’s view

2.178 In the Commission’s view, section 40 of the Act provides a fair and equitable process for resolving disputes about the location of the common boundary and apportioning the costs of a survey to define the boundary.

2.179 The Commission notes that the *Surveyors Act 2003* (Qld) deals with the registration and regulation of surveyors, and surveys. Only certain persons are authorised to carry out cadastral surveys.<sup>137</sup> The Commission considers that the definition of ‘cadastral surveyor’ in section 40(7) should be amended to refer to ‘a person who is authorised to carry out a cadastral survey under the *Surveyors Act 2003* (Qld)’.

2.180 Some respondents commented that section 40 was difficult to understand. To address that issue, the Commission recommends that section 40 be redrafted so that it more clearly sets out the rights and responsibilities of the owner who gives the notice and the owner who receives the notice at each stage of the procedure.

### Recommendations

**2-5 The definition of ‘cadastral surveyor’ in section 40(7) of the Act should be amended to refer to ‘a person who is authorised to carry out a cadastral survey under the *Surveyors Act 2003* (Qld)’.**

**2-6 Section 40 of the Act should be redrafted so that it more clearly sets out the rights and responsibilities of the owner who gives the notice and the owner who receives the notice at each stage of the procedure.**

### QCAT JURISDICTION AND POWERS

2.181 Chapter 2 of the Act gives QCAT jurisdiction to hear and decide ‘any matter arising under [that Chapter] about a dividing fence’.<sup>138</sup>

<sup>137</sup> In Queensland, a person must not carry out a cadastral survey unless the person is a cadastral surveyor, or a surveyor, surveying graduate or surveying associate carrying out the survey under the supervision of a cadastral surveyor who, expressly or impliedly, accepts responsibility for the survey’s survey quality: *Surveyors Act 2003* (Qld) s 75(1). The Surveyors Board of Queensland keeps a Register of Surveyors who have been assessed as competent and are registered to perform cadastral surveys: Surveyors Board of Queensland, *Cadastral Surveyor* <<http://sbq.com.au/public/about-surveyors/cadastral-surveyor/>>. As at 30 June 2015, there were 793 registered surveyors in Queensland. Of these, 545 had a cadastral endorsement and 239 had a consulting cadastral endorsement: Surveyors Board of Queensland, *Annual Report 2014–2015* 10.

<sup>138</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(1). QCAT’s processes for dividing fence disputes are discussed in Chapter 4 of this Report.

## Orders about carrying out fencing work

2.182 Section 35(1) of the Act provides that QCAT may, for an application in relation to fencing work for a dividing fence, decide and order any one or more of the following:

- (a) the line on which the fencing work is to be carried out, whether or not that line is on the common boundary of the adjoining land;
- (b) the fencing work to be carried out, including the kind of dividing fence involved;
- (c) the way in which contributions for the fencing work are to be apportioned or reapportioned or the amount that each adjoining owner is liable to pay for the fencing work;
- (d) the part of the dividing fence to be constructed or repaired by either adjoining owner;
- (e) the time by which the fencing work is to be carried out;
- (f) any other work to be carried out that is necessary to carry out the fencing work ordered under [section 35] including work for a retaining wall;
- (g) that, in the circumstances, no dividing fence is required for all or part of the boundary of the adjoining lands;
- (h) that a fence has been used, or could reasonably be used, as a dividing fence under section 15 [of the Act];<sup>139</sup>
- (i) the amount of compensation payable to an adjoining owner for damage or destruction to a dividing fence caused by another adjoining owner or a person mentioned in section 26(1)(b) [of the Act];<sup>140</sup>
- (j) that an adjoining owner remove a thing attached to a dividing fence and restore the dividing fence; and
- (k) the amount of compensation payable to an adjoining owner for the removal of a fence under section 33(3) [of the Act].<sup>141</sup> (notes added)

2.183 Section 35(2) provides that the occupation of land on either side of a dividing fence, as a result of an order made by QCAT that fencing work is to be carried out on a line other than on the common boundary of the adjoining lands, does not affect the title to, or possession of, the land.

<sup>139</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 15(2)(b), which provides that QCAT may make that decision in relation to owners of agricultural or pastoral land on either side of a road (as 'adjoining owners').

<sup>140</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 26 is discussed at [2.117] above. A person mentioned in s 26(1)(b) is a person who has entered an owner's land with the owner's express consent and by a negligent or deliberate act or omission damaged or destroyed the dividing fence.

<sup>141</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(3) is discussed at [2.198] below.

## Order for work for a retaining wall

2.184 A retaining wall is defined under the Act as ‘a structure that supports excavated or filled earth’.<sup>142</sup>

2.185 Chapter 2 of the Act does not generally deal with adjoining owners’ disputes about retaining walls. The definition of ‘fence’ in the Act excludes a retaining wall.<sup>143</sup> As a consequence, retaining walls are not considered to be ‘dividing fences’ for the purposes of Chapter 2 of the Act.

2.186 However, Chapter 2 of the Act also addresses the practical reality that, in some instances, to fully resolve a dispute about fencing work for a dividing fence (which is ordinarily built on the common boundary of adjoining land), it may be necessary to carry out work on a retaining wall.

2.187 To facilitate the expeditious resolution of such dividing fence disputes, section 35(1)(f) of the Act gives QCAT a limited power to deal with retaining walls. It provides that QCAT may, for an application in relation to fencing work for a dividing fence, decide and order ‘any other work to be carried out that is necessary to carry out the fencing work ordered under [section 35] including work for a retaining wall’.<sup>144</sup> The orders that may be made under section 35(1)(f) also encompass other types of work necessary to carry out fencing work such as drainage work.<sup>145</sup>

2.188 Chapter 2 of the Act does not otherwise confer power on QCAT to make an order to resolve a dispute about a retaining wall.<sup>146</sup> It also does not affect the law about retaining walls or rights of support, including easements of support.<sup>147</sup> This preserves a person’s obligations, rights and liabilities under statute and the common law in relation to retaining walls.

## Discussion Paper

2.189 In the Discussion Paper, the Commission sought submissions on whether the powers conferred by section 35(1) of the Act on QCAT require any amendment.<sup>148</sup> The Commission further asked whether any amendments should be made to the power conferred by section 35(1)(f) of the Act on QCAT to order work

<sup>142</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of ‘retaining wall’).

<sup>143</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 11(2). See *Neighbourhood Disputes Act Discussion Paper* (2015) [2.85], for a general discussion of the reasons for this distinction.

<sup>144</sup> An order of this kind may 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’: Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 23.

<sup>145</sup> *Ibid.*

<sup>146</sup> See, eg, *Jones v Budd* [2015] QCATA 117, in which the QCAT Appeal Tribunal observed, at [17], that ‘[I]f the fence was not a sufficient fence, and the tribunal was minded to make an order about it, then it could also have made an order about the retaining wall to the extent necessary to support the new fence. By conceding that the issue was the retaining wall and not the fence, Mr Jones excluded the tribunal’s jurisdiction to make the orders he sought’.

<sup>147</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 10(1)(c).

<sup>148</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.77]–[2.78], Question 2-13.

for a retaining wall that is necessary to carry out fencing work for a dividing fence ordered under section 35.<sup>149</sup>

### **Submissions**

2.190 QCAT submitted that section 35(1) should be amended to include a specific power to order a survey:

Matters still come to QCAT where the common boundary is in dispute and QCAT relies on section 35(1)(a) to order a survey be carried out; generally QCAT will order the parties share the cost but has discretion to apportion the cost differently.

A specific power in section 35 to order a survey may be useful.

2.191 The Chief Magistrate of Queensland considered that section 35(1)(f) adequately provides a head of power for QCAT to make orders where a dispute about a dividing fence cannot be resolved without an ancillary order being made for work for a retaining wall. The Chief Magistrate also commented, however, that some dividing fence disputes which involve ancillary work for a retaining wall may be unable to be heard in QCAT's minor civil dispute jurisdiction because they exceed the monetary limit for that jurisdiction:

there may well be scenarios where there is a fencing dispute involving a retaining wall which is collapsing. The cost of rectification to the retaining wall to enable proper support of the dividing fence could easily exceed \$25 000, and thus remove the matter from QCAT's jurisdiction. Perhaps where the state of the retaining wall and the dividing fence are intricately connected but the combined cost would exceed \$25 000, QCAT could be given jurisdiction to say \$25 000 for each of the fence and the retaining wall. This is obviously a matter of policy for consideration by Government.

2.192 QCAT submitted that section 35(1) should be amended to include a broad 'catch-all' power, noting that such a power 'would be rarely used but would be of assistance in unusual circumstances'.

### **The Commission's view**

2.193 In the Commission's view, the existing powers conferred on QCAT by section 35(1) are generally sufficient and appropriate to deal with disputes about fencing work for a dividing fence.

2.194 Section 35(1) of the Act includes a power to order a survey.<sup>150</sup> However, to remove any doubt, the Commission considers section 35 of the Act should be amended to include a new provision to the effect that, in making an order under section 35(1)(a) about the line on which the fencing works are to be carried out or the line that is the common boundary of adjoining land, QCAT may require that the common boundary be defined by a person who is authorised to carry out a cadastral survey under the *Surveyors Act 2003* (Qld).

<sup>149</sup> Ibid [2.79]–[2.89], Question 2-14.

<sup>150</sup> See, eg, s 35(1)(b), which empowers QCAT to make an order about the 'fencing work to be carried out' for a dividing fence. This head of power includes a power to survey, because s 16(b) of the Act defines 'fencing work' to include a survey.

2.195 If a claim for a dividing fence dispute is for more than \$25 000, the claim will fall within QCAT's general civil jurisdiction.<sup>151</sup> The Commission considers that the administrative arrangements that support QCAT's jurisdiction to hear such disputes are matters that are best dealt with by it.

2.196 Finally, the Commission does not consider that section 35(1) should be amended to add a provision conferring a 'catch-all' power. Section 35(1) already confers broad and extensive powers on QCAT, including a power to order any other work to be carried out that is necessary to carry out fencing work ordered under that section.<sup>152</sup>

### **Recommendation**

**2-7 Section 35 of the Act should be amended to add a provision to the effect that, in making an order under section 35(1)(a) about the line on which the fencing works are to be carried out or the line that is the common boundary of adjoining land, QCAT may require that the common boundary be defined by a person who is authorised to carry out a cadastral survey under the *Surveyors Act 2003 (Qld)*.**

### **Orders about the removal of a second fence**

2.197 The Act empowers QCAT, under section 33(2), to decide which of two or more fences on the boundary of adjoining land is the dividing fence and to order the removal of the other fence or fences. This enables QCAT to deal with the situation where adjoining owners have each built a boundary fence to their own specifications.

2.198 Section 33(3) provides that, if there is a fence, other than a dividing fence, on adjoining land, QCAT may order that it be removed if QCAT considers its removal is necessary to allow fencing work for a dividing fence. If QCAT orders the removal of the adjoining owner's fence, it may also order the other owner to pay compensation to the adjoining owner.<sup>153</sup>

### **Discussion Paper**

2.199 In the Discussion Paper, the Commission sought submissions on whether any changes should be made to section 33(2) and (3) of the Act.<sup>154</sup>

<sup>151</sup> A claim that is the subject of a dividing fence dispute under ch 2 of the Act, and is for an amount not more than \$25 000, is heard in QCAT's 'minor civil disputes' jurisdiction: *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ss 10(1)(a), 11–14, sch 3 (definitions of 'minor civil dispute' para 1(f) and 'prescribed amount'). This is part of QCAT's original jurisdiction to hear and decide a minor civil dispute. See also *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ss 10(1)(b), 15–16, in relation to the exercise of original jurisdiction conferred on QCAT by s 33(1) of the Act to decide a matter in the first instance.

<sup>152</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 35(1)(f).

<sup>153</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 35(1)(k).

<sup>154</sup> *Neighbourhood Disputes Act Discussion Paper (2015)* [2.90]–[2.91], Question 2-15.

## **Submissions**

2.200 Caxton Legal Centre Inc commented that section 33 is useful for dealing with ‘two fence scenarios’ which, although not particularly common, are still problematic:

Over the years we have encountered numerous clients who have chosen to build a second fence within the boundary of their own land, at their own cost, because they wanted a more substantial fence than the basic existing dividing fence. There have been many different reasons for such a choice, including reasons of privacy, aesthetics, animal-control and so on.

Sometimes this has suited both neighbours and there have been no problems until new neighbours have moved in. On other occasions this situation has arisen because neighbours have been worried about consenting to a new expensive fence, which could potentially involve much greater ongoing maintenance costs than, say, a pre-existing basic chain wire fence. This is a particular issue for homeowners on pensions and low incomes. In cases like this, some neighbours simply decide to go ahead and build their own fence to their taste within their own property.

We have seen problems arise when, after a neighbour has paid to build a particular fence within their own land parallel to the existing dividing fence, the other neighbour has unilaterally torn down the existing dividing fence — ostensibly in order to create additional amenity, such as additional space for driveways/yards etc.

In other cases where two parallel fences are co-located on and near the boundary, problems have arisen when the space between 2 fences has been neglected and has become overgrown with weeds/long grass, or has been filled with rubbish etc.

Problems have also been encountered in these ‘two-fence scenarios’ when repair to the existing ‘dividing fence’ is required and access has been a problem because of the second fence.

2.201 QCAT, the Cairns Regional Council and a member of the public<sup>155</sup> considered that section 33(2) and 33(3) of the Act are both appropriate in their current form, and do not need any amendment.

2.202 The Townsville Community Legal Service Inc considered that section 33(3) deals appropriately with attempts by adjoining owners to ‘frustrate’ the objects of the Act. This respondent also submitted that where one owner builds a fence on their own land creating a no man’s land, and QCAT exercises its powers to order the removal of the fence, QCAT should take the owner’s conduct into account when deciding whether to make an order for compensation for the removal of the fence:

The interests of justice must be served ... and the conduct of adjoining owners [is a relevant factor for QCAT to consider when determining whether to make an order for compensation under section 35(1)(k)].

2.203 Caxton Legal Centre Inc submitted that section 33(3) should be amended to provide that, if QCAT orders the removal of a fence located on an adjoining owner’s land, the fence must also be restored to the same standard it was in before

its removal and within a stated timeframe, unless, given all the circumstances, it is more appropriate to order compensation.

2.204 The Ipswich City Council and the LGAQ submitted that, if QCAT has ordered the removal of a fence on adjoining land under section 33(3), it should also be empowered to order the re-installation of the fence.

### ***The Commission's view***

2.205 Sections 33(2) and 33(3) of the Act empower QCAT to make orders to address problems that may arise where a second fence is built on the common boundary or inside the boundary of adjoining land. In the Commission's view, the powers conferred by those provisions are appropriate and do not require any amendment.

2.206 The Commission does not consider that the Act should be amended to empower QCAT to order the reinstallation of a fence which it has ordered to be removed under section 33(3). The purpose of section 33(3) is to give QCAT the power to order the removal of a second fence where the fence is preventing or hindering fencing work (for example, maintenance work) for a dividing fence from being carried out. The Commission considers that QCAT's power to order an owner to pay compensation to the adjoining owner if it orders the removal of the adjoining owner's fence is an appropriate way of dealing with the issue.

### **Sufficient dividing fence factors for the consideration of QCAT**

2.207 Section 36 provides that, in deciding an application about whether a dividing fence is a sufficient dividing fence, QCAT may consider all the circumstances of the application, including the following:

- (a) any existing or previously existing dividing fence;
- (b) the purposes for which the 2 parcels of land consisting of the adjoining land are used, or intended to be used;
- (c) the kind of dividing fence normally used in the area;
- (d) whether the dividing fence is capable of being maintained by the adjoining owners;
- (e) any policy adopted, or local law made, in relation to dividing fences by a local government for the area where either parcel of land is situated;
- (f) any requirement for fencing work in a development approval for the land of either adjoining owner; and
- (g) any written agreement made between the adjoining owners for the purposes of [Chapter 2 of the Act].

2.208 The existing list of factors in section 36 is non-exhaustive, which means that other factors not listed may also be relevant.

2.209 In the Explanatory Notes to the Bill, it was stated that:<sup>156</sup>

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

2.210 The Explanatory Notes to the Bill also stated that the factor 'whether the dividing fence is capable of being maintained by the adjoining owners' is intended to refer to an adjoining owner's physical and financial capacity to maintain the fence.<sup>157</sup> If that is the case, an adjoining owner's capacity to maintain a dividing fence may operate as a constraint on what constitutes a sufficient dividing fence.

2.211 The existing list of factors does not specifically refer to privacy or security. Those matters were considered to be matters of personal preference to be negotiated between adjoining owners:<sup>158</sup>

There are differences in the expectations of the community about the purpose of a dividing fence. In compelling financial contribution, the [Neighbourhood Disputes Resolution Bill] seeks to force contribution to the minimum necessary to divide. Where an old serviceable chain wire fence exists, it is not intended that it should be replaced. Factors such as a desire for privacy or security need to be issues of negotiation between neighbours, not forced contribution.

2.212 In contrast, the Victorian dividing fences legislation requires the court to consider 'the reasonable privacy concerns of the owners of the adjoining lands'.<sup>159</sup>

2.213 Similarly, the NSW Act lists 'the privacy or other concerns of the adjoining land owners' as a factor for the court or tribunal to consider.<sup>160</sup> In its 1988 review of dividing fences legislation then in force in NSW, the NSW Law Reform Commission noted that one of the main purposes for which fences are built in urban areas is to secure privacy for adjoining owners.<sup>161</sup>

### **Discussion Paper**

2.214 In the Discussion Paper, the Commission asked whether any changes should be made to the existing list of factors in section 36 of the Act.<sup>162</sup>

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<sup>156</sup> Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 23.

<sup>157</sup> Ibid.

<sup>158</sup> Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 4–5.

<sup>159</sup> *Fences Act 1968* (Vic) s 6(1)(c).

<sup>160</sup> *Dividing Fences Act 1991* (NSW) s 4(c).

<sup>161</sup> NSW Law Reform Commission, *Community Law Reform Program: Dividing Fences*, Report No 59 (1988) [3.26].

<sup>162</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.92]–[2.95], Question 2-16.



## **Submissions**

2.215 The Cairns Regional Council submitted that the existing list of factors is appropriate.

2.216 Caxton Legal Centre Inc suggested that the nature of an existing or previously constructed fence should be given particular weight by QCAT in its consideration of what sort of fence should be ordered.

2.217 Several submissions commented on the factor 'whether the dividing fence is capable of being maintained by the adjoining owners'.

2.218 Caxton Legal Centre Inc commented that:

[Section 36(d)] is critically important for our pensioner home-owning clients who may be faced with a fencing dispute. These clients often have very limited resources and cannot pay costs for extravagant fences which go beyond the function of a basic dividing fence.

2.219 The Ipswich City Council and the LGAQ considered that the Act should give more guidance as to the application of section 36(d):

Further clarification of [the context in which the term 'capable' applies] may assist eg, capable in terms of the structure? Access? Ability of the adjoining owners?

2.220 The Townsville Community Legal Service Inc, noting that solid fencing styles can block or divert breezes, suggested that the effect of a dividing fence on ventilation is another factor relevant to QCAT's consideration.

2.221 DNRM suggested that the list of factors in section 36 should be expanded to include 'requirements in relation to cluster boundary fences in rural areas':

Leases, licences and permits over State land used for agriculture, grazing and pastoral purposes may at times be subject to conditions relating to the erection or maintenance of fences under the *Land Act 1994*. The sufficiency of the dividing fence is an issue for some landholders in pastoral areas (eg, erecting a normal domestic livestock fence versus a more robust cluster boundary fence designed to limit the destruction of pastures by wild dogs and kangaroos).

2.222 QCAT suggested amending section 36 to specifically refer to development covenants, submitting that they do not fall squarely within section 36(e) or 36(f).

2.223 Strata Community Australia (Qld) submitted that section 36 should be amended to also refer to 'any by-laws made by a body corporate that apply to the land':

Many community titles schemes and integrated resorts are subject to by-laws and other rules that require developments to be designed and built (including dividing fences) to a certain standard or finish.

2.224 The Townsville Community Legal Service Inc considered that 'heritage factors' might also be relevant. It suggested that:

It may be appropriate for QCAT to consider evidence from local authorities about suitability quite aside from the parties' own views. QCAT could require the parties to contact local authorities and seek their advice about such matters.

2.225 Caxton Legal Centre Inc suggested adding ‘the conduct of adjoining owners and previous owners’ to the list of factors set out in section 36.

### ***The Commission’s view***

2.226 Section 36 provides that, in deciding an application about whether a dividing fence is a sufficient dividing fence, QCAT may consider ‘all the circumstances of the application’. It also refers the tribunal to a list of specific factors it may take into account. The Commission considers this overall approach is appropriate. As the fencing requirements of adjoining owners may vary considerably, this approach ensures that QCAT has flexibility while also directing its attention to specific factors that may be generally relevant for it to consider.

2.227 The Commission also considers that the existing list of factors mentioned in section 36(a)–(g) is appropriate and should be retained.

2.228 The Commission further considers that section 36 should be amended to add two new factors.

2.229 The first additional factor is ‘the privacy concerns of the adjoining owners’. In the Commission’s view, privacy concerns are a common consideration for adjoining owners in residential areas.

2.230 The second additional factor is ‘the existence of any agreements or covenants that may affect either parcel of adjoining land’. This is broad enough to cover an agreement about cluster fencing and a fencing requirement in a development covenant.

2.231 Finally, the Commission notes that it is not necessary to attempt to list every possible circumstance that may be relevant to a particular application because section 36 provides that QCAT may consider ‘all the circumstances of an application’.

### ***Recommendation***

**2-8 Section 36 of the Act should be amended to add ‘the privacy concerns of the adjoining owners’ and ‘the existence of any agreements or covenants that may affect either parcel of adjoining land’ to the existing list of factors mentioned in that section.**

### **Orders dealing with unauthorised construction or demolition**

2.232 Part 5 of Chapter 2 of the Act empowers QCAT to make orders to deal with the construction or demolition of a dividing fence without ‘authorisation’.<sup>163</sup> This situation might arise, for example, where an adjoining owner constructs a new

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*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ch 2 pt 5 (ss 38–39). ‘Authorisation’, for a dividing fence, means the adjoining owners have agreed under ch 2 of the Act about fencing work to be carried out for the dividing fence or QCAT has ordered that fencing work be carried out for the dividing fence: s 17. The definition of ‘fencing work’, for a dividing fence, includes the construction, replacement or removal of the dividing fence: s 16(a).

dividing fence (which may or may not involve the demolition of an existing dividing fence) without seeking any agreement or a contribution from the adjoining owner.

2.233 If an owner believes on reasonable grounds that an adjoining owner intends to construct or demolish a dividing fence without authorisation, the owner can apply to QCAT under section 38 for an order to prevent the adjoining owner from constructing or demolishing the fence.<sup>164</sup> The owner is required to give the adjoining owner a copy of the application at least one day before it is heard.<sup>165</sup> This short period of notice reflects the urgent nature of the application, particularly where the fence is being demolished without permission. The aim is to provide 'a fast and accessible' remedy to halt work on the fence so that 'constructive negotiations can [then] take place between the parties'.<sup>166</sup> Consistent with that approach, such applications are generally listed for hearing without first being referred for mediation by QCAT.<sup>167</sup>

2.234 If an owner has constructed or demolished a dividing fence without authorisation, an adjoining owner can apply to QCAT under section 39 for an order requiring the owner to remove, modify or rectify the fence.<sup>168</sup> The adjoining owner must give the owner a copy of the application at least three days before the application is heard.<sup>169</sup> QCAT can also order the owner to bear the costs of the work involved.<sup>170</sup>

### **Discussion Paper**

2.235 In the Discussion Paper, the Commission sought submissions as to whether the procedures set out in sections 38 and 39 of the Act are sufficient to deal with the construction or demolition of a dividing fence without authorisation. The Commission also asked whether those procedures could be improved.<sup>171</sup>

### **Submissions**

2.236 QCAT considered that sections 38 and 39 are sufficient to deal with the unauthorised construction or demolition of a dividing fence.

2.237 The Cairns Regional Council suggested streamlining the process under section 38 and 39 by extending the timeframe in which to make an application under either provision to five days. One member of the public commented that the

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<sup>164</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 38(1), (3).

<sup>165</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 38(2).

<sup>166</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2292 (PT Lucas, Deputy Premier, Attorney-General, Minister for Local Government and Special Minister of State).

<sup>167</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 — Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011.

<sup>168</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39(1), (3)(a).

<sup>169</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39(2).

<sup>170</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 39(3)(b).

<sup>171</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.99]–[2.101], Question 2-17.

requirement in section 38 to give a copy of an application at least one day before the application is heard seemed ‘very short’.<sup>172</sup>

2.238 Caxton Legal Centre Inc commented that there needs to be a ‘much faster mechanism’ for obtaining urgent orders for the unauthorised construction or demolition of dividing fences.

Sections 38 and 39 set out a process for dealing with the unauthorised construction or demolition of a [dividing] fence. In these cases, urgent orders are often required to prevent fencing dispute problems from escalating. Unfortunately, obtaining relevant orders still takes time, given that the application must be served at least 1 day before a hearing.

There are certain situations where urgent fencing orders are required immediately and ... the current process can be too slow. Our clients sometimes need to be able to get immediate intervention when a neighbour unilaterally begins to demolish a fence without authorisation.

2.239 The Townsville Community Legal Service Inc observed that section 39 is silent as to the issue of obtaining a contribution from an adjoining owner when QCAT exercises its discretion not to order the removal, modification or rectification of an ‘unauthorised’ dividing fence.

### **The Commission’s view**

2.240 The Commission considers that, subject to one recommended amendment to section 38, QCAT’s powers under sections 38 and 39 to deal with the construction or demolition of a dividing fence without authorisation are generally adequate and appropriate.

2.241 Section 38(2) requires an owner to give the adjoining owner a copy of an application made under section 38(1) at least one day before the application is heard. QCAT has no power under section 38 to expedite the hearing of the application if, for example, the construction or demolition of a dividing fence is imminent. The Commission considers that section 38 should be amended to include a new subsection to the effect that, despite non-compliance with section 38(2), QCAT may make an order under section 38(1) if it considers that it is necessary to do so to prevent the adjoining owner from constructing or demolishing the dividing fence.

2.242 The Commission notes the submission of the Townsville Community Legal Service Inc as to obtaining a contribution from an adjoining owner for an ‘unauthorised’ dividing fence. If, on an application under section 39, QCAT finds that a dividing fence was constructed or modified without authorisation, it may nevertheless decide that, in the circumstances, it is appropriate not to order its removal, modification or rectification.<sup>173</sup> If that situation arises, there is no head of power under section 39 enabling QCAT to apportion the costs of the dividing fence between the owner and the adjoining owner. Under the legislative scheme established by Chapter 2 of the Act, unless the fencing work is urgent, an owner who wishes to require the adjoining owner to contribute towards the cost of carrying out

<sup>172</sup> Submission 49.

<sup>173</sup> See, eg, *Creighton v Skull* [2012] QCAT 652.

fencing work must first give a notice to contribute to the adjoining owner, and either reach an agreement about carrying out the fencing work and the contributions to it, or obtain an order from QCAT, before carrying out the fencing work.

### **Recommendation**

**2-9 Section 38 of the Act should be amended to include a new subsection to the effect that, despite non-compliance with section 38(2), QCAT may make an order under section 38(1) if it considers that it is necessary to do so to prevent the adjoining owner from constructing or demolishing the dividing fence.**

## **DISPUTES ABOUT RETAINING WALLS BUILT ON NEIGHBOURING PROPERTIES' BOUNDARIES**

2.243 The terms of reference require the Commission to consider 'whether the scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries'.

2.244 A retaining wall is defined in the Act as a structure that supports excavated or filled (built up) earth.<sup>174</sup> An owner of land may alter the level of the land and, in so doing, affect the adjoining land. In that case, a retaining wall or other measure may be required to support the excavated or filled earth.

2.245 In Queensland, the laws relating to retaining walls are contained in statute and the common law.<sup>175</sup>

2.246 Section 179 of the *Property Law Act 1979* (Qld) attaches to land a statutory obligation not to do anything on or below the land that would withdraw support from any other land or from any building, structure or erection placed on or below it. As a result, an owner of land who excavates land (lowering its ground level) and builds a retaining wall or other measure to support the adjoining land must ensure that the wall or other measure is structurally adequate to prevent the subsidence of the adjoining land, or the collapse of the buildings or structures on it. An infringement of s 179 of the *Property Law Act 1974* (Qld) is actionable in nuisance. An action in nuisance may also lie under the common law if an owner removes support from an adjoining owner's land, causing the land to subside.<sup>176</sup>

2.247 Filling land (raising its ground level) without providing a structurally adequate retaining wall or other measure may result in soil falling onto the adjoining land, and may also cause damage to buildings and other structures on it. In that

<sup>174</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'retaining wall').

<sup>175</sup> See also *Neighbourhood Disputes Act Discussion Paper* (2015) [2.80]–[2.84], for a more detailed discussion of the legal aspects of retaining walls.

<sup>176</sup> *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; *Pantalone v Alouie* (1989) 18 NSWLR 119, 129. An action in nuisance under the common law extends only to the support of land in its natural state: *Sutherland Shire Council v Becker* (2006) 150 LGERA 184, [3]–[9]; *Hicks v Lake Macquarie City Council* (1992) 77 LGRA 261; and does not extend to any structures on the land: *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2011) 243 CLR 558.

situation, the owner who filled land is liable at common law in trespass, and possibly in nuisance where the inconvenience to the adjoining owner is unreasonable and substantial.<sup>177</sup>

2.248 The construction of a retaining wall must also comply with any relevant requirements in the *Building Act 1975* (Qld), the *Sustainable Planning Act 2009* (Qld) and local government laws and planning schemes. These requirements may include obtaining any necessary approvals.<sup>178</sup>

2.249 As mentioned earlier, Chapter 2 of the Act does not generally deal with neighbours' disputes about retaining walls. Dividing fences and retaining walls serve different purposes and give rise to different legal rights and obligations.

2.250 Although Chapter 2 of the Act does not generally enable QCAT to resolve disputes about retaining walls, section 35(1)(f) gives QCAT, on an application in relation to fencing work for a dividing fence (which is ordinarily built on the common boundary of adjoining land), a limited power to order work for a retaining wall where it is necessary to carry out fencing work ordered under that section for a dividing fence.<sup>179</sup>

## Submissions

2.251 Several submissions that addressed this term of reference highlighted the contentious and complex nature of retaining wall disputes. A number of respondents, including several local governments, favoured expanding the scope of the Act to include disputes about retaining walls built on neighbouring properties' boundaries.<sup>180</sup> Several respondents did not, however, support such an expansion.<sup>181</sup> In particular, the Queensland Law Society commented on the inherent difficulty of attempting to draft rules of general application in relation to retaining walls.

## The Commission's view

2.252 The Commission agrees that the issue of disputes between neighbours about retaining walls is a significant area of concern. However, for various reasons, the Commission does not consider that the Act should generally be expanded to include disputes about retaining walls built on neighbouring properties' boundaries beyond the limited jurisdiction conferred on QCAT under section 35(1)(f) to order work for a retaining wall where it is necessary to carry out fencing work ordered under that section for a dividing fence.

<sup>177</sup> See: Law Reform Commission of Western Australia, *Project No 44: Alteration of Ground Levels*, Report (1986) [4.1]; *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11, [105], [107]–[108]; *Levet v Dalla* (2012) ACTLR 23; *Carroll v Azolia Pty Ltd* [1998] ANZ ConvR 485; *Sutherland Shire Council v Becker* (2006) 150 LGERA 184.

<sup>178</sup> See *Building Act 1975* (Qld) ss 20–21, ch 4 pt 5 div 1; *Building Regulation 2006* (Qld) s 4, sch 1 item 3. For local government planning schemes, see Department of Infrastructure, Local Government and Planning, *Local government planning schemes* (3 November 2015) <<http://www.statedevelopment.qld.gov.au/local-area-planning/local-government-planning-schemes.html>>.

<sup>179</sup> The scope of QCAT's power to make an order under s 35(1)(f) is considered at [2.184] ff above.

<sup>180</sup> Submissions 14, 16, 33, 34, 37, 39, 49, 52, 55, 56.

<sup>181</sup> Submissions 43, 46, 58.

2.253 First, the Commission's review is limited by the terms of reference to a consideration of whether the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries. Many retaining walls are built off the boundary so that they are positioned wholly within the boundary of one owner's land. Retaining walls built a short distance off the boundary may nevertheless constitute a danger or a nuisance to an adjoining owner.

2.254 A consistent and principled approach would require a consideration of disputes about retaining walls whether or not they are located on the common boundary. If a statutory remedy that applied only to retaining walls on the common boundary were to be developed, it would not sufficiently resolve the wider and more complex legal and technical issues that often underlie disputes about retaining walls, and may have unintended consequences.

2.255 Second, a consideration of the law relating to retaining walls would also require an examination of the wider context in which those laws may apply, which is beyond the scope of this statutory review of the Act.<sup>182</sup>

2.256 In NSW and Western Australia, the rights and obligations of adjoining owners in relation to retaining walls have been considered in the context of a wider examination of the laws dealing with the alteration of ground levels and the consequences of making such alterations.<sup>183</sup> The Commission is of the view that a consideration of whether it is necessary or desirable to make changes to the existing law to assist neighbours to resolve disputes about retaining walls would similarly benefit from a separate examination of the legal, technical and practical issues involved.

2.257 Finally, the Commission has found that there are few publicly available resources providing general information about neighbours' rights and responsibilities in relation to the construction, maintenance and repair of retaining walls. The Commission considers that the development of an information tool dealing with those matters, and including references to relevant legislation and other resources, may be of practical assistance to neighbours in reducing or resolving disputes about retaining walls.

## Recommendation

**2-10 The scope of the Act should not be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.**

<sup>182</sup> For example, s 179 of the *Property Law Act 1974* (Qld) is not limited in its application to retaining walls, as there are other measures that may be taken to avoid the withdrawal of support for adjoining land.

<sup>183</sup> See Law Reform Commission of Western Australia, *Project No 44: Alteration of Ground Levels*, Report (1986); NSW Law Reform Commission, *The Right to Support from Adjoining Land*, Report 84 (1997).





# Chapter 3

## Trees

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## INTRODUCTION

3.1 Chapter 3 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act') deals with trees.

3.2 In addition to other matters, the terms of reference require the Commission to consider:

- the operation and effect of section 57 of the Act (Notice for particular overhanging branches);<sup>1</sup> and
- the operation and effect of section 66(3)(b)(ii) of the Act (severe obstruction of a view), including whether it should operate retrospectively.<sup>2</sup>

## BACKGROUND

### Nuisance

3.3 Subject to the law of nuisance, the common law does not restrict the type, number or location of trees planted by a property owner or occupier.

3.4 If a person suffers an 'unlawful'<sup>3</sup> or 'wrongful'<sup>4</sup> interference with the use or enjoyment of their land as a result of a tree on adjoining land, that person has a right of action in the tort of nuisance.

3.5 In modern textbooks, an action for damages or an injunction for damage caused by overhanging branches or encroaching roots is treated as a species of the tort of nuisance. But the reality is that the case law is somewhat sparse. In 1904, for example, the English Court of Appeal<sup>5</sup> relied on a statement in 1894 by way of dictum that 'for any damage occasioned by [overhanging branches] an action on the case would lie'.<sup>6</sup> There was at least one earlier similar case.<sup>7</sup> The alternative remedy of an injunction compelling the defendant to remove the nuisance is often the primary remedy sought in a case of nuisance.

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<sup>1</sup> Terms of reference, para 3(h). This issue is discussed at [3.272] ff below. The terms of reference are set out in full in Appendix A to this Report.

<sup>2</sup> Terms of reference, para 3(g). This issue is discussed at [3.494] ff below. The terms of reference are set out in full in Appendix A to this Report.

<sup>3</sup> *Gartner v Kidman* (1962) 108 CLR 12, 22.

<sup>4</sup> *Elston v Dore* (1982) 149 CLR 480, 488.

<sup>5</sup> *Smith v Giddy* [1904] 2 KB 448, 451.

<sup>6</sup> *Lemmon v Webb* [1894] 3 Ch 1, 24.

<sup>7</sup> *Crowhurst v Amersham Burial Board* (1878) 4 Ex D 5.

3.6 The law of nuisance regulates the balance between the right of an occupier to use their land as they see fit and the right of a neighbour to enjoy their land without interference.

3.7 The principal remedies a court can grant are:

- an injunction to restrain the nuisance including a mandatory injunction (for example, by cutting down the tree or branches or removing the roots); and
- damages to compensate for the nuisance.

3.8 The common law does not generally recognise a neighbour's right to sunlight unless it is protected by an easement.<sup>8</sup> In that context, sunlight, view and privacy have been described as 'non-proprietary rights ancillary to property'.<sup>9</sup>

3.9 Consistently with that, section 178 of the *Property Law Act 1974* (Qld) provides that 'no right to the access or use of light ... to or for any building shall be deemed to exist, or to be capable of coming into existence, merely because of the enjoyment of such access or use for any period or of any presumption of lost grant based upon such enjoyment'. An interference with a neighbour's sunlight is not a nuisance.

3.10 Similarly the common law does not generally recognise a neighbour's right to a view, unless it is protected by an easement. An interference with a neighbour's view is also not protected by the law of nuisance.<sup>10</sup>

## Abatement

3.11 At common law, a person may abate a nuisance constituted by overhanging branches or encroaching tree roots, without notice to the tree owner, by cutting the branches<sup>11</sup> or roots<sup>12</sup> back to the boundary.

3.12 At common law there is a requirement to return any branches, roots or fruits obtained through abatement to the tree owner.<sup>13</sup>

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<sup>8</sup> See, eg, *re Parimax (SA) Pty Ltd* (1956) SR (NSW) 130.

<sup>9</sup> *Bloom v Lepre* [2008] NSWSC 79, [39].

<sup>10</sup> *Newcastle City Council v Shortland Management Services* (2003) 57 NSWLR 173, 190 [90].

<sup>11</sup> *Lemmon v Webb* [1894] AC 1.

<sup>12</sup> *Young v Wheeler* (1987) Aust Tort Reports 80-126.

<sup>13</sup> *Mills v Brooker* [1919] 1 KB 555.

## OVERVIEW OF CHAPTER 3

### Central concepts

3.13 The central principle of Chapter 3 of the Act is that a ‘tree-keeper’ is responsible for the proper care and maintenance of the tree-keeper’s tree.<sup>14</sup>

3.14 The Act encourages a neighbour and tree-keeper to resolve, informally, any issues about a tree on the tree-keeper’s land.<sup>15</sup>

3.15 Although the common law right of abatement is continued by the Act, the requirement to return any branches, roots or fruits obtained through abatement to the tree-keeper was removed for trees to which Chapter 3 of the Act applies.

3.16 For overhanging branches 2.5 metres or less above the ground and extending at least 50 centimetres from the common boundary, a neighbour may give a notice to the tree-keeper to remove the overhanging branches.<sup>16</sup> If the tree-keeper does not remove the branches the neighbour may do so and recover a monetary contribution to the costs of removal up to \$300.

3.17 In more serious cases (whether or not about overhanging branches) the Queensland Civil and Administrative Tribunal (‘QCAT’) has jurisdiction to hear tree disputes to prevent serious injury to any person, or to remedy restrain or prevent serious damage to the neighbour’s land or property or substantial ongoing and unreasonable interference with the use and enjoyment of the neighbour’s land.

3.18 Except where the interference with the use and enjoyment of the land is a severe obstruction of sunlight or severe obstruction of a view, the threshold requirement before QCAT can make an order is that the order will prevent serious injury to a person, or remedy, restrain or prevent serious damage to the neighbour’s land or any property on the neighbour’s land, or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour’s land.<sup>17</sup>

3.19 Where the interference is a severe obstruction of sunlight or a view, there are additional threshold requirements before QCAT can make an order, namely:

- the tree must rise at least 2.5 metres above the ground; and
- the obstruction must be a:
  - severe obstruction of sunlight to a window or roof of a dwelling on the neighbour’s land; or
  - severe obstruction of a view from a dwelling on the neighbour’s land, that existed when the neighbour took possession of the land.

<sup>14</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 41. The tree-keeper’s responsibilities are set out in s 52 of the Act.

<sup>15</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 60(1).

<sup>16</sup> If there is a vegetation protection order or tree protection order over the tree the notice cannot be used.

<sup>17</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.

### The Parts of Chapter 3

3.20 Part 1 of Chapter 3 identifies the categories of land (and therefore trees) to which Chapter 3 applies. Two significant categories are land recorded in the freehold land register and land the subject of a lease or licence under the *Land Act 1994* (Qld). An important effect of the definition is that trees on land not in those categories, such as unallocated State land, reserves for community purposes and dedicated roads including footpaths, are not trees to which the Chapter applies.<sup>18</sup>

3.21 Trees on other specified categories of land are excluded from Chapter 3, including trees on rural land, a parcel of land that is more than 4 hectares, land owned by a local government that is used as a public park, land prescribed by regulation and unallocated State land. Trees planted or maintained for particular purposes are excluded, being those grown for a commercial purpose, or under a court order or a condition of a development approval.

3.22 Part 2 of Chapter 3 provides the key definitions for the chapter, including the meaning of ‘tree’,<sup>19</sup> ‘tree-keeper’,<sup>20</sup> ‘neighbour’,<sup>21</sup> and when land is ‘affected by a tree’.<sup>22</sup>

3.23 Part 3 of Chapter 3 provides for the responsibilities, liabilities and rights of a tree-keeper and the right of abatement of a neighbour. A tree-keeper is responsible for cutting and removing any branches that overhang a neighbour’s land, and must ensure that their trees do not cause serious injury to a person or serious damage to land, or substantial ongoing and unreasonable interference with a person’s use and enjoyment of their land.<sup>23</sup>

3.24 A neighbour’s common law right to abate a nuisance created by a tree<sup>24</sup> is not affected by the Act,<sup>25</sup> except to the extent that a person who exercises that common law right of abatement may, but is not required to, return the removed part of the tree to the tree-keeper.<sup>26</sup>

3.25 Pruning of a tree is subject to any ‘vegetation protection order’<sup>27</sup> or other like order of the State or local government protecting the tree.<sup>28</sup>

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18 See also [3.49] ff below for further discussion.

19 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45.

20 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48.

21 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49.

22 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46.

23 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 52.

24 As to the common law right to abatement, see [3.11]–[3.12] above.

25 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(1).

26 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54(2).

27 A ‘vegetation protection order’ is an order made by a local government under a local law to provide for or facilitate the protection of a tree. (*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of ‘vegetation protection order’).

28 Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 4.

3.26 Part 4 of Chapter 3 deals with the removal of overhanging branches that are 2.5 metres or less above the ground and extend at least 50 centimetres from the common boundary. A neighbour may give written notice to the tree-keeper requiring removal of such overhanging branches and, if the work is not done, the neighbour may remove the branches (or engage a contractor) and recover costs of up to \$300 from the tree-keeper.<sup>29</sup>

3.27 Part 5 of Chapter 3 deals with QCAT's power to make orders to resolve issues about trees. QCAT has jurisdiction to hear and decide any matter in relation to a tree where it is alleged that, as at the date of the application to QCAT, land is 'affected by a tree'.<sup>30</sup> However, QCAT's power to make an order is subject to threshold requirements.

3.28 A 'neighbour'<sup>31</sup> (on land 'affected by a tree')<sup>32</sup> may apply to QCAT for an order under section 66 of the Act:

- (a) to prevent serious injury to any person; or
- (b) to remedy, restrain or prevent—
  - (i) serious damage to the neighbour's land or any property on the neighbour's land; or
  - (ii) substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.

3.29 If the substantial, ongoing and unreasonable interference is obstruction of sunlight or a view, the tree must rise at least 2.5 metres above the ground, and:

- for sunlight — there must be severe obstruction of sunlight to a window or roof of a dwelling on the neighbour's land; or
- for a view — there must be severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land.<sup>33</sup>

3.30 By section 65 of the Act, QCAT may make an order under section 66 if it is satisfied of the following matters:

- the neighbour has made a reasonable effort to reach agreement with the tree-keeper;

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<sup>29</sup> Consistent with pt 3 of the Act, 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.

<sup>30</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii).

<sup>31</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49.

<sup>32</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46.

<sup>33</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3).

- the neighbour has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process;
- if the issue relates to overhanging branches, they must extend at least 50 centimetres over the common boundary and it must be the case that the neighbour cannot properly resolve the issue using the notice process under Part 4.

3.31 Part 5 of Chapter 3 also specifies the orders QCAT can make,<sup>34</sup> the matters QCAT must consider<sup>35</sup> (and other matters QCAT may consider)<sup>36</sup> and the consequences if a person fails to comply with a QCAT order.<sup>37</sup> QCAT can override a 'vegetation protection order'<sup>38</sup> or local law, but not an Act of the State protecting the tree.<sup>39</sup>

3.32 Part 6 of Chapter 3 provides that QCAT is required to keep a register of orders made under Chapter 3<sup>40</sup> and sets out the procedures and mechanisms for maintaining the register so as to assist a person to find any orders about trees that may affect the land.<sup>41</sup>

3.33 Part 7 of Chapter 3 provides for a seller to disclose, to a buyer, the existence of an application or order affecting the land in relation to a tree, and for the consequences that flow from any disclosure or failure to make a disclosure.

3.34 Part 8 of Chapter 3 provides for an enforcement procedure that can be undertaken by a local government if the tree-keeper fails to carry out work on a tree under a QCAT order.<sup>42</sup>

### The Commission's view of the organisation of Chapter 3

3.35 The Commission's preferred view is that if the current policies that inform the rights and liabilities provided for in Chapter 3 of the Act are to be maintained, the structure of the Chapter ought to be reorganised so that the relevant provisions are more easily understood and applied.

3.36 First, the Commission considers that the subject of overhanging branches should be treated separately. At present, one of the two broad bases on which land

<sup>34</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 66–69.

<sup>35</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73. Section 71 of the Act states that the primary consideration is the safety of any person.

<sup>36</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 74–75.

<sup>37</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 77.

<sup>38</sup> A 'vegetation protection order' is an order made by a local government under a local law to provide for or facilitate the protection of a tree. (*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'vegetation protection order').

<sup>39</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 43, 67.

<sup>40</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 79.

<sup>41</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 81.

<sup>42</sup> Compliance and enforcement of QCAT orders are discussed in more detail in Chapter 5 of this Report.

may be 'affected by a tree' is if the branches from the tree overhang the land.<sup>43</sup> There is a separate responsibility of a tree-keeper for cutting and removing any branches of the tree that overhang a neighbour's land.<sup>44</sup>

3.37 Part 4 of Chapter 3 applies if land is affected by a tree because branches of the tree overhang the land. It engages upon a specific height and depth of overhang. The height must be 2.5 metres or less above the ground. The depth must be at least 50 centimetres from the boundary. Part 4 confers a right upon a neighbour either to have the tree-keeper remove the branches or to obtain a contribution to the costs of removal up to a maximum amount of \$300 in each 12 month period.<sup>45</sup> The neighbour must follow the notice procedure to obtain the rights. None of this involves QCAT.

3.38 In the Commission's view, the separate nature of this bundle of rights and obligations would be clearer if the subject of overhanging branches were extracted from the definition of land 'affected by a tree' and all the relevant provisions relating to the Part 4 procedures were self-contained in a separate Chapter or Part.

3.39 QCAT's jurisdiction in respect of personal injury, damage to land or property on land or interference with the use and enjoyment of land can be engaged by a sufficiently serious case of overhanging branches. The Commission does not propose to alter the rights and obligations of the parties in a case of that kind.

3.40 Secondly, the Commission considers that the balance of the provisions in Chapter 3 relating to QCAT's powers to make orders in the general categories of personal injury, damage to land or property or interference with the use and enjoyment of the neighbour's land by a tree would then be most usefully relocated in a separate Chapter or Part.

3.41 This separation would do away with the need for the current definition of land 'affected by a tree' and would make it clearer that the rights and obligations in the different categories of case are discrete.

3.42 Thirdly, the Commission considers that the structure of section 66 of the Act would be improved if the different categories of case that it covers were dealt with in separate sections. Thus, interference with the use and enjoyment of land other than by sunlight or a view would appropriately be dealt with in one section, with separate sub-sections for injury to a person, damage to the neighbour's land or property on the land and interference with the use and enjoyment of the neighbour's land.

3.43 A second separate section would then be appropriate for severe obstruction of sunlight to a window or roof of a dwelling on a neighbour's land. A third separate section would be appropriate for severe obstruction of a view from a dwelling on the neighbour's land.

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43 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(i).

44 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 52(1).

45 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(5).



3.44 By breaking up the separate categories of cases in which QCAT may make an order in this way, the Commission considers that the operation of the Act in relation to trees would be clearer.

3.45 The reason for this recommendation is that both the Commission and respondents to the Discussion Paper have at times found the present structure of Chapter 3 confusing, due to the significantly different rights and obligations that attach in different categories of cases.

3.46 The Commission is of the view that Chapter 3 of the Act should be redrafted to more clearly outline the rights and responsibilities of a neighbour and a tree-keeper, structured around each of the various potential tree issues faced by a neighbour, and the remedies available to a neighbour in each scenario, particularly in relation to overhanging branches, and the jurisdiction of QCAT to resolve such tree disputes.

3.47 The time and resources available for this review have not permitted the Commission to carry out the proposed redraft.

3.48 Notwithstanding this view, and the recommendation made immediately below, the Commission has made a number of recommendations for changes to the Act based on its current drafting.

## Recommendation

**3-1 Chapter 3 of the Act should be redrafted, to more clearly outline the rights and responsibilities of a neighbour and a tree-keeper, focused on each of the various tree issues faced by a neighbour, and the remedies available to a neighbour in each scenario, particularly in relation to overhanging branches and the jurisdiction of QCAT to resolve any tree disputes.**

## WHAT TREES ARE SUBJECT TO CHAPTER 3

3.49 Chapter 3 defines the trees to which it applies in two ways: first it identifies the categories of land to which it applies, thereby excluding trees on other land; second, it provides that it does not apply to trees situated on particular classes of land or trees used for particular purposes.<sup>46</sup>

3.50 The categories to which Chapter 3 applies are land that is:

- recorded in the freehold land register;<sup>47</sup>
- the subject of a lease or licence under the *Land Act 1994* (Qld);<sup>48</sup>

<sup>46</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42.

<sup>47</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(a). See [2.8], n 3 above.

<sup>48</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(b).

- subject to an occupation permit or stock grazing permit under the *Forestry Act 1959* (Qld)<sup>49</sup> or subject to a stock grazing permit under the *Nature Conservation Act 1992* (Qld);<sup>50</sup> or
- a reserve, other than a reserve for community purposes, under the *Land Act 1994* (Qld).<sup>51</sup>

3.51 The trees to which Chapter 3 does not apply are:

- trees situated on:
  - rural land;<sup>52</sup>
  - a parcel of land that is more than four hectares;<sup>53</sup>
  - land owned by a local government that is used as a public park;<sup>54</sup>
  - unallocated State land;<sup>55</sup> and
- trees planted or maintained for commercial purposes, under an order of a court or tribunal, or as a condition of a development approval.<sup>56</sup>

3.52 A regulation may also declare land,<sup>57</sup> a prescribed plant,<sup>58</sup> or trees situated on land within a stated local government area<sup>59</sup> to be excluded from Chapter 3.

## Discussion Paper

3.53 In the Discussion Paper, the Commission sought submissions on whether the Act appropriately deals with different categories of land.<sup>60</sup>

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49 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(c). See [2.8] ff above.

50 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(d). See [2.8] ff above.

51 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(e).

52 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(a).

53 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(b).

54 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(c).

55 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(5). See [2.8] ff above.

56 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(4).

57 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(d).

58 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45(3).

59 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(2). No such regulation has been made to date.

60 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.31]–[3.33], Question 3-1.

## Parcels more than four hectares

### *Submissions*

3.54 All of the respondents to the Discussion Paper that addressed this question, except one, submitted that Chapter 3 should apply to trees on land more than four hectares.

3.55 QCAT submitted that ‘it does not matter whether the land is 4 hectares or not — if the tree is causing a problem, there is a tree problem’.<sup>61</sup>

3.56 The Queensland Association of Independent Legal Services (‘QAILS’) advised that ‘community legal centres do also receive inquiries from landholders on or adjoining ... larger tracts of lands that fall outside the jurisdiction of the Act’.

3.57 One submission from a member of the public highlighted possible unfairness attending the current exemption for land more than 4 hectares. The submission raised the fact that a person living on property which is more than four hectares is not subject to any order by QCAT about their trees<sup>62</sup> but that same person, as a neighbour, can take action in QCAT against the tree-keeper next door whose parcel is 4 hectares or less.<sup>63</sup>

3.58 The Department of National Parks, Sport and Racing (‘DNPSR’) further submitted that:

[Queensland Parks and Wildlife Service (‘QPWS’)] arranges for the removal of hazardous trees where they threaten property or life, with the cost borne by QPWS through the use of professional arborists, in line with the Procedural guide — Risk management of hazardous trees. ... QPWS suggests that any changes to the NDA Chapter 3 exemptions should minimise additional costs to QPWS, for example, by specifically exempting freehold land that is being held as a proposed protected area or for another public purpose.

3.59 The Brisbane City Council (‘BCC’) submitted that:

The current ... jurisdiction of four hectares is appropriate, given the problems the Act was designed to address... The focus of neighbour disputes about trees is on loss of amenity, nuisance or safety issues, all occasioned by proximity in normal residential communities. On large parcels, where the building footprint is typically at a considerable distance from the boundary, the effect on adjoining owners could be considered to be minimal at best. Such disputes can be reasonably dealt with by using common law remedies.

### *The Commission’s view*

3.60 Neither the Explanatory Notes nor the Second Reading Speech to the Neighbourhood Disputes Resolution Bill 2010 provides any guidance as to why land greater than four hectares was excluded from the scope of the Act.

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61 Submission 61.

62 The same is true of the notice procedure under ch 3 pt 4 of the Act.

63 Submission 59.

3.61 During the consultation process for the Bill, a community legal centre queried why blocks of land of five hectares were excluded. The then Minister's response was that in New South Wales the equivalent trees legislation applies only in urban areas and the Bill was to be restricted to urban areas.<sup>64</sup> The *Trees (Disputes Between Neighbours) Act 2006* (NSW) ('NSW Act') is, in effect, limited in its application to land in urban areas but does not also exclude land above a designated area.

3.62 The Commission is of the view that it is inequitable that a person who lives on a smaller parcel does not have rights as a neighbour under Chapter 3 against a next door owner whose land is more than 4 hectares, yet the owner on the larger parcel has the rights of a neighbour against the tree-keeper on the smaller parcel.

3.63 The Commission considers that Chapter 3 should be amended to provide that Part 5 of Chapter 3 (QCAT's power to make orders about trees) applies to land more than 4 hectares to which Chapter 3 otherwise applies but that Part 4 of Chapter 3 (the notice procedure for particular overhanging branches) does not apply to such land.

3.64 The Commission has attempted to assess the likely impact of the proposed amendment, particularly on the State and local governments.

3.65 DNPSR advised that QPWS holds parcels of freehold land for visitor centres, ranger stations and land for conservation purposes which are covered under the Act. It advised that if the 4 hectare exemption was removed, but the 'rural land' exemption remained, QPWS' liability under Chapter 3 of the Act would potentially increase from 4.7 kilometres to 13 kilometres of boundaries with neighbouring freehold land. Most of the parcels of freehold land held by QPWS would remain exempt under the 'rural land' exemption.

3.66 The BCC advised that it holds limited freehold land over 4 hectares and that it is unlikely that a neighbour would need to make an application to QCAT about a nuisance tree on such land (given the council's continuing maintenance program).<sup>65</sup>

3.67 Further, limiting the proposed amendment to the application of Part 5 of Chapter 3 would limit the liability of the tree-keeper on a parcel more than 4 hectares to a case where the tree has caused or is likely to cause within 12 months, serious injury, or serious damage to the neighbour's land or property on that land or substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of their land.

3.68 The Commission does not consider that its recommendation will have unreasonable and unacceptable impacts for the State or local governments.

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<sup>64</sup> Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 13.

<sup>65</sup> Information provided by the Brisbane City Council, Brisbane City Legal Practice, 20 October 2015.

### Recommendation

**3-2 The Act should be amended to provide that Part 5 of Chapter 3 of the Act applies to land more than 4 hectares to which Chapter 3 otherwise applies but that Part 4 of Chapter 3 of the Act does not apply to such land.**

### Rural land

3.69 The Act defines ‘rural land’ as ‘rural land under the *Land Valuation Act 2010* (Qld)’ (‘LVA’).<sup>66</sup>

3.70 The LVA provides that land is ‘rural land’ if:<sup>67</sup>

- under section 10 of the LVA, it is zoned rural land and it has not, under section 11 of the LVA, ceased to be zoned rural land;<sup>68</sup>
- under section 13 or 14 of the LVA, it has been declared to be rural land.

3.71 Land is zoned rural land under the LVA if:<sup>69</sup>

- more than half the land is zoned as rural land under a planning scheme made under the *Sustainable Planning Act 2009* (Qld);<sup>70</sup> or
- under a ‘continued IPA planning scheme’,<sup>71</sup> more than half the land is:
  - zoned as rural land;<sup>72</sup> or
  - in a zone (whatever called) that is the nearest equivalent to rural land under the Queensland planning provisions.<sup>73</sup>

<sup>66</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of ‘rural land’).

<sup>67</sup> *Land Valuation Act 2010* (Qld) s 9.

<sup>68</sup> Land ‘zoned rural land ceases to be zoned rural land and becomes non-rural land if, under a preliminary approval under the Planning Act approving a material change of use, it is used for an urban purpose’: *Land Valuation Act 2010* (Qld) s 11.

<sup>69</sup> *Land Valuation Act 2010* (Qld) s 10.

<sup>70</sup> *Land Valuation Act 2010* (Qld) s 10(1). A consultation draft Planning Bill 2015, to replace the *Sustainable Planning Act 2009* (Qld), was released on 10 September 2015.

<sup>71</sup> A ‘continued IPA planning scheme’ is defined under the *Land Valuation Act 2010* (Qld) s 10(5) as ‘a planning scheme made under the repealed *Integrated Planning Act 1997* (Qld) and continued in force under the *Sustainable Planning Act 2010* (Qld), ss 777–778’.

<sup>72</sup> *Land Valuation Act 2010* (Qld) s 10(2)(a).

<sup>73</sup> *Land Valuation Act 2010* (Qld) s 10(2)(b). ‘Queensland planning provisions’ means the standard planning scheme provisions under the [*Sustainable Planning Act 2010* (Qld)], s 54: *Land Valuation Act 2010* (Qld) s 10(5).

3.72 Further, the LVA<sup>74</sup> provides that, to remove any doubt, for section 10(3) it is declared that land zoned under a Planning Act scheme as ‘rural–residential’ or land in a zone (whatever called) under a continued IPA planning scheme<sup>75</sup> that is the nearest equivalent to ‘rural–residential’ land under the Queensland planning provisions,<sup>76</sup> is not rural land.

3.73 Finally, the LVA provides that, in deciding the nearest equivalent land zone, regard must be had to the purposes and outcomes under the Queensland planning provisions for land to be zoned as rural.<sup>77</sup>

3.74 The Queensland Planning Provisions (‘QPP’)<sup>78</sup> is an instrument containing standard planning scheme provisions for local governments to prepare their planning schemes under the *Sustainable Planning Act 2009* (Qld) through a standardised structure and format.

3.75 Under the QPP, zones are the primary organising concept. All land in the planning scheme area, with the exception of roads and waterways, must be included in a zone.<sup>79</sup> There is a standard suite of zones, each of which is described by a purpose statement together with example overall outcomes.

3.76 The QPP provide that the purpose of the ‘rural zone’ is, amongst other things, to:<sup>80</sup>

- provide for rural uses including cropping, intensive horticulture, intensive animal industries, animal husbandry, animal keeping and other primary production activities; and
- protect or manage significant natural resources and processes to maintain the capacity for primary production.

3.77 In describing the overall outcomes sought for the ‘rural zone’ the QPP include the following examples:<sup>81</sup>

- ‘the establishment of a wide range of rural activities is facilitated, including cropping, intensive horticulture, intensive animal industries, animal husbandry and animal keeping and other compatible primary production activities’; and

<sup>74</sup> *Land Valuation Act 2010* (Qld) s 10(3).

<sup>75</sup> ‘Continued IPA planning scheme’ means ‘a planning scheme made under the repealed *Integrated Planning Act 1997* (Qld) and continued in force under the [*Sustainable Planning Act 2010* (Qld)]; *Land Valuation Act 2010* (Qld) s 10(5).

<sup>76</sup> ‘Queensland planning provisions’ means the standard planning scheme provisions under the [*Sustainable Planning Act*] 2010 (Qld)], s 54: *Land Valuation Act 2010* (Qld) s 10(5).

<sup>77</sup> *Land Valuation Act 2010* (Qld) s 10(4).

<sup>78</sup> The Queensland Planning Provisions are made by the Minister for Planning under s 54 of the *Sustainable Planning Act 2009* (Qld).

<sup>79</sup> *Queensland Planning Provisions* version 3.1, 27 June 2014, pt 6-29.

<sup>80</sup> *Ibid* pt 6-52.

<sup>81</sup> *Ibid* pt 6-53.

- 'residential and other development is appropriate only where directly associated with the rural nature of the zone'.

3.78 As to the 'rural residential zone', the QPP provide that 'the purpose is to provide for residential development on large lots where local government infrastructure and services may not be provided, on the basis that the intensity of development is generally dispersed'.<sup>82</sup>

### **Submissions**

3.79 The Commission received a number of submissions arguing that the Act should apply to rural land.<sup>83</sup>

3.80 QCAT noted<sup>84</sup> that in some areas there is not a zoning called 'rural land'.<sup>85</sup>

3.81 QAILS submitted that community legal centres receive inquiries from landholders on or adjoining 'rural land' or larger tracts of lands that fall outside the jurisdiction of the Act.

3.82 A member of the public submitted that:<sup>86</sup>

I have great concern for the future costs of removing [bamboo] clumps... I have been baffled that the Act in this instance does not cover rural land, I believe this needs rectifying. ... my lawyer has told me ... it could cost up to \$10 000 to [go] to court, and not necessarily achieve the desired outcome...

3.83 Another member of the public submitted that:<sup>87</sup>

Trees of neighbours can be just as dangerous/damaging no matter where you are ... [such as] damaging infrastructure and blocking access, (potentially to emergency services)...property size and classification should not determine access to the provisions of the Act, [but] rather the threat to life and property. If a property owner can demonstrate that a tree-keeper's trees have damaged or threaten to damage property or life or enjoyment/access this should suffice.

3.84 DNPSR submitted that:

The departments position is that the review of the Act must not result in any removal or reduction of the current exemptions [including rural land], owing to the high level of financial liability that this would impose on the department and more broadly on the State in respect of other lands.

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82 Ibid.

83 Submissions 1, 17, 47, 55, 59.

84 Information provided by QCAT, 7 September 2015.

85 One such area is Mt Tamborine. See, eg, *Easterbrook v Janalan Pty Ltd* [2015] QCAT 81.

86 Submission 1.

87 Submission 47.

### **The Commission's view**

3.85 The NSW Act, in effect, applies only to urban land because it applies to trees situated on defined categories of land only, namely 'land within a zone designated 'residential', 'rural-residential',<sup>88</sup> 'village', 'township', 'industrial' or 'business' under an environmental planning instrument (within the meaning of the *Environmental Planning and Assessment Act 1979* (NSW)) or, having regard to the purpose of the zone, having the substantial character of a zone so designated'.<sup>89</sup>

3.86 The Commission recognises that its recommendation that Chapter 3 be amended so that Part 5 of Chapter 3 applies to parcels more than 4 hectares would have a much larger impact if Chapter 3 applied to 'rural land'. However, taking into account the QPP and the outcomes that they seek for land zoned 'rural land', the Commission does not consider that it is appropriate to extend the application of Chapter 3 of the Act to 'rural land'.

3.87 Accordingly, the Commission does not consider that the current exemption of 'rural land' in section 42(3)(a) of the Act should be removed.

### **Trees on land controlled by the State or local governments**

#### **Land controlled by the State**

3.88 Chapter 3 of the Act applies to trees on land held by the State as freehold land<sup>90</sup> that is four hectares or less and is not rural land.<sup>91</sup> It may also apply to land held by the State by taking a transfer of a lease or licence held under the *Land Act 1994* (Qld). The remaining land controlled by the State is, unless otherwise provided under the Act, generally not subject to Chapter 3.<sup>92</sup>

3.89 For example, the DNPSR is responsible for trees situated on freehold land that is 4 hectares or less and is not rural land. Similarly, the Department of Housing and Public Works ('DHPW') manages, through local Housing Service Centres ('HSC'), a social housing portfolio, on freehold land to which Chapter 3 of the Act applies. DHPW advises that HSC seek to resolve any neighbourhood concerns relating to trees (and fencing) and a small number of cases concerning trees on departmental land have been referred to QCAT since the commencement of the Act.

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<sup>88</sup> The NSW Act has been relevantly amended in two progressive stages. In 2010, the *Trees (Disputes Between Neighbours) Act 2006* (NSW) was amended to extend its application to land zoned 'rural-residential' but only in respect of pt 2 of the NSW Act (trees that cause or are likely to cause damage or injury). This amendment implemented a recommendation made in a 2009 statutory review of the NSW Act. In 2015, the application of the NSW Act to land zoned 'rural-residential' was further extended (in respect of court orders) to pt 2A of the Act, (which covers high hedges that obstruct sunlight or views).

<sup>89</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1).

<sup>90</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(1)(a).

<sup>91</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3).

<sup>92</sup> Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 12. One possible exception is a reserve, other than a reserve for community purposes, under the *Land Act 1994* (Qld).



### ***Land controlled by local governments***

3.90 Chapter 3 of the Act applies to trees on land held by a local government as freehold land that is four hectares or less and is not rural land. It may also apply to land held by a local government by taking a transfer of a lease or licence held under the *Land Act 1994* (Qld). An exception is land held by a local government as Freehold that is used as a public park.<sup>93</sup>

### ***Trees growing on public footpaths***

3.91 Chapter 3 of the Act does not apply to trees growing on a public footpath on a road. That is because a road is not one of the categories of land to which Chapter 3 applies. The BCC has control of all roads in the Brisbane local government area.<sup>94</sup> The local governments in other places have control of all roads in their local government areas.<sup>95</sup> A 'road' includes a footpath.<sup>96</sup>

3.92 The Minister said during debate on the Bill:<sup>97</sup>

[T]he [Bill] does not the alter the existing law concerning public footpaths and parks and, in particular, does not take away common law remedies such as abatement and remedies under nuisance, which remain available to landowners. ... Footpaths and parks are public areas and local authorities have a duty of care to all members of the public, and specifically with regards to negligence, to ensure the public are not harmed by trees growing in public access areas. It is up to local councils to introduce local laws and policies to deal with those issues...

3.93 The NSW Act does apply to trees on Crown land but does not apply to trees on land owned or managed by a Council. 'Crown land' has the same meaning as it has in the *Crown Lands Act 1989* (NSW), and includes land dedicated for a public purpose under Part 5 of that Act.

### ***Discussion Paper***

3.94 In the Discussion Paper, the Commission sought submissions on whether there should be any changes to the current exemptions in respect of the State or local governments.<sup>98</sup>

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<sup>93</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 42(3)(c).

<sup>94</sup> *City of Brisbane Act 2010* (Qld) s 66(1).

<sup>95</sup> *Local Government Act 2009* (Qld) s 60(1).

<sup>96</sup> *City of Brisbane Act 2010* (Qld) s 65(2)(c); *Local Government Act 2009* (Qld) s 59(2)(c).

<sup>97</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2292 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

<sup>98</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.34]–[3.44], Question 3-2.

## Submissions

### ***Trees on land controlled by the State or by local governments***

3.95 The Commission received three submissions from members of the public that the Act should apply to land in public ownership,<sup>99</sup> ‘particularly local government controlled parks and reserves’.<sup>100</sup>

3.96 DNPSR, the Department of Natural Resources and Mines, and Strata Community Australia (Qld) all submitted that there should not be any change to the current exemptions in respect of the State.

3.97 DNPSR submitted that:

The existing model under the [Act] is adequate in exempting the majority of land managed by the [Queensland Parks and Wildlife Service] ... The exemptions under the Act that apply to the State, including the department, are justified and recognise the practical and financial difficulties that the State would otherwise incur.

3.98 Similarly the BCC submitted:<sup>101</sup>

The public interest is best served at present by leaving local governments to manage trees on their parklands having regard to their existing statutory obligations under the *City of Brisbane Act 2010*. The Act recognises the practical and financial implications that would exist for Council if the exemption for public parks did not exist. Applying the Act to Council parkland will result in significant legal and cost exposure for Council having regard to the significant number of private properties that adjoin council parkland.

[Moreover] local governments should not be placed in the same ‘neighbour’ category as private individuals when land controlled or owned by local government abuts land in private ownership. Furthermore, the Act focuses on neighbour disputes about trees where there is a loss of amenity, nuisance or safety issues, all occasioned by the proximity of a tree to a neighbour on a standard residential house block.

3.99 The Local Government Association of Queensland (‘LGAQ’) said that it has not received any comment from member Councils on the question whether there should be any change to the current exemptions in respect of local governments.<sup>102</sup>

3.100 The Commission received several submissions in respect of trees on footpaths, also referred to as street trees.

3.101 Caxton Legal Centre Inc submitted that its clients frequently seek advice about trees on footpaths and rights and obligations in this area should be more

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99 Submissions 29, 47, 49.

100 Submission 49.

101 Submission 64.

102 Submission 37.

clearly explained in the Act, perhaps using cross-references or notes to the BCC *Natural Assets Local Law 2003* in section 42 of the Act.<sup>103</sup>

3.102 Caxton Legal Centre Inc submitted that there is a need for better community education about this topic, suggesting that the overview in the Commission's Discussion Paper<sup>104</sup> about Council powers and trees growing on public parks and footpaths could be turned into a fact sheet and made available on the DJAG website.

3.103 The BCC submitted that:<sup>105</sup>

Street trees are ... public assets that contribute to the biodiversity and amenity of Brisbane, and are properly managed by Council in the exercise of its function under section 66 of the *City of Brisbane Act 2010*. Council has a continuing maintenance program for street trees and responds to residents' representations about individual trees. Council also allows minor pruning of street trees by residents. In Council's view, this strikes the correct balance between protecting the public domain and acknowledging private property rights.

On the 5700 kilometres of council-controlled roads in Brisbane, Council manages some 575 000 street trees, the vast majority of which are growing on footpaths abutting private land.

Currently applications are frequently filed with QCAT, seeking orders against Council about footpath street trees on footpaths that abut private land. Those applications are currently being wrongly accepted by QCAT. This requires Council having to regularly make appearance in and submissions to QCAT, as to the lack of jurisdiction to consider such applications. While Council's submissions to date have been accepted by QCAT, this is a significant imposition on Council's and QCAT's resources and proves to be frustrating for the applicants. Council requests that the Act be clarified to make it clear that street trees on footpaths are exempt from the Act.

3.104 A member of the public submitted that the status of trees on public land other than public parks, notably footpaths, should be clarified.<sup>106</sup>

### ***The Commission's view***

#### ***Trees on land controlled by the State and local governments***

3.105 The current provisions of the Act reflect a policy that the State and local governments (and therefore taxpayers and ratepayers) should not be responsible under the Act for all of the trees that adjoin and overhang the boundaries of all the land they control. For example, DNPSR advised that the State manages approximately 12 million hectares of national park and State forest and one million hectares of unallocated State land. These areas have about 44 000 kilometres of external boundaries. Noosa National Park alone has more than 1500 neighbouring blocks.

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103 Submission 58.

104 *Neighbourhood Disputes Act Discussion Paper* (2015) 49–51.

105 Submission 64.

106 Submission 49.

3.106 The Commission is not able to gauge the impact on the State if the land controlled by it were to be made subject to Chapter 3 generally, because it does not have an accurate assessment of the number of persons who might be a 'neighbour' in relation to such land or the extent of the relevant adjoining land boundaries. However, the Noosa National Park example is an illustration of how extensive that impact might be.

3.107 As to roads, the BCC manages some 575 000 street trees, the vast majority of which are growing on footpaths of the 5700 kilometres of Council-controlled roads in Brisbane adjoining private land.<sup>107</sup>

3.108 If Chapter 3 of the Act were to extend to applications about trees situated on roads including footpaths, the impact upon local governments would be significant. The Commission considers that the impact upon QCAT could also be an increase in its caseload.

3.109 The Commission does not favour any amendment to the Act (other than in respect of land more than 4 hectares) to vary the current responsibility of the State and local governments for trees under the Act.

#### ***Trees on public footpaths***

3.110 The Commission accepts that there is merit in clarifying that Chapter 3 of the Act does not apply to trees on footpaths, in the same way that section 42(5) expressly provides that, to remove any doubt, it is declared that the chapter does not apply to trees situated on unallocated State land.

3.111 The Commission considers that the most convenient way to do so would be to amend section 42(5) of the Act to provide that, to remove any doubt, it is declared that the Act does not apply to trees situated on land dedicated as a road for public use, including footpaths.

3.112 The Commission acknowledges Caxton Legal Centre Inc's suggestion that there is a need for better community education about the rights and obligations of neighbours in respect of trees growing on footpaths and public parks, and suggests this area should be more clearly explained in community education material.<sup>108</sup>

#### ***Trees on land owned by a local government used as a public park***

3.113 As noted in Chapter 2 of this Report, the Commission does not consider that it is necessary to define the term 'public park'.<sup>109</sup>

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107 Submission 64.

108 See [3.102] above.

109 See [2.47] above.

### **Recommendation**

**3-3 Section 42(5) of the Act should be amended to provide that, to remove any doubt, it is declared that Chapter 3 does not apply to land dedicated as a road for public use, including footpaths.**

### **KEY DEFINITIONS IN CHAPTER 3**

#### **‘Tree’**

3.114 The Act defines the term ‘tree’ as follows:<sup>110</sup>

- (1) Tree means—
  - (a) any woody perennial plant; or
  - (b) any plant resembling a tree in form and size; or

*Examples—*

bamboo, banana plant, palm, cactus

  - (c) a vine; or
  - (d) a plant prescribed under a regulation to be a tree for this chapter.
- (2) Tree includes—
  - (a) a bare trunk; and
  - (b) a stump rooted in the land; and
  - (c) a dead tree.

#### **Submissions**

3.115 The Commission received a number of submissions about the definition of ‘tree’. The Cairns Regional Council proposed the following additional paragraph to section 45(1):<sup>111</sup>

- (e) a plant described/known as a tree by taxonomical description.

3.116 Several members of the public also made submissions about the scope of the definition of ‘tree’. One submitted that consideration should be given to expanding it to include weeds, because they grow against a fence and may cause the fence to be damaged or to collapse. The person would like to be able to give a notice in order to make their neighbour clear the weeds.<sup>112</sup>

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<sup>110</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45(1)–(2); see also *Neighbourhood Disputes Act Discussion Paper* (2015) [3.50].

<sup>111</sup> Submission 20.

<sup>112</sup> Submission 42.

3.117 Another member of the public submitted that the definition of ‘tree’ should recognise the fragility of certain trees and the danger posed to those trees by indiscriminate pruning.<sup>113</sup>

3.118 Another member of the public submitted that the definition of ‘tree’ should be expanded to state that a ‘tree’ includes the roots of the tree. It was submitted that this would reduce confusion and make clear that root damage is also encompassed.<sup>114</sup> Conversely, Strata Community Australia (Qld) questioned whether the Act should apply the same treatment to roots and branches, stating that ‘the ability for a tree-keeper to monitor, manage and maintain branches is materially different from their ability to monitor, manage and maintain roots’.

### ***The Commission’s view***

3.119 The Commission considers that the term ‘tree’ is widely and clearly defined. With one exception, it does not consider that the definition should be amended.

3.120 The roots of a tree are part of the existing responsibilities of a tree-keeper under sections 41(1) and 52(2) of the Act. Roots are an integral part of a tree and have the potential to be a source of damage or interference with use or enjoyment of land. The Act’s definition of ‘work’, on a tree, includes cutting and removing roots of a tree.<sup>115</sup>

3.121 Nevertheless, the Commission considers that the proposal to expressly include the roots of a tree within the definition of tree has merit. Adding ‘a root or roots of any living or dead tree’ in the definition of ‘tree’ would make the existing position clearer.

### ***Recommendation***

**3-4 Section 45(2) of the Act should be amended to add that ‘tree’ includes ‘a root or the roots of any living or dead tree’.**

### **‘Tree-keeper’**

3.122 Section 48 of the Act defines the phrase ‘tree-keeper’.<sup>116</sup> A tree-keeper is the registered owner of freehold land,<sup>117</sup> the lessee or licensee of Crown land,<sup>118</sup> the

<sup>113</sup> Submission 26. The submission specified a tree/plant known as ‘clumped monocots’, which the respondent stated were ideal for property borders but did have some level of fragility.

<sup>114</sup> Submission 40.

<sup>115</sup> See, eg, *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 50(a) (definition of ‘work’).

<sup>116</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48; *Neighbourhood Disputes Act Discussion Paper* (2015) [3.51]–[3.52].

<sup>117</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(a). The registered owner of freehold land can be identified by undertaking a title search under the *Land Title Act 1994* (Qld).

<sup>118</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(b). This applies where the land is subject to a lease or licence under the *Land Act 1994* (Qld).

grantee of an occupation or stock grazing permit over land,<sup>119</sup> or the body corporate of common property land<sup>120</sup> upon which the tree is, or was previously, wholly or mainly situated.<sup>121</sup>

3.123 During debate on the Bill, the Attorney-General said that:<sup>122</sup>

the tree-keeper retains the role of tree-keeper under the Bill even if there is a [vegetation protection order]. [The tree] does not belong to the council; you are the person. However, the bill gives power to QCAT to order that the work be carried out on a tree where it is satisfied that the applicant has demonstrated one of the grounds under clause 66. Such an order applies even if a vegetation protection order or similar tree protection order is placed over the tree by a local council. In this way, QCAT can override any decision that may have been made about a tree by a local council. ... During the review it was reported that a tree-keeper faces a dilemma when they believe that one of their trees may pose a risk to the neighbour. Often, tree-keepers are keen to take pre-emptive action, but because of a vegetation protection order placed over the tree by the local council they are unable to do so without local council approval. People who are concerned about their obligations under a vegetation protection order imposed by a local council and their possible exposure to civil action need to take this up with their local council or seek legal advice.

### Submissions

3.124 One member of the public submitted that he had experienced difficulty with being a tree-keeper due to the fact that the trees on his property are regarded as 'protected vegetation'. Some years ago he identified that the trees might pose a risk in the future and applied to the local government to undertake vegetation management procedures by removing the trees, but his application was refused. The trees are now of 'massive proportions' and in his opinion pose a risk to both persons and property. In light of this scenario, he submits that:<sup>123</sup>

I feel the definition of 'tree-keeper' must be amended so that the property owner is not the tree-keeper if the management of the vegetation is not entirely within the control of the property owner ... the present laws place enormous psychological, physical and financial burdens on some property owners. The whole community derives benefit from this (protected/significant) vegetation ... the whole community should accept responsibility for the management of the vegetation. The definition of 'tree-keeper' must be amended to identify the party responsible for the management of the tree as the 'tree-keeper'.

119 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(c)–(d).

120 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 48(1)(e), (f). As noted in the Discussion Paper (at [3.51], n 93) 'the Explanatory Notes for Amendments, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2, make it clear that 'this sub-section only captures the owners of the common property (in the scheme under the *Body Corporate and Community Management Act 1997* (Qld) or in the plan under the *Building Units and Group Titles Act 1980* (Qld)). The registered owners of individual lots in the scheme under the *Body Corporate and Community Management Act 1997* (Qld) or in the plan under the *Building Units and Group Titles Act 1980* (Qld) are included in s 48(1)(a) of the Act'.

121 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 47.

122 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2293 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

123 Submission 12.

### **The Commission's view**

3.125 A vegetation protection order does not create rights or obligations as between a neighbour and a tree-keeper. Both may be affected by the operation of such an order. The inter-operation of the rights and obligations of neighbour and tree-keeper and a vegetation protection order are adequately addressed by sections 43 and 67 of the Act, in the context of a genuine dispute between a neighbour and a tree-keeper. QCAT is able to make an order for work on a tree even if it is subject to a vegetation protection order.<sup>124</sup> It is not the province of the Act to deal with a dispute between a tree owner and a local government about a vegetation protection order.

3.126 The Commission acknowledges that a vegetation protection order for a tree may be a source of confusion for members of the public, and considers that community education regarding relevant issues may assist.<sup>125</sup> Information is available to the community regarding the practical implications of a tree being classed as 'protected vegetation' and the assistance that may be offered by the local government where such a tree poses some issue or danger.<sup>126</sup>

3.127 The Commission does not recommend any change to the definition of 'tree-keeper'.

### **'Neighbour'**

3.128 Section 49 of the Act defines who is a 'neighbour':<sup>127</sup>

Each of the following entities is a 'neighbour' in relation to a particular tree or the tree-keeper for a particular tree—

- (a) if land affected by the tree is a lot recorded in the freehold land register under the *Land Title Act 1994*—
  - (i) a registered owner of the lot under that Act; and
  - (ii) an occupier of the land;
- (b) if land affected by the tree is scheme land under the *Body Corporate and Community Management Act 1997*—the body corporate for the community titles scheme;
- (c) if land affected by the tree is a parcel of land the subject of a plan under the *Building Units and Group Titles Act 1980*—the body corporate for the plan.

3.129 However, for the purposes of removal of overhanging branches under Part 4 of Chapter 3, the neighbour is the landlord (not the occupier).<sup>128</sup>

<sup>124</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 67(1)(a).

<sup>125</sup> Community education is discussed further in Chapter 6 of this Report.

<sup>126</sup> See, eg, <<http://www.brisbane.qld.gov.au/laws-permits/laws-permits-residents/protected-vegetation>>.

<sup>127</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.53].

<sup>128</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49(2).



3.130 The terms 'lot' and 'scheme land' are not defined in the Act.

### **Meaning of 'lot'**

3.131 Under the *Land Title Act 1994* (Qld) ('LTA'), a 'lot' means 'a separate, distinct parcel of land created on the registration of a plan of subdivision, or the recording of particulars of an instrument, and includes a lot under the *Building Units and Group Titles Act 1980* (Qld)' ('BUGTA').<sup>129</sup>

3.132 Under the *Body Corporate and Community Management Act 1997* (Qld) ('BCCMA'), 'lot' generally means 'a lot under the *Land Title Act 1994* (Qld), but if the lot is included in a community titles scheme other than a basic scheme, the lot could be another community titles scheme'.<sup>130</sup>

### **Meaning of 'scheme land'**

3.133 Section 10 of the BCCMA provides:<sup>131</sup>

- (1) A community titles scheme is—
  - (a) a single community management statement recorded by the registrar identifying land (the scheme land); and
  - (b) the scheme land.
- (2) Land may be identified as scheme land only if it consists of—
  - (a) 2 or more lots; and
  - (b) other land (the common property for the community titles scheme) that is not included in a lot mentioned in paragraph (a).

### **Exclusive use by-laws**

3.134 Common property for a community titles scheme is vested in the owners of lots as tenants in common, in shares proportionate to their lot entitlements. This applies even though, under the *Land Title Act 1994* (Qld), the registrar creates an indefeasible title for the common property for a community titles scheme.<sup>132</sup>

3.135 An exclusive use by-law, for a community titles scheme, is a by-law that attaches to a lot included in the scheme, and gives the owner or occupier of the lot for the time being exclusive use to the rights and enjoyment of, or other special rights about common property or a body corporate asset.<sup>133</sup> The owner of a lot in a

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<sup>129</sup> *Land Title Act 1994* (Qld) s 4, sch 2 (definition of 'lot').

<sup>130</sup> *Body Corporate and Community Management Act 1997* (Qld) s 5, sch 6 (definition of 'lot'). Note that a different definition applies for the purposes of ch 5 pt 3 of the Act (implied warranties in relation to the sale of a lot), which includes proposed lots: s 220.

<sup>131</sup> See also s 115B of the *Land Title Act 1994* (Qld), which contains a definition of 'community titles scheme' in nearly identical terms.

<sup>132</sup> *Land Title Act 1994* (Qld) s 41BA.

<sup>133</sup> *Body Corporate and Community Management Act 1997* (Qld) s 170(1).

community titles scheme may be granted exclusive use or other special rights in relation to common property or a body corporate asset.<sup>134</sup>

3.136 An exclusive use by-law must be recorded in the community management statement that must be lodged with the Registrar of Titles.<sup>135</sup>

3.137 In *Lanyon v Lucas*, QCAT rejected the contention that an occupier under an exclusive use by-law is a 'neighbour' as defined.<sup>136</sup>

The land affected by the tree in this case is common property of the body corporate and that is not affected by the fact that it may be subject to an exclusive use by-law. As the land is common property it is scheme land in accordance with the BCCMA and the neighbour is then the body corporate and not Ms Lanyon.

3.138 A body corporate is the entity authorised to deal with the common property under the BCCMA.<sup>137</sup> Section 36 of the BCCMA provides:

**36 Rights and responsibilities for common property**

- (1) The body corporate for a community titles scheme may sue and be sued for rights and liabilities related to the common property as if the body corporate were the owner of the common property.
- (2) For common property other than common property for which an entity other than the body corporate is the occupier, the body corporate may sue and be sued as if the body corporate were the occupier.

### **Submissions**

3.139 Strata Community Australia (Qld) submitted that the definition of 'neighbour' should include both the body corporate for a scheme or plan and the owner or occupier of a lot within a scheme or plan, including any common property allocated for the exclusive use of that lot.<sup>138</sup> Strata Community Australia (Qld) submitted that this would enable a single owner or occupier to take direct action to seek a remedy under the Act, thereby avoiding the need for involvement of the body corporate and simplifying the process.

3.140 Strata Community Australia (Qld) submitted that a lot owner with an exclusive use agreement may be left without any standing to redress a tree issue under the Act if the body corporate is unwilling to bring an application, for example because the other lot owners are reluctant to use their money collectively to seek a remedy on behalf of the lot owner who has exclusive use of the common property.<sup>139</sup>

<sup>134</sup> See *Body Corporate and Community Management Act 1997* (Qld) ch 3 pt 5 div 2. For the meaning of 'common property' see *Body Corporate and Community Management Act 1997* (Qld) s 10. 'Body corporate assets' for a community titles scheme, mean 'items of real or personal property acquired by the body corporate, other than property that is incorporated into and becomes part of the common property': s 11.

<sup>135</sup> *Body Corporate and Community Management Act 1997* (Qld) s 172.

<sup>136</sup> [2014] QCAT 180, [9].

<sup>137</sup> *Body Corporate and Community Management Act 1997* (Qld) ss 35(6), 36; *Land Title Act 1994* (Qld) s 41C(3).

<sup>138</sup> Submission 39; Supplementary information provided by Strata Community Australia (Qld), 1 October 2015.

<sup>139</sup> Supplementary information provided by Strata Community Australia (Qld), 1 October 2015.

3.141 Under section 312 of the BCCMA, a body corporate may start a legal proceeding only if authorised by a special resolution, except where the proceeding is a ‘prescribed proceeding’ as defined in section 312(4). An application to QCAT under the Act is not a ‘prescribed proceeding’.

3.142 Strata Community Australia (Qld) submitted that section 312(4) of the BCCMA should be amended to include an application under the Act in the definition of ‘prescribed proceeding’.

3.143 Strata Community Australia (Qld) argued:

[The need for a special resolution creates] a high and difficult threshold for a body corporate to comply with in order to approach QCAT to resolve a relatively minor dispute about a dividing fence or overhanging tree’. ... In order to pass a special resolution, a decision would first need to be made by the committee to convene a general meeting, and then the general meeting would need to be called on at least 21 days notice. Acting promptly, it could take up to six weeks for a body corporate to pass a special resolution to authorise the commencement of proceedings. A special resolution also requires at least a two-thirds majority of votes in favour for it to pass, among other requirements.... [T]he Body Corporate would need to act very quickly given the minimum notice requirements for general meetings in order to decide whether to commence such a proceeding. ... The need for a special resolution is avoided in the case of prescribed proceedings. For the most part, prescribed proceedings are usually those made to a forum that facilitates self-representation and discourages legal costs being awarded. A proceeding in QCAT follows in much the same vein. It is a user-friendly jurisdiction that rarely awards costs.

### **The Commission’s view**

#### **Definition of a ‘neighbour’**

3.144 The definition of a ‘neighbour’ in section 49 of the Act has created some confusion. In several decisions involving trees affecting either ‘scheme land’ comprised in a community titles scheme under the BCCMA or ‘a parcel of land the subject of a plan’ under the BUGTA, QCAT has decided that a registered owner of a lot recorded in the freehold land register under the LTA was not a ‘neighbour’ because the lot in question was part of relevant ‘scheme land’ or part of the relevant ‘parcel of land the subject of a plan’ so that the relevant body corporate was the ‘neighbour’ under the Act.<sup>140</sup>

3.145 Contrary to these QCAT decisions, the Commission considers that an individual registered owner of a lot within a scheme or plan, or occupier, is arguably a ‘neighbour’ in relation to a particular tree if their lot is affected by the tree, as well as the body corporate. That is because the lot is one recorded in the freehold land register under the LTA.<sup>141</sup> The body corporate for the relevant ‘scheme land’ under the BCCMA or ‘land the subject of a plan’ under the BUGTA is also a ‘neighbour’ in relation to the tree because the lot is part of the scheme land or the plan.

<sup>140</sup> *Brown v Wallace* [2014] QCAT 461; *Wood v Kenyon* [2015] QCAT 335; *Lowe v BGC Technical Ltd* [2015] QCAT 408.

<sup>141</sup> *Land Title Act 1994* (Qld) s 28.

3.146 There is an apparent difference between the scope of the definitions of ‘tree-keeper’ and ‘neighbour’ in respect of land held under the BCCMA and the BUGTA.

3.147 A body corporate under the BCCMA and the BUGTA is only a ‘tree-keeper’ in relation to ‘common property’, but is a ‘neighbour’ in relation to land that is ‘scheme land’ or ‘a parcel of land the subject of a plan’ respectively.

3.148 This difference did not exist in the original Bill for the Act. In the original Bill, clause 48 also made the body corporate a ‘neighbour’ if the tree was situated on ‘scheme land’ or a ‘parcel of land the subject of a plan’. However, that was changed during the consultation phase of the Bill, into the form of section 48(1)(e) and (f) as enacted. The amendments were made to ‘avoid possible duplication and clarify the intention of the clause’<sup>142</sup> about who is a tree-keeper in relation to bodies corporate and building units and group title land.<sup>143</sup> The Explanatory Notes for amendments to the Bill provide that:<sup>144</sup>

It is the intention of [clause 48(1)(e) and (f)] to only capture the owners of common property. The registered owners of individual lots in [the scheme under section 48(1)(e) and the plan under section 48(1)(f)] are included in clause 48(1)(a).

3.149 No corresponding changes were made to the definition of ‘neighbour’ in sections 49(1)(b) and (c) of the Bill. As a consequence, a body corporate for a community titles scheme or for a plan is a ‘neighbour’ in respect of ‘scheme land’<sup>145</sup> and ‘a parcel’<sup>146</sup> of land the subject of a plan respectively, rather than in respect of common property only.

3.150 However, the Commission does not consider that the intention of the drafter of section 49 was that a lot owner under section 49(1)(a) does not include a lot owner under the BCCMA or the BUGTA, if the lot is the land affected by a tree.

3.151 The Commission is of the view that section 49 of the Act should be amended to provide that the body corporate for a community titles scheme or for a plan is the ‘neighbour’ if the land affected by the tree is common property.

3.152 To achieve this, the Commission is of the view that section 49(1)(b) and section 49(1)(c) should be amended to replace ‘scheme land’ and ‘parcel of land the

<sup>142</sup> Explanatory Notes for Amendments to be moved during consideration in detail by the Honourable Paul Lucas MP, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2.

<sup>143</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2304 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

<sup>144</sup> Explanatory Notes for Amendments to be moved during consideration in detail by PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State, Neighbourhood Disputes Resolution Bill 2010 (Qld) 2.

<sup>145</sup> See *Body Corporate and Community Management Act 1997* (Qld) s 10(2) which provides that ‘scheme land’ for a community titles scheme is the lots and other land in the scheme which is not a lot (that is, the common property).

<sup>146</sup> A ‘parcel’ of land for a building units and group titles plan ‘means the land comprised in a plan’: *Building Units and Group Titles Act 1980* (Qld) s 7 (definition of ‘parcel’). A ‘plan’ means a building units plan or a group titles plan. A ‘building units plan’ means a plan which is described in the title or heading thereto as a building units plan, shows the building comprised therein as being divided into lots and the common property comprised therein, complies with the requirements of s 9, and includes a plan of re-subdivision of a lot or common property or a lot and common property in a building units plan registered under this Act: *Building Units and Group Titles Act 1980* (Qld) s 7 (definition of ‘plan’).

subject of a plan' with 'common property', consistently with the definition of a 'tree-keeper' in section 48(1)(e) and (f) respectively.

3.153 Further, the Commission is of the view that section 49 of the Act should be amended to make it clear that a lot owner includes a lot owner under the BCCMA and BUGTA. Similarly, section 48 of the Act should be amended in the same way.

3.154 The Commission notes that section 311(1) of the BCCMA provides that for the Act the body corporate for a community titles scheme 'is taken to be the owner of the scheme land'.

3.155 At present, the only references to 'scheme land' in the Act are those in section 49(1)(b) and section 14(1)(e). Section 49 is not concerned with who is an 'owner' but who is a 'neighbour', so section 311 has no operation in that section.

3.156 Section 14(1)(e) of the Act provides that in Chapter 2 of the Act an 'owner' for land that is scheme land under the BCCMA is the body corporate for the community titles scheme. In other words, it already does the work that section 311(1) of the BCCMA is purporting to do in this respect.

3.157 However, section 311(2) contains additional provisions to identify who is the owner where there are layered schemes and therefore possibly more than one body corporate who could be identified as the owner of relevant scheme land. Section 311(3) of the BCCMA continues as follows:

However for the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, owners of adjoining lots included in the community titles scheme are taken to be the owners of adjoining land.

3.158 In the Commission's view, section 311(3) does not operate under section 49, because section 49 does not identify an 'owner' for any other purpose under Chapter 3. It only identifies a 'neighbour'.

### ***Exclusive use of common property***

3.159 The body corporate is the entity appropriately authorised to deal with the common property, including common property subject to an exclusive use by-law.

3.160 The Commission is not persuaded that section 49 of the Act should be amended to broaden the definition of 'neighbour' to include a person who has exclusive use of land that is common property of scheme land under the BCCMA or land the subject of a plan under the BUGTA.

### ***Should an application under Chapter 3 be made a 'prescribed proceeding' under the BCCMA?***

3.161 The lot owners for a community titles scheme are the members of the body corporate for that scheme.<sup>147</sup> The body corporate is responsible for the management and administration of the scheme's common property and assets.<sup>148</sup> The BCCMA

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<sup>147</sup> *Body Corporate and Community Management Act 1997* (Qld) s 31.

<sup>148</sup> *Body Corporate and Community Management Act 1997* (Qld) s 36.

provides for the distribution of the constitutional powers of the body corporate and for the proceedings of meetings of members of the body corporate.

3.162 The restriction, under section 312(1) of the BCCMA, that the body corporate for a community titles scheme may start a proceeding only if there is a special resolution to do so is part of the statutory distribution of that power. It has the purpose of requiring the support of 75% of members before the body corporate launches and exposes itself to the risks of a legal proceeding. The exception is a 'prescribed proceeding'.

3.163 A proceeding under Chapter 3 Part 5 of the Act is generally speaking of a relatively minor kind. But the existing categories of 'prescribed proceeding' do not turn on the amount of money at risk.

3.164 On balance, the Commission is not persuaded that section 312 of the BCCMA should be amended to include a proceeding under Chapter 3 Part 5 of the Act in the definition of 'prescribed proceeding'.

### **Recommendations**

**3-5 Section 49(1)(a) of the Act should be amended to provide that a lot owner includes a lot owner under the BCCMA and BUGTA.**

**3-6 Section 48(1)(a) of the Act should be amended to provide that a lot owner includes a lot owner under the BCCMA and BUGTA.**

**3-7 Section 49(1)(b) of the Act should be amended to replace 'scheme land' with 'common property'.**

**3-8 Section 49(1)(c) of the Act should be amended to replace 'parcel of land the subject of the plan' with 'common property'.**

### **Land 'affected by a tree'**

3.165 Section 46 of the Act defines the phrase land 'affected by a tree' in the following way:

Land is affected by a tree at a particular time if—

- (a) any of the following applies—
  - (i) branches from the tree overhang the land;
  - (ii) the tree has caused, is causing, or is likely within the next 12 months to cause—
    - (A) serious injury to a person on the land; or
    - (B) serious damage to the land or any property on the land; or
    - (C) substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land; and

- (b) the land—
  - (i) adjoins the land on which the tree is situated; or
  - (ii) would adjoin the land on which the tree is situated if it were not separated by a road.

### **Discussion Paper**

3.166 In the Discussion Paper, the Commission sought submissions regarding whether the definition of land ‘affected by a tree’ should be changed.<sup>149</sup> The Commission received a large number of submissions in response to this question, all of which suggested some amendment to the definition.<sup>150</sup>

### **Submissions**

#### **Overhanging branches**

3.167 The Queensland Arboricultural Association submitted that the word ‘branches’ in section 46(a)(i) should be removed and replaced with the words ‘any part’, so as to include other issues such as leaning trunks and large buttress roots.

#### **Other aspects of land ‘affected by a tree’**

3.168 A member of the public submitted that section 46(a)(ii) should be amended such that land is only ‘affected by a tree’ where the tree has actually caused or is actually causing the matters set out in subsection (ii). In this respondent’s view, as the section is presently drafted, an application on the basis of ‘likelihood’ relies upon the unqualified judgment of a landowner regarding the tree’s likely growth and places an unfair burden on the tree-keeper. Specifically, it was submitted that:<sup>151</sup>

People without any horticultural knowledge or skills are making a judgment on the likely growth habit of an array of plant species (which they may not even be able to identify) when they are deciding to make application to QCAT. Trees are living things and it is difficult for experts to predict a tree’s growth in the next 12 months, let alone a lay person.

The section allows a neighbour to apply to QCAT about a tree that isn’t a problem now and which may not become a problem in the next 12 months. It also assumes there will be no ongoing management of the tree by the tree-keeper. This won’t always be the case. The Act unfairly favours the neighbour, treating the tree-keeper as guilty until proven innocent and exposing them to the threat of or actual proceedings in relation to a problem that may never eventuate. It is a waste of QCAT’s valuable time and resources to have to decide if a tree will affect land within 12 months. QCAT’s resources would be better spent dealing with land that is actually affected by trees.

3.169 The Townsville Community Legal Service Inc drew attention to how a tree may indirectly affect land. Its submission stated:

<sup>149</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.54], Question 3-3.

<sup>150</sup> Submissions 10, 17, 20, 21, 28, 36, 40, 41, 44, 49, 51, 57, 58.

<sup>151</sup> Submission 41.

The definition at section 46(a)(ii)(C) sets a high bar. There are cases where the tree does not affect the land, rather the tree indirectly affects the land through a related intervening act such as attracting migrating birds, flying foxes, insects etc. These matters are difficult to advise on because while they do have a substantial interference with enjoyment, the question remains: Is the tree causing the damage or interference?

An example common to Townsville is the extent to which a large mango tree can cause interference by dropped and rotting fruit, causing odours, attracting birds and bats and so on.

3.170 The Queensland Arboricultural Association submitted that the reference to 'enjoyment' in section 46(a)(ii)(C) of the Act should be removed as 'it is ambiguous and most applicants use it as justification for their applications'.

3.171 The Mackay Regional Council submitted that section 46(a)(ii) be amended to include an additional subsection to protect Council and other utility holders' infrastructure, specifically:

substantial, ongoing interference or damage to local government or other utility providers' infrastructure within or upon the land.

***Adjoining land on which a tree is situated***

3.172 The Commission received a submission proposing that:<sup>152</sup>

[Section 46(b)] be amended to include those cases where there may not be a common boundary but where one lot has a right of easement over a [servient] lot; and/or

an amendment to section 46(b) by adding (iii) where the interests of one lot are affected by the owner of another lot and the two lots could be reasonably accepted as being neighbours.

3.173 The Mackay Regional Council proposed the inclusion of a new section 46(b)(iii), to the effect that the land is a dedicated easement and the conditions of the easement have been breached.

3.174 A member of the public suggested that section 46(b) should be expanded to include any affected neighbour, not only adjoining neighbours. This respondent observed that the roots from some trees, for example fig trees, may travel through two or three neighbouring properties; in her instance the roots of such a tree have travelled 30 metres and will continue to grow. It was submitted that all affected neighbours should be able to raise this as a genuine issue affecting their land.<sup>153</sup>

3.175 Another member of the public submitted that section 46(b)(ii) should be removed so that land separated by a road is not included in the definition of land 'affected by a tree'. It was submitted that a road provides a sizeable buffer between

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152 Submission 10.

153 Submission 21.



two parcels of land, and to include land separated by a road is out of step with a shift to higher-density living and is unduly burdensome on a tree-keeper.<sup>154</sup>

### ***Overshadowing and sloped land***

3.176 A member of the public suggested that section 46 should give specific consideration to the issue of overshadowing by a tree. It was submitted that sunlight is important for health and economic reasons, and substantial overshadowing could adversely affect a neighbouring property; although it was also noted that some shadowing may be of benefit to a property.<sup>155</sup>

3.177 Another member of the public raised the issue of land that is on a steep slope. It was submitted that sloped land can increase the impact of a tree, for example by shading the properties below, and that this should be taken into consideration when considering whether land is 'affected by a tree'.<sup>156</sup>

## ***The Commission's view***

### ***Overhanging branches***

3.178 As presently drafted, section 46(a)(i) deliberately refers only to branches that overhang land because Part 4 of Chapter 3 of the Act is limited to land affected by a tree 'because branches from the tree overhang the land'.<sup>157</sup> That is also why the separate category of land 'affected by a tree' constituted by overhanging branches does not have to meet the other requirements contained in section 46(a)(ii) of the Act before it can be land 'affected by a tree'.

3.179 As section 46 is presently drafted, a leaning trunk or a large buttress root encroaching upon a neighbour's land, will only be land 'affected by a tree' where the other requirements contained in section 46(a)(ii) of the Act are met. Those parts of a tree are not included in the separate process for particular overhanging branches under Part 4 of Chapter 3.

3.180 The Commission notes that QCAT cannot make an order about a leaning trunk or large buttress root or branch simply because they overhang or encroach upon a neighbour's land,<sup>158</sup> in the same way that QCAT is unable to make an order about overhanging branches unless they affect the land in a way that satisfies section 46(a)(ii) and section 66(2).

3.181 Apart from its earlier recommendation that the whole of Chapter 3 should be reorganised, the Commission considers that no amendment to the definition of land 'affected by a tree' in section 46(a)(i) is required.

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154 Submission 41.

155 Submission 49.

156 Submission 44.

157 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 55(1)(a).

158 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66.

***Other aspects of land ‘affected by a tree’***

3.182 The Commission considers that it is not necessary to define the term ‘substantial, ongoing and unreasonable interference’ in the definition of land ‘affected by a tree’.<sup>159</sup> It is intended to set one part of the threshold requirements to prevent less serious disputes reaching QCAT contained in sections 46(a)(ii) and 66(2) of the Act.

3.183 The Commission appreciates that it may be difficult for these terms to be understood or interpreted by agencies or members of the public, and suggests that examples of matters falling within the ambit of these phrases, with references to cases decided by QCAT, may be a useful tool for inclusion in any further community education.

3.184 The Commission takes a similar approach with regard to the phrase ‘enjoyment of the land’ in section 46(a)(ii)(C). The Commission considers that interference with a neighbour’s use and enjoyment of their land is a sound conceptual basis for an application under Chapter 3, but does not agree that it requires elaboration. Section 46(a)(ii)(C) is engaged only if the whole of the threshold requirement of ‘substantial, ongoing and unreasonable interference with the neighbour’s use and enjoyment of land’ is met. Lesser interference is not enough.

3.185 The Commission considered whether section 46(a)(ii) of the Act should be amended to limit its operation to cases where a tree has already caused serious injury or damage or substantial ongoing and unreasonable interference.

3.186 The Commission accepts that a neighbour making an application on the ground that a tree that is likely to cause serious injury, serious damage or substantial ongoing and unreasonable interference within the next 12 months is exercising a degree of judgment. The Commission notes that often the neighbour will be informed by having monitored the tree over time or may have sought advice before making an application.

3.187 The Commission considers that it is appropriate that Chapter 3 of the Act applies where a tree is likely within the next 12 months to cause serious injury, serious damage or substantial, ongoing and unreasonable interference. Under section 66(2) of the Act, QCAT may make an order ‘to prevent’ serious injury or serious damage to land or property on land or substantial, ongoing and unreasonable interference with use and enjoyment of land. As section 46(a)(ii) is presently drafted, that power is engaged although injury, damage or interference has not yet occurred.

3.188 In some cases, the likelihood that a tree will affect a neighbour’s land within the next 12 months will be clear. In the Commission’s view, a neighbour should not be prevented from making an application in such a case. It is beneficial that an application may be made in advance, to prevent or minimise the likely injury, damage or interference.

3.189 The Commission considered whether, in order to minimise disputes over whether the required injury, damage or interference is likely to occur within the next

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See also [3.219] below.

12 months, a neighbour should be required to obtain a report to that effect before making an application to QCAT. It is preferable that the procedures of the Act are simple and easy to use. The introduction of a requirement for a pre-application report could lead to unnecessary delay and wasted expense.

3.190 The Commission considers that the requirements for informal resolution<sup>160</sup> as they apply to an application about a tree that is likely to affect a neighbour's land with 12 months are sufficient.

#### ***Adjoining land on which a tree is situated***

3.191 Where a local government or utility provider has placed infrastructure within or upon freehold land, they may not be the owner or occupier of the land. The placement may be done under a statutory easement.<sup>161</sup>

3.192 The Commission considered whether the definition of land 'affected by a tree' should be amended in a way that would include interference or damage to the infrastructure of a local government or utility provider within or upon the land. That would require amendment of section 46 as to the land 'affected by a tree' where the land on which the infrastructure is located does not adjoin the land on which the tree is situated.<sup>162</sup>

3.193 Chapter 3 of the Act is directed toward establishing the rights and responsibilities of neighbours and assisting neighbours to resolve disputes about trees.<sup>163</sup> The Act is not intended to address the rights and responsibilities of a landowner as against the holder of an easement, or to provide a remedy for a local government or utility provider that holds a public utility easement.

3.194 The Commission therefore does not recommend any expansion to the definition of land 'affected by a tree' to accommodate interference or damage to local government or other utility providers' infrastructure within or upon the land.

3.195 The Commission considered whether the definition of land 'affected by a tree' should be amended to include easements and lots that could be 'reasonably accepted as being neighbours'.

3.196 Where there are two parcels of adjoining land and an easement on one of them up to a common boundary, the Commission does not consider that any issue arises. The servient tenement may still be land 'affected by a tree' and the owner or occupier of that land may still be a 'neighbour'. If the owner of the dominant tenement has a right of way that is affected by a tree on adjacent land, they will have their rights against the owner of the servient tenement according to the terms of the easement,

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<sup>160</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 56(1), 60(1), 65(a).

<sup>161</sup> See *Land Act 1994* (Qld) ch 6 pt 4 div 8; *Land Title Act 1994* (Qld) pt 6 div 4.

<sup>162</sup> It would also require amendment to the definition of 'neighbour'. If the relevant infrastructure is supported by a statutory easement over freehold land, neither a local government nor a utility provider is a 'neighbour' under ch 3, unless they are the registered owner or occupier of the land affected by the tree: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 49. An occupier is not a neighbour for the purpose of the removal of overhanging branches under ch 3 pt 4 of the Act.

<sup>163</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3.

while the owner or occupier of the servient tenement will have the rights of a 'neighbour' under the Act against the 'tree-keeper'.

3.197 Where an easement passes over land that does not adjoin the land of a tree-keeper, the Commission also does not consider that Chapter 3 should apply because of the existence of the easement. If the use or enjoyment of the easement is adversely affected by a tree, the rights of the holder of the dominant tenement will depend on the terms of the easement, not upon their status as a neighbour and tree-keeper. The Commission considers that it is not appropriate to provide QCAT with the jurisdiction to hear such matters.

3.198 As to the proposal to include lots that could be 'reasonably accepted as neighbours' as land 'affected by a tree', the Commission considers that such an amendment would be uncertain in operation. The Commission does not support it.

3.199 The Commission considered section 46(b)(ii) of the Act, which provides that land is affected by a tree if it 'would adjoin the land on which the tree is situated if it were not separated by a road'.

3.200 The term 'road' is defined in the Act to mean:<sup>164</sup>

- (a) an area of land dedicated to public use as a road; or
- (b) an area that is open to or used by the public and is developed for, or has as [one] of its main uses, the driving or riding of motor vehicles; or
- (c) a bridge or culvert; or
- (d) a pedestrian or bicycle path; or
- (e) a part of an area, bridge, culvert or path mentioned in paragraphs (a) to (d).

3.201 There are instances where a tree on one parcel of land might affect another parcel of land, if the two parcels are separated by a narrow road.

3.202 The Commission considers that in such a case it is appropriate that two parcels of land separated by a road are included within the definition of land 'affected by a tree' and within the scope of Chapter 3 of the Act. The Commission therefore does not recommend any change to section 46(b)(ii) of the Act.

3.203 The Commission considered the proposal that section 46(b) of the Act should be amended to provide, in effect, that land may be land 'affected by a tree' irrespective of whether it is adjoining land. The Commission accepts that there may

<sup>164</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 4, sch (definition of 'road').

This definition does not include a private road. However, a private road does not assume the status of a 'road' within the meaning of the *Transport Infrastructure Act 1994* (Qld) sch 6 (definition of 'road'); the *Local Government Act 2009* (Qld) s 9(2); the *City of Brisbane Act 2010* (Qld) s 65(2); or the *State Development and Public Works Organisation Act 1971* sch 2 (definition of 'road'). Rather, a private road remains part of the land on which it is built and remains the property of the landowner (that is, if a private road is built on freehold land, that private road remains part of the freehold land). Consequently, a private road is simply part of a parcel of land that is or is not included within the scope of the Act (as determined by s 42) and does not need to be specifically addressed in the Act.

be instances in which injury, damage or interference of a kind that would fall within section 46(a)(ii) may be caused by a tree that is located on land that is not adjoining.

3.204 The Commission has considered the objects of the Act, namely to provide rules about ‘each neighbour’s responsibility’ for trees and ‘to facilitate the resolution of any disputes about ... trees that do arise between neighbours’.<sup>165</sup> The Act is intended to resolve disputes between neighbours as adjoining owners, but not disputes between non-adjoining landowners or disputes about trees in general.

3.205 The Commission is of the opinion that expanding Chapter 3 of the Act to encompass all affected land could lead to a significant increase in the application and operation of the Act. Some types of applications, such as an application about damage by encroachment of roots from a tree on land that is not adjoining, might occur relatively rarely. However other applications, such as an application about interference with a view from a tree on land that is not adjoining, might occur more commonly.

### ***Overshadowing and sloped land***

3.206 The Commission notes that QCAT’s powers to deal with obstruction of sunlight are expressly limited and affected by sections 66(3)(a), (b)(i) and 75(e) of the Act.

3.207 Within the confines of the limit under section 46(b)(i) that the land affected by a tree must adjoin the land on which the tree is situated, the Commission considers that overshadowing of land on a steep slope is encompassed by those sections. The factors that QCAT must consider include the location of a tree in relation to both the boundary of land and any premises affected by the location of the tree.<sup>166</sup>

3.208 The Commission further considers that the objects of the Act are directed to neighbours’ rights, responsibilities and disputes only, and it would not be appropriate to amend section 46 to expand the operation of the Act beyond those objects by removing the requirement that the land ‘affected by a tree’ adjoins the land on which the tree is situated.

### ***Land indirectly affected by a tree***

3.209 The Commission has considered the issue of land being indirectly affected by a tree. For example, land may be affected because the tree drops rotting fruit or attracts wildlife. The Commission considers that issues related to the dropping of fruit (or other materials) by a tree are within the ambit of ‘tree litter’ disputes, which are discussed below.<sup>167</sup>

3.210 The potential effect of wildlife in trees was raised during debate about the Bill. It was queried whether QCAT would be able to order the removal of a tree that was or was likely to be used as a roost for flying foxes, on the basis that they pose a

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<sup>165</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3.

<sup>166</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(a).

<sup>167</sup> See [3.543] ff below.

serious risk to health and therefore removal is necessary to prevent a serious injury.<sup>168</sup> The Attorney-General stated that ‘this legislation deals with neighbourhood disputes, that is, trees in relation to their interaction with next door neighbours and not otherwise’.<sup>169</sup>

3.211 The issue of a tree attracting wildlife has been considered by QCAT.<sup>170</sup> A neighbour applied for removal of a tree on several grounds, including that the tree attracted bats. The neighbour alleged that bat droppings affected the wall, deck and roof of his property and contaminated his water tank. It was held that the fact that a tree may attract and provide habitat to an animal, bird or insect does not mean that any damage caused by such an animal, bird or insect is caused by the tree which provides that habitat.<sup>171</sup>

3.212 The Commission has the same view as to the operation of section 46 of the Act. The requirement that the ‘tree ... has caused, is causing, or is likely ... to cause’ the required injury, damage or interference is a causal connection between the outcome and the tree, not the outcome and an intermediary causal agent such as an animal living in the tree.

3.213 The Commission notes that other legislation, for example the *Nature Conservation Act 1992* (Qld), affects the rights of persons in relation to animals that may live in a tree. For example, in some circumstances, a local government is authorised to manage and disperse flying fox roosts.<sup>172</sup>

3.214 The Commission does not recommend that the Act be amended to address issues associated with animals living in trees.

## RESPONSIBILITIES OF A TREE-KEEPER

3.215 One of the central aims of the Act is to make a ‘tree-keeper’ responsible for trees on their land:<sup>173</sup>

The proposed bill provides clear direction about a tree-keeper’s responsibilities and reflects the strong community view that a tree owner, known as the ‘tree-keeper’ in the Bill, should be responsible for the proper care and maintenance of a tree growing on their land in the neighbourhood.

<sup>168</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2310 (R Messenger).

<sup>169</sup> Ibid 2310 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

<sup>170</sup> *Thomsen v White* [2013] QCAT 381.

<sup>171</sup> Ibid [13]–[14].

<sup>172</sup> Queensland Government, Department of Environment and Heritage Protection, *Authorised Flying Fox Roost Management* (8 October 2015) <<https://www.ehp.qld.gov.au/wildlife/livingwith/flyingfoxes/roost-management.html>>.

<sup>173</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).

3.216 Section 52 of the Act addresses the responsibilities of a tree-keeper and provides that a tree-keeper is responsible for:<sup>174</sup>

- (1) cutting and removing any branches of the tree that overhang a neighbour's land; and
- (2) ensuring that the tree does not cause—
  - (a) serious injury to a person; or
  - (b) serious damage to a person's land or any property on a person's land; or
  - (c) substantial, ongoing and unreasonable interference with a person's use and enjoyment of the person's land.

## Submissions

3.217 A member of the public submitted that, in the context of section 52, the words 'serious' and the phrase 'substantial, ongoing and unreasonable' require an expanded definition in order to make them easier to understand.<sup>175</sup>

## The Commission's view

3.218 The Commission notes that, during debate on the Bill, the Minister said of the related expressions used in the cognate part of section 46(a)(ii):<sup>176</sup>

I wish to make some important comments about the trees chapter, in particular clause 46. I make these comments to assist in the interpretation of the Bill. The trees chapter is intended to promote safety. Clause 71 provides that in an application under the trees chapter QCAT must place as a primary consideration the safety of any person. When a person brings an application to QCAT that involves personal injury which has occurred or is likely to occur, it is necessary to establish that the previous or potential injury is serious. That is the expression used in clause 46(a)(i). That is under that limb of that section.

The use of the expression 'serious injury' is to create a threshold, the intention being to weed out trivial or trifling issues. For example, if a person was struck by a twig and not injured, this would not be sufficient. A person with a mild case of hay fever from the neighbour's flowering tree might not be able to bring an application. Of course, it is a matter for tribunals. A person who tripped over a root and grazed their knee might not be able to bring an application. However, in relation to that root they might be able to establish that someone could suffer a serious injury like a broken leg in the future from tripping over that root that is there as a potential for serious injury.

3.219 The Commission considers that it would not be necessary or appropriate to define the terms 'serious injury', 'serious damage' or 'substantial, ongoing and unreasonable interference'. Those terms set threshold requirements to prevent less

<sup>174</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 52(2); see also *Neighbourhood Disputes Act Discussion Paper* (2015) [3.55]–[3.59].

<sup>175</sup> Submission 49.

<sup>176</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2290 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

serious disputes from progressing to QCAT. They are expressions in common usage and involve matters for judgment in all the circumstances of a particular case.

## ABATEMENT

### Abatement preserved and modified under the Act

3.220 As noted above, section 54 of the Act preserves the common law right of abatement in relation to a tree to which Chapter 3 applies, with the modification that a neighbour who removes part of a tree is not required to return the removed part to the tree-keeper, but has the right to do so.<sup>177</sup>

3.221 This modification does not apply to a tree to which Chapter 3 of the Act does not apply. This means that a neighbour of a tree to which Chapter 3 does not apply who exercises the right of abatement is required (under the common law) to return the removed parts of the tree.

### Abatement under the common law

3.222 As noted above, the common law doctrine of abatement is a self-help remedy by which a person may take steps to abate a nuisance caused by the use of adjoining land.

3.223 A person may remedy overhanging branches or encroaching roots by cutting back any overhanging tree branches<sup>178</sup> or roots<sup>179</sup> that extend into their land to the common boundary. The person must return any cut branches, roots and fruit to the tree owner.<sup>180</sup>

3.224 The justification for abatement appears in Blackstone's Commentaries on the Laws of England:<sup>181</sup>

And the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy and cannot wait for the slow progress of the ordinary forms of law.

3.225 Generally, a person is not able to recover the costs of abatement from the tree owner. An exception exists where the person has suffered loss or damage and it can be demonstrated that the abatement constituted a reasonable step taken in mitigation of damages.

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<sup>177</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 54; see also ss 56(2)(a), 60(2)(a).

<sup>178</sup> *Lemmon v Webb* [1895] AC 1.

<sup>179</sup> *Young v Wheeler* (1987) Aust Tort Reports 80-126.

<sup>180</sup> *Mills v Brooker* [1919] 1 KB 555.

<sup>181</sup> W Blackstone, *Commentaries on the Laws of England, Book III* (Cadell and Davies, 15th ed, 1809) 6.



### **Entry onto neighbouring land**

3.226 The self-help remedy of abatement is generally not favoured by the law,<sup>182</sup> and there must be strong reasons to justify entry upon the land of another to effect abatement.<sup>183</sup>

3.227 However, exceptions exist where the person has issued a notice<sup>184</sup> or where there is such immediate danger to life or health as to render it unsafe to wait.<sup>185</sup>

3.228 There is no requirement to issue a notice when abatement can be effected without entry into the neighbouring land; for example, where the cutting of overhanging branches or the cutting of encroaching roots<sup>186</sup> can be done from the land of the person suffering the nuisance.<sup>187</sup>

### **Exercise care in effecting abatement**

3.229 In some contexts, it is said that a person who abates a nuisance must do so reasonably<sup>188</sup> or only as far as is necessary,<sup>189</sup> and may be bound to use due care and skill to avoid causing damage.<sup>190</sup> A failure to do so may expose the person to a risk of liability in either negligence or trespass.<sup>191</sup>

<sup>182</sup> See *Lagan Navigation Co v Lambeg Bleaching Dyeing and Finishing Co* [1927] AC 226, 244; *Sedleigh-Denfield v O'Callaghan* [1940] 3 All ER 349, 369; *Traian v Ware* [1957] VR 200, 207.

<sup>183</sup> *Traian v Ware* [1957] VR 200, 207.

<sup>184</sup> *Traian v Ware* [1957] VR 200, 207 and *Lemmon v Webb* [1895] AC 1, 8 refer to a requirement that the person who wishes to abate the nuisance must give notice of his intention before entering the land to abate the nuisance. *Jones v Williams* (1843) 11 M & W 176, 181–2 (applied in *Traian v Ware*) refers to a requirement to issue a notice to remove before abating the nuisance.

<sup>185</sup> *Traian v Ware* [1957] VR 200, 207; *Jones v Williams* (1843) 11 M & W 176, 182.

<sup>186</sup> *Young v Wheeler* (1987) Aust Tort Reports 80-126.

<sup>187</sup> *Lemmon v Webb* [1895] AC 1.

<sup>188</sup> *Nicol v Nicol* (1887) 13 VLR 322, 326. See also RA Buckley, *The Law of Negligence and Nuisance* (Lexis Nexis UK, 5th ed, 2011) 656.

<sup>189</sup> *Dimes v Petley* (1850) 15 QB 276, 283; *Roberts v Rose* (1865) LR 1 Ex 82, 89; *Lagan Navigation Company v Lambeg Bleaching, Dyeing and Finishing Company, Limited* [1927] AC 226, 245–6.

<sup>190</sup> *Mayor, Aldermen and Burgesses of the Borough of Colchester v Brooke* (1847) 7 QB 339, 377–8.

<sup>191</sup> RA Buckley, *The Law of Negligence and Nuisance* (Lexis Nexis UK, 5th ed, 2011) 656, citing *Six Carpenters' Case* (1610) 8 Co Rep 146a and *Clerk and Lindsell on Torts* (20th ed, 2010) 1240 [19]–[36]. Buckley argues 'the better view is that a person abating a nuisance must exercise reasonable care, and that failure to do so will involve his risking liability in negligence and trespass' (referring specifically to trespass *ab initio*). See also A Stickley, *Australian Torts Law* (Lexis Nexis Butterworths, 3rd ed, 2012) 603 which states that 'the law allows a plaintiff to abate the nuisance as a self-help remedy. However, abatement must be used with caution to ensure the plaintiff is not exposed to actions in trespass for excessive exercise of the right when removing the nuisance (citing *Lemon v Webb* [1895] AC 1; *Traian v Ware* [1957] VR 200; *Mayor, Aldermen and Burgesses of the Borough of Colchester v Brooke* (1847) 7 QB 339).

3.230 These statements must be treated with some care in the present context.<sup>192</sup> Surprisingly, perhaps, there does not appear to be any Australian or English<sup>193</sup> authority which limits the right of a person to abate by cutting overhanging branches or encroaching roots to the point of the common boundary.

3.231 However, in the United States of America, there are recent appellate cases in the State courts that support both possible views, when considering the right of abatement by cutting encroaching roots or overhanging branches. In *Booska v Patel*, the Court of Appeal, First District, Division 1, California rejected that the right of abatement was unlimited regardless of the consequences, holding that the right is qualified by the right of an owner to use his property in a reasonable way.<sup>194</sup>

3.232 On the other hand, in *Alvarez v Katz* the Supreme Court of Vermont rejected the 'urban-tree rule' that trimming the roots or branches of an overhanging tree may be proscribed if the trimming will destroy the tree (said to be based on *Booska*) in favour of the rule that:<sup>195</sup>

It is a sound principle that where a tree stands wholly on the ground of one and so is his tree, any part which overhangs the land of an adjoining owner may be cut off at the division line.

3.233 It is unnecessary to descend into the case law further. There is no binding or determinative answer in this State to the question whether a neighbour who exercises their common law right of abatement by cutting overhanging branches or encroaching roots back to the common boundary is restricted in doing so if that will seriously damage or destroy the tree.

## Discussion Paper

3.234 In the Discussion Paper, the Commission noted that the Act specifically preserves the common law right of abatement in relation to a tree. The Commission sought submissions regarding whether this right should be modified, and if so how.<sup>196</sup>

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<sup>192</sup> None of the cases cited as authorities for such generalisations in Australian or English law is a case of abatement by cutting back overhanging branches or encroaching roots to a common boundary. Some of them were cases about the defence of abatement to a public nuisance on a waterway. The private nuisance cases were cases about blocking a drain or waterway where there was a question whether another method of blocking the water from coming onto the defendant's land with less damage to the plaintiff, who was the creator of the nuisance, might have been available.

<sup>193</sup> See *Dayani v London Borough of Bromley* [2011] BLR 503, 9, which was a single judge decision considering this question. Although it was not necessary for the purposes of the decision, the Court commented that it was doubtful whether the decision in *Lemmon v Webb* (1985) AC 1 was authority for the proposition that a neighbour may cut back a tree to the boundary regardless of the effects on the health of the tree or consequent threats to nearby buildings. It was stated that this would create a substantial and unjustified exception to the general law of nuisance, and that given that the encroachment of trees is usually gradual and comparatively benign it was not warranted in the circumstances.

<sup>194</sup> 24 Cal.App.4th 1786 (1994).

<sup>195</sup> 2015 WL 3795939, citing *Cobb v W Union Tel Co* 90 Vt 342, 344; 98 A 758, 759 (1916).

<sup>196</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.64]–[3.67], Question 3-4.

3.235 The Commission also sought submissions regarding whether a neighbour of the State or a local government should have the benefit of the Act's modification of the common law right of abatement.<sup>197</sup>

## Submissions

### *Modification of the common law of abatement*

3.236 The Commission received numerous submissions regarding this issue. The submissions were reasonably evenly split, with slightly more than half proposing various modifications to the common law, as discussed below.<sup>198</sup>

3.237 The remaining submissions indicated that the common law should not be modified.<sup>199</sup> However, several indicated specific support for retaining the current modification allowing a neighbour to choose whether to return or dispose of the removed parts of the tree.<sup>200</sup>

### *Damage caused by abatement*

3.238 A number of submissions raised questions about damage to a tree from cutting branches by way of abatement,<sup>201</sup> described as engaging in 'indiscriminate pruning', resulting in 'mutilated' and sickened trees.<sup>202</sup>

3.239 A member of the public,<sup>203</sup> two local governments<sup>204</sup> and the LGAQ raised the question that a tree may become unstable or unsafe as a potential consequence of damage from cutting branches by way of abatement.<sup>205</sup>

3.240 The issue that was then raised was on whom liability for the damage would rest.<sup>206</sup>

3.241 Several submissions proposed the introduction of a notice requirement before a neighbour exercises the right of abatement.<sup>207</sup> A tree-keeper could then arrange to trim the tree or use a professional tree lopper to avoid damage to the

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197 Ibid Question 3-5.

198 Submissions 6, 11, 20, 26, 37, 41, 58.

199 Submissions 39, 40, 49, 57, 64.

200 Submissions 40, 57.

201 Submissions 11, 16, 20, 26, 37, 40.

202 Submissions 11, 26.

203 Submission 40.

204 Submissions 16, 20.

205 Ibid.

206 Submissions 20, 40.

207 Submissions 11, 20.

tree.<sup>208</sup> It was also suggested that a notice could trigger a requirement for an inspection to allow the calculation of the safe limits of work.<sup>209</sup>

3.242 Alternatively, one submission proposed that the Act should:<sup>210</sup>

impose a responsibility on the affected neighbour to be familiar with the types of trees they are pruning and to ensure that their tree-pruning actions will not compromise the health of the tree.

3.243 The BCC submitted that the common law right of abatement should not be modified, stating that:<sup>211</sup>

Property owners should be able to trim the overhanging branches of a neighbour's tree, as allowed for in that common law right but that right should continue to be subject to tree preservation requirements as statutory orders imposed by local government and the Queensland Government for the protection of trees.

Clarification of that right by the Act is more appropriate than seeking to modify that right.

3.244 Some submissions suggested that the Act should include fines or penalties to punish a neighbour who 'improperly' exercises the right to remove parts of a tree by way of abatement. In particular, it was suggested that the neighbour should be fined or punished when they cause serious damage to a tree-keeper's tree or when they cut back the tree to a point inside the tree-keeper's boundary.<sup>212</sup>

### **Costs of abatement**

3.245 One member of the public stated that a neighbour should not be directed toward abatement by lopping overhanging branches unless it is clear that they can recover the costs of doing so. This is because a neighbour should not be responsible for the cost of mitigating a problem caused by the tree-keeper's denial or refusal to meet their responsibilities. It was submitted that the Act should emphasise other processes including mediation, compulsory conferencing and hearings. The remedy of abatement should still be available but should be regulated, particularly with regard to costs.<sup>213</sup>

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208 Submission 11.

209 Submission 20. With regard to safe limits of work the submission made reference to Australian Standards AS4373:2007 — *Pruning of Amenity Trees* and AS 4970:2009 — *Protection of Trees in Development Sites*. This would be consistent with section 71 of the Act, which provides that the primary consideration (for QCAT) is the safety of any person.

210 Submission 26.

211 Submission 64.

212 Submissions 7, 26.

213 Submission 49.

### ***Return of legally pruned material***

3.246 Several submissions suggested that there was a need to address the return of legally pruned material.<sup>214</sup>

3.247 A member of the public suggested that the Act should include a process by which a neighbour can return legally-pruned material to a tree-keeper. The submission indicates that actions such as throwing branches over the fence or dumping leaves onto the lawn unnecessarily escalate disputes. It proposed that the Act should clearly set out a formal handover process so that all parties are aware of their roles and requirements.<sup>215</sup>

3.248 Caxton Legal Centre Inc suggested that it would be useful to modify section 54 of the Act<sup>216</sup> to make clear that viable fruit should be carefully returned to the tree owner, unless the owner consents otherwise. The fruit may be of some value, and that factor should be considered by a neighbour exercising their right to abatement.<sup>217</sup>

### ***Other proposals for modification***

3.249 Several submissions suggested that the common law right of abatement should be modified to grant a neighbour further rights<sup>218</sup> or to place restrictions upon the exercise of the right.<sup>219</sup>

3.250 A member of the public suggested that the right to abate a nuisance should be amended so that, instead of a neighbour being permitted to cut a tree back to the boundary, the neighbour is permitted to prune the tree away from the boundary and up to a maximum of 50 centimetres inside the tree-keeper's boundary. This was suggested particularly in relation to situations where a tree exceeds 2.5 metres in height and/or where a tree-keeper has failed to comply with a notice to trim overhanging branches.<sup>220</sup>

3.251 Finally, the Queensland Arboricultural Association acknowledged that a person retains their common law right whilst proceeding through the QCAT process, but submitted that:

it would make things clearer if these common law rights were temporarily suspended whilst any matter is going through the [neighbourhood dispute resolution] process. It is not uncommon for tree assessors to travel to site only to find that the trees have been cut back or removed which wastes significant amount public service resources.

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214 Submissions 26, 58.

215 Submission 26.

216 Section 54 preserves the common law right of abatement, with the modification that a neighbour who removes part of a tree may, but is not required to, return the removed part to the tree-keeper.

217 Submission 58.

218 Submission 40.

219 Submission 41.

220 Submission 40.

### ***Application of abatement to the State or local governments***

3.252 The Commission received numerous submissions, which were evenly divided as to whether a neighbour of the State or local government should<sup>221</sup> or should not<sup>222</sup> have the benefit of the modification of the common law.

3.253 The Queensland Arboricultural Association noted that many local governments and some State government departments have existing processes for resolving issues raised by members of the community regarding street trees or trees in parks. The Queensland Arboricultural Association suggested that, rather than modify the common law or the Act, the Department of Justice could recommend that all local government authorities and State government departments develop policies for resolving disputes or complaints about trees.

### **The Commission's view**

#### ***Modification of the common law of abatement***

3.254 The Commission has considered the various proposals to amend the common law right of abatement as it relates to trees. However, the Commission has concluded that the common law right should not be further altered.

#### ***Damage caused by abatement***

3.255 Although a requirement to give notice to a tree-keeper prior to any abatement action would assist the tree-keeper to protect and trim their own trees, it would also take away the neighbour's choice to take action on their own land to abate the nuisance.

3.256 The Explanatory Notes for the Bill stated that:<sup>223</sup>

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.

3.257 If a notice requirement were introduced, a question would also arise as to the consequence of non-compliance.

3.258 The Commission also considers that a requirement to give a notice on each occasion when a neighbour wishes to cut and remove any part of any overhanging branch would be onerous for both the neighbour and the tree-keeper.

3.259 As mentioned above, the Commission is unaware of any binding proposition of law that a right of abatement by removal of overhanging branches or encroaching roots up to the common boundary is qualified, if the removal of the overhanging branches will damage the remaining parts of the tree. It does not consider that the

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221 Submissions 37, 49, 57.

222 Submissions 8, 39, 64.

223 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 6.

Act should be amended to confer a right to compensation on a tree-keeper for injury to a tree caused by the exercise of the right of abatement.

### ***Costs of abatement***

3.260 The Commission does not consider that the Act should be amended to provide that a neighbour who exercises a right of abatement can generally recover the costs of abatement from a tree-keeper. Under Part 4 of Chapter 3 of the Act, there is a limited right of that kind in particular circumstances where overhanging branches are cut and removed. A general right to the costs of abatement would operate inconsistently with the policy choices and the tight controls that inform and restrict the extent of the operation of the provisions in Part 4.

### ***Return of legally pruned material***

3.261 The Commission does not consider that the Act should be amended to provide that viable fruit must be returned to the tree-keeper for a tree situated on land to which Chapter 3 of the Act applies. The introduction of such a requirement would create issues as to whether fruit was viable when the overhanging branch is removed and as to the effect of not returning viable fruit.

3.262 The Commission notes that Chapter 3 does not apply to trees planted or maintained for a commercial purpose. Outside that context, the Commission considers that the legislative structure that overhanging fruit does not have to be returned is a simple and reasonable legislative permission that eliminates the risk of minor damages claims over the value of unreturned fruit.

3.263 The Commission also does not consider that it is necessary for the Act to include a formal process for the return of any removed parts of a tree where a neighbour chooses to do so. An important object of the Act is to provide rules about responsibilities for trees, but that does not extend to all the ways in which the neighbour and tree-keeper must behave. The Act encourages them to informally resolve issues. It confers the right upon a neighbour to elect whether or not to return branches removed by abatement. It should not be necessary to create a formal process for what mostly will be a minor inconvenience when the removed parts of a tree are returned.

3.264 The Commission considered the proposal to amend the common law right of abatement to enable a neighbour to cut tree branches up to 50 centimetres inside the tree-keeper's boundary. However, the Commission does not consider it is necessary to authorise a trespass onto a tree-keeper's land to achieve a reasonable balance of rights relating to the maintenance of a tree.

3.265 Consistently with the view that the common law right of abatement should remain, the Commission is not of the view that the Act should be amended to provide that the right of abatement should be suspended whilst an application is proceeding in QCAT. Under section 65(c) of the Act, QCAT must be satisfied of certain matters before making an order under section 66. To the extent that the issue relates to the land being affected because branches from the tree overhang the land, one of those matters is that the neighbour is unable to properly resolve the issue using the process under Part 4 of Chapter 3. In the Commission's view, the 'process' under Part 4 is the process to give a notice under section 57.

3.266 A neighbour should, even during a proceeding, be able to exercise their right of abatement. Abatement is carried out at the cost of the neighbour. Where a matter is not quickly resolved and a tree requires periodic trimming in order to avoid or mitigate damage, a removal of the right of abatement might work hardship upon a neighbour. In any event, the availability of abatement may encourage a neighbour to stop an application in QCAT.

### ***State or local government***

3.267 The Commission considered whether section 54(2) of the Act should be amended so that it applies to a person living next to land owned or controlled by the State or local government (to which Chapter 3 of the Act does not apply). That would have the effect of giving that person the same permission that a neighbour under Chapter 3 has, not to return the removed parts of a tree to the tree-keeper.

3.268 Such an amendment would result in some land owned or controlled by the State or local governments being included in the operation of Chapter 3 of the Act only for the purpose of modifying the common law of abatement. Chapter 3 of the Act is otherwise only applicable to neighbours and tree-keepers, and land and trees to which the Chapter applies.

3.269 The Commission therefore does not recommend that the modification to the common law right of abatement under section 54(2) of the Act be expanded to include all neighbours of the State or local governments.

### ***Community understanding and education***

3.270 The Commission identified as an issue the possibility that neighbours may lack a clear or any understanding of the common law right of abatement.

3.271 If additional community education resources are to be developed, the Commission suggests that this include information regarding the right to abatement and ways in which a member of the public may go about exercising their right.

## **NOTICE TO REMOVE OVERHANGING BRANCHES 2.5 METRES OR LESS ABOVE THE GROUND**

3.272 A neighbour may give a written notice to a tree-keeper asking the tree-keeper to cut and remove the branches that are 2.5 metres or less above the ground and extend more than 50 centimetres over the boundary.<sup>224</sup>

3.273 If the work is not done, the neighbour (or their contractor) may remove the branches and the tree-keeper is liable for the reasonable expenses incurred in cutting

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*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(1)–(2).



and removing the overhanging branches, up to a maximum of \$300<sup>225</sup> in each 12 month period.<sup>226</sup>

3.274 The neighbour may recover the amount for which the tree-keeper is liable as a debt, with or without interest, in minor civil dispute proceedings through QCAT.<sup>227</sup>

3.275 The notice procedure does not authorise cutting or removal of branches contrary to a vegetation or tree protection order over the tree.<sup>228</sup>

### Approved form

3.276 The Act provides that ‘the Chief Executive may approve forms for use under this Act’.<sup>229</sup>

3.277 A notice to contribute to fencing work under Chapter 2 of the Act must be in the approved form,<sup>230</sup> but there is no equivalent requirement for a notice to cut and remove overhanging branches under Chapter 3. Section 57(3) of the Act sets out the requirements for a notice to cut and remove overhanging branches.<sup>231</sup>

3.278 However there is an approved form for the notice.<sup>232</sup> It is entitled ‘Form 3 — Notice for Removal of Particular Overhanging Branches’.<sup>233</sup> A neighbour is not required to use the approved form but may do so.

### The Commission’s view

3.279 The Commission considers that the Act should be amended to provide that a notice to cut and remove overhanging branches must be in the approved form. Where the approved form is used, it will ensure that the requirements for the notice are complied with. An added benefit of the approved form is that it contains other useful information for both the neighbour and tree-keeper.

225 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(4). A neighbour cannot claim for their own labour to undertake the work: Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2308 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State).

226 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(5).

227 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(5). The relevant application form to complete is Queensland Civil and Administrative Tribunal, *Form 3 Application for minor civil dispute — minor debt (Version 4)*. The application must include a copy of all relevant documents, such as receipts for the expenses incurred.

228 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 43.

229 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 96.

230 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 31(2).

231 Section 57(2) of the Act provides that ‘the neighbour may give a written notice to the tree-keeper asking the tree-keeper to cut and remove the overhanging branches’. Section 57(3) states the information that must be included in the notice.

232 Queensland, *Queensland Government Gazette*, No 83, 12 April 2013, 512. See previously, at No 78, 5 April 2013, 489 (version 2); No 62, 28 October 2011, 397 (version 1).

233 The forms are available at Queensland Government, *Notices to neighbours regarding fences and trees* (29 October 2015) <<https://publications.qld.gov.au/dataset/notices-to-neighbours>>.

3.280 The Commission notes that substantial compliance with any notice mentioned in the Act is adequate for the Act.<sup>234</sup> The effect is that notice not in an approved form may be adequate, depending on its contents.

### **Recommendation**

**3-9 Section 57(3) of the Act should be amended to require that a notice to cut and remove overhanging branches under section 57(2) must be in the approved form.**

### **Height and depth limits for a notice**

3.281 Under Part 4 of Chapter 3 of the Act, a notice to cut and remove overhanging branches is used for overhanging branches that are 2.5 metres or less above the ground and extend more than 50 centimetres over the boundary.<sup>235</sup>

### **Discussion Paper**

3.282 In the Discussion Paper, the Commission sought submissions regarding whether the height and depth triggers for Part 4 of Chapter 3 are appropriate.

### **Submissions**

3.283 The Commission received numerous submissions in response to this issue. The majority of the submissions indicated that the height and depth limits were in some way inappropriate or required amendment.<sup>236</sup>

#### **Height**

3.284 The majority of submissions related to the height limit. The Townsville Community Legal Service Inc submitted that some have said that the height limit of 2.5 metres or less above the ground is too high. However, most other submissions stated that the height limit should be increased.<sup>237</sup>

3.285 A number of submissions noted that tree branches more than 2.5 metres above the ground may pose a nuisance<sup>238</sup> or a danger.<sup>239</sup> One member of the public with safety concerns noted that:<sup>240</sup>

<sup>234</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 91.

<sup>235</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(1)–(2).

<sup>236</sup> Submissions 15, 15A, 16, 23, 25, 31, 37, 38, 40, 41, 49.

<sup>237</sup> Submissions 15, 15A, 16, 23, 25, 37, 38, 49.

<sup>238</sup> Submissions 16, 37.

<sup>239</sup> Submissions 16, 37, 38.

<sup>240</sup> Submission 38.

The greater the height that falling material is from the ground, the greater the speed and impact of the fall. [This means that] material falling from above 2.5 metres is actually more hazardous than the same material falling below 2.5 metres.

3.286 It was submitted that, in light of the safety concerns posed by overhanging branches more than 2.5 metres above the ground, neighbours should have the ability to issue a notice for removal of those branches.<sup>241</sup> Other submissions also stated that the Act should enable a neighbour to issue a notice for branches more than 2.5 metres above the ground<sup>242</sup> or generally provide a means by which such an issue can be resolved without resort to QCAT.<sup>243</sup>

3.287 Noting that tree branches more than 2.5 metres above the ground are equally likely to pose a nuisance or a danger, the Ipswich City Council and the LGAQ suggested that the height limit be removed from the notice process under Part 4 of Chapter 3. They submitted that:

under the common law right of abatement there is no height trigger, so it seems consistent to not prescribe a height for the process under the Act.

3.288 A member of the public stated that the height limit should be increased; noting that the higher an overhanging branch, the higher the cost of lopping that branch.

### **Depth**

3.289 A number of submissions also proposed that the depth trigger should be amended.<sup>244</sup>

3.290 A member of the public submitted that the depth trigger should be revised to a permanent overhang of one metre across the boundary. It was submitted that the depth trigger should be increased because:<sup>245</sup>

The Act is out of step with the shift to higher density living and is overly burdensome on the tree-keeper. Residential density is increasing. Lot sizes are decreasing. Trees are not getting any smaller. Trees make a valuable contribution to our communities. They provide privacy, shade, habitat for wildlife and improved visual amenity. Neighbours will inevitably need to become more tolerant of overhanging branches if they want the benefits trees provide.

A foreseeable consequence of not revising the depth trigger is more cases coming before QCAT or less trees in our communities.

3.291 Conversely, a number of submissions by members of the public effectively suggested that the depth trigger should be decreased by submitting that the

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241 Ibid.

242 Submission 25.

243 Submission 49.

244 Submissions 31, 40, 49.

245 Submission 41. Note, if this amendment were made, consequential amendments would be required, for example, to ss 52(1), 55(a), 57, and heading to pt 4.

50 centimetre limit should apply on the tree-keeper's side of the boundary.<sup>246</sup> It was also suggested that a neighbour should be able to prune a tree back to 50 centimetres inside the tree-keeper's boundary without consequence.<sup>247</sup> One person stated:<sup>248</sup>

we cannot build this close and cannot extend a building over the boundary, so why is it that a tree can occupy a neighbour's space?

### **Community awareness**

3.292 The Townsville Community Legal Service Inc raised the issue of community awareness, stating that it appears that many neighbours do not know the height trigger exists.

3.293 Conversely, the Queensland Arboricultural Association stated that in the experience of independent arborist consultants, the height and depth triggers are easily understood by all parties and are workable.

### **The Commission's view**

3.294 The primary issue raised was that the height limit of 2.5 metres or less above the ground restricts the scope of the notice process in Part 4 of Chapter 3 of the Act.

3.295 The Commission notes that overhanging branches that are 2.5 metres or less above the ground may impede the passage of a person or vehicle. It is also a lower and safer height range to carry out the work of cutting and removing the branches.<sup>249</sup>

3.296 The Commission considers that the policy reasons for selecting the height limit of 2.5 metres or less above the ground for the notice process have not been shown to be invalid, although there clearly is scope for a range of differing views about the appropriate height (or depth). The Commission also notes that the existing height limit is consistent with section 71 of the Act, which provides that 'the primary consideration is the safety of any person'.

3.297 The Commission therefore considers that, for the purposes of a notice to cut and remove overhanging branches under Part 4 of Chapter 3 of the Act, the height limit of 2.5 metres or less above the ground should continue to apply.

3.298 As to the depth trigger, the Commission notes that the majority of submissions did not raise it as an issue.

3.299 The Commission considers that the 50 centimetre depth trigger provides a reasonable balance between the right of a neighbour to have uninterrupted use of

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246 Submissions 31, 40, 49.

247 Submission 40.

248 Submission 31.

249 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.69].

their property, and the burden that a tree-keeper may experience as a result of the ongoing need to trim or lop trees close to the boundary.

3.300 Overall, the Commission concludes that no change should be made to the height or depth limits for a notice to cut and remove overhanging branches under Part 4 of Chapter 3 of the Act.

3.301 As to the issue of community awareness, the Commission considers that this may be an area in which community education would assist.<sup>250</sup>

### **Prescribed maximum contribution under a notice**

3.302 If a tree-keeper does not respond to a notice to cut and remove overhanging branches within 30 days (or the time otherwise specified in the notice) then the neighbour may cut and remove the overhanging branches, or arrange for someone else to do so.<sup>251</sup> The tree-keeper will be liable for the reasonable expenses incurred by the neighbour in doing so, up to a maximum of \$300.<sup>252</sup>

### **Discussion Paper**

3.303 In the Discussion Paper, the Commission sought responses on whether the prescribed maximum contribution of \$300 was appropriate.

### **Submissions**

3.304 The Commission received numerous submissions in response to this issue.

3.305 One member of the public submitted that the prescribed maximum liability of \$300 was appropriate, stating that ‘it represents a fair contribution by the tree-keeper’.<sup>253</sup> The Townsville Community Legal Service Inc also stated that ‘the maximum contribution is adequate and should not be modified’.

3.306 The majority of submissions indicated that the prescribed maximum liability of \$300 is insufficient.<sup>254</sup> Several members of the public indicated that they would be out-of-pocket if they arranged for overhanging branches to be lopped and then sought the \$300 contribution from the tree-keeper.<sup>255</sup>

3.307 The Queensland Arboricultural Association notes that the current prescribed maximum contribution may be sufficient for the cost of minor pruning, but would not assist if a more significant amount of pruning was required or if the issue was such that an arborist became necessary. The Queensland Arboricultural Association concluded that the amount could be too low and instead ‘should reflect

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250 Public education and awareness is discussed further in Chapter 6 of this Report.

251 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(1)–(2).

252 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(4).

253 Submission 41.

254 Submissions 15A, 16, 31, 37, 38, 39, 40, 49, 51.

255 Submissions 31, 49, 51.

the average minimum call out charge for a trained and qualified arboricultural consultant to attend the site’.

3.308 Another member of the public submitted that some tree lopping jobs are very expensive because a tree-keeper has been negligent with regard to their responsibilities over a period of time, and a neighbouring owner should not be penalised for this negligence.<sup>256</sup>

3.309 A number of submissions also raised the issue of tree-keepers being lax with regard to their responsibilities.<sup>257</sup> The Ipswich City Council and the LGAQ both submitted that:

Feedback is that the matter of limiting reimbursements to \$300 for those neighbours having to undertake extensive lopping to tree(s) is making the provisions of the Act unattractive and therefore frustrating to affected residents. The prescribed amount of \$300 is allowing the ‘tree-keeper’ to be inactive on their responsibilities. If this amount were raised and/or changed to, for example, 50% of costs, then this would make the ‘tree-keeper’ more proactive.

3.310 A member of the public stated that if the contribution a tree-keeper was required to pay was commensurate to the cost of lopping or other work on trees, then:<sup>258</sup>

This would in time become a deterrent as tree owners would come to understand that it would be far cheaper to do regular maintenance on any of their trees which have the potential to be problematic for their neighbours.

3.311 Caxton Legal Centre Inc commented on the height and depth triggers, the \$300 maximum liability and the ‘one notice per year’ limitation. This respondent, noting the need to balance the hardship that may be caused to both the tree-keeper and the neighbour as a result of those limitations, stated that:<sup>259</sup>

It is difficult to comment definitively on these issues because although many of our clients can ill afford even a \$300 fee for these costs, there are other genuine cases where action is required to lop trees in order to limit ongoing damage to a neighbour's property, and in such cases, these particular limitations can cause significant hardship too.

3.312 The submissions offered a variety of suggestions as to how the contribution should be increased, namely:

- to an amount of \$500, which would be a reasonable amount to cover the trimming and disposal (which is often an expensive exercise) of overhanging branches;<sup>260</sup>

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256 Submission 47.

257 Submission 16, 31, 37, 47.

258 Submission 47.

259 Submission 58.

260 Submission 39. This submission by Strata Community Australia (Qld) also noted that the Act treats roots and branches in the same manner, and that the removal of tree roots often involves excavation. It was submitted that it is unlikely that the excavation and removal of tree roots would cost less than \$500.

- to an amount of \$1000, which should thereafter be regularly adjusted to account for inflation;<sup>261</sup>
- to an amount of or closer to \$5000, given the additional height at which arborists are required to work;<sup>262</sup>
- to 50% of the costs of the work carried out;<sup>263</sup>
- such that there is not an upper limit<sup>264</sup> (or if this is unsuitable, then a much greater upper limit);<sup>265</sup> or
- by calculating the contribution on a per tree/shrub per year basis.<sup>266</sup>

### ***The Commission's view***

3.313 The Commission accepts that the current maximum liability of \$300 for expenses incurred is insufficient to meet the costs to the neighbour of having work done to cut and remove overhanging branches 2.5 metres or less above the ground in all cases.

3.314 The Commission considers that it is fair to impose some limit on the liability of a tree-keeper, taking into account that a tree-keeper may experience hardship and that the lopping of overhanging branches may sometimes be a matter of a neighbour's preference rather than necessity.

3.315 The Commission considered whether the liability should be increased to a higher maximum monetary amount, or whether the contribution should be expressed as a percentage of the expenses incurred by the neighbour.

3.316 A higher amount might need further review at a later date, if that amount also became inappropriate or insufficient.

3.317 The Commission notes that to express the liability as a percentage of the expenses of doing the work would increase the expenses of the neighbour in most cases, as it would result in a neighbour bearing a proportion of all the expenses rather than expenses incurred in excess of the maximum of the tree-keeper's liability.

3.318 The Commission considers that these problems would be addressed best by amending section 58(4) to provide that the tree-keeper's liability is up to a maximum of \$500 or any greater amount prescribed by regulation. A prescribed amount could be updated as necessary.<sup>267</sup>

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261 Submission 49.

262 Submission 38.

263 Submissions 16, 37.

264 Submissions 40, 47.

265 Submission 47.

266 Submission 40.

267 The Governor in Council has power to make regulations under s 95 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

3.319 The Commission notes that if a prescribed amount were set by way of regulation, that information could be included on the approved form for a notice to cut and remove overhanging branches.

### **Recommendation**

**3-10 Section 58(4) of the Act should be amended to delete the amount of \$300 and replace it with ‘\$500 or any greater amount prescribed by regulation’.**

### **Frequency of a notice to cut and remove**

3.320 A neighbour cannot give a notice to cut and remove overhanging branches under Part 4 of Chapter 3 of the Act if the neighbour has given a prior notice, for any tree, to the tree-keeper within the previous 12 months.<sup>268</sup>

### **Discussion Paper**

3.321 In the Discussion Paper, the Commission sought submissions regarding whether this prescribed frequency, which restricts a neighbour to issuing only one notice to a tree-keeper for all of the tree-keeper’s trees per 12 month period, is appropriate.

### **Submissions**

3.322 The Commission received a number of responses to this issue, which were evenly divided. A number of respondents, including Strata Community Australia (Qld), a member of the public, the Queensland Arboricultural Association and the Townsville Community Legal Service Inc stated that the prescribed frequency of one notice per 12 month period is appropriate.<sup>269</sup>

3.323 The Queensland Arboricultural Association submitted that the pruning of trees at a frequency of once per 12 month period is appropriate, as long as the notice is not given or the pruning is not done too early in the growing season. The Queensland Arboricultural Association submitted that:

Selective remedial pruning to address the emergence of epicormic shoots can be easily and appropriately accommodated at 12 monthly intervals. Further pruning within 12 months has potential to inflame vexatious circumstances, attract unnecessary cost and would be contra to (Australian Standards).

3.324 A number of other submissions by members of the public stated that the prescribed frequency of one notice per 12 month period is inappropriate.<sup>270</sup> These submissions stated that summer in Queensland is conducive to rapid plant or tree growth, and that this may result in the need for more than one trimming per year. As

<sup>268</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 57(5)(a). Note also that a notice cannot be given to anyone else who is also a tree-keeper for the tree with the overhanging branches: s 57(5)(b).

<sup>269</sup> Submissions 39, 41, 57, 62.

<sup>270</sup> Submissions 40, 47, 49.



such, a neighbour should be able to give notice to a tree-keeper as required. One submission suggested that this could be two or more notices if necessary, with an attached quote.<sup>271</sup>

3.325 A member of the public stated that the ability to issue a notice may have a protective aspect, submitting that:<sup>272</sup>

restricting the number of notices should be reconsidered — especially in consideration for older people who may need the protection a notice might provide. It would be very rare to find a vexatious litigant in this area and the need for more than one notice in a year is likely to be based on genuine need.

3.326 Caxton Legal Centre Inc commented on the need to balance the hardship that requirements to trim or lop trees may cause to a tree-keeper with the need for trimming or lopping in order to limit ongoing damage to a neighbour's property, noting that neighbours may also suffer hardship as a result of the limitations of Part 4 of Chapter 3.

### ***The Commission's view***

3.327 The Commission considers that there should be a limit to the frequency with which a neighbour can issue a notice to a tree-keeper asking that overhanging branches be cut and removed.

3.328 As previously stated, there is a balance to be struck between the right of a neighbour to ask that a tree-keeper cut and remove overhanging branches and the burden that a tree-keeper may experience as a result of the ongoing need for the trimming or lopping of tree branches. It is also appropriate that the notice process cannot be used in a manner that is oppressive or vindictive or that undermines the monetary limit of the tree-keeper's liability for their responsibility to cut and remove overhanging branches within the specified height and depth limits.

3.329 The Commission acknowledges that the current prescribed frequency of one notice (for all trees on a tree-keeper's land) for an ensuing period of 12 months may pose some difficulties for neighbours. For example, a tree may grow at such a rate that multiple notices would be required within one 12 month period, or overhanging branches for some trees may become a problem within less than 12 months of a neighbour having given a notice for another tree.

3.330 The Commission notes that the neighbour retains the right of abatement at all times. That right is neither limited in frequency, nor is it limited to overhanging branches of a particular height and depth.

3.331 The Commission is of the view that the current maximum frequency of one notice per 12 month period is appropriate and should remain in place. This frequency provides for a balance of rights and responsibilities, and will prevent oppressive use of the notice process against the tree-keeper.

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271 Submission 40.

272 Submission 47.

3.332 The Commission therefore does not recommend any change to the current prescribed frequency with which a neighbour may give a notice to cut and remove overhanging branches to a tree-keeper.

### **Liability when going onto neighbour's land under a notice**

3.333 There is a note under section 57(3)(c) of the Act, which states that it is a neighbour's responsibility to consider public liability insurance before giving a person permission to enter their land, and a tree-keeper's responsibility to consider a contractor's insurance before engaging a contractor to carry out work on a tree. These points are also included in the approved form.

3.334 During the consultation process for the Bill, concerns were raised that a neighbour is not afforded the protection of any limitation of liability if a tree-keeper or their contractor enters the neighbour's land to carry out work. It was suggested at that time that either the Act should provide that a tree-keeper or contractor enters a neighbour's land at their own risk, or that a tree-keeper or contractor entering a neighbour's land to carry out work must indemnify the neighbour against any damage or personal injury occurring on the neighbour's land.<sup>273</sup>

### **Discussion Paper**

3.335 In the Discussion Paper the Commission sought submissions as to whether the Act should expressly deal with questions of liability arising from a person going onto a neighbour's land pursuant to a notice to cut and remove branches.<sup>274</sup>

### **Submissions**

3.336 The Commission received relatively few responses to this question.<sup>275</sup> A submission by Strata Community Australia (Qld) answered in the negative, but did not provide any further explanation for this response.

3.337 The Queensland Arboricultural Association stated that the Act should not expressly deal with these questions of liability as long as the person obtains the landowner's permission before going on to the land. The Queensland Arboricultural Association stated that this may require further consideration in other situations where QCAT issues an order that requires entry onto land, but notes generally that a landowner's duty of care extends to all persons coming on to their property.

3.338 Some submissions from members of the public proposed change. One member of the public submitted that the notice should clearly specify that the tree-keeper is responsible for any insurance required by the tree-keeper or a contractor before entering the neighbour's property.<sup>276</sup> A second member of the public indicated that, whilst a contractor engaged by a tree-keeper is responsible for their own

<sup>273</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.75], citing Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 14.

<sup>274</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.75]–[3.77], Question 3-6.

<sup>275</sup> Submissions 39, 40, 41, 49, 57.

<sup>276</sup> Submission 40.

insurance, it would be useful for the Act to clarify that the contractor's insurance also covers any act involving the neighbour's property. It was also suggested that it would be useful to clarify that, as a general rule, households should obtain worker's compensation insurance.<sup>277</sup>

3.339 Another member of the public indicated that 'the normal rules of liability should apply', and a tree-keeper should not be required to indemnify the neighbour if they, or a contractor, are undertaking work on the neighbour's land. It was submitted that the risk should be managed by the person best placed to do so which, given their superior knowledge of their property and any hazards, would be the neighbour. Therefore, the neighbour should ensure that it is safe for people to enter onto their land to carry out work on a tree, including by alerting those people to any hazards.<sup>278</sup>

3.340 The Townsville Community Legal Service Inc answered this question with reference to liability in trespass. It submitted that:

The Act should not deal with remedies for common law trespass or other forms of trespass other than to prescribe where one might be allowed to enter or remain on another's land for the proper objects of the Act. It could make specific reference to section 11 of the *Summary Offences Act 2005* (Qld). That Act makes specific reference to 'unlawful entry' which could be accommodated in section 57(4).

### ***The Commission's view***

3.341 The present note under section 57(3)(c) of the Act does not purport to affect the liabilities or obligations that otherwise arise when a person permits another person to enter their land to perform work.

3.342 The Commission considers that it is unnecessary for the Act to expressly address those matters further.

3.343 What is covered by insurance will vary depending upon the policies obtained by a neighbour, tree-keeper or contractor. The Commission does not consider that the Act or notice to cut and remove overhanging branches can or should be used to provide further information or guidelines about insurance.

## **Appropriateness of notice procedure**

### ***Discussion Paper***

3.344 In the Discussion Paper, the Commission sought submissions regarding whether, as a whole, the procedure under Part 4 of Chapter 3 of the Act was appropriate to give effect to the rights and responsibilities of the tree-keeper under section 52 of the Act.

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<sup>277</sup> Submission 49.

<sup>278</sup> Submission 41.

## **Submissions**

### ***Rights and responsibilities***

3.345 Several submissions indicated that the notice process is effective to give effect to the rights and responsibilities of the tree-keeper.<sup>279</sup> QAILS stated that ‘the statutory procedure and the approved form for a notice to cut and remove overhanging branches are generally clear and easy to use’. A member of the public described the procedure as ‘straight forward and easy for both parties to understand and execute’.<sup>280</sup>

3.346 There were some specific aspects of the notice procedure that were critiqued by submissions, as discussed previously. Broadly these included the height and depth restrictions,<sup>281</sup> the fact that tree-keepers may avoid taking some or full responsibility for their trees,<sup>282</sup> and the frequency with which notices may be issued.<sup>283</sup>

### ***Resolution of disputes***

3.347 The Queensland Arboricultural Association made the following general submission:

The [notice may] have the potential to give rise to increased animosity between any feuding parties. In most situations (throughout the developed world), boundary encroachments and actionable nuisance issues are generally dealt with under the common law rights of abatement which seems to work well enough.

Re-evaluate inclusion of this chapter based on evidence of use.

### ***Other issues***

3.348 Section 57(3)(b) of the Act provides that a tree-keeper who receives a notice to cut and remove overhanging branches may give a counter-notice of their intention to enter the neighbour’s land to cut and remove the branches at least a day before entering the neighbour’s land.

3.349 It was submitted by a member of the public that the period of time within which the notice to enter is to be given should be two working days before entry. The submission argues that a period of one day’s notice seems insufficient, taking into account the busy lives that people lead.<sup>284</sup>

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279 Submissions 39, 40, 41, 55.

280 Submission 41.

281 See [3.283] ff above.

282 See [3.309] above.

283 See [3.322] ff above.

284 Submission 40.

### ***The Commission's view***

3.350 The Commission does not consider that it is necessary to increase the period of time within which a tree-keeper is to give a notice to a neighbour advising of entry onto their land. In the circumstances, the neighbour has requested the work be done and is reasonably expecting to receive a notice to this effect. The Commission has not received any submissions stating that this period has been insufficient or caused difficulties. As such, the Commission is not persuaded that the period of time should be increased.

3.351 More generally, the Commission has considered how the notice process is operating for overhanging branches that are 2.5 metres or less above the ground and extend at least 50 centimetres over the boundary.

3.352 The Commission acknowledges that specific issues have been raised about parts of the notice process, and the rights and responsibilities of the neighbour and tree-keeper. These have been dealt with earlier in this Report and, where appropriate, recommendations to amend the Act have been made.<sup>285</sup>

3.353 The submissions received did not indicate that the notice process as a whole is ineffective, and it appears that overall it is working well. Subject to those particular issues that the Commission has addressed, there is no suggestion that the notice process requires substantial change.

3.354 In many cases, overhanging branch issues are addressed by neighbours by informal agreement<sup>286</sup> or by a neighbour exercising the right of abatement.

3.355 The Commission accepts that the notice process will not resolve all overhanging branch disputes for overhanging branches 2.5 metres or less above the ground. However, it considers that it is a valuable means by which many disputes can be adequately addressed. The Commission is of the view that the notice process provided for by Part 4 of Chapter 3 should continue to operate.

### **JURISDICTION OF QCAT**

3.356 Apart from the operation of Part 4 of Chapter 3 and the right of abatement, the rights of a neighbour and the obligations of a tree-keeper created by the Act are framed by QCAT's powers to make orders under Part 5 of Chapter 3. Section 61 provides that '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'.<sup>287</sup>

3.357 However, the apparent simplicity of section 61 is belied by the limits upon QCAT's powers contained in the other provisions of Part 5, expressed as requirements that must be satisfied before QCAT can make an order. Those limits

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<sup>285</sup> See [3.281] ff above, in relation to the height and depth triggers; [3.302] ff above, in relation to the maximum contribution payable; and [3.320] ff above, in relation to the frequency with which a neighbour may issue a notice to a tree-keeper.

<sup>286</sup> The informal resolution of disputes is discussed in Chapter 4 of this Report.

<sup>287</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46 (for the definition of land 'affected by a tree').

vary in different categories of case. First, there are limits that apply generally, including the threshold that the subject matter of the dispute must be serious injury to a person, or serious damage to land or property on the land of the neighbour or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.<sup>288</sup> Second, where interference with the use and enjoyment of the land is an obstruction of sunlight or a view, there are further specific limits upon QCAT's powers.<sup>289</sup>

3.358 Accordingly, this Report will consider Part 5 in four separate categories:

- applications to QCAT about trees generally, including the general requirements that apply in a case of overhanging branches, obstruction of sunlight or obstruction of a view;
- applications to QCAT about overhanging branches;
- applications to QCAT about obstruction of sunlight; and
- applications to QCAT about obstruction of a view.

## Applications in QCAT generally

### *Who may apply to QCAT*

3.359 A neighbour may apply to QCAT for an order under section 66 of the Act.<sup>290</sup> For a lot recorded in the freehold land register, a neighbour who is an occupier, but not a registered owner, of that land can bring an application only if the owner of the land has refused to bring the application.<sup>291</sup>

3.360 The Act expressly encourages the tree-keeper and neighbour to resolve the issue informally.<sup>292</sup>

### *Requirements before QCAT can make an order*

3.361 Generally, QCAT may make an order under section 66 of the Act if, and only if, it is satisfied that:<sup>293</sup>

- the neighbour has made a reasonable effort to reach agreement with the tree-keeper;<sup>294</sup>

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<sup>288</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2).

<sup>289</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3).

<sup>290</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 62.

<sup>291</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 62(2).

<sup>292</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 60(1).

<sup>293</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(a), (b). See also s 65(d) (for the additional requirement to provide copies of the application under s 63, unless it is waived) and (c) (for the additional requirements where the land is affected by branches that overhang the land).

<sup>294</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(a).

- the neighbour has taken all reasonable steps to resolve the dispute under any relevant local law, local government scheme or local government administrative process.<sup>295</sup>

### **The orders QCAT can make**

3.362 QCAT may make a wide variety of orders about trees. Under section 66 of the Act, QCAT can make ‘the orders it considers appropriate’ in relation to a tree affecting a neighbour’s land to:<sup>296</sup>

- prevent serious injury to any person;<sup>297</sup>
- remedy, restrain or prevent serious damage to the neighbouring landowner’s land or property on the land;<sup>298</sup> or
- remedy, restrain or prevent substantial, ongoing and unreasonable interference<sup>299</sup> with the use and enjoyment of the neighbour’s land.<sup>300</sup>

3.363 Additionally, there is a range of specific orders that may be made.<sup>301</sup>

### **Matters for QCAT to consider**

3.364 Chapter 3 specifies the matters QCAT must consider<sup>302</sup> and other matters QCAT may consider.<sup>303</sup>

#### **Safety**

3.365 The primary consideration is the safety of any person.<sup>304</sup>

#### **Removal or destruction of living tree to be avoided**

3.366 By way of counterpoint, it is provided that a living tree should not be removed or destroyed, unless there is no other means of satisfactorily resolving the issue that exists in relation to the tree.<sup>305</sup>

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295 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 65(b). The relevant local government may have a scheme for dealing with ‘nuisance’ trees.

296 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2).

297 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(a).

298 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(i).

299 For interference that is an obstruction of sunlight or a view, see the discussion at [3.459] ff below and *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3).

300 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(ii).

301 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5).

302 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73.

303 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 74–75.

304 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 71.

305 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 72.

### **General matters QCAT must consider**

3.367 Section 73 lists general matters that QCAT must consider. They include:

- the location of the tree in relation to the boundary of the land on which it is situated and any premises, fence or other structure affected by the location;<sup>306</sup>
- whether the tree has any historical, cultural, social or scientific value;<sup>307</sup>
- any contribution the tree makes to the local ecosystem, natural landscape and scenic value of the land or locality;<sup>308</sup>
- any contribution the tree makes to public amenity;<sup>309</sup>
- any contribution the tree makes to the amenity of the land on which the tree is situated;<sup>310</sup> and
- other matters.<sup>311</sup>

### **General matters QCAT may consider**

3.368 There is also a range of other matters QCAT may consider. They vary, depending on how the neighbour alleges the tree affects the land. These matters are outlined below.

### **Matters QCAT may consider if serious injury or serious damage is alleged**

3.369 If the neighbour alleges that 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 property on the 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.<sup>312</sup> QCAT may also consider 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.<sup>313</sup>

3.370 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,<sup>314</sup> any steps that have been taken by the tree-keeper or the neighbour to prevent further

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<sup>306</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(a).

<sup>307</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(c).

<sup>308</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(d)–(e).

<sup>309</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(f).

<sup>310</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(g). This may include a contribution to privacy, landscaping, garden design and protection from sun, wind, noise, odour or smoke.

<sup>311</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(b), (h), (i), (j), (k).

<sup>312</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(1)(a).

<sup>313</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(1)(b).

<sup>314</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(a).



injury or damage,<sup>315</sup> anything other than the tree that may have caused, or contributed to, some or all of the injury or damage<sup>316</sup> and any other matter QCAT considers relevant.<sup>317</sup>

***Matters QCAT may consider if substantial, ongoing and unreasonable interference is alleged***

3.371 If the neighbour alleges the tree has caused, or is causing, substantial, ongoing and unreasonable interference with the use and enjoyment of the land affected by the tree, QCAT may consider some additional matters.<sup>318</sup> They include whether anything other than the tree has contributed or is contributing to the interference,<sup>319</sup> any steps taken by the tree-keeper or the neighbour to prevent or minimise the interference,<sup>320</sup> the size of the neighbour's land<sup>321</sup> and whether the tree existed before the neighbour acquired the land.<sup>322</sup>

***Other suggested matters for QCAT to consider***

***Discussion Paper***

3.372 In the Discussion Paper, the Commission asked whether there were any additional matters that it is appropriate that QCAT 'must consider'.<sup>323</sup>

3.373 Two submissions indicated that there were not any additional matters.<sup>324</sup> The remainder suggested additional matters which it would be appropriate that QCAT 'must consider', as summarised below.<sup>325</sup>

***Tree types, location and maintenance***

**SUBMISSIONS**

3.374 Currently, QCAT must consider the likely impact on a tree of pruning it, including the impact on the tree of maintaining it at a particular height, width or shape.<sup>326</sup> The Cairns Regional Council proposes that this matter should be added to as underlined below:

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<sup>315</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(b).

<sup>316</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(c).

<sup>317</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 74(2)(d).

<sup>318</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75.

<sup>319</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(a).

<sup>320</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(b).

<sup>321</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(c).

<sup>322</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(d).

<sup>323</sup> *Neighbourhood Disputes Act Discussion Paper* (2015), Question 3-17.

<sup>324</sup> Submissions 39, 57.

<sup>325</sup> Submissions 20, 23, 29, 36, 40, 41, 44, 49.

<sup>326</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(1)(j).

- (j) the likely impact on the tree of pruning it, including the impact on the tree of maintaining it at a particular height, width or shape, safe and stable balance, safe and stable structure, including the possibility of epicormic regrowth. (emphasis added)

3.375 A member of the public suggested that QCAT should be required to consider the appropriateness of a particular tree for the location in which it has been planted, because some large trees are inappropriately planted on narrow boundaries or in close proximity to sewers, stormwater drains, pools, retaining walls, building foundations and the like.<sup>327</sup>

3.376 The Queensland Arboricultural Association suggested that QCAT should be required to consider the 'likely tree-related building damage from tree root growth and function'.

3.377 Another member of the public suggested that the location of the tree should also be considered by reference to the particular features of a piece of land. For example, due to the slope of a parcel of land, a tree can overhang a roof and cause significant overshadowing even where it is some distance from a boundary.<sup>328</sup>

3.378 As well, the Queensland Arboricultural Association suggested that section 73(1)(i) should include not only a consideration of 'risks associated with the tree in the event of a cyclone or other extreme weather event', but also typical and moderate weather events for the relevant location within Queensland. It submitted that trees may also fail in typical or more moderate weather events, and such risks should be given equal or greater consideration.

#### **THE COMMISSION'S VIEW**

3.379 The Commission considers that many of the matters raised for inclusion by the submissions are already addressed by section 73.

3.380 Concerns about the safety of a tree fall within the scope of section 73(1)(h)–(j) as well as section 71. The Commission does not consider it necessary to amend section 73(1)(j) to refer specifically to a tree's balance and structure.

3.381 The Commission also considers that the appropriateness of a particular tree for the location in which it has been planted is already within the scope of section 73(1)(a). A tree's proximity to premises or a structure is also within the scope of section 73(1)(a).

3.382 Further, section 73(1)(k) requires QCAT to consider the type of tree that has been planted, where that is relevant.

3.383 The Commission does not consider that section 73 is in need of amendment to require QCAT to take into account any additional matters regarding the type, location or maintenance of a tree. These matters are adequately covered by its existing provisions.

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<sup>327</sup> Submissions 40, 44.

<sup>328</sup> Submission 44.

3.384 However, the Commission does consider that there is merit in expanding section 73(1)(i) to include a broader range of weather events, because some trees will fail or be adversely affected in non-extreme weather events.

#### RECOMMENDATION

**3-11 Section 73(1)(i) of the Act should be amended to provide that QCAT must consider any risks associated with the tree in the event of a cyclone or other weather event.**

#### *Impact of the tree on the neighbour's land*

#### SUBMISSIONS

3.385 Several members of the public suggested that the impact of a tree on a neighbour should be a matter that QCAT must consider. One submission stated that the Act should prioritise amenity and individual rights, including mitigation of any impact on those rights:<sup>329</sup>

the primary concern of this Act should be on people and their right to enjoy the amenity of their property.

In our case an arborist report reported on the loss of public amenity — for a tree that was in the back yard of the neighbouring property, and on the fence line of our respective properties and at one time extended across our yard and into our other neighbours yard. The arborists view was a loss of public amenity was a reason to take no action.

Accordingly the rights of people affected adversely by the tree's position and characteristics as well as any failure to act to mitigate any negative result they may experience should be elevated to primacy in the order of matters to be considered by QCAT. (emphasis in original)

3.386 Another member of the public similarly submitted that it was relevant for QCAT to consider any steps the tree-keeper has taken to prevent or minimise interference from the tree. It was acknowledged that although this is a matter that may be considered under section 75(b) of the Act, it should be elevated to a matter that QCAT must consider. This is because if it remains only as something that may be considered then there is no incentive for the tree-keeper to take appropriate steps, such as pruning, that may resolve and issue and prevent a matter from reaching QCAT.<sup>330</sup>

3.387 Finally, a member of the public submitted that when QCAT considers whether a tree is causing a nuisance, it should look at the amount of stress and work the tree is causing an affected neighbour.<sup>331</sup>

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329 Submission 49.

330 Submission 41.

331 Submission 23.

### THE COMMISSION'S VIEW

3.388 The Commission notes that QCAT 'may consider' any steps a neighbour or a tree-keeper has taken to prevent or rectify any injury or damage or the likelihood of injury or damage, or to prevent or minimise any interference under sections 74(1)(b) and 75(1)(b). The Commission is of the view that the issue of mitigating steps by a neighbour or a tree-keeper is adequately addressed by these provisions.

3.389 In the Commission's view, the tree's effect on the amenity of the land affected by the tree is a relevant factor for QCAT to consider in many cases where the basis of the application is that the tree is causing a substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.

3.390 On balance, the Commission's view is that it is appropriate that one of the factors QCAT must consider, under section 73, is the amenity of the land affected by the tree.

3.391 As to other matters raised, such as the stress experienced by or work caused to a neighbour, the Commission does not recommend any change to section 73, because they will vary depending upon the individual neighbour.

### RECOMMENDATION

**3-12 Section 73(1) of the Act should be amended to add to the matters that QCAT must consider 'whether the tree detracts from the amenity of the land affected by the tree'.**

### *Actions of the neighbour*

#### SUBMISSIONS

3.392 Several submissions suggested that some of the matters that QCAT may consider (as set out in sections 74 and 75 of the Act) are of such significance that they should be made matters that QCAT 'must consider'.<sup>332</sup> The matters focussed upon generally had particular relevance to the actions of a neighbour.

#### *Neighbour's conduct and use of land*

3.393 A number of submissions suggested that QCAT should be required to consider whether anything that is on the neighbour's land or the conduct of the neighbour contributed to the underlying cause of the dispute.<sup>333</sup>

3.394 Caxton Legal Centre Inc provided a number of relevant case examples:<sup>334</sup>

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<sup>332</sup> Submissions 29, 41, 58.

<sup>333</sup> Submissions 41, 58.

<sup>334</sup> Submission 58.

In one case, new neighbours sought to have an extremely mature tree removed from another neighbour's property on the basis that the fine leaves were being deposited over the boundary and were clogging gutters. However, these new neighbours had sought a significant relaxation in order to build right to the boundary and, but for this, the problem, arguably, would not have arisen. The tree provided significant amenity which could not be replaced if the tree was removed.

In other cases new neighbours have asked long term property owners to remove very mature heritage trees in order to make more light for planned solar panels. Such requests are normally denied. Despite this, some individuals proceed to have the panels added and then continue to harass the tree-owner/s to remove the tree/s. In most cases, panels could reasonably have been positioned elsewhere. Sometimes the panels are not even being added for domestic purposes, instead being added for commercial gains.

3.395 A member of the public raised the situation where a neighbour builds a tall house overlooking the tree-keeper's land and impacts on the tree-keeper's privacy and amenity, which results in the tree-keeper planting screening trees. This respondent suggested that QCAT should be required to consider how the neighbour's house and the neighbour's conduct contributed to the dispute and whether there were any other options open to the tree-keeper for preserving privacy.<sup>335</sup>

3.396 Another member of the public suggested that the Act should make provision for 'bad neighbours', including 'neighbours who are prone to be excessively noisy, use bad language, have regular rowdy parties, enjoy nudity, fail to clean up dog mess, fail to maintain their properties and accumulate rubbish'.<sup>336</sup> It was suggested that these neighbours impact particularly on a tree-keeper's privacy and amenity, and that the existence of a 'bad neighbour' should be a matter that, where relevant, operates in favour of the preservation of trees and vegetation.<sup>337</sup>

#### Date of acquisition or possession of land

3.397 A member of the public submitted that it should be a requirement for QCAT to consider whether the tree in question existed at the time the neighbour took possession of their land. It was suggested that 'by taking possession of land with existing trees on adjoining land, the neighbour is impliedly consenting to the existing trees and their effect on the neighbour's land'.<sup>338</sup>

3.398 It was also submitted that QCAT should give consideration to the period of time between the neighbour purchasing their property and the date of their application to QCAT. If the application is made soon after purchase, this may indicate that they were aware of the issue at the time of purchase.<sup>339</sup>

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335 Submission 41.

336 Submission 29.

337 Submission 29.

338 Submission 41. The date of possession is relevant to a case of obstruction of a view: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(b)(ii).

339 Ibid.

## THE COMMISSION'S VIEW

### Neighbour's conduct and use of land

3.399 The Commission accepts that, in some cases, the actions of a neighbour are relevant to the determination of a tree dispute and should be considered as a relevant matter by QCAT.

3.400 The Commission also accepts that the building of taller houses, or houses that are closer to the boundary, are matters that can contribute to a tree dispute, and therefore should be considered as relevant matters by QCAT.

3.401 The Commission notes that sections 74(1)(a), (2)(c) and 75(a) all require consideration of anything other than the tree that has contributed to, or is contributing to, the issue at hand. Section 74(1)(a) expressly includes the actions of a neighbour. In the Commission's view, building in a particular location or building a structure with particular features on the neighbour's land are relevant matters that QCAT may consider.

3.402 The Commission is of the view that it is apt that these are matters that QCAT 'may consider', and therefore is of the view that they should not be elevated to matters that QCAT 'must' consider.

### Date of acquisition or possession of land

3.403 It is necessary to distinguish between the category of cases where a neighbour alleges that a tree has caused, is causing or is likely to cause, serious injury to a person or serious damage to land or property on land and other cases when considering the relevance of whether the tree existed before the neighbour acquired the land. Section 74 of the Act applies to the first category.

3.404 The other category of cases is where the neighbour alleges the tree has caused, or is causing, substantial, ongoing and unreasonable interference with the use and enjoyment of the land affected by the tree. Section 75 applies to that category. Section 75(d) expressly includes 'whether the tree existed before the neighbour acquired the land' as a matter that QCAT may consider in that category of case.

3.405 The absence of any equivalent provision in section 74 is consistent with that not being a matter to be taken into account in cases of the first category. The distinction turns on the difference between cases involving serious injury to a person or serious damage to land or property on the land on the one hand, and interference with use or enjoyment of land on the other.

3.406 The Commission does not consider that any amendment is required on this point.

### **Particular orders QCAT can make**

3.407 Division 3 of Part 5 of Chapter 3 of the Act specifies the orders QCAT can make, including the removal or pruning of a tree.<sup>340</sup>

#### **Scope of QCAT to override other laws about trees**

3.408 A local government can protect a tree under a local law through a 'vegetation protection order' (VPO).<sup>341</sup>

3.409 QCAT may order a person to carry out work on a tree notwithstanding that consent is withheld by a local government or a tree-keeper under a VPO, a local law requires consent or authorisation before the work can be carried out, or the work is otherwise restricted or prohibited under a local law.<sup>342</sup> QCAT must also be satisfied that the application was made because of a genuine dispute.

3.410 QCAT cannot, however, make an order to carry out work on a tree if the work is prohibited under another Act.<sup>343</sup> For example, trees of particular cultural heritage significance are protected under the *Queensland Heritage Act 1992* (Qld) and listed in the Queensland Heritage Register.<sup>344</sup>

### **SUBMISSIONS**

3.411 The BCC and Caxton Legal Centre Inc made submissions as to QCAT's power to make an order overriding a VPO issued by a local government.

3.412 The BCC submitted:<sup>345</sup>

Council has long held the power to make local laws protecting vegetation on private land and has exercised that power for approximately 24 years. ... Implicit in a VPO is the relevance of the health and structural safety of the tree. Removal of a dying and/or dangerous tree under [the Brisbane City Council *Natural Assets Local Law*] would not be characterised as [the indiscriminate clearing of vegetation]. This aligns with the requirement for QCAT to consider safety issues in determining disputes about trees. ... The Act recognises the local law regime and should continue to recognise it in full. ... Matters relating to ecology, biodiversity, amenity and the like, are key elements of the local government's function and expertise in making and administering the local law and were not originally intended to be or should be part of QCAT's scope under the Act.

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340 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 66–69.

341 A 'vegetation protection order' is defined as an order made by a local government under a local law to provide for or facilitate the protection of a tree: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of 'vegetation protection order').

342 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 47, 67(1).

343 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 47, 67(3).

344 The Queensland Heritage Register is a list of places that have cultural heritage significance to Queensland. See <<http://www.qld.gov.au/environment/land/heritage/register/>>.

345 Submission 64.

### 3.413 Caxton Legal Centre Inc submitted:

We find it incongruous that QCAT can override a vegetation protection order protecting a tree under section 67(1). Decision-makers should comply with these significant vegetation protection orders, save for very extreme cases. Mechanisms for protecting mature trees, especially heritage trees and trees that provide considerable amenity within neighbourhoods are extremely important. This a key issue that requires further public debate.

### THE COMMISSION'S VIEW

3.414 The Commission notes that during the debate on the Bill, the Minister said that the Bill was intended to reduce the risk of injury to persons and reduce property damage by allowing QCAT to override a local law, including a vegetation protection order, 'to ensure that if required, persons and property are fully protected from possible or future harm or damage'.<sup>346</sup>

3.415 Chapter 3 of the Act strikes a balance between the risk of injury to a person or to a neighbour's land or property on the land and the goal that a living tree should not be removed or destroyed unless the issue cannot otherwise be avoided. In part, it does so by ensuring that trees on the Queensland Heritage Register, under the *Queensland Heritage Act 1992* (Qld), are outside QCAT's powers under the Act.

3.416 However, in an appropriate case, QCAT, balancing the various matters set out in Division 4 of Part 5 of Chapter 3, has the power to override a local law, including a VPO issued by a local government in order to resolve a genuine dispute between a neighbour and a tree-keeper.

3.417 On that basis, the Commission is of the view that no change to section 67 of the Act is necessary.

### ***Trees that have been removed***

3.418 QCAT may make an order under section 66 of the Act even if a tree has been completely removed. This allows a neighbour to seek compensation or repair costs for damage caused by a tree even where, subsequent to the damage or injury occurring, a tree-keeper completely removed the tree. However, this does not apply if the tree-keeper has sold the land on which the tree was situated since the damage was caused.<sup>347</sup>

### DISCUSSION PAPER

3.419 In the Discussion Paper, the Commission sought submissions regarding whether liability under section 68 of the Act for damages caused by trees that have been removed, should be extended to a former owner.<sup>348</sup>

<sup>346</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2293 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

<sup>347</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 47(2), 68.

<sup>348</sup> *Neighbourhood Disputes Act Discussion Paper* (2015), Question 3-16.



## SUBMISSIONS

3.420 Several submissions considered that liability should be extended.<sup>349</sup> One submission suggested a specific extension where a tree is not effectively ‘stump ground’ or poisoned at the time of removal and the underground growth of the tree continues so that the former owner should be liable for any damage caused.<sup>350</sup>

3.421 The Queensland Arboricultural Association stated that liability should not be extended, unless ‘it can be proved that the former owner was negligent, contributed to the issue (for example, due to action being unreasonably delayed) or failed to act on recommendations or orders’.

3.422 The remaining submissions stated that liability should not be extended to former owners.<sup>351</sup> The Ipswich City Council and the LGAQ stated that liability should rest with the current owner, not the former owner. Strata Community Australia (Qld) took the same position, based upon the principle of *caveat emptor*.

3.423 The Queensland Law Society noted that under the current standard REIQ contract, the buyer of land is responsible for any trees on the land acquired. The Queensland Law Society indicated that they would be opposed to any proposal to reverse that responsibility.

3.424 The Townsville Community Legal Service Inc submitted that a change to section 68 was not warranted and raised two particular considerations. First, a difficulty would arise because the person is no longer a tree-keeper of that tree. Second, this type of issue should be considered within the context of the whole Act; for example, should there be a similar process occurring for fencing work where a property is sold?

## THE COMMISSION’S VIEW

3.425 The Commission considered the terms of the standard REIQ contract, which provide that from the date of the contract of sale the property is at the buyer’s risk. The Commission is not persuaded that the Act should be amended either to affect or reflect that agreed allocation of responsibility.

3.426 The Commission considers that an extension of liability to a former owner and tree-keeper might create practical difficulties as to the person responsible. It would also operate inconsistently with the responsibility of a former owner for a dividing fence. It also moves away from the focus of Part 5 upon the relations of neighbours and the quelling of controversies between current neighbours. On balance, the Commission does not consider that liability to an order under section 66 of the Act, as extended for a tree that has been removed under section 68, should be further extended to a former owner.

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349 Submissions 40, 49.

350 Submission 40.

351 Submissions 16, 37, 39, 57.

### **QCAT assisted by a tree assessor**

3.427 QCAT may seek a report from a qualified arborist or tree assessor to provide expert evidence to assist QCAT in making an order.<sup>352</sup>

3.428 The Act does not make any provision for the costs of an arborist or tree assessor. However, QCAT Practice Direction 7 of 2013 provides that, as a general rule, parties to a tree dispute should share equally in the costs of a tree assessor, subject to QCAT's discretion to order otherwise where appropriate.<sup>353</sup>

#### **Discussion Paper**

3.429 In the Discussion Paper the Commission sought submissions regarding whether the Act should specifically provide for costs arrangements for reports from arborists or other experts and, if so, in what way.<sup>354</sup>

#### **Submissions**

##### **NEED FOR APPOINTMENT OF AN ARBORIST**

3.430 In discussions, QCAT have indicated that it is necessary to appoint an arborist, particularly for large trees, to ensure a tree is properly dealt with and not adversely affected. However, if the parties cannot afford an arborist or other expert, the matter may be decided in the absence of that evidence.<sup>355</sup>

3.431 A joint report is not obtained in an adversarial way and can assist the parties to work toward achieving an agreed outcome.<sup>356</sup> It was also suggested that if it was made clear from the outset that parties would be jointly liable for expenses, then this may have the effect of encouraging dispute resolution without resort to QCAT.<sup>357</sup>

3.432 A number of submissions suggested that an arborist should not be appointed by QCAT on a mandatory or routine basis, but only in instances where the appointment would be beneficial<sup>358</sup> such as where the parties have not provided an independent report or quote.<sup>359</sup> It was submitted that the mandatory or routine

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352 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(g). See also ch 2 pt 6 div 7 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) which provides for the appointment of assessors with relevant knowledge, expertise and experience to help QCAT in a proceeding.

353 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.118]–[3.123]. Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for orders to resolve other issues about trees*, 3 April 2014.

354 *Neighbourhood Disputes Act Discussion Paper* (2015), Question 3-15.

355 Information provided by QCAT, 14 August 2015. Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for orders to resolve other issues about trees*, 3 April 2014.

356 Information provided by QCAT, 14 August 2015.

357 Submission 49.

358 Submissions 40, 46, 49.

359 Submission 46.

appointment of an arborist is expensive, complicates the process, and may be unnecessary.<sup>360</sup>

3.433 The Queensland Arboricultural Association submitted that the timely and effective resolution of tree disputes has been assisted by the role of arborists, and their ongoing involvement is critical to ensuring that the Act continues to meet its objectives. The Queensland Arboricultural Association notes that an arborist is best placed to provide a 'factual, objective and professional assessment ... in accordance with recognised national qualifications and international best practice', particularly with regard to risks posed by trees and the drafting of orders, notably orders requiring ongoing tree maintenance.

#### **COSTS ASSOCIATED WITH ARBORISTS**

3.434 It was submitted that the cost of engaging (or having QCAT engage) an arborist is prohibitively expensive.<sup>361</sup> A member of the public noted that the cost of a QCAT application fee exceeded the expected costs associated with removal of an offending tree, and the cost of the arborist was more than necessary.<sup>362</sup> The cost may be particularly burdensome for pensioners or those on low incomes.<sup>363</sup>

3.435 Several submissions stated that the Act should provide greater certainty by clarifying how the costs of the arborist are to be borne.<sup>364</sup> It was suggested by way of example that the Act could provide that costs be shared by the two parties being required to pay 50% each, to a maximum of \$1000.<sup>365</sup> Another submission suggested that the Act should provide an unfettered discretion for the allocations of costs contributions in appropriate circumstances.<sup>366</sup> One member of the public suggested that where an arborist is appointed, the associated costs should be shared equally between the parties, but should be met as part of the application fee.<sup>367</sup>

3.436 One submission stated that the Act should not provide for costs arrangements because the provisions of QCAT Practice Direction No. 7 are sufficient.<sup>368</sup> Similarly, QCAT indicated that in their view the Act does not need to provide for costs arrangements, stating that it was 'suggested only to clarify for self-represented parties that QCAT has the power to do it'.<sup>369</sup>

3.437 One submission indicated that where a neighbour requires an order based solely upon an issue of interference with a view, then that neighbour should be

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360 Submissions 46, 49.

361 Submissions 5, 5A, 35, 46, 58.

362 Submissions 5, 5A.

363 Submission 58.

364 Submission 15A, 16, 37.

365 Submission 37, 16.

366 Submission 57.

367 Submission 49.

368 Submission 39.

369 Submission 61.

required to pay the costs of any report. This is because the tree-keeper has nothing to gain from the application, and the neighbour has nothing to lose.<sup>370</sup>

3.438 The Queensland Arboricultural Association acknowledged in its submission that members of the community often consider the cost of an arborist report to be excessive. However, the Queensland Arboricultural Association explained that the arborist is required to:

review the case file, visit the site/s, undertake the tree/s assessments, interview the applicant/s and tree-keeper/s (who often have major grievances with each other), [provide] a 15-30 page, evidentiary standard report with edited photos for the tribunal in their required format, referencing the NDR Act, etc., and maintain their skills, qualifications and insurances.

3.439 The Queensland Arboricultural Association submitted that arborists perform an important role, helping members of the community with the cost-effective resolution of tree disputes. The Queensland Arboricultural Association suggested that, to further this role, additional information about how an arborist can assist to resolve a tree dispute at an early stage could be included on relevant websites.

3.440 The Queensland Arboricultural Association did note that there is a need to address financial hardship and provide alternate funding, particularly for people who are unable to defend a claim because they cannot pay the fee. It was submitted that, where people cannot defend a claim as they cannot meet the costs of an arborist, this is contrary to the notion of dispute resolution and the settling of disputes outside of court. The Queensland Arboricultural Association notes that pensioners, who often live on properties with large trees next to newly subdivided lots, may sometimes be charged a reduced fee or have the fee waived completely.

#### **ACCESSIBILITY OF ARBORISTS IN QCAT PROCEEDINGS**

3.441 A number of submissions indicated that arborists or tree assessors were not accessible to people involved in tree disputes.

3.442 First, as discussed previously, multiple submissions noted that the costs associated with having QCAT engage an arborist are expensive and, for some people, are prohibitive.<sup>371</sup> This is particularly problematic because parties to an application for a tree order are advised that, if they do not contribute to the costs of a tree assessor as ordered, QCAT may dismiss the application without further order.<sup>372</sup>

#### ***The Commission's view***

3.443 The Commission notes that QCAT is proposing to change and streamline its procedures, with the effect that an arborist will not be appointed for simpler disputes such as those related to leaf litter.<sup>373</sup> QCAT considers that this change in

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<sup>370</sup> Submission 18.

<sup>371</sup> Submissions 5, 5A, 35, 46, 58, 62.

<sup>372</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for orders to resolve other issues about trees*, 3 April 2014.

<sup>373</sup> See [4.158] ff below.

procedure will reduce the number of occasions on which an arborist is required, and will therefore go some way towards addressing the issue of appointments that are considered by parties to be unnecessary and costly.

3.444 The advice of an arborist is necessary in some matters. In particular, section 73 of the Act requires that QCAT must consider any historical, cultural, social or scientific value of the tree, and any contribution to the ecosystem and to biodiversity made by the tree.<sup>374</sup>

3.445 The appointment of an arborist, including the circumstances in which they are appointed and the costs associated with that appointment, are matters for QCAT to consider in deciding an application made under Part 5 of Chapter 3. The processes and procedures developed by QCAT are largely matters of a practical nature. In the Commission's view, they are best managed practically by QCAT. The incidence of the expense of doing so is a function of the procedural steps QCAT deploys to manage applications made before it. The Commission considers that it would be unhelpful to attempt to comment further upon the appointment of arborists by QCAT and the associated costs. The Commission does not consider that any amendment of the Act is necessary upon these points.

## **Overhanging branches in QCAT**

### ***Overhanging branches more than 2.5 metres above the ground***

3.446 Section 59 of the Act, in explaining the application of Part 5 of Chapter 3, states that the Part applies if a neighbour's land is affected by a tree and the neighbour cannot resolve the issue using the process under Part 4. Example 3 under section 59 is that '[t]he neighbour is seeking the cutting and removal of branches overhanging the neighbour's land that are more than 2.5 metres above the ground'.<sup>375</sup>

3.447 There are two points to make about section 59. First, the requirement that the neighbour cannot resolve the issue using the process under Part 4 refers to the process of giving a notice to cut and remove overhanging branches 2.5 metres or less above the ground. It has no relevance to overhanging branches above that height. Second, although Example 3 refers to overhanging branches that are more than 2.5 metres above the ground, Part 5 also applies to overhanging branches 2.5 metres or less above the ground, if the process under Part 4 cannot resolve the issue.

3.448 Section 60 of the Act provides that the neighbour may alternatively exercise the common law right of abatement or apply to QCAT for resolution of the issue. Section 61 of the Act provides that QCAT has jurisdiction to decide 'any matter in relation to a tree' in which it is alleged that 'land is affected by a tree'.

3.449 However, contrary to that general language, QCAT has no general jurisdiction to make an order for the removal of overhanging branches, whether more or less than 2.5 metres above the ground, as a separate subject matter. In effect, QCAT may make an order about an overhanging branch or branches only if the 'land

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<sup>374</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73(c)–(d).

<sup>375</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 59, Example 3.

is affected by a tree' under section 46(a)(ii) and the cognate threshold requirements under sections 65 and 66 of the Act are met.

3.450 Consequently, QCAT cannot make an order about a tree if the 'land is affected by [the] tree' only because a branch or branches overhang the land under s 46(a)(i) of the Act.

3.451 The Explanatory Notes to the Bill were silent on this issue.

3.452 However, the Note under section 52 of the Act, dealing with the responsibilities of a tree-keeper, includes:

This chapter provides ways of dealing with some issues that fall within a tree-keeper's responsibilities under this section. (emphasis added)

3.453 Example 3 under section 59 of the Act also expressly contemplates that QCAT has power to deal with overhanging branches more than 2.5 metres above the ground.

### **Submissions**

3.454 QCAT submitted that:

There is a disconnection between the section 46 provision that provides land is 'affected by a tree' because branches from the tree overhang the land and the fact QCAT can't make an order under section 66 about the tree just because it is 'overhanging'; parties have difficulty understanding this particularly in light of section 52(1) responsibilities on a tree-keeper for cutting and removing overhanging branches. Tree-keepers also form the view that because of section 57(1)(b) they are not responsible to maintain trees with branches over 2.5 metres or that it is the neighbour's responsibility to deal with the branches under 2.5 metres.

The Act could make it clearer that QCAT's jurisdiction is only for serious matters by removing section 46(a)(i) and, if the issue is just overhanging branches, provide a mechanism in Chapter 3 Part 4 to resolve regardless of the height the branches are from the ground. Eg, removing section 57(1)(b) and providing that a qualified arborist must be engaged for branch removal over 2.5 metres.

### **The Commission's view**

3.455 The Commission has considered whether (consistently with section 61 of the Act) QCAT's jurisdiction should be broadened to include a power to make an order to cut or remove any overhanging branch or branches that are more than 2.5 metres above the ground, irrespective of whether the thresholds created by sections 46(a)(ii), 65 and 66(2) of the Act are met, because those branches are outside the operation of Part 4 of Chapter 3.

3.456 The Commission is concerned that such a reform might significantly increase QCAT's workload by the addition of less serious cases.

3.457 On balance, the Commission considers that QCAT's jurisdiction should remain limited to the orders it may make having regard to the threshold requirements contained in sections 46(a)(ii) and 66(2), and should not be expanded so as to be

able to make an order in relation to any overhanging branch more than 2.5 metres above the ground.

3.458 The Commission is of the view is view that Example 3 under section 59 of the Act is inexactly expressed. It should be made clearer by adding the words ‘to prevent serious injury to any person or to remedy, restrain or prevent serious damage to the neighbour’s land or any property on the neighbours land or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour’s land’.

### **Recommendation**

**3-13 To avoid confusion, the words ‘to prevent serious injury to any person or to remedy, restrain or prevent serious damage to the neighbour’s land or any property on the neighbour’s land or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour’s land’ should be added at the end of Example 3 under section 59 of the Act.**

### **Severe obstruction of sunlight to a window or roof**

3.459 As stated previously, the common law does not provide a remedy where trees block out a neighbour’s sunlight unless an easement of sunlight has been granted in favour of the neighbour’s land.

3.460 Section 178 of the *Property Law Act 1974* (Qld) (‘PLA’) provides:

**178 No presumption of right to access or use of light or air**

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

3.461 Despite section 178 of the PLA, QCAT has wide powers to make an order under section 66(2)(b)(ii) and section 66(3) of the Act that will remedy or prevent the severe obstruction of sunlight to land affected by a tree.<sup>376</sup>

3.462 However, there are some limits on QCAT’s powers to make an order about obstruction of sunlight namely:

- the general requirement that for land to be affected by a tree there must be ‘substantial, ongoing and unreasonable interference’ with the neighbour’s use and enjoyment of the land;<sup>377</sup>

<sup>376</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(4).

<sup>377</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(ii).

- the tree must rise at least 2.5 metres above the ground;<sup>378</sup>
- there must be 'severe obstruction'<sup>379</sup> of sunlight; and
- the obstruction must be to a 'window or roof of a dwelling on the neighbour's land'.<sup>380</sup>

3.463 The Explanatory Notes for clause 61 of the Bill stated that:<sup>381</sup>

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.

3.464 QCAT's powers to make an order about severe obstruction of sunlight are not limited to the sunlight that existed when the neighbour took possession of the land.

### **Submissions**

3.465 QCAT submitted that:

it would be beneficial if section 66(3)(b)(i) made it clear that with respect to sunlight to a window or a roof, the neighbour must take the trees as they find them at the time they took possession of the property. There are specific issues with solar panels — that a neighbour should not be able to install solar panels and be entitled to apply to QCAT to have trees removed that shaded the roof at the time the neighbour installed the panels. The decision in *Thomsen v White* [2012] QCAT 381 illustrates a situation where a neighbour made an application to QCAT to have a tree removed for a number of reasons when the evidence showed he deliberately built his house in a position where damage and nuisance were far more likely to occur and where severe obstruction of sunlight was obvious from the size of the tree's canopy.

3.466 One submission from a member of the public argued:<sup>382</sup>

there should be no restrictions on sunlight ... [as] more people will want to switch to solar with rising electricity prices and ... a tree-keeper should not be allowed to prevent a neighbour from having an effective solar system. ... Sunlight and views are two different considerations and should be treated as such.

3.467 One submission from a member of the public considered that QCAT should not be able to make orders about sunlight.<sup>383</sup> In contrast, a number of submissions from members of the public outlined the impacts of the loss of sunlight on the use and enjoyment of their land.<sup>384</sup>

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378 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(a).

379 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(b)(i).

380 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(i).

381 Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 32.

382 Submission 31.

383 Submission 41.

384 Submissions 40, 44, 49, 51, 59.



3.468 The Queensland Arboricultural Association submitted that:

consideration should also be given to the proportion of impact on the effective operation of the panels. 100% sunlight access for 100% of the day is not required to achieve effective solar panel operation. It is suggested that severe obstruction of sunlight to solar panels be defined as greater than 50% tree shading, within peak effectiveness periods of 10 am to 3 pm. The NSW *Trees (Disputes Between Neighbours) Amendment Act 2010* No 27 added a specific consideration in relation to sunlight obstruction ie, (o) the amount, and number of hours per day, of any sunlight that is lost as a result of the obstruction throughout the year and the time of the year during which the sunlight is lost.

3.469 Five submissions argued that the matters QCAT may consider under section 75(e) of the Act, which applies for interference with the use and enjoyment of land which is an obstruction of sunlight or a view, should be amended to include when the obstruction arose.<sup>385</sup>

### **Access to sunlight in other jurisdictions**

3.470 The Commission notes that several jurisdictions have modified the common law to enable a property owner to apply to a court, tribunal or local government authority to seek access to sunlight blocked by trees.<sup>386</sup>

3.471 Part 2A of the *Trees (Disputes Between Neighbours) Act 2006* NSW (NSW Act) covers severe obstruction<sup>387</sup> of sunlight<sup>388</sup> to the windows of a dwelling on the applicant's land,<sup>389</sup> where:

- there are groups of two or more<sup>390</sup> trees<sup>391</sup> which form a hedge rising to a height of at least 2.5 metres above ground level;<sup>392</sup> and
- the trees are located on adjoining land<sup>393</sup> that is urban land.<sup>394</sup>

3.472 The NSW Act, unlike the Queensland Act, does not extend to sunlight to a roof (or solar panels on the roof) of a dwelling.

<sup>385</sup> Submissions 16, 18, 29, 37, 41.

<sup>386</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW); *Anti-social Behaviour Act 2003* (UK); *High Hedges (Northern Ireland) Act 2011* (NI); and *High Hedges (Scotland) Act 2013* (Scot).

<sup>387</sup> The phrase 'severe obstruction' is not defined in the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

<sup>388</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 14B(a), 14D(1)(a), 14E(2)(a)(i).

<sup>389</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 14B(a), 14D(1)(a).

<sup>390</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A(1).

<sup>391</sup> Trees are widely defined in s 3 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) to include any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations.

<sup>392</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A(1).

<sup>393</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14B.

<sup>394</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1). The land must be situated within a zone designated 'residential', 'rural-residential', 'village', 'township', 'industrial' or 'business' under an environmental planning instrument (within the meaning of the *Environmental Planning and Assessment Act 1979* (NSW)) or, having regard to the purpose of the zone, having the substantial character of a zone so designated.

3.473 Under the NSW Act, before making an order, the NSW Land and Environment Court ('NSWLEC') must be satisfied that 'the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order'.<sup>395</sup>

3.474 The NSW Act also specifies a number of matters the court must consider before making an order. Many of them correspond to the matters listed in sections 73 and 75 of the Act. However, the factors in NSW also include:<sup>396</sup>

- (o) the amount, and number of hours per day, of any sunlight that is lost as a result of the obstruction throughout the year and the time of the year during which the sunlight is lost;
- (p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves;
- ...
- (r) the part of the dwelling the subject of the application ... to which sunlight is obstructed.

3.475 The question whether the scope of Part 2A of the NSW Act should be broadened, including to protect sunlight to solar panels, was considered by the NSW Department of Justice in a 2009 review<sup>397</sup> ('2009 NSW DJAG Statutory Review') and in a 2013 review ('2013 NSW DAGJ Statutory Review').<sup>398</sup>

3.476 The 2009 NSW DJAG Statutory Review, recommended an amendment to extend the Act to sunlight and views blocked by high hedges, limited to the most problematic cases.<sup>399</sup> The review relevantly noted:<sup>400</sup>

It would not be appropriate, for example, for a person to purchase a property knowing there is a high hedge next door, and then be able to seek orders against their neighbours so as to gain additional solar access which had not existed at the time of purchase.

3.477 The 2013 NSW DAGJ Statutory Review concluded that there was insufficient evidence to support a significant policy shift to broaden the existing provisions to cover solar access.<sup>401</sup>

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395 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14E(2)(b).

396 *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14F.

397 NSW Government, Department of Justice and Attorney-General, *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)*, Report (2009).

398 NSW Government, Department of Attorney-General and Justice, *Review of Part 2A of the Trees (Disputes Between Neighbours) Act 2006 (NSW) (High hedge provisions)*, Report (2013).

399 NSW Government, above n 397, 35.

400 *Ibid.*

401 NSW Government, above n 398, 16.

3.478 The 2013 NSW DAGJ Statutory Review noted that the 2009 NSW DJAG Statutory Review considered that:<sup>402</sup>

it was not appropriate for views or solar access to override privacy and other concerns of the hedge-owner, or the broader community benefits of maintaining the hedge. It further commented that, 'Creating this kind of presumption in favour of views or solar access would run the risk of creating a new kind of legal right, similar to an easement' (p 37). This concern remains in the current review. ... The reference group noted that hedges would need to be very high in most cases to block solar panels and that nearby trees and other shade causing structures are taken into account by installation companies when recommending location of solar panels.

3.479 In the United Kingdom, Part 8 of the *Anti-social Behaviour Act 2003 (UK)*<sup>403</sup> provides a framework for resolving disputes between neighbouring property owners about a high boundary hedge that is a barrier to light or access, through a complaint to a relevant local authority<sup>404</sup> that has power to issue a remedial notice.<sup>405</sup> The legislation requires:

- the complainant is the owner or occupier of domestic property;<sup>406</sup>
- the high hedge must be a barrier to light or access;<sup>407</sup>
- the hedge must be formed wholly or predominantly by a line of two or more evergreens;<sup>408</sup>
- the hedge must rise to a height of more than two metres above ground level;<sup>409</sup>
- the complainant's reasonable enjoyment of that property must be adversely affected by the height of a high hedge situated on land owned or occupied by another person;<sup>410</sup> and
- the complaint does not relate to the roots of a high hedge.<sup>411</sup>

<sup>402</sup> The 2013 NSW DAGJ Statutory Review considered it appropriate to revisit the issue following the review of the Queensland Act, to consider whether a modified version of the Queensland statutory scheme is appropriate for NSW: NSW Government, above n 398, 15.

<sup>403</sup> Part 8 of the *Anti-social Behaviour Act 2003 (UK)* came into force in England and Wales on 1 June 2005. High hedges in Northern Ireland and Scotland are dealt with under similar legislation: see *High Hedges Act (Northern Ireland) 2011 (NI) c 21*; *High Hedges (Scotland) Act 2013 (Scot) asp 6*.

<sup>404</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 68*.

<sup>405</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 69*. Under s 69(3) of that Act the remedial notice cannot require the removal of the hedge or a reduction in the height of the hedge to less than 2 metres above ground level.

<sup>406</sup> *Anti-social Behaviour Act 2003 (UK) c 38, ss 65(1)(a), 67*.

<sup>407</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 66(1)*.

<sup>408</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 66(1)(a), (3)*.

<sup>409</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 66(1)(b)*.

<sup>410</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 65(1)(b)*.

<sup>411</sup> *Anti-social Behaviour Act 2003 (UK) c 38, s 65(4)*.

3.480 The complainant must have first taken all reasonable steps to resolve the matter.<sup>412</sup>

### ***The Commission's view***

3.481 The scope of the Act in respect of sunlight is broader than legislation in other jurisdictions. The Act applies to a single tree,<sup>413</sup> and extends to the obstruction of sunlight to a roof of a dwelling,<sup>414</sup> and thereby applies to solar panels on the roof.<sup>415</sup>

3.482 The question is whether the Act achieves the appropriate balance between the rights of a neighbour and the obligations of a tree-keeper.

3.483 Loss of sunlight caused by shade from a tree can lead to loss of use and enjoyment of a neighbour's home. It may result in higher energy use for lighting or heating. It may reduce the efficiency of solar panels located on a neighbour's roof. As electricity prices rise, and emphasis on the environmental advantages of renewable energy sources continues, more home-owners will install solar panels. The number of issues about a tree shading a neighbour's solar panels is likely to increase.

3.484 On the other hand, the Act reflects a policy that trees provide benefits to the health of residents and the amenity of a neighbourhood — a living tree should not be removed or destroyed unless the issue cannot be otherwise satisfactorily be resolved.

3.485 The Commission does not know why the scope of QCAT's powers to make an order about severe obstruction of sunlight is currently not limited to the sunlight that existed at the time the neighbour took possession of the land.

3.486 It might be argued section 66(3)(b)(i), as currently drafted, together with the factors QCAT must<sup>416</sup> and may<sup>417</sup> take into account before QCAT can make an order provide an appropriate balance between the rights and obligations of a neighbour and a tree-keeper.

3.487 For example, an important factor that generally applies if a neighbour alleges any form of unreasonable interference with the use and enjoyment of their land, is 'whether the tree existed before the neighbour acquired the land'.<sup>418</sup>

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412 *Anti-social Behaviour Act 2003* (UK) c 38, s 68(2)(a).

413 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 41, 44. The Act applies to single or multiple trees.

414 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 66(3)(b)(i). The NSW Act is limited to a window of a dwelling: *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14B. A 'window' is defined under that Act to include 'a glass sliding door, a door with a window, a skylight and any other similar thing': s 3.

415 Solar panels are not windows for the purpose of the Act: see *Hendry v Olsson* [2010] NSWLEC 1302, [29]–[30].

416 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 73.

417 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75.

418 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 75(d).

3.488 The submissions to the Commission pointed out that the current differences between the Act's treatment of interference by obstruction of sunlight, on the one hand, and obstruction of a view, on the other hand, are confusing to neighbours and tree-keepers.<sup>419</sup>

***Sunlight that existed when the neighbour took possession of the property***

3.489 The Commission is attracted to QCAT's submission that:<sup>420</sup>

[A] neighbour must take the trees as they find them at the time they took possession of the property ... [A] neighbour should not be able to install solar panels and be entitled to apply to QCAT to have trees removed that shaded the roof at the time the neighbour installed the panels.

3.490 The 2009 NSW DJAG Statutory Review expressed a similar view.<sup>421</sup>

3.491 In the Commission's view, section 66(3)(b)(i) of the Act should be amended to limit its scope to 'sunlight ... that existed when the neighbour took possession of the land'. This would be consistent with the limitation that applies to obstruction of a view under section 66(3)(b)(ii) of the Act, and would operate in addition to the matter that the tree existed before the neighbour acquired the land.

***Sunlight that existed no longer than six years before the application is made***

3.492 In the Commission's view, the scope of section 66(3)(b)(i) of the Act should be further limited, so that a neighbour does not have an open-ended period within which to bring an application seeking to remedy an obstruction of sunlight to a window or roof of a dwelling.

3.493 The Commission considers that section 66(3)(b)(i) of the Act should be amended to add a time limitation period of six years for an application to remedy an obstruction of sunlight to a window or roof of a dwelling. The period of six years is consistent with the limitation period for an action in tort for nuisance for property damage.<sup>422</sup>

***Recommendations***

**3-14 Section 66(3)(b)(i) of the Act should be amended to limit its scope, consistent with the limitation placed on a 'view' under section 66(3)(b)(ii) of the Act, to 'severe obstruction of sunlight, to a window or roof of a dwelling on the neighbour's land, that existed when the neighbour took possession of the land'.**

<sup>419</sup> See, eg, Submissions 18, 29, 31, 40, 41, 48.

<sup>420</sup> Submission 61.

<sup>421</sup> NSW Government, Department of Justice and Attorney-General, *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)*, Report (2009), 35.

<sup>422</sup> *Limitations of Actions Act 1974 (Qld)* s 10(1)(a).

**3-15 Section 66(3)(b)(i) of the Act should be amended to further limit its operation to a ‘severe obstruction of sunlight, to a window or roof of a dwelling on a neighbour’s land, that existed when the neighbour took possession of the land, or no longer than six years before the application to QCAT is filed, whichever is the lesser’.**

### Severe obstruction of a view

3.494 As stated previously, the common law of nuisance does not provide a remedy where trees block out a neighbour’s view.

3.495 There are a number of limitations to QCAT’s power to make an order about interference that is an obstruction of a view:

- the trees or their foliage obstructing the view must be ‘at least 2.5 metres above the ground’;<sup>423</sup>
- there must be ‘substantial ongoing and unreasonable interference’ with the neighbour’s use and enjoyment of their land;<sup>424</sup>
- there must be a ‘severe obstruction’ of the view;<sup>425</sup>
- the view must be ‘from a dwelling’ on the neighbour’s land;<sup>426</sup> and
- the view must have ‘existed when the neighbour took possession of the land’.<sup>427</sup>

3.496 The Act does not create an unconditional right to a view. QCAT has described the nature of the remedy as ‘a statutory one which is discretionary, and will not be exercised if it is not appropriate in the circumstances’.<sup>428</sup>

<sup>423</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(a).

<sup>424</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(ii). In *Radford v Neverfail Pty Ltd as Trustee for the Harris Siksna Family Trust* [2015] QCAT 334, QCAT held, at [97], that ‘a city view ... is a prized feature of a home, and reflects on its desirability and value. The complete obstruction of a city view is unquestionably substantial and ongoing’. In that case, the loss of the city view was estimated as a diminution of value in the home of \$500 000.

<sup>425</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(ii). See the discussion at [3.537] ff below.

<sup>426</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(2)(b)(ii). See *Vecchio v Papvasiliou* [2015] QCAT 70 which concerned a hedge that was already in existence at the time the neighbour took possession of their vacant block of land. The neighbour subsequently built a house on the land and sought an order from QCAT that the hedge be removed (or pruned), arguing that it restricted a pre-existing view. QCAT held, at [11], that, because there was no house on the land at the time the neighbour took possession, there was no view capable of protection by the Act. The Act does not require that the view must be from a window of the dwelling. A dwelling includes a deck or a veranda attached to the dwelling.

<sup>427</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(b)(ii).

<sup>428</sup> *Laing v Kokkinos (No 2)* [2013] QCATA 247 [32].

3.497 In *Laing v Kokkinos (No 2)*,<sup>429</sup> QCAT outlined a three step process under the Act which QCAT will follow when determining applications for orders under section 66(3)(b)(ii) of the Act:<sup>430</sup>

First, the Tribunal must consider what view existed when the applicant took possession of the property. Secondly, the Tribunal must determine whether the trees on the adjoining property are causing a severe obstruction of that view. Then, if they are, the third step requires the Tribunal to balance the interests of the parties considering the matters listed in Chapter 3, Part 5, Division 4 of the Act, namely, sections 72, 73 and 75.

3.498 The terms of reference<sup>431</sup> require the Commission to consider whether section 66(3)(b)(ii) of the Act should operate retrospectively (to a view which existed before the Act came into force) having regard to section 178 of the *Property Law Act 1974* (Qld).

### **Discussion Paper**

3.499 In the Discussion Paper, the Commission sought submissions about whether section 66(3)(b)(ii) of the Act should be changed to limit its operation. More specifically, the Commission sought submissions as to whether it should be limited to:<sup>432</sup>

- a view that existed at or after the commencement of the Act (that is, 1 November 2011);
- for a particular owner, a view that existed when that person became an owner; or
- a view that existed no longer than five years, or some other period, before the application is made.

### **Submissions**

#### ***Should the Act give QCAT the power to restore a pre-existing view?***

3.500 Three members of the public submitted that the Act should not give QCAT the power to restore a view.<sup>433</sup> One submission argued that protecting views effectively strips the tree-keeper of property rights regarding their trees and garden.<sup>434</sup> Another submission argued that the Act unfairly favours the neighbour by giving them the ability to apply to QCAT if their view is affected.<sup>435</sup>

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429 [2013] QCATA 247.

430 Ibid [34].

431 Terms of reference, para 3(g).

432 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.99]–[3.109], Questions 3-12 to 3-14.

433 Submissions 18, 29, 41.

434 Submission 29.

435 Submission 41.

3.501 One submission provided a list of reasons why the Act should not give QCAT power to prune or remove trees solely to restore a view, including that the issue was considered but rejected in a NSW review<sup>436</sup> of equivalent NSW tree legislation.<sup>437</sup>

3.502 The Queensland Arboricultural Association submitted that:

The notion held by some people that a view over a limitless expanse of land is their entitlement in perpetuity, seems at best to be unreasonable.

Providing neighbours with the opportunity to take action against a tree-keeper, to restore their view, at any time, after many years of view obstruction and many tree-keeper property owners later, is an inappropriate burden on a tree-keeper. It also opens the opportunity for vindictive behaviours from neighbours who can choose which tree-keeper they take action against. Rather than limiting such actions to the commencement of the NDR Act, it may be more appropriate to add further considerations within the NDR Act (section 75) such as the length of time that the view has been obstructed (such as is considered in matters relating to damage to property section 74(2)(a) and the steps taken by the neighbour in resolving the issue during that time.

3.503 One member of the public submitted that views should be regulated to provide greater certainty and protection and to enable any such orders included on the land title, but if views are to remain an area covered by the Act then the Act should apply to land in public ownership, particularly local government controlled parks and reserves.<sup>438</sup> This respondent went on to argue that if protection of views is retained in the Act, QCAT should be given the ability to grant compensation to the tree-keeper (based on loss of privacy and amenity by the tree-keeper, the ongoing cost of managing the tree/s and any increased value of the neighbour's property through restoration of the view).<sup>439</sup>

3.504 A submission from a member of the public highlighted the inconsistency of the Act as a tree-keeper has no ability to seek an order to attempt to restore their privacy and the amenity of their property through planting screening trees, if a neighbour builds a new higher house.<sup>440</sup>

3.505 Other submissions argued in favour of retaining QCAT's ability to restore a pre-existing view.<sup>441</sup> One submission argued that fines should be imposed on people if their trees obstruct views.<sup>442</sup>

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436 NSW Government, Department of Justice and Attorney-General, *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)*, Report (2009), 34.

437 Submission 18. Although this submission notes the NSW review did recommend removal of 'spite hedges', and this recommendation was ultimately adopted. See *Trees (Disputes Between Neighbours) Amendment Act 2010 (NSW)* sch 1.

438 Submission 29.

439 Ibid.

440 Submission 41.

441 Submissions 15A, 40.

442 Submission 48.



3.506 Caxton Legal Centre Inc noted that issues about lost views are often raised by their clients and it is clearly an issue that causes conflict between neighbours.

***Does section 66(3)(b)(ii) of the Act operate retrospectively and, if so, should it?***

3.507 One submission argued that the Act (as interpreted by QCAT in *Mahoney v Corrin*)<sup>443</sup> effectively operates retrospectively<sup>444</sup> by making orders 'to protect a view that was lost prior to the commencement of the Act'.<sup>445</sup>

***Should section 66(3)(b)(ii) of the Act be changed to limit its operation to a view that existed at or after the Act commenced on 1 November 2011?***

3.508 One submission was in favour of limiting the operation of section 66(3)(b)(ii) to a view that existed after the Act commenced.<sup>446</sup> One submission argued that if the Act is to continue to protect a view, its operation should be limited to a view that existed after the commencement of the Act (and was in existence when the tree-keeper purchased the neighbouring property).<sup>447</sup>

3.509 By comparison, four submissions from members of the public argued that the Act should not be limited to a view that existed after the Act commenced.<sup>448</sup>

3.510 One submission argued that, if the neighbour can prove the extent of the view at the time they took possession of the property, then the Act should apply.<sup>449</sup>

3.511 One submission argued that where a tree has any impact on the amenity (view/light/access/other) then the date of the Act should not limit or determine the ability of QCAT to make an order.<sup>450</sup>

3.512 The Queensland Arboricultural Association submitted that:

Rather than limiting such actions to the commencement of the NDR Act, it may be more appropriate to add further considerations within the NDR Act (section 75) such as the length of time that the view has been obstructed (such as is considered in matters relating to damage to property — section 74(2)(a) and the steps taken by the neighbour in resolving the issue during that time).

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443 [2013] QCAT 318.

444 The term 'retrospectively' is not used here in the technical legal sense of the term, but in the sense that the relevant view is the one that exists or existed at time of possession.

445 Submission 18.

446 Ibid.

447 Ibid.

448 Submissions 15A, 40, 41, 49.

449 Submission 40.

450 Submission 49.

***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?***

3.513 One submission was in favour of limiting the operation of section 66, if it is to remain in the Act, to a view that both existed after the commencement of the Act and which was in existence when the tree-keeper purchased the property.<sup>451</sup> One submission from a member of the public argued that ‘QCAT should be required to consider the circumstances by which the view arose’.<sup>452</sup>

3.514 One submission from a member of the public argued that when a neighbour takes possession of the property the neighbour should be required to give notice to the tree-keeper of their intention to ‘exercise their right to the view existing at that point in time’.<sup>453</sup>

3.515 Three submissions from members of the public were against such a limitation.<sup>454</sup>

***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?***

3.516 One submission<sup>455</sup> was in favour of limiting the period after a view is lost to make an application to QCAT. The submission agreed that five years was an appropriate period.<sup>456</sup>

3.517 Three submissions were against such a time limitation.<sup>457</sup>

***The meaning of ‘severe’ obstruction***

3.518 One member of the public submitted that the term ‘severe’ obstruction should be deleted and substituted with a quantum amount; for example, an obstruction greater than 15%.<sup>458</sup>

***Restoration of views in other jurisdictions***

3.519 The Commission notes that NSW is the only other jurisdiction to modify the common law to enable an aggrieved property owner to apply to a court to seek to have access to a view restored.<sup>459</sup>

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451 Submission 18.

452 Submission 41.

453 Submission 29.

454 Submissions 15A, 40, 49.

455 Submission 49.

456 Ibid.

457 Submissions 15A, 18, 40.

458 Submission 49.

459 *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 14A(1), 14E(2)(a)(ii).

3.520 Part 2A of the NSW Act covers severe obstruction of a view from a dwelling on the applicant's land, where:

- there are groups of two or more<sup>460</sup> trees<sup>461</sup> which form a hedge which rises to a height of at least 2.5 metres above ground level;<sup>462</sup> and
- the trees are located on adjoining land<sup>463</sup> and that land is urban land.<sup>464</sup>

3.521 Before making an order, the NSWLEC must be satisfied that 'the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order'.<sup>465</sup>

3.522 The NSW Act also specifies a number of matters the court is to consider before making an order, including relevantly:<sup>466</sup>

- (a) the location of the trees concerned in relation to the boundary of the land on which the trees are situated and the dwelling the subject of the application;
- (b) whether the trees existed prior to the dwelling the subject of the application ...;
- (c) whether the trees grew to a height of 2.5 metres or more during the period that the applicant has owned (or occupied) the relevant land;
- ...
- (i) the intrinsic value of the trees to public amenity;
- ...
- (k) the impact any pruning (including the maintenance of the trees at a certain height, width or shape) would have on the trees;
- (l) any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated;

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<sup>460</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A(1).

<sup>461</sup> Trees are widely defined in s 3 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) to include any woody perennial plant, any plant resembling a tree in form and size.

<sup>462</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A(1).

<sup>463</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14B.

<sup>464</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 4(1). The land must be situated within a zone designated 'residential', 'rural-residential', 'village', 'township', 'industrial' or 'business' under an environmental planning instrument (within the meaning of the *Environmental Planning and Assessment Act 1979* (NSW)) or, having regard to the purpose of the zone, having the substantial character of a zone so designated.

<sup>465</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14E(2)(b).

<sup>466</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14F.

- (m) anything, other than the trees, that has contributed, or is contributing, to the obstruction;
- (n) any steps taken by the applicant or the owner of the land on which the trees are situated to prevent or rectify the obstruction;
- ...
- (p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves;
- (q) the nature and extent of any view affected by the obstruction and the nature and extent of any remaining view;
- (r) the part of the dwelling the subject of the application from which a view is obstructed ...;
- (s) such other matters as the Court considers relevant in the circumstances of the case.

### **The Commission's view**

#### ***Does section 66(3)(b)(ii) of the Act operate retrospectively and, if so, should it?***

3.523 The Commission notes that the question of whether section 66 of the Act operates 'retrospectively' has been considered by QCAT.<sup>467</sup> It was held the QCAT has power to make an order to prevent severe obstruction of a view that existed when the neighbour took possession of the land, even if that was before the commencement of the Act.<sup>468</sup> However QCAT also held that '[It] is not the purpose or intent of the [Act] to provide an applicant with greater or better views than those which existed at the time of purchase'.<sup>469</sup>

3.524 The Commission considers that the more relevant question, discussed below, is whether the Act should be limited to a view that existed after the Act commenced?

#### ***Should section 66(3)(b)(ii) of the Act be changed to limit its operation to a view that existed at or after the Act commenced on 1 November 2011?***

3.525 The small number of submissions received by the Commission on this issue were evenly split on this question.<sup>470</sup>

3.526 The Commission accepts that it was Parliament's intention that QCAT have jurisdiction to make an order to prevent a severe obstruction of a view that existed when the neighbour takes possession of the land, even if that occurred before the commencement of the Act.

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<sup>467</sup> *Mahoney v Corrin* [2013] QCAT 318.

<sup>468</sup> *Ibid* [30]–[31].

<sup>469</sup> *Ibid* [10].

<sup>470</sup> Submissions 15A, 18, 37, 40, 41, 49.

3.527 The Commission is not persuaded to recommend any amendment to section 66(3)(b)(ii) of the Act to limit its operation to a view that existed at or after the commencement of the Act (that is, after 1 November 2011).

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

3.528 The purpose of section 66(3)(b)(ii) in its present form is to ensure the right (to seek to restore a lost view that existed when that neighbour took possession of the land) attaches to that particular neighbour and is lost when the neighbour no longer possesses the land. That right cannot be passed to a subsequent owner who purchases the neighbour's land. The subsequent purchaser of the neighbour's land is entitled to seek to restore only the view that existed when that purchaser took possession of the land.

3.529 The Commission agrees with this purpose.

3.530 Subject to the further limitation recommended below in respect of the addition of a six year time limitation, the Commission is not persuaded to recommend any further change to the scope of section 66(3)(b)(ii) to vary the words in section 66(3)(b)(ii) 'that existed when the neighbour took possession of the land'.

***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?***

3.531 Consistent with the Commission's recommendation above in respect of obstruction of sunlight, the Commission considers that the scope of section 66(3)(b)(ii) of the Act should be further limited, so that a neighbour does not have an open-ended period within which to bring an application seeking to restore a lost view.

3.532 At present, a neighbour is able to bring an application to QCAT to restore a view which existed when the neighbour took possession of the property, but many years after the obstruction to their view arose.<sup>471</sup> For example, a neighbour may take action to restore a view lost many years previously to increase the value of their property for sale, even though the effect upon the tree-keeper's land is a significant loss of amenity because the neighbour will be able to look into the tree-keeper's home.

3.533 In the Commission's view, if there is a severe obstruction of a pre-existing view, the neighbour should not be able to obtain an order that places them in a better position than existed six years prior to the date of the application.

3.534 The Commission considers that section 66(3)(b)(ii) of the Act should be amended to add a time limitation period of six years.

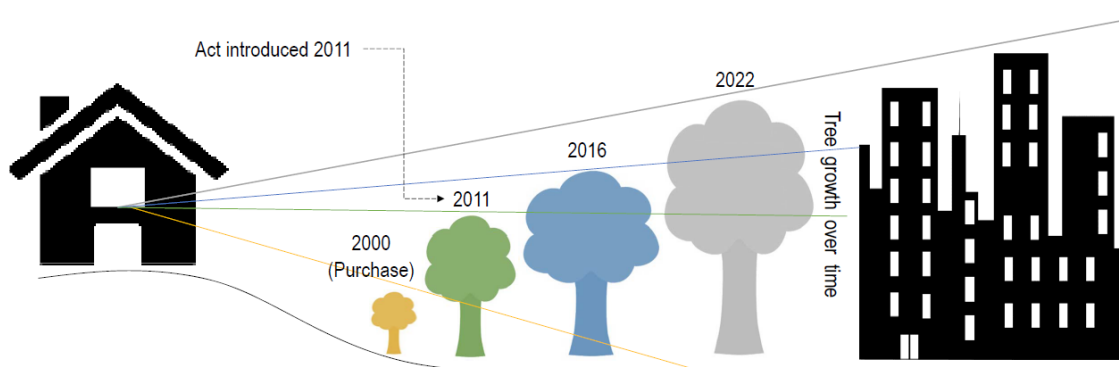
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<sup>471</sup>

See, eg, *Radford v Neverfail Pty Ltd as Trustee for the Harris Siksna Family Trust* [2015] QCAT 334.

3.535 As noted at [3.493] above, the Commission settled on a time limitation period of 6 years by analogy with the limitation period for damage to property in an action in tort.<sup>472</sup>

3.536 Figure 3-1 below demonstrates the effect that this proposed time limitation would have on an application to restore a view by a neighbour who has been in possession since the year 2000. At present, the neighbour will be able to apply for an order to restore the view as at the year 2000. If a six year limitation period were introduced, the restorable view would be the views that existed six years beforehand. For example, if an application were made in 2022, any order in favour of the applicant neighbour would, at most, return the applicant's view to that which existed in 2016. The applicant would no longer be able to restore a view that existed at the time of possession (which in this example, was the year 2000).



**Figure 3-1: Effect of proposed limits on application to restore view**

### **The meaning of 'severe' obstruction**

3.537 The term 'severe obstruction' used in section 66(3)(b)(ii) was not defined in the Act or the Explanatory Notes to the Bill.

3.538 During debate on the Bill the Minister said 'the severity threshold requires that the view must be nearly blocked out'.<sup>473</sup>

3.539 The meaning of 'severe obstruction' has been judicially considered by both QCAT<sup>474</sup> and, in the context of the NSW Act, by the NSWLEC.<sup>475</sup>

3.540 QCAT has said that the word 'severe' in section 66 of the Act means 'the obstruction must be considerable' and that:<sup>476</sup>

<sup>472</sup> *Limitations of Actions Act 1974* (Qld) s 10(1)(a). In forming this view, the Commission is not concerned with any analogy with the continuation of a nuisance in the law of limitations of actions in tort.

<sup>473</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2309 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State).

<sup>474</sup> *Laing v Kokkinos (No 2)* [2013] QCATA 247. The word 'severe' in s 66 of the Act means 'the obstruction must be considerable': [36].

<sup>475</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14E(2); *Haindl v Daisch* [2011] NSWLEC 1145.

<sup>476</sup> *Laing v Kokkinos (No 2)* [2013] QCATA 247, [36], [39]–[41].

The first step is to identify and value the type of views affected: water views and iconic views are valued more than views not of those things; and whole views are valued more highly than partial views.

The second step identifies the part of the dwelling [where] the views exist and the reasonableness of protecting views from such areas: views across side boundaries are more difficult to protect than front and rear boundaries; sitting views are more difficult to protect than standing views.

The third step assesses the impact of the interference to the views of the whole property, not just for the view that is affected: views from living areas are more significant than from bedrooms or service areas, except those from kitchens which are highly valued. As Roseth SC said:<sup>477</sup>

The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

3.541 In *Haindl v Daisch*<sup>478</sup> the NSWLEC stated that an assessment of severity had both quantitative and qualitative elements:<sup>479</sup>

[If the] view comprises predominantly an unrelieved outlook towards unattractive and blank-walled built form and there is only a limited viewing corridor or limited viewing corridors past that built form to some attractive more distant elements, whether natural or built and whether iconic or not, a significant reduction of the attractive elements by trees on an adjoining property may well constitute a severe contextual obstruction of the view from that viewing point. On the other hand, if the outlook is from an upper, living area level of the building across a 180 degree generally uninterrupted vista of coastline, even a modestly significant interruption of part of that view caused by trees on an adjoining property might not constitute, in an overall context, a severe obstruction to that view.

3.542 The Commission does not consider that there is any need for section 66(3)(b)(ii) to be amended to define the meaning of a 'severe obstruction'.

### **Recommendation**

**3-16 Section 66(3)(b)(ii) of the Act should be amended to further limit its operation to a 'severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land, or no longer than six years before the application to QCAT is filed, whichever is the lesser'.**

<sup>477</sup> *Tenacity Consulting v Warringah* [2004] NSWLEC 140, [28] (Roseth SC).

<sup>478</sup> [2011] NSWLEC 1145.

<sup>479</sup> *Ibid* [64].

## Other issues relating to trees

### *Tree litter*

3.543 A complaint made by some neighbours is that a neighbouring tree deposits tree litter onto their property. The phrase ‘tree litter’ is used to describe smaller and regularly falling tree materials such as leaves, petals, bark, flowers, fruit, seeds and small elements of deadwood.<sup>480</sup>

3.544 Tree litter can clog a gutter leading to an overflow of water and consequential damage, can cause problems in swimming pools and water tanks, can stain surfaces, or be generally unsightly.

3.545 Neighbours faced with such problems commonly make an application to QCAT, alleging that their land is affected by a tree because the tree litter constitutes a ‘substantial, ongoing and unreasonable interference with the neighbour’s use and enjoyment of the land’.<sup>481</sup>

3.546 QCAT has considered the issue in a number of cases.<sup>482</sup> Whether an order will be made has turned on whether the dropping of tree litter is interference with the neighbour’s use of their land that is substantial, ongoing and unreasonable. In many cases it has been found that it was not, as a matter of fact.<sup>483</sup>

3.547 However, an ‘abundance of leaf debris’ dropping into a neighbour’s gutters constituted an unreasonable interference and therefore grounds to make an order in one case.<sup>484</sup> A tree that dropped spiky fronds and an excessive amount of seed pods into the neighbour’s pool, which interfered with pool-cleaning equipment was held to be a source of unreasonable and ongoing interference in another case and an order for pruning was made.<sup>485</sup>

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480 *Thomsen v White* [2012] QCAT 381, [11], citing *Barker v Kyriakides* [2007] NSWLEC 292, [20].

481 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(C).

482 *Robinson v McCombe* [2012] QCAT 712; *Thomsen v White* [2012] QCAT 381; *Ferraro v Body Corporate of ‘Omaru’ Brisbane* [2013] QCAT 343; *Oberhoffer v Tarlton* [2013] QCAT 495.

483 See, eg, *Wallace v Keg* [2012] QCAT 466; *McConnell v Zenalee Pty Ltd* [2013] QCAT 249; *Bunyard v McManus* [2013] QCAT 258; *Carroll v Eager* [2013] QCAT 293; *King v Samios* [2014] QCAT 165; *Tighe v Schak* [2015] QCAT 387. See also *Milgate v Wilson* [2014] QCAT 109, which did not refer specifically to QCAT decisions but included a statement, at [18], that:

Debris of the nature that accumulates in Mrs Milgate’s yard is not considered to be serious damage to her land or property, or substantial, ongoing and unreasonable interference. Leaf litter is an accepted reality in any treed suburb. Regular maintenance is required to ensure that protective devices are installed and, importantly, properly maintained and cleaned.

484 *Ferraro v Body Corporate of ‘Omaru’ Brisbane* [2013] QCAT 343, [21].

485 *Oberhoffer v Tarlton* [2013] QCAT 495, [2], [18].



### **Submissions**

3.548 The Commission received a number of submissions to the effect that QCAT should have a greater or more specific power to address the issue of leaf litter. A member of the public submitted that:<sup>486</sup>

The issues that QCAT can determine should be defined more extensively to include the effects of persistent and substantial tree litter, especially where this has a deleterious impact on structural components of the residence or other relevant property or has the potential to regularly require action to clean up the affected area.

3.549 Another member of the public argued that, whilst the Act makes a tree-keeper responsible for cutting and removing overhanging branches, they are not made responsible for cleaning up litter from their tree.<sup>487</sup>

### **The Commission's view**

3.550 The Commission accepts that the presence of tree litter may constitute a 'substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land'.<sup>488</sup> Whether tree litter does or does not constitute such an interference is a question of fact that must be answered having regard to all of the relevant circumstances and taking into consideration the relevant matters.<sup>489</sup>

3.551 The Commission accepts that, in many cases, tree litter will not amount to an unreasonable interference with a neighbour's use and enjoyment of land. Tree litter is to be expected in urban or suburban areas with trees and it is reasonable to expect that all residents in those suburbs will be required to perform some level of regular maintenance, including cleaning gutters and leaf litter.<sup>490</sup>

3.552 As well, a neighbour does not require an order from QCAT to exercise the right of abatement.

3.553 Where QCAT does find that tree litter is causing a substantial, ongoing and unreasonable interference with a neighbour's land, the Commission considers that QCAT has adequate powers to make an order. These may include orders that work (for example, pruning) be done on the tree and that a neighbour be compensated for damage caused by the tree litter.<sup>491</sup>

3.554 The Commission does not consider that the issue of tree litter needs to be further or specifically addressed in the Act. The Commission therefore does not recommend any amendment to the Act on this subject matter.

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486 Submission 49.

487 Submission 23.

488 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 46(a)(ii)(C).

489 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 73, 75.

490 See *Thomsen v White* [2012] QCAT 381.

491 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5).

## **Other submissions as to QCAT's powers**

### **Discussion Paper**

3.555 In the Discussion Paper, the Commission asked whether QCAT's jurisdiction in relation to trees should be changed.<sup>492</sup>

### **Submissions**

3.556 The Commission received a number of submissions suggesting that the scope both of Chapter 3 and of QCAT's jurisdiction be expanded.

3.557 Several submissions suggested that the Act should place greater controls on tree-keepers. It was submitted that a tree-keeper should be required to plant trees a specified distance from their boundary and to remove any trees that are too close, or that are dangerous.<sup>493</sup> It was also submitted that the height of all trees on suburban properties should be restricted to no more than 2.5 metres.<sup>494</sup> It was also suggested that there should be regulations (made by QCAT or in local law) prohibiting the growth of certain tree species or prohibiting the growing of trees in proximity to boundaries or to foundations, sewerage lines and other such items built on properties.<sup>495</sup>

3.558 A number of submissions also suggested that the Act should include fines or penalty provisions about trees. It was suggested that these could apply to a neighbour who incorrectly cuts a tree when exercising their right to abatement (for example, by mutilating the tree or cutting branches that are within the tree-keeper's boundary);<sup>496</sup> to a tree-keeper who obstructs a neighbour's view or potential view;<sup>497</sup> and to people who deliberately breach the Act or damage trees.<sup>498</sup> It was submitted that without penalties, tree-keepers do not suffer consequences for breaching the Act or refusing to engage in the Act's processes, whilst neighbours are expected to engage in the process without any clear expectation of a successful resolution.<sup>499</sup>

3.559 Finally, it was submitted that the types of orders QCAT can make should be expanded. These should include:<sup>500</sup>

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492 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.85]–[3.91], Question 3-11.

493 Submissions 3, 63.

494 Submission 38.

495 Submissions 22, 40.

496 Submission 7.

497 Submission 48.

498 Submission 26.

499 *Ibid.*

500 Submission 41.

- an order requiring a neighbour to do something to reduce a tree-keeper's need for a tree (for example, ordering a neighbour to screen their windows and provide a tree-keeper with greater privacy, thereby reducing the need for screening trees); and
- an order that a matter be heard and determined by another court.

3.560 It was submitted that if QCAT were able to make such orders the number of 'vexatious applications' would be reduced, as presently neighbours have 'little to lose' by making an application.<sup>501</sup>

### ***The Commission's view***

3.561 The Commission does not consider that the matters raised in these submissions are within the intended scope of the Act.

### **REGULATION OF PLANTING OF TREES**

3.562 The *Land Protection (Pest and Stock Route Management) Act 2002* (Qld), provides that plants that may have economic, environmental or social impacts may be nominated as 'declared plants' that must be controlled by landowners.<sup>502</sup> Similarly, the BCC may declare certain trees or plants to be pests and require landowners to take various actions to address or control the plants.<sup>503</sup>

3.563 The objects of the Act are different. They include 'to provide rules about each neighbour's responsibility... for trees' and to resolve issues about trees without a dispute arising.<sup>504</sup> The Act's purposes do not encompass the regulation of species of flora throughout Queensland.

3.564 The Commission therefore does not consider it appropriate to introduce any regulation regarding the type, size or location of trees planted by landowners.

### **FINES AND PENALTIES**

3.565 The Commission does not support the introduction of a fine for non-compliance with the responsibilities of a tree-keeper. Section 52 expressly provides that it does not create a civil cause of action based on a breach of a tree-keeper's responsibilities. The Commission does not consider that to introduce liability to a fine would be consistent with the intention that informs section 52, namely that the liability of a tree-keeper under the Act is limited to that provided for by Parts 4 and 5 of Chapter 3.

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501 Ibid.

502 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) ch 2 pt 5; Department of Agriculture, Fisheries and Forestry Biosecurity Queensland, *Fact Sheet: Declared Pest Plants: PP1*, October 2013, 1.

503 *Natural Assets Local Law 2003* s 31 (pest management); Brisbane City Council, *Brisbane Invasive Species Management Plan 2013–17*, Publication N 2013-03018, 23.

504 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3.

3.566 The Commission notes that it is an offence under the QCAT Act for a person to, without reasonable excuse, contravene a non-monetary order made by QCAT.<sup>505</sup> A court may impose a maximum penalty of 1000 penalty units.<sup>506</sup>

#### **EXPANSION OF ORDERS BY QCAT**

3.567 The Commission does not consider that it is appropriate to expand the types of orders that QCAT can make to include an order requiring action by a neighbour or an order referring a matter to another court.

3.568 The Act gives QCAT broad power to make an order in relation to a tree. A further power is not necessary in the Commission's view.

3.569 The Commission considers that QCAT is the appropriate forum to make orders relating to a tree. The QCAT Act has objects that include QCAT proceedings should be conducted informally, promptly and at a minimum of expense.<sup>507</sup> They are matched to the Act's objects.

#### **SALE OR PROPOSED SALE OF LAND AFFECTED BY AN APPLICATION OR ORDER**

3.570 Part 7 of Chapter 3 of the Act provides mechanisms for ensuring that a seller has disclosed to a buyer the existence of a QCAT application or QCAT order affecting the land in relation to a tree, and includes the consequences if that disclosure is not made.<sup>508</sup>

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

3.571 Under section 83 of the Act, a person selling land affected by an application or order must provide the buyer with a copy of that application or order before the buyer enters into a contract of sale for the land.<sup>509</sup>

3.572 Section 84 provides that if under section 83 a seller gives the buyer a copy of an application and the buyer subsequently enters into the contract of sale, the buyer is then joined as a party to the QCAT proceedings.<sup>510</sup>

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505 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213. This section is an offence-creating provision that must be enforced under the *Justices Act 1886* (Qld).

506 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 213(1). The prescribed value of a penalty unit is \$117.80: *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e), (2), 5A; *Penalties and Sentences Regulation 2005* (Qld) s 3.

507 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 4.

508 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.147]–[3.168].

509 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83; *Neighbourhood Disputes Act Discussion Paper* (2015) [3.152].

510 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 84; *Neighbourhood Disputes Act Discussion Paper* (2015) [3.153].

3.573 Section 85 provides that if, under section 83, a seller gives the buyer a copy of an order, 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 was the seller (and any period mentioned in the order for carrying out the order commences on the transfer day).<sup>511</sup>

### ***Seller providing buyer with additional material filed***

#### ***Discussion Paper***

3.574 In the Discussion Paper, the Commission sought submissions on whether a person selling land (the tree-keeper) affected by an application to or order by QCAT, should also provide to the buyer (in addition to the application or order) any additional material filed, before the buyer enters a contract of sale for the land.<sup>512</sup>

#### ***Submissions***

3.575 The Commission received few submissions regarding this issue. Of these, a number agreed that the seller should provide additional material filed.<sup>513</sup>

3.576 The remaining submissions indicated that the seller should not be required to provide the buyer with any additional material filed.<sup>514</sup> The Queensland Law Society indicated that there are practical difficulties in determining whether land is affected by an application or order, and it did not support any increase in the burden on conveyancers. Specifically, the Queensland Law Society stated:

The Society is concerned in relation to the practical application of section 83 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (NDA). The lengthy time taken for searches to be obtained has meant that in practice, solicitors are relying on instructions from clients as to whether or not a property is affected by an application or order. Clients may not be well-informed in this regard, and the online register of applications is difficult to use and based on street addresses rather than Real Property Descriptions, making it unreliable.

The Society supports amendment to section 83 to address the difficulties in its practical application.

The Society is of the view that any changes to the NDA should not result in an increase of the burden on conveyancers. In particular, the Society supports the current situation under the standard contract regarding trees, which makes the buyer responsible for any affected trees on the land; the Society opposes any proposal to reverse that responsibility.

#### ***The Commission's view***

3.577 The Commission considers that the proposed additional requirement on a person selling land affected by an application to QCAT, or order by QCAT, to also provide to the buyer (in addition to the application or order) any additional material

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511 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 85.

512 *Neighbourhood Disputes Act Discussion Paper* (2015) [3.147]–[3.153], Question 3-20.

513 Submissions 37, 49, 57, 62.

514 Submissions 39, 43.

filed, is not a significant imposition and will assist the buyer in determining whether to sign the contract.

3.578 The Commission does not propose to address the transfer of orders beyond the view that an order under the Act is not an interest in land that would be capable of registration under the *Land Title Act 1994* (Qld), and that any such proposal would be a matter to be considered in relation to the objects and operation of the *Land Title Act 1994* (Qld), not within the current review of the Act.

### **Recommendation**

**3-17 Section 83 of the Act should be amended to require a person selling land affected by an application to, or order made by, QCAT to also provide to the buyer (in addition to the application or order) any additional material filed.**

### ***Seller to notify QCAT of a new party to the QCAT application if buyer joined as a party***

3.579 Under section 84, 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.

### **Discussion Paper**

3.580 In the Discussion Paper, the Commission sought submissions on whether the Act should be changed to require a person selling the land (the tree-keeper) to 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.<sup>515</sup>

### **Submissions**

3.581 The Commission received few submissions regarding this issue. With one exception, the submissions supported the seller being required to notify QCAT that there is a new party to the application once a buyer has entered into a contract of sale and therefore been joined as a party to the QCAT proceeding.<sup>516</sup> One submission added that this should be made retrospective to all currently active QCAT matters.<sup>517</sup>

3.582 The Queensland Law Society submitted that the seller should not be required to notify QCAT of a new party being joined to the application. As discussed previously, the Queensland Law Society has indicated that it is difficult to determine

<sup>515</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.153], Question 3-21.

<sup>516</sup> Submissions 37, 39, 49, 57, 62.

<sup>517</sup> Submission 49.

whether land is affected by an application and that it does not support increasing the burden on conveyancers.

### ***The Commission's view***

3.583 The Commission considers that the proposed additional requirement upon the person selling the land to notify QCAT of the new party to the QCAT proceeding is not a large imposition and will make for simpler management of ongoing disputes.

### ***Recommendation***

**3-18 Section 84 of the Act should be amended to require the person selling the land to notify QCAT that there is a new party to the application as a result of a buyer entering into a contract of sale.**

### **Application affecting the tree-keeper's land filed after contract entered but before settlement**

3.584 As noted above, the obligation under section 83 of the Act only requires disclosure by the seller to the buyer of an existing order made by QCAT (affecting the tree-keeper's land) or an application to QCAT, before the contract is signed.

3.585 The seller's disclosure obligation under section 83 of the Act is contained in REIQ contracts.<sup>518</sup> The seller's warranties<sup>519</sup> in the REIQ contracts go further, requiring the seller to warrant that 'there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property'.<sup>520</sup> This is likely to include any information about an existing dispute about a tree on the property but which is not the subject of a formal application to QCAT, but would not include a notice for particular overhanging branches under Part 4 of the Act.<sup>521</sup>

3.586 The seller's warranty does not require ongoing disclosure, so would not include disclosure of information about a tree order or application, after the contract is entered into but before settlement.<sup>522</sup>

3.587 After the contract date, the property is at the buyer's risk.<sup>523</sup> After the contract date, the seller's obligation is limited to, promptly, upon receiving any notice, proceeding or order that affects the property or requires work on the property, giving a copy to the buyer.<sup>524</sup>

<sup>518</sup> REIQ Contract for houses and residential land, 11th ed, 4.

<sup>519</sup> Ibid s 7.4.

<sup>520</sup> Ibid s 7.4(2).

<sup>521</sup> B Dixon 'The Neighbourhood Disputes Resolution Act 2011 (Qld) and Disclosure Issues' (2012) 32 *Queensland Lawyer* 80, 86–7.

<sup>522</sup> REIQ Contract for houses and residential land, 11th ed, s 7.4(2).

<sup>523</sup> Ibid s 8.1.

<sup>524</sup> Ibid s 8.3(2).

3.588 Where an order in relation to trees is actually issued under the Act on or after the contract date, the REIQ contracts provide that this will be the buyer's responsibility<sup>525</sup> and is expressly excluded from the operation of the seller's warranty.<sup>526</sup>

### **Discussion Paper**

3.589 The Commission sought submissions regarding whether the Act should be changed to cover the situation where an application is filed after the contract is entered into but before settlement and, if so, what rights and responsibilities should be provided for by the Act.<sup>527</sup>

### **Submissions**

3.590 The Commission received few responses to this question, all of which supported amending the Act to address the relevant situation.<sup>528</sup> One submission indicated that this change should be made in order to protect the rights of the buyer,<sup>529</sup> and another considered that the Act should apply equally to any prospective or actual purchaser.<sup>530</sup>

3.591 The Queensland Arboricultural Association submitted that 'for serious matters, consideration may be given to applying a direction or order to the title deeds of a property so that direction or order must be complied with irrespective of the conveyancing process or who owns the property'.

3.592 The Queensland Law Society stated that the burden on conveyancers should not be increased. Further the Queensland Law Society opposed any proposal to reverse the current situation under a standard contract regarding trees, which presently makes the buyer responsible for any affected trees on the land.

### **The Commission's view**

3.593 The Commission considered whether the rights and responsibilities of both the seller and buyer in this scenario, up to the time when the contract settles, should mirror the consequences that follow if a copy of an application is not given to the buyer before the buyer enters into the contract of sale, as outlined in section 86 of the Act.

3.594 The Commission has also considered the inter-relationship between the Act and the REIQ contractual provisions.

3.595 On balance, the Commission is not persuaded that the current situation under the REIQ contracts should be reversed. The Commission is of the view that

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525 Ibid s 7.6(1)(b).

526 Ibid s 7.4(1)(d).

527 *Neighbourhood Disputes Act Discussion Paper* (2015), Question 3-22.

528 Submissions 37, 49, 57.

529 Submission 49.

530 Submission 57.



any possible reform of the seller's obligations under Part 7 of Chapter 3 of the Act should be considered in the context of the specific review of sellers' obligations being undertaken by the Commercial and Property Law Centre, Queensland University of Technology Law, on behalf of the Queensland Government.<sup>531</sup>

### Consequences if a copy of an application or order is not given to a buyer

3.596 Section 86 of the Act outlines the consequences, before the contract settles, if the seller does not give the buyer a copy of an application or order affecting the land before the buyer enters into the contract, namely:

- The buyer may terminate the contract of sale for the land at any time before the contract settles and the seller must refund any deposit paid;<sup>532</sup> and
- If the contract is terminated, the seller and the person acting for the seller who prepared the contract are liable to the buyer for the reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.<sup>533</sup> If multiple persons are liable to reimburse the buyer, their liability is joint and several.<sup>534</sup>

3.597 Section 87 of the Act outlines the consequences, after the land is transferred to the buyer, if the seller does not give the buyer, a copy of an order affecting the land, namely 'despite ownership of the land being transferred to the buyer, the [seller] remains liable to carry out the work required under the order'.

3.598 Unlike section 86, section 87 makes no provision for the buyer to recover from the seller (and the person acting for the seller who prepared the contract) the reasonable legal and other expenses incurred by the buyer in relation to the contract.

### Discussion Paper

3.599 In the Discussion Paper, the Commission sought submissions regarding whether it was 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 any legal and other expenses incurred by the buyer.<sup>535</sup> The Commission further asked, if that arrangement was considered appropriate, whether that person should be jointly and severally liable.<sup>536</sup>

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531 Queensland University of Technology Law, Commercial and Property Law Centre, 'Queensland Government Property Law Review — Seller disclosure in Queensland' (Issues Paper No 1, February 2014).

532 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(1)–(5); *Neighbourhood Disputes Act Discussion Paper* (2015) [3.157]–[3.163].

533 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(6); *Neighbourhood Disputes Act Discussion Paper* (2015) [3.157]–[3.163].

534 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 86(7); *Neighbourhood Disputes Act Discussion Paper* (2015) [3.157]–[3.163].

535 *Neighbourhood Disputes Act Discussion Paper* (2015), [3.164]–[3.165], Question 3-23.

536 *Ibid* Question 3-24.

### **Submissions**

3.600 A member of the public answered both these questions in the affirmative. In relation to the issue of joint and several liability, this answer was based upon the assumption that this would make liable both the tree-keeper and an agent or conveyancer (as the 'person acting for the seller').<sup>537</sup>

3.601 The Queensland Law Society indicated that section 86(6), regarding liability of the seller and the seller's solicitor, should be removed. The submission stated:

The Society supports the removal of section 86(6) which makes the seller/seller's solicitor responsible for the purchaser's legal costs if the contract is terminated by the buyer on the seller's failure to disclose an application or order. As noted above, the time taken to obtain searches and the unreliability of the system makes such disclosure problematic in practice, and the Society is of the view that it is unfair to impose liability on the seller in such circumstances.

### **The Commission's view**

3.602 The Commission does not consider that section 86(6) should be removed.

3.603 As to section 87, the legal and other expenses incurred by the buyer in relation to the contract are not losses caused by any order to which section 87 applies. Any question of whether the seller should be liable to compensate the buyer for costs incurred in carrying out the work under the order could be considered as part of the review of sellers' obligations being undertaken by the Commercial and Property Law Centre, Queensland University of Technology Law, on behalf of the Queensland Government.<sup>538</sup>

### **Recommendation**

**3-19 Any reform of the seller's obligations under Part 7 of Chapter 3 of the Act should be considered in the context of the specific review of sellers' obligations being undertaken by the Commercial and Property Law Centre, Queensland University of Technology Law, on behalf of the Queensland Government.**

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<sup>537</sup> Submission 49.

<sup>538</sup> Queensland University of Technology Law, Commercial and Property Law Centre, 'Queensland Government Property Law Review — Seller disclosure in Queensland' (Issues Paper No 1, February 2014).

# Chapter 4

## Dispute Resolution Processes

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### INTRODUCTION

4.1 The terms of reference require the Commission to consider a number of general procedural matters, including, in particular, whether the dispute resolution processes under the Act are fair, just and effective.<sup>1</sup>

4.2 In considering these issues, the Commission has had regard to other matters identified in the terms of reference, namely:

- whether the objects of the Act remain valid and are being met;
- the simplicity and ease of use of the Act for members of the community; and
- the operation of the Act in relation to other statutes or laws.

4.3 This chapter considers the key steps in the dispute resolution processes provided under and in relation to the Act. Generally, the recommendations in this chapter relate to procedural matters of general application to the Act as a whole. More detailed and specific matters about the approach of the Act to dividing fences and trees (including the notice procedures) are covered in Chapters 2 and 3, respectively. The question of what may happen when a person does not comply with an order made by the Queensland Civil and Administrative Tribunal (‘QCAT’) is considered in Chapter 5.

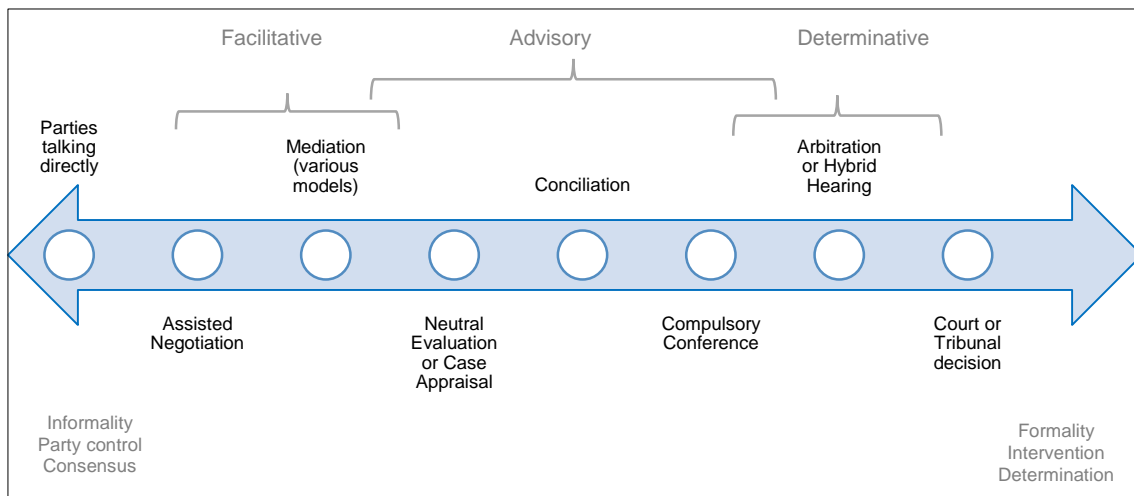
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<sup>1</sup> The terms of reference are set out in full in Appendix A to this Report.

## DISPUTE RESOLUTION OVERVIEW

4.4 One of the objects of the Act is ‘to facilitate the resolution of any disputes about dividing fences or trees that do arise between neighbours’.<sup>2</sup>

4.5 ‘Dispute resolution’ is a wide term that captures many different processes. It includes ‘consensual processes’, such as negotiation and mediation, as well as ‘determinative processes’, such as court or tribunal determinations.<sup>3</sup> As indicated in figure 4-1 below, different processes involve different degrees of formality and intervention. Generally, more formal processes involve greater intervention from experts or decision-makers and less control by the parties over the outcome.<sup>4</sup>



**Figure 4-1: Types of dispute resolution processes, including ADR**

4.6 It is common to refer to dispute resolution processes other than judicial or tribunal decisions as ‘alternative dispute resolution’ (‘ADR’). This reflects the view that they are ‘supplementary to traditional adversarial processes’, at least for some types of disputes.<sup>5</sup>

4.7 Apart from direct discussion and negotiation between the parties, ADR involves a dispute resolution practitioner who assists the parties to reach a resolution, or narrow the issues in dispute. However, there is considerable variation and overlap in the way different ADR processes are defined and put into practice. ADR processes

<sup>2</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3(b).

<sup>3</sup> D Spencer, *Principles of Dispute Resolution* (Lawbook Co, 2011) [1.10].

<sup>4</sup> See generally, and for other useful diagrammatic representations of the range of dispute resolution processes, National Alternative Dispute Resolution Advisory Council (‘NADRAC’), ‘Your Guide to Dispute Resolution’ (2012) [2.2]; D Spencer, above n 3, [1.10]; M King et al, *Non-Adversarial Justice* (Federation Press, 2009) 101; Secretary of State for Constitutional Affairs and Lord Chancellor, *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243 (2004) 7. Figure 4-1 above is not exhaustive, but indicative only.

<sup>5</sup> M King et al, above n 4, 89. Those authors suggest that the term ‘appropriate’ rather than ‘alternative’ is more apposite. Other suggestions include ‘assisted’, ‘amicable’, ‘administrative’, and ‘additional’ dispute resolution: *ibid* 89; and D Spencer, above n 3, [1.20].

evolve over time, having the flexibility to adapt to different circumstances.<sup>6</sup> Generally, the focus of the process can be classed as either 'facilitative', 'advisory', or 'determinative', as explained in figure 4-2 below:<sup>7</sup>

Facilitative	Advisory	Determinative
<ul style="list-style-type: none"> <li>• Assists the parties to identify the issues, develop options, consider alternatives and try to reach an agreement</li> <li>• Examples include facilitated negotiation, mediation, and conciliation</li> </ul>	<ul style="list-style-type: none"> <li>• Considers and appraises the dispute and provides advice about the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how these can be achieved</li> <li>• Examples include neutral evaluation, case appraisal, and conciliation (where advice is offered)</li> </ul>	<ul style="list-style-type: none"> <li>• Evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination</li> <li>• Examples include arbitration and expert determination</li> </ul>

**Figure 4-2: Descriptive classification of ADR processes**

4.8 Some ADR processes exist outside the formal justice system. Others are part of a court or tribunal process. Inside a court or tribunal process, ADR is often used to identify and narrow the issues for decision and/or to give the parties guidance about the merits of their case and likely outcomes if the court or tribunal decides the dispute.<sup>8</sup>

4.9 The dispute resolution processes relevant to the Act reflect this wide scope and flexibility. In this Report, the Commission has classified these processes into the following main categories:

- Informal processes — those engaged in by the parties outside the QCAT process, with or without assistance from a third person (such as a lawyer or mediator); and
- Formal processes — those to which the parties are subject as part of the QCAT process, including tribunal-referred or directed mediation, compulsory conferences, and hearings concluded by a final QCAT decision or order.

<sup>6</sup> See, eg, D Spencer, above n 3, [1.10]. ADR is characterised by 'diversity, flexibility and dynamism': NADRAC, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (September 2003) Australian Government Attorney-General's Department, 1 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

<sup>7</sup> See Australian Government Attorney-General's Department, *Alternative dispute resolution* <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>>, cited in Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 5 September 2014) vol 1, 285. See also the general discussion in Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR — its role in federal dispute resolution*, Issues Paper No 25 (June 1998) ch 2.

<sup>8</sup> See generally, Productivity Commission, above n 7, vol 1, 285.

## RESOLVING ISSUES INFORMALLY

### Informal resolution as an appropriate objective

4.10 The Act intentionally includes a focus on ‘informal resolution of disputes’.<sup>9</sup>

4.11 Although slightly different language is used, several provisions relating both to dividing fences and trees expressly state that neighbours are encouraged to resolve, or attempt to resolve, issues informally or to avoid a dispute arising.<sup>10</sup>

4.12 These provisions appear to be based on the idea that peaceful neighbourly relations are better served if neighbours can resolve conflicts before they escalate and without resort to the formality, expense and distress of litigation. ‘When conflict does arise most neighbours prefer to resolve their issues in an amicable way, privately and between themselves’.<sup>11</sup> The approach recognises the importance of preserving good relationships, both for individuals and the community:<sup>12</sup>

sorting it out between neighbours in the first instance, is the backbone of maintaining good relationships. ... And who knows, if people get used to talking issues through instead of raising a dispute in the first instance, we may see communities become even more friendly and tight knit.

4.13 The argument for informal resolution is summed up in the following:<sup>13</sup>

The ordinary run of neighbors presents an ordinary range of human delightfulness and orneriness; and most people share a quite natural desire to live in a state of reasonable peace with their neighbors.

... In neighborly relations, as in any other area of life, only an idiot goes to the law when friendly — or even not so friendly — negotiation and compromise are likely to solve a problem. Indeed, applying the law may ‘settle’ a question between neighbors but in the process permanently embitter not only the contestants but other people who live nearby as well. It is also, of course, costly and chancy and likely to bring out the worst in everyone.

But knowing the law can help all concerned to arrange reasonable solutions to neighborly problems in informal channels, either personally or through mediation. People sometimes behave with great certainty that the law is on their side and are surprised to find the situation is more complicated.

<sup>9</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).

<sup>10</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(3), 30(1), 56(1), 60(1). See also ss 3(a), 65(a)–(b). Section 65(a)–(b) is discussed at [4.90] ff below.

<sup>11</sup> Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 1.

<sup>12</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2240 (M-A O’Neill). See also at 2241 (ECM Van Litsenburg); and 2243 (R Stevens).

<sup>13</sup> E Callenbach, ‘Foreword’ in E Doskow and C Jordan, *Neighbor Law: Fences, Trees, Boundaries and Noise* (Nolo, 6th ed, 2008). ‘A strict application of the law will not always meet the needs of the parties, but sensible and reasonable negotiation can often overcome neighbourhood differences’: *Drinan v Dawson* [2014] QCATA 168, [12] (Thomas J, President).

4.14 This is reflected in the objects of the Act, in particular, to provide rules about neighbours' responsibilities so that they are 'generally able to resolve issues about fences or trees without a dispute arising'.<sup>14</sup>

### **Discussion Paper**

4.15 In the Discussion Paper, the Commission sought submissions on whether the provisions of the Act that encourage neighbours to resolve their issues 'informally' should be retained.<sup>15</sup>

### **Submissions**

4.16 All of the respondents to the Discussion Paper who addressed this question agreed that the provisions encouraging neighbours to resolve issues informally should be retained.<sup>16</sup>

4.17 Strata Community Australia (Qld) submitted that the provisions should be retained 'in the interest of promoting the peaceful resolution' of disputes:

without the need for third party intervention and the added administrative burden of having disputes brought to QCAT which may otherwise have been able to be resolved between the parties.

4.18 A member of the public similarly submitted that this would 'minimise the number of applications made to QCAT, allowing it to decide only the most serious of matters':<sup>17</sup>

Encouraging neighbours to informally resolve their issues will result in better outcomes for both parties as they are involved in formulating the solution and is more likely to result in ongoing positive relationships between neighbours.

4.19 Another respondent also favoured retention of these provisions, observing that, although their own attempt to 'mediate very early to keep it out of QCAT' did not succeed, '[o]ther cases could be more successful'.<sup>18</sup>

4.20 Caxton Legal Centre Inc submitted that it 'wholly support[s] the philosophical approach' of the Act in encouraging parties to use 'mediation and alternative dispute resolution services':

In most cases, facilitating resolution of disputes in a less confrontational way than is typically the case in formal QCAT proceedings is preferable.

4.21 The Queensland Association of Independent Legal Services Inc ('QAILS') also considered that the Act 'appropriately encourages the informal resolution of neighbourly disputes'.

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<sup>14</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3(a).

<sup>15</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.16]–[4.18], Question 4-2.

<sup>16</sup> Submissions 16, 37, 39, 40, 41, 49, 55, 57, 58, 62.

<sup>17</sup> Submission 41.

<sup>18</sup> Submission 40.

4.22 QCAT expressed the view that informal resolution in the first instance is appropriate:

Fence and tree disputes are often symptomatic of deeper issues between neighbours that may respond well to an informal process. The principle of informal resolution followed by formal resolution is sound ...

4.23 The Dispute Resolution Branch ('DRB') also expressed support for increased informal resolution, observing that it has 'seen the benefits' of early informal resolution, 'particularly in disputes where parties have an ongoing relationship':

In DRB's experience the earlier a dispute can be resolved the better for all concerned: there are fewer financial and emotional costs to the parties and to the community. And the more thoroughly all the issues in dispute can be clarified and addressed the more chance there is of sustained agreements and lasting impact.

...

The further a neighbour dispute proceeds into the formal justice system the more likely that there will be winners and losers and that is never going to be good for neighbourly relations or for people feeling comfortable living side by side.

4.24 A number of respondents cautioned, however, that informal resolution is not always appropriate or fruitful.<sup>19</sup> Some members of the public explained that their approaches to their neighbour had been met with either no response, a refusal to engage or comply with their request, or (in some cases) threatening or abusive language or behaviour.<sup>20</sup>

4.25 One respondent observed that it may not always be 'safe' to approach a neighbour,<sup>21</sup> and some noted that neighbours can sometimes be 'aggressive' or intimidating.<sup>22</sup>

4.26 Caxton Legal Centre Inc submitted that caution is required 'where one neighbour seeks to exploit another neighbour who may be vulnerable because of age, infirmity, social isolation, or language barriers'. This respondent also noted that fencing, tree and other disputes between neighbours 'often coexist', and that 'broader legal questions' and complex issues sometimes arise. The following illustration was given:

a very elderly person was harassed by a neighbour over a fence, a survey, a building encroachment and thousands of dollars of compensation. The case was not as clear cut as was made out, but it was a very stressful situation for the elderly client to try to negotiate alone.

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<sup>19</sup> Submissions 5, 17, 24, 25, 26, 27, 35, 46, 55, 58.

<sup>20</sup> Submissions 5, 17, 25, 35, 46, 59.

<sup>21</sup> Submission 24.

<sup>22</sup> Submissions 26, 27.



4.27 Another respondent referred to anecdotal accounts of elderly residents being 'harassed and victimised by unscrupulous neighbours'. This respondent observed, in relation to trees, that:<sup>23</sup>

The reality ... is that the process only works when both owners have a medium to long term investment in the ongoing development of their properties and their local community and are willing to pursue mutually beneficial outcomes. Where a neighbour buys into an established community with a view to short-term turn-around with maximum profit, the constraints that compel the informal negotiation process no longer apply.

### ***The Commission's view***

4.28 The Commission considers that the general philosophy of the Act in encouraging neighbours to resolve issues informally, where possible, continues to be appropriate. Although the Act provides a means of formal dispute resolution, it is preferable that parties reach an informal resolution in most cases. QCAT's jurisdiction under the Act is necessarily limited to making orders about the statutory rights and obligations. Informal resolution is not so limited.

4.29 The Commission recognises that attempts to resolve issues informally will not always be successful and may sometimes not be practical or appropriate, depending on the personalities and circumstances involved.

4.30 However, the starting point should ordinarily be for neighbours to identify and deal with issues about dividing fences and trees between themselves early and amicably, to try to prevent the escalation of issues into more protracted or hostile legal disputes. As one person put it succinctly, 'Like it or not, we're all neighbours — and we ought to get better at it'.<sup>24</sup>

4.31 Accordingly, the Commission considers the provisions in the Act that encourage neighbours to attempt to resolve issues informally should be retained.<sup>25</sup> The Commission also considers there is room to improve the effectiveness of those provisions, and makes some further recommendations about this below.

### ***Recommendation***

**4-1 The provisions in the Act that encourage neighbours to attempt to resolve issues informally should be retained, and modified in accordance with Recommendations 4-3, 4-5, 4-7, and 4-11 below.**

<sup>23</sup> Submission 26.

<sup>24</sup> E Callenbach, 'Foreword' in E Doskow and C Jordan, *Neighbor Law: Fences, Trees, Boundaries and Noise* (Nolo, 6th ed, 2008).

<sup>25</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(3), 30(1), 56(1), 60(1).

## Clarifying what ‘informal’ resolution means

4.32 ‘Informal’ resolution is not defined in the Act, and no specific guidance appears in the Act about what it might involve.

4.33 As explained above, attempts to resolve issues can make use of a range of different dispute resolution options, including many that fall outside a court or tribunal process.

4.34 Information presently provided on the Queensland Government’s website suggests a range of ways in which neighbours might attempt to resolve issues before going to QCAT.<sup>26</sup> These include preventative measures as well as steps to try to reach an agreement. Similar suggestions are made on the QAILS’ *Queensland Neighbourhood Disputes* website and in the information kits produced by Caxton Legal Centre Inc.<sup>27</sup> The range of informal steps is outlined in figure 4-3 below.

Prevention		
<ul style="list-style-type: none"> <li>• Keeping on good terms</li> <li>• Choosing trees carefully, and maintaining trees</li> <li>• Consulting before doing work that may affect a dividing fence</li> <li>• Knowing your legal responsibilities</li> </ul>		
<b>Negotiation</b> <ul style="list-style-type: none"> <li>• Talking face-to-face</li> <li>• Writing a letter explaining the issue</li> <li>• Putting any agreement in writing</li> </ul>	<b>Mediation</b> <ul style="list-style-type: none"> <li>• Arranging a free mediation session with DRB</li> </ul>	<b>Legal Advice</b> <ul style="list-style-type: none"> <li>• Getting specific legal advice about how the law applies to your situation</li> </ul>
<b>Complaint</b> <ul style="list-style-type: none"> <li>• Contacting the local council to ask if they have a process to deal with nuisance trees</li> </ul>	<b>Self-Help</b> <ul style="list-style-type: none"> <li>• Exercising the common law right of abatement</li> </ul>	<b>Legal Notice</b> <ul style="list-style-type: none"> <li>• Using the notice procedures under the Act</li> </ul>

**Figure 4-3: Suggested ways to resolve issues informally**

4.35 On one view, the notice procedures provided in the Act for obtaining contribution for a dividing fence or dealing with particular overhanging branches can be considered an informal resolution option, since they do not involve going to QCAT. In this sense, the Act provides additional mechanisms to assist informal resolution.<sup>28</sup> On the other hand, the notice procedures are part of a legislative scheme with specific requirements and therefore entail a higher degree of formality (and, in

<sup>26</sup> See Queensland Government, *Disputes about fences, trees and buildings* (30 October 2015) Your rights, crime and the law <<http://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/>>, and the links on that page to *Avoiding disputes about trees*; *Avoiding disputes about fences*; and *Step-by-step guide to resolving tree and fence disputes*.

<sup>27</sup> See QAILS, *If you're having problems with your neighbours, we can help*, Queensland Neighbourhood Disputes <<http://www.qldneighbourhoods.com/>>, and the links on that page to *Talk to your neighbour*; *Write to your neighbour*; and *Mediation*; and Caxton Legal Centre Inc, *Self-help Kits* <[https://caxton.org.au/self\\_help\\_kits.html](https://caxton.org.au/self_help_kits.html)>.

<sup>28</sup> Indeed, the review which led to the introduction of the Act and its notice procedures was conducted ‘to support neighbours to resolve their disputes in a friendly, timely and accessible manner’: Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).

relation to some dividing fence matters, are also a required step before applying to QCAT).<sup>29</sup>

4.36 Similarly, as a self-help remedy, the common law right of abatement can be considered a form of informal resolution, although it is also modified by the Act.<sup>30</sup>

4.37 In addition, a neighbour might be able to seek assistance with a tree from the local government, if there is a relevant local law or scheme about nuisance trees.

### **Examples from legislation in other jurisdictions**

4.38 New South Wales is the only other Australian jurisdiction to include provisions about (non-legislative) informal resolution in its dividing fences legislation. Although it does not otherwise refer to 'informal' resolution, section 12(1) of the *Dividing Fences Act 1991* (NSW) does state that adjoining owners 'may attend a Community Justice Centre in an attempt to reach an agreement' about fencing work.

4.39 Legislation in the United Kingdom provides a remedy for high hedges. It includes provisions, directed toward informal resolution, that require applicants to take 'all reasonable steps to resolve the matters'.<sup>31</sup> In Scotland, this is supplemented by Ministerial and local authority guidance. The Ministerial Guidance explains that steps 'will vary from case to case depending on the circumstances', but that:<sup>32</sup>

Usually the first step that an applicant will make is to discuss the issue with their neighbour in an attempt to resolve the problem amicably. ...

Another potential option for resolving high hedge disputes without recourse to local authority intervention is mediation.

4.40 Scottish local authorities give the following examples of 'reasonable steps':<sup>33</sup>

- approaching the neighbour to discuss the issue;
- sending a letter to the neighbour highlighting your concerns;
- inviting the neighbour to take part in mediation or another form of negotiation;
- informing the neighbour of the Act; and

<sup>29</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 32(6). The notice procedures are discussed in Chapters 2 and 3 of this Report.

<sup>30</sup> The common law right of abatement is discussed in Chapter 3 of this Report.

<sup>31</sup> *Anti-social Behaviour Act 2003* (UK) c 38, s 68(2)(a); *High Hedges (Scotland) Act 2013* (Scot) asp 6, ss 3, 5(1)(a); *High Hedges Act (Northern Ireland) 2011* (NI) c 21, s 3(2)(a).

<sup>32</sup> Minister for Local Government and Planning, *High Hedges (Scotland) Act 2012 — Guidance to Local Authorities* (2014) The Scottish Government, 7 <<http://www.gov.scot/Publications/2014/06/1160>>.

<sup>33</sup> See, for example, the information and application forms at Aberdeen City Council, *High Hedges* (2015) <[http://www.aberdeencity.gov.uk/planning\\_environment/planning/trees\\_woodlands/pla\\_high\\_hedges.asp](http://www.aberdeencity.gov.uk/planning_environment/planning/trees_woodlands/pla_high_hedges.asp)>; Dundee City Council, *High Hedges FAQs* <<http://www.dundee.gov.uk/citydevelopment/highhedges/FAQ>>; City of Edinburgh Council, *High Hedges* <[http://www.edinburgh.gov.uk/info/20013/planning\\_and\\_building/920/high\\_hedges](http://www.edinburgh.gov.uk/info/20013/planning_and_building/920/high_hedges)>; Glasgow City Council, *High Hedges* <<http://www.glasgow.gov.uk/index.aspx?articleid=14646>>; and Perth and Kinross Council, *High Hedges* (2 April 2014) <<http://www.pkc.gov.uk/article/8616/High-Hedges>>.

- informing the neighbour of your intention to make an application under the Act.

4.41 Looking more widely, legislative guidance about the steps that can be taken to resolve a dispute informally (before starting legal proceedings) is also contained in the *Civil Dispute Resolution Act 2011* (Cth).<sup>34</sup>

### **Discussion Paper**

4.42 In the Discussion Paper, the Commission observed that, whilst the Act encourages neighbours to resolve issues informally, it is silent on what is meant by ‘informal’ resolution.<sup>35</sup>

### **Submissions**

4.43 A number of respondents to the Discussion Paper identified concerns that the Act does not clarify what resolving an issue ‘informally’ means, or how to give it effect.<sup>36</sup>

4.44 DRB submitted that ‘further information about this could be beneficial’, observing that the Act ‘is silent on a definition’ and common client feedback to DRB staff has been that ‘it was not always clear to [clients] what was meant by “informal dispute resolution” or where they could go to get that kind of assistance’.

4.45 Strata Community Australia (Qld) also submitted that further guidance is needed to give ‘practical effect’ to the provisions that encourage informal resolution. This respondent suggested the provisions could be enhanced by providing ‘an explanatory note as guidance as to methods of negotiation, private mediation, expert determination etc, which the parties may wish to utilise’.

4.46 A member of the public also commented that the informal resolution provisions should be retained, but ‘[w]ith much greater emphasis and assistance’.<sup>37</sup>

4.47 QAILS explained that community legal centres ‘will almost always recommend that clients engage directly with their neighbours’ or advise them to contact the DRB or otherwise attempt mediation before using the notice procedures or applying to QCAT:

It’s surprising how few people have attempted to discuss the issues with their neighbours to informally resolve these issues. On QAILS’s [www.qldneighbourhoods.com](http://www.qldneighbourhoods.com) website, template letters are provided to assist people [who] might not feel comfortable engaging in conversation with their

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<sup>34</sup> See *Civil Dispute Resolution Act 2011* (Cth) s 4(1). As explained at [4.93] below, that Act encourages prospective parties to federal civil proceedings to take genuine steps to resolve the dispute before commencing legal proceedings. Section 4(1) provides, among other things, that notifying the other person of the issues, providing relevant information and documents to the other person, and considering whether the dispute could be resolved by an ADR process are ‘[e]xamples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute’.

<sup>35</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.16].

<sup>36</sup> Submissions 26, 39, 49, 54, 55.

<sup>37</sup> Submission 49.

neighbours. Agencies should always encourage informal resolution, advising people to try to speak to their neighbours about these issues.

If clients are unwilling to discuss the issue with their neighbour, community legal centres may advise clients to use the Dispute Resolution Branch (DRB) of DJAG.

...

When advising people with issues under the Act, community legal centres invariably suggest a client attempt mediation with the neighbour before proceeding to giving the relevant notice and then proceeding to QCAT. Given that QCAT generally refers people to mediation, it seems sensible to try mediation in the first instance. (notes omitted)

4.48 The Townsville Community Legal Service Inc suggested that a number of options could be considered, including contacting DRB or engaging a community legal centre to write to the other party. The respondent further submitted that a 'note could suggest some forms [of informal resolution] that are acceptable'.

### **The Commission's view**

4.49 It is a fundamental legislative principle that legislation is to be 'unambiguous and drafted in a sufficiently clear and precise way'. It should, therefore, be 'user-friendly and accessible' to 'ordinary Queenslanders' and drafted in a simple style 'consistent with the nature of the subject matter'.<sup>38</sup> In this context, the Office of Queensland Parliamentary Counsel observes that the 'use of examples in legislation is often a helpful way to illustrate how Parliament intends a provision to operate'.<sup>39</sup>

4.50 The principal purpose of an Act is to provide for rights and liabilities, not to provide a consumer guide. On the other hand, the Act is specifically designed to assist ordinary people in dealing with everyday problems about dividing fences and trees.<sup>40</sup> Accessibility and clarity are therefore especially important.

4.51 It appears from the submissions to the review, however, that users of the legislation are often unsure what is intended by the references to 'informal' resolution. This has the potential to undermine the aim of the provisions, and the wider objectives of the Act, to encourage and assist neighbours to resolve issues themselves.

4.52 For these reasons, the Commission considers that the Act should include a list of examples of the steps a person could take to attempt to resolve the issues informally. The list of examples should be non-exhaustive, recognising that the steps people might take will vary from case to case. The examples should also be relevant to the specific context of this Act.

4.53 Having regard to the examples given in other legislation, the information commonly provided to neighbours about steps they can take, and the suggestions in

<sup>38</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(k) (Meaning of *fundamental legislative principles*); Office of Queensland Parliamentary Counsel, 'Clear meaning' in *Principles of Good Legislation: OQPC Guide to FLPs* (14 February 2014) [1]–[3] <[http://www.legislation.qld.gov.au/Leg\\_Info/flp.htm](http://www.legislation.qld.gov.au/Leg_Info/flp.htm)>.

<sup>39</sup> Office of Queensland Parliamentary Counsel, above n 38, [57]. Examples may need monitoring to ensure their continued relevance: *ibid.*

<sup>40</sup> Users of the Act are also likely to be legally unrepresented.

the submissions, the Commission considers the following examples should be included:

- approaching the other person, directly or in writing, to notify them of the issues and offering to discuss them;
- providing information to the other person to help them understand the issues and how they might be resolved, such as a quotation for any proposed work or a letter from a tree expert about the danger posed by the tree;
- inviting the other person to take part in a form of assisted dispute resolution, such as negotiation or mediation;
- if the local council has a relevant process for dealing with nuisance trees, taking steps to follow that process.

4.54 Some of these examples are specific to trees, but most are of general relevance. Rather than repeating the same examples in each provision of the Act that encourages informal resolution, the Commission considers it would be more useful to include the list of examples in the ‘overview’ provisions appearing at the start of Chapter 2 and Chapter 3 of the Act,<sup>41</sup> with a note in the subsequent provisions referring back to those sections.<sup>42</sup> For Chapter 3, this would also necessitate the addition of a new provision in section 41, mirroring section 7(3) and (4) in Chapter 2.<sup>43</sup>

4.55 The Commission further considers that these overview provisions should refer to the relevant notice procedures under the Act which, as recognised at [4.35] above, may form part of an attempt at informal resolution (and in some cases are a required step before applying to QCAT). In particular, the Commission considers that a note should be added to the list of examples to refer to the relevant notice procedures, for example, that:<sup>44</sup>

- in relation to dividing fences — contribution from an adjoining owner for fencing work may be obtained after giving a notice to the adjoining owner under section 31 or 32; and
- in relation to trees — work on a tree to cut and remove particular overhanging branches may be requested by giving a notice to the tree-keeper under Chapter 3, Part 4.

<sup>41</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7, 41, respectively.

<sup>42</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 30(1), 56(1), 60(1). A note in an Act to another provision of the Act is part of the Act: *Acts Interpretation Act 1954* (Qld) s 14(4).

<sup>43</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 7(3)–(4) provides ‘This chapter encourages neighbours to attempt to resolve a dividing fence issue informally’, ‘However, if neighbours can not resolve a dividing fence issue, the dispute may be taken to QCAT for resolution’. Although s 41(2)(c) refers to ch 3 pt 5 of the Act, under which a person may apply to QCAT, it does not link this with informal resolution in the way achieved by s 7(3)–(4).

<sup>44</sup> The suggested wording for these notes is adapted from *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 28(2) (note) and 41(2)(b), 57, respectively.

**Recommendations**

- 4-2 Section 41 of the Act should be amended to include a new provision, modelled on section 7(3) and (4), to the general effect that:**
- (a) Chapter 3 of the Act encourages the tree-keeper and neighbour to attempt to resolve issues about trees informally;**
  - (b) However, if the tree-keeper and neighbour cannot resolve a tree issue, the dispute may be taken to QCAT for resolution.**
- 4-3 Sections 7 and 41 of the Act should be amended to include a non-exhaustive list of examples of steps that could be taken by a person to attempt to resolve an issue informally, including:**
- (a) approaching the other person, directly or in writing, to notify them of the issues and offering to discuss them;**
  - (b) providing information to the other person to help them understand the issues and how they might be resolved, such as a quotation for any proposed work or a letter from a tree expert about the danger posed by the tree;**
  - (c) inviting the other person to take part in a form of assisted dispute resolution, such as negotiation or mediation; and**
  - (d) if the local council has a relevant process for dealing with nuisance trees, taking steps to follow that process.**
- 4-4 The list of examples in Recommendation 4-3 above should include a note referring, relevantly, to the notice to contribute to fencing work (in sections 31 and 32 of the Act) and the notice for particular overhanging branches (in Chapter 3, Part 4 of the Act), which might be used as part of an attempt to resolve an issue informally.**
- 4-5 Subsequent provisions of the Act that encourage neighbours to attempt to resolve the issue informally (sections 30(1), 56(1) and 60(1)) should include a note referring to the list of examples in Recommendation 4-3 above.**

**Mediation and the Dispute Resolution Branch**

4.56 One of the ways neighbours may attempt to resolve issues informally is by mediation.

4.57 Mediation involves a trained and impartial dispute resolution practitioner (the mediator) who assists the parties to identify issues, develop options, and try to

reach an agreement.<sup>45</sup> There are many different and overlapping styles and models of mediation, making definition problematic.<sup>46</sup> In many contexts, the mediator's role is seen as 'facilitative' only, but some mediation processes also give the mediator an evaluative or 'advisory' role.<sup>47</sup> There is often, therefore, an overlap between the use of the terms 'mediation' and 'conciliation'.<sup>48</sup>

4.58 The flexibility and adaptability of mediation is, however, one of its key strengths.<sup>49</sup>

### **The Dispute Resolution Branch**

4.59 Neighbours can access mediation privately (for a fee),<sup>50</sup> or through DRB, within the Department of Justice and Attorney-General ('DJAG').

4.60 As explained in the Discussion Paper, DRB operates a free mediation service for neighbourhood disputes through its Dispute Resolution Centres, established under the *Dispute Resolution Centres Act 1990* (Qld).<sup>51</sup>

4.61 DRB's operation has expanded significantly since its establishment. From 1990–91 to 2014–15, the number of trained mediators has increased from 36 to 160, and the total number of civil dispute mediations (including but not limited to neighbourhood disputes) has increased from 182 to more than 3000.<sup>52</sup>

4.62 DRB provides mediation as part of its informal neighbour dispute resolution service. After an initial contact with DRB, a person may decide to request a mediation.<sup>53</sup>

If the client decides that mediation is the assistance they need, a case is opened. The other parties are contacted and offered mediation as a means to resolve any

45 Australia has an established national scheme for mediator standards and accreditation. The National Mediator Accreditation System, which includes Approval and Practice Standards, is implemented by the independent Mediator Standards Board and was developed with support from NADRAC. Membership remains voluntary. See Mediator Standards Board, *Mediator Standards* (2015) <<http://www.msb.org.au/mediator-standards>>.

46 See generally M King et al, *Non-Adversarial Justice* (Federation Press, 2009) 104–7.

47 See [4.7] above.

48 NADRAC, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (September 2003) Australian Government Attorney-General's Department, 3 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>. There is also variation in what is meant by 'conciliation'. Generally, the conciliator has an advisory role and may, for example, make suggestions for terms of settlement, give expert advice on likely settlement terms, and actively encourage the participants to reach an agreement: *ibid* 5.

49 See, eg, D Spencer, *Principles of Dispute Resolution* (Lawbook Co, 2011) [3.30]. See also [1.10] where the same point is made in relation to ADR in general.

50 For example, many solicitors are recognised mediators: see the information and links (including the 'Find a Mediator' page) at Queensland Law Society, *Mediation* (2005–15) <[http://www.qls.com.au/For\\_the\\_community/Dispute\\_resolution\\_services/Mediation](http://www.qls.com.au/For_the_community/Dispute_resolution_services/Mediation)>.

51 *Neighbourhood Disputes Act Discussion Paper* (2015) [4.19]–[4.20]. The Dispute Resolution Centres are based in Brisbane, Hervey Bay, Rockhampton, Mackay, Townsville and Cairns.

52 Information provided by DRB, 14 August 2015 (Submission 54).

53 *Ibid*. DRB is also currently working to implement 'an online form which will enable clients to seamlessly request the assistance of a mediator directly from the [Queensland Government's] Your Rights Crime and the Law franchise websites'.



issues. If all parties agree to attend mediation, then the Intake Officer works with them separately to assist them to prepare for the mediation session. This may involve each party being encouraged to identify what is most important to them as an outcome and what may be most important to the other party and why. Intake Officers may talk with the parties on several occasions to prepare them and to schedule the mediation session at a time and place convenient to all parties.

4.63 For cases that proceed to mediation, DRB uses a facilitative model and 12 step process:<sup>54</sup>

Both parties come together in mediation and, with the assistance of the impartial mediator(s), discuss their concerns and work towards reaching an agreement. Neighbour disputes are generally facilitated by two mediators using the 12 step mediation process, which aligns with the National Mediation Accreditation standards.<sup>55</sup> This process can take up to four hours and seeks to resolve all issues in dispute and improve the neighbourly relationship. (note added)

4.64 If a mediation does not proceed, DRB also assists 'disappointed initiating parties to explore their other options to manage their dispute'.<sup>56</sup>

4.65 In the four years since the Act was introduced, DRB has conducted 324 of these mediations for disputes between neighbours, with 154 (48%) of those relating to fences or trees.<sup>57</sup> During the same period, DRB has recorded a combined agreement rate of 84% for all mediations between neighbours and the same rate for all tree and fence disputes.<sup>58</sup>

4.66 There is no reference to DRB's informal mediation role in the Act. In contrast, section 12(1) of the *Dividing Fences Act 1991* (NSW) expressly states that adjoining owners 'may attend a Community Justice Centre in an attempt to reach an agreement' about fencing work.

4.67 DRB also provides mediation upon referral from QCAT as part of the QCAT process for dividing fence disputes within QCAT's minor civil dispute ('MCD') jurisdiction. This is discussed later in the chapter.

### ***Enforceability of agreements reached at mediation***

4.68 An agreement reached as a result of a mediation process may result in an enforceable contract. However, an agreement reached at an informal mediation conducted by DRB is not enforceable in a court or tribunal 'unless the parties agree in writing that the agreement is to be enforceable'.<sup>59</sup> If the parties subsequently start proceedings in QCAT, there is provision in the *Queensland Civil and Administrative*

<sup>54</sup> Ibid. Use of a 'facilitative' model was confirmed in information provided by DRB, 16 January 2015.

<sup>55</sup> As to the National Mediation Accreditation standards, see n 45 above.

<sup>56</sup> Information provided by DRB, 14 August 2015 (Submission 54).

<sup>57</sup> Ibid. This relates to the span of years from 2011–12 to 2014–15.

<sup>58</sup> Ibid. In 2014–15, DRB reported an 89% agreement rate overall for its informal mediations for all civil community disputes, including disputes between neighbours, workmates, families and others.

<sup>59</sup> *Dispute Resolution Centres Act 1990* (Qld) s 31(3). The position is similar in other jurisdictions: see, eg, *Community Justice Centres Act 1983* (NSW) s 23(3).

*Tribunal Act 2009* (Qld) ('QCAT Act') for the agreement to be signed and filed by the parties in the QCAT registry, and for QCAT to make orders giving it effect.<sup>60</sup>

4.69 The requirement for the parties' agreement in writing to enforceability reflects the informal and generally voluntary nature of DRB mediations. It is also consistent with the confidential nature of DRB mediations, such that evidence of things said or admissions made at a mediation, and documents prepared pursuant to a mediation, are not generally admissible in court or tribunal proceedings without the parties' consent.<sup>61</sup>

4.70 The treatment of informal mediation agreements differs slightly from agreements reached at mediations as part of the QCAT process. For mediations conducted by a member, adjudicator or principal registrar of QCAT, the mediator may record the terms of the settlement in writing and make orders giving it effect. For other QCAT-referred mediations, the mediator may have the parties sign written terms of settlement and file this in registry. QCAT may then make the orders necessary to give effect to the settlement.<sup>62</sup>

### **Discussion Paper**

4.71 In the Discussion Paper, the Commission observed that the Act does not contain any reference to DRB mediation and asked whether the Act should provide for DRB mediation and, if so, how. The Discussion Paper also asked whether all agreements reached at DRB mediation should be enforceable in QCAT, or whether they should be enforceable only if the neighbours agree to this in writing.<sup>63</sup>

### **Submissions**

#### **DRB mediation**

4.72 A number of respondents thought the Act should provide for DRB mediation.

4.73 Strata Community Australia (Qld) submitted that the Act could do this by incorporating DRB mediation as 'one of the suggested options for the parties to attempt to resolve matters "informally"'. A member of the public alternatively suggested that section 58 of the Act, which relates to the notice procedure for particular overhanging branches, might include a reference to DRB to encourage the parties to try to resolve the issue early.<sup>64</sup>

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<sup>60</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 86. That provision applies to settlements reached by the parties other than at a compulsory conference or mediation conducted under the QCAT Act. As to the process for agreements reached at a mediation to which the parties were referred by the tribunal as part of a QCAT proceeding, see s 85 of the QCAT Act. Mediation as part of the QCAT process is discussed later in this chapter.

<sup>61</sup> *Dispute Resolution Centres Act 1990* (Qld) s 36(4)–(6). The confidentiality provisions do not expressly except agreements made resolving the dispute, whether or not the parties have agreed in writing that the agreement is to be enforceable.

<sup>62</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 85. An order can be made only if the entity making the order is satisfied the tribunal could make a decision in the terms of the settlement or in terms consistent with the settlement: s 87.

<sup>63</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.21]–[4.22], [4.25], Questions 4-3 and 4-4.

<sup>64</sup> Submission 40.

4.74 The Local Government Association of Queensland ('LGAQ') and Ipswich City Council submitted that the Act could provide for '[v]oluntary mediation with a certain timeframe for resolution if agreed to by both parties otherwise the current process under the Act commences'.

4.75 Some other respondents — including Strata Community Australia (Qld) and QAILS — were similarly in favour of the Act providing for DRB mediation prior to, or immediately upon, making an application to QCAT.<sup>65</sup>

4.76 However, neither DRB nor QCAT considered that the Act should expressly provide for DRB mediation. DRB highlighted the benefits and success of its informal mediation service, but submitted that contact with DRB should be encouraged 'in a less formal way through greater acknowledgement and promotion of DRB's role outside the Act and formal system'. In support of its ongoing informal mediation role, DRB referred to its high client satisfaction rate and feedback from magistrates:

DRB's formal client satisfaction surveys indicate a 95% satisfaction rate with the informal mediation service. It therefore seems reasonable to assume that the majority of mediation participants ... did not subsequently need to enter the formal justice system to address the same neighbourhood dispute.

...

Anecdotal feedback from Magistrates over many years also indicates that parties who have been through mediation have often narrowed the issues in contention which assists in focussing the court process.

4.77 QCAT expressed the view that informal resolution for dividing fence and tree disputes is 'best served by DRB maintaining its current role'.

4.78 The Townsville Community Legal Service Inc also considered that DRB should be a point of contact but that 'broader options' should be considered. In its view, the Act should focus on ensuring that genuine efforts at dispute resolution are made, without limiting this to DRB mediation.

### ***Enforceability of agreements***

4.79 The LGAQ, Ipswich City Council, Strata Community Australia (Qld), and the Queensland Law Society each considered that an agreement reached after an informal DRB mediation should continue to be enforceable in QCAT only if the parties agree in writing that it be enforceable.

4.80 QCAT considered that enforceability without the parties' agreement would be 'problematic' because the 'agreements would need to reflect the orders QCAT could make under the Act' and this 'would diminish the informality' of the mediation process. DRB also expressed the view that the enforceability of agreements without the parties' consent may 'dissolve [the] delineation' between informal and formal dispute resolution.

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<sup>65</sup> These submissions are discussed in more detail at [4.102] ff below.

4.81 The Queensland Law Society commented generally that dispute resolution processes ‘would benefit from parties having access to legal representation’, observing that:

many potential resolutions are thwarted by virtue of the fact that the parties themselves are unaware of their legal position; [and] mediators are not permitted to provide legal advice/guidance and so cannot assist the parties in such cases.

4.82 Two members of the public considered, however, that any agreement arising from an informal DRB mediation should be enforceable whether or not the parties agree that it be enforceable.<sup>66</sup> Townsville Community Legal Service Inc also suggested that enforceability ‘should be no different’, except where a point of law or matter beyond QCAT’s jurisdiction is raised.

4.83 The Queensland Arboricultural Association suggested that, if agreements are to be binding, ‘it may be appropriate’ in some cases ‘to include a date for review’.

4.84 DRB suggested a different approach. In its view, the ability to admit a mediated agreement as evidence in a QCAT proceeding ‘may be sufficient to reasonably progress a mediated resolution in a formal process’, and ‘may create a more seamless experience for clients through a continuum of informal and formal mechanisms whereupon one process compliments the other’. DRB further observed that this would assist the tribunal ‘to more readily resolve the dispute’.

### ***The Commission’s view***

4.85 DRB plays a significant role in the informal resolution of neighbour disputes through its mediation service. The Commission generally agrees with DRB’s submission that its informal mediation role should be encouraged in a ‘less formal way’, and does not consider that the Act should attempt to modify or codify its current role. There is a risk that making detailed legislative provision will undermine the flexibility and adaptability of DRB’s informal role.

4.86 However, the Commission considers that a note referring to DRB’s Dispute Resolution Centres should be included in the Act as part of the non-exhaustive list of examples of ‘informal’ resolution, recommended earlier in this chapter. In the Commission’s view, this would provide helpful guidance for users of the Act and would promote DRB’s role without the risk of making detailed legislative provision.<sup>67</sup>

4.87 In relation to the enforceability of an agreement reached as a result of an informal DRB mediation, the Commission considers, on balance, that there is no reason to interfere with the existing processes under which the parties must agree in writing that the agreement be enforceable. This is consistent with the informal and voluntary nature of these mediations, and avoids the difficulties that arise with any terms of an agreement that cannot properly be made the subject of a QCAT order.

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<sup>66</sup> Submissions 40, 49.

<sup>67</sup> A footnote or editor’s note to a provision in an Act is not part of the Act, but material set out in an official copy of an Act may be considered in the interpretation of a provision of the Act: *Acts Interpretation Act 1954* (Qld) ss 14(7), 14B(1), (3)(a).

4.88 The Commission has considered the alternative suggestion that agreements reached at DRB mediations outside the QCAT process should be admissible in subsequent QCAT proceedings to assist the tribunal to decide the dispute. As explained previously, this issue is dealt with under the *Dispute Resolution Centres Act 1990* (Qld), which includes confidentiality provisions that limit the admissibility of evidence relating to any DRB mediation without the parties' consent. On balance, the Commission does not consider it necessary or appropriate to provide an exception to that general approach. To do so would alter the confidentiality of particular mediations and potentially undermine the mediation process.

### **Recommendation**

**4-6 A note referring to mediation provided by a Dispute Resolution Centre under the *Dispute Resolution Centres Act 1990* (Qld) should be included in the Act as part of the non-exhaustive list of examples in Recommendation 4-3 above.**

### **Encouragement and requirement**

4.89 At present, the Act 'encourages' parties to attempt to resolve issues informally. In relation to applications to QCAT for an order about a tree, the Act goes further.

4.90 Section 65(a)–(b) of the Act provides that, if a matter about a tree reaches QCAT, the tribunal may make orders if it is satisfied the neighbour has 'made a reasonable effort to reach agreement with the tree-keeper' and has 'taken all reasonable steps to resolve the issue' under any relevant local law or local government scheme or process:<sup>68</sup>

#### **65 Requirements before order may be made**

QCAT may make an order under section 66 if it is satisfied of the following matters—

- (a) the neighbour has made a reasonable effort to reach agreement with the tree-keeper;
- (b) the neighbour has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process;

*Note—*

*The relevant local government may have a scheme for dealing with 'nuisance' trees.*

...

<sup>68</sup> Specific questions directed toward these matters are included in the application form for tree disputes: Queensland Civil and Administrative Tribunal, *Form 51 Application for a tree dispute — Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Version 2).

### Examples from legislation in other jurisdictions

4.91 The *Trees (Disputes Between Neighbours) Act 2006* (NSW) includes a provision in substantially the same terms as section 65(a) of the Act requiring the court to be satisfied, before making an order, that the applicant ‘has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated’.<sup>69</sup>

4.92 The United Kingdom ‘high hedges’ legislation includes similar provisions. For example, the Scottish Act expressly states that, before making an application, the applicant ‘must take all reasonable steps to resolve the matters in relation to the high hedge which would otherwise be the subject of the application’, and requires the local authority to dismiss an application if the authority considers the applicant has not complied with that duty.<sup>70</sup>

4.93 Pre-action protocols and obligations also apply to a broad range of other civil disputes in Queensland and in other jurisdictions. As shown in the examples outlined below, different approaches are taken, including requirements to engage in ADR, requirements to exchange information and make settlement offers, obligations to state what steps have been taken to resolve the dispute, and provisions for the court or tribunal to take such matters into account on costs:<sup>71</sup>

- The *Retirement Villages Act 1999* (Qld) and *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) impose mandatory dispute resolution requirements on parties in which recourse to the relevant tribunal is available only if the parties have been unable to resolve the dispute through preliminary negotiation or subsequent mediation or conciliation under those Acts.
- The *Personal Injuries Proceedings Act 2002* (Qld) and *Workers’ Compensation and Rehabilitation Act 2003* (Qld) establish detailed mandatory ‘pre-court procedures’ that include requirements, among other things, to give notices of and responses to claims, make settlement offers, provide relevant documents and information, participate in compulsory conferences and, if claims are not resolved at compulsory conference, exchange written final offers.
- The *Civil Dispute Resolution Act 2011* (Cth) requires prospective parties to federal civil proceedings to file a ‘genuine steps statement’ outlining the steps

<sup>69</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 10(1)(a), 14E(1)(a), applying to damage or injury and obstruction of sunlight or views, respectively. The *Dividing Fences Act 1991* (NSW) does not contain any similar provision.

<sup>70</sup> *High Hedges (Scotland) Act 2013* (Scot) asp 6, ss 3, 5(1)(a). See also the similar provisions, empowering the authority to dismiss a complaint, in *High Hedges Act (Northern Ireland) 2011* (NI) c 21, s 3(2)(a); and *Anti-social Behaviour Act 2003* (UK) c 38, s 68(2)(a).

<sup>71</sup> See, respectively, *Retirement Villages Act 1999* (Qld) ss 154, 167; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 397, 416; *Personal Injuries Proceedings Act 2002* (Qld) ch 2 pt 1; *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ch 5 pts 5, 6; *Civil Dispute Resolution Act 2011* (Cth); *Family Law Rules 2004* (Cth) rr 1.05, 1.10(2)(d), sch 1; *Civil Procedure Act 2010* (Vic) ss 10, 22–23, ch 2 pt 2.4, ch 4 pt 4.1; Northern Territory Supreme Court, *Practice Direction No 6 of 2009 — Trial Civil Procedure Reforms*, 11 June 2009; United Kingdom, *Practice Direction — Pre-Action Conduct and Protocols* available at Justice, *CPR — Pre-Action Protocols* (28 July 2015) <<http://www.justice.gov.uk/courts/procedure-rules/civil/protocol>>; *Rules of Court* (Singapore, cap 322, 2014 rev ed) O 59 r 5.

taken to resolve the issue or why such steps have not been taken. The court may take account of a party's compliance, and whether genuine steps were taken, in the exercise of a function or performance of a power in a proceeding, including in relation to costs.

- The *Family Law Rules 2004* (Cth) establish 'pre-action procedures' in which prospective parties are 'required to make a genuine effort to resolve the dispute before starting a case', unless there are 'good reasons for not doing so'. The rules specify in detail what steps are required (including exploring options for settlement and exchanging information), matters to which the parties must have regard, and the consequences of non-compliance (including potential orders for costs).
- The *Civil Procedure Act 2010* (Vic) imposes a number of 'overarching obligations' on parties to civil proceedings and their legal representatives, including obligations to 'use reasonable endeavours to resolve a dispute by agreement' (including, if appropriate, 'by appropriate dispute resolution') and to 'narrow the scope of the remaining issues in dispute'. The court may take non-compliance into account in exercising any power in relation to the proceedings, including in exercising its discretion as to costs.
- Practice Directions in the Northern Territory and the United Kingdom provide for 'pre-action' steps for civil proceedings, including the exchange of correspondence and consideration of ADR. The parties may be required to provide evidence that ADR was considered and the court may take the parties' non-compliance into account when determining costs.
- The *Rules of Court* in Singapore do not require steps to be taken before applying to court, but provide that, in exercising its discretion as to costs, the court may take into account 'the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution'.

4.94 The Productivity Commission has also recently recommended that Australian, State and Territory Governments should 'further explore the use of targeted pre-action protocols' for disputes that may benefit from narrowing the range of issues in dispute and facilitating alternative dispute resolution.<sup>72</sup>

### ***Taking the parties' conduct into account on costs***

4.95 As indicated above, many jurisdictions provide for the court to consider the parties' conduct in relation to pre-action protocols when exercising its discretion to award costs.

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<sup>72</sup> Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 5 September 2014) vol 1, 429, Rec 12.2. In its submission to the Productivity Commission's inquiry, the Queensland Public Interest Law Clearing House ('QPILCH') observed that mandatory ADR will not always be appropriate, but expressed support for the use of targeted pre-action protocols in suitable cases such as minor disputes, disputes within and between non-profit organisations, and disputes involving self-represented litigants: QPILCH, Submission No DR427 to Productivity Commission, *Access to Justice Arrangements*, 21 May 2013, 21, 29.

4.96 Under the QCAT Act, the usual rule is that each party bears the party's own costs.<sup>73</sup> However, QCAT may make an award of costs if it considers 'the interests of justice require it' to do so.<sup>74</sup> Section 102(3) of the QCAT Act sets out the following matters to which QCAT may have regard in deciding whether to award costs:

- (a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);<sup>75</sup>
- (b) the nature and complexity of the dispute the subject of the proceeding;
- (c) the relative strengths of the claims made by each of the parties to the proceeding;
- (d) for a proceeding for the review of a reviewable decision—
  - (i) whether the applicant was afforded natural justice by the decision-maker for the decision; and
  - (ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits;
- (e) the financial circumstances of the parties to the proceeding;
- (f) anything else the tribunal considers relevant. (note added)

4.97 QCAT also has a general power to award costs in limited circumstances if a party did not accept an offer to settle the dispute and QCAT's decision in the proceeding is not more favourable to that party than the offer.<sup>76</sup>

### **Consistency of terminology**

4.98 A related issue is the extent to which the Act, in its references to informal resolution, should use consistent language to avoid unnecessary confusion and potential interpretation problems.

4.99 At present, different expressions are used throughout the Act:

- section 7(3) encourages parties to 'attempt to resolve [the] issue informally';
- sections 56(1) and 60(1) encourage parties to 'resolve the issue informally';

<sup>73</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100. An enabling Act may provide otherwise.

<sup>74</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(1). For a MCD, costs may be awarded against an unsuccessful respondent to an application for the amount of the application fee: s 102(2); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 83.

<sup>75</sup> Section 48(1)(a)–(g) of the QCAT Act refers to the following: (a) not complying with a tribunal order or direction without reasonable excuse; (b) not complying with the QCAT Act, an enabling Act or the QCAT Rules; (c) asking for an adjournment as a result of conduct mentioned in para (a) or (b); (d) causing an adjournment; (e) attempting to deceive another party or the tribunal; (f) vexatiously conducting the proceeding; (g) failing to attend mediation or the hearing of the proceeding without reasonable excuse.

<sup>76</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 105; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 86. This does not apply to a proceeding for a MCD.



- section 30(1) encourages parties to ‘attempt to resolve issues ... to avoid a dispute arising’; and
- section 65(a)–(b) requires that parties have made a ‘reasonable effort to reach agreement’ and have taken ‘all reasonable steps to resolve the issue’ under any relevant local government law, scheme or process.

4.100 In the wider context of pre-action protocols, it has been suggested that the concept of ‘reasonableness’, although familiar in legal settings, may be difficult to interpret, and that the expression ‘genuine steps’ may be preferable because it can be given its ordinary meaning.<sup>77</sup>

### **Discussion Paper**

4.101 The Discussion Paper observed that the Act encourages neighbours to resolve issues informally and that one of the ways neighbours may seek to do this is by mediation.<sup>78</sup>

### **Submissions**

4.102 Some respondents to the review suggested that mediation or other ADR processes should be a required first step either prior to, or immediately upon, making an application to QCAT.

4.103 Strata Community Australia (Qld) submitted that early resolution of disputes would be promoted by requiring prospective applicants to ‘attempt conciliation or mediation’ before making a formal application to QCAT for an order. In its view, this would avoid the need to go to QCAT and ‘ultimately reduce the resources invested in QCAT to resolve disputes of this kind’. This respondent considered that DRB mediation could be used as a ‘precondition to commencing proceedings in QCAT’, for example:

The parties have engaged in a DRB mediation and have been unable to resolve the dispute; or

The parties have been unable to agree to engage in a DRB mediation (with evidence of refusal of either party to engage in the process).

4.104 The same respondent further suggested that the provisions encouraging informal resolution could be ‘enhanced’ by giving consequences for not attempting to resolve matters informally:

specifically provid[ing] that the eventual decision-maker in any dispute which has been brought to QCAT may have regard (in respect to the issue of costs only) to the nature and extent of any efforts by either of the parties to the dispute to resolve the matter informally.

<sup>77</sup> See NADRAC, ‘The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction’ (Report to the Commonwealth Attorney-General, September 2009) 31–2, 148. See also Office of Queensland Parliamentary Counsel, ‘Clear meaning’ in *Principles of Good Legislation: OQPC Guide to FLPS* (14 February 2014) [38] <[http://www.legislation.qld.gov.au/Leg\\_Info/flp.htm](http://www.legislation.qld.gov.au/Leg_Info/flp.htm)>: ‘views on what is “reasonable” may differ considerably depending on the individual’.

<sup>78</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.16], [4.19].

4.105 QAILS also suggested that the Act could be improved by ‘requiring disputing neighbours to attend an alternative dispute resolution process before bringing a proceeding in QCAT’:

It may be considered that a formal requirement to attempt ADR may add unnecessary formality or bureaucracy to the process. On balance, it may be more appropriate to require an attempt at informal resolution before applying to QCAT for an order, evidenced by a copy of a letter sent to the neighbour and a copy of the refusal, or just the expiration of a reasonable timeframe in which to receive a response.

4.106 QAILS considered that this could help to reduce QCAT’s workload and minimise the taking of adversarial positions.

4.107 The Townsville Community Legal Service Inc similarly submitted, in the context of dividing fences, that there ‘could be an intermediate step requiring compulsory dispute resolution’ before applying to QCAT, suggesting that ‘a greater emphasis on dispute resolution is likely to be beneficial’:

For example, there could be a system in place similar to that which exists within the family law system. Mandatory dispute resolution prior to commencing proceedings could be considered.

4.108 That respondent suggested that section 30(2) of the Act could be amended to provide that adjoining owners are encouraged to ‘make genuine attempts to resolve issues’ about fencing work to avoid a dispute arising, and that an owner may apply to QCAT if the owner ‘has made a genuine effort to resolve the dispute by engaging in dispute resolution’. This respondent further suggested that the Act might provide carefully worded exceptions to this requirement, including ‘violence between neighbours, safety of children, retention of animals, urgent land use issues such as landscaping, [or] the need for cadastral surveying’.

4.109 The same respondent also observed, in relation to section 65 of the Act, that it is ‘interesting’ that the Act treats dispute resolution for trees and dividing fences differently. In its view, section 65 ‘shows an underlying object to have QCAT a station of last resort’, and reflects its suggestion to make provision in the Act for genuine efforts to resolve disputes.

4.110 A member of the public expressed the view that the provisions encouraging informal resolution should be given ‘greater emphasis’, and suggested that, ‘as a first contact point after an application to QCAT is made’, the parties could be required to ‘meet and engage in a discussion of their respective viewpoints and present any argument supporting their position’.<sup>79</sup>

4.111 The LGAQ and Ipswich City Council submitted that the Act could provide for ‘[v]oluntary mediation with a certain timeframe for resolution if agreed to by both parties otherwise the current process under the Act commences’.

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Submission 49.

### **The Commission's view**

4.112 As stated earlier, the Commission considers the general philosophy of the Act in encouraging neighbours to reach an informal resolution in most cases is appropriate.

4.113 At present, this is addressed in the Act by a number of provisions, differently worded, but directed to the same concept. In the Commission's view, the language of those provisions should be made consistent throughout the Act to avoid unnecessary confusion.<sup>80</sup> In particular, the Commission considers sections 30(1), 56(1) and 60(1) should be changed to adopt the expression used in section 7(3) — that the neighbours are encouraged 'to attempt to resolve the issue informally'. In the Commission's view, the words 'attempt to', which presently appear in section 7(3), appropriately focus on the idea that neighbours should make an effort to resolve the issue whilst recognising that an informal agreement may not always be reached.

4.114 The Commission has considered whether those provisions should instead use a different expression, used in some other legislation, such as 'take genuine steps'. However, the Commission considers it unnecessary to introduce new expressions where the existing language of the Act, with which users of the Act are already familiar, is sufficient.

4.115 The Commission also considers it appropriate to retain section 65(a)–(b) of the Act. In the Commission's view, this supports and gives weight to the other provisions of the Act that encourage informal resolution. It ensures that the applicant considers the steps they have taken, or might take, to resolve the issue before applying to QCAT, and appropriately limits the circumstances in which QCAT may make an order.

4.116 In general, the Commission considers the language used in section 65(a)–(b) is appropriate. Although different people may have different views about what is 'reasonable' in particular circumstances, the Commission observes that it is a familiar expression and appropriately qualifies the provision so as not to impose an unfairly high threshold. It is also an expression used widely throughout the Act.<sup>81</sup>

4.117 However, the Commission is of the view that section 65(a)–(b) should be expressly linked with the earlier provisions in the Act about informal resolution. In particular, the Commission considers section 65(a)–(b) should be amended by adding a note to that provision referring to the list of examples of the steps a person could take to resolve issues informally, which the Commission has recommended earlier in this chapter.<sup>82</sup>

4.118 At present, section 65 applies only in relation to tree disputes, under Chapter 3 of the Act. For consistency, the Commission considers that Chapter 2 of

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<sup>80</sup> That the same concepts should be expressed consistently within the same Act is recognised in Office of Queensland Parliamentary Counsel, 'Clear meaning' in *Principles of Good Legislation: OQPC Guide to FLPs* (14 February 2014) [49] <[http://www.legislation.qld.gov.au/Leg\\_Info/flp.htm](http://www.legislation.qld.gov.au/Leg_Info/flp.htm)>.

<sup>81</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 15(2)(b), 26(2), 27(2), 28(2), 32(2), 35(1)(h), 37(2), 38(1), 40(5), (6)(a), 58(4), 77, 83, 86(6), 88(5B), 92(1)(b), (c), 93, 94(4). See also ss 7(2)(b), 27(1), 46(a)(ii)(C), 52(2)(c), 66(2)(b)(ii) and 75 which use the concept of 'unreasonableness'.

<sup>82</sup> A note in an Act to another provision of the Act is part of the Act: *Acts Interpretation Act 1954* (Qld) s 14(4).

the Act should also include a provision to the same general effect as section 65(a) — that QCAT may make an order under section 35 if it is satisfied that the applicant has made a reasonable effort to reach agreement with the adjoining owner.<sup>83</sup> Again, a note should be included to refer to the recommended new section giving examples.<sup>84</sup>

4.119 Further, the Commission considers it appropriate for QCAT to have power to take these matters into account in the exercise of its discretion as to costs. QCAT may have regard to a number of matters under section 102(3) of the QCAT Act in deciding whether to award costs against a party in the interests of justice, but these do not specifically refer to the parties' efforts to resolve the dispute before applying to QCAT. In the Commission's view, the Act should be amended to the general effect that, without limiting those factors or otherwise modifying the other provisions of the QCAT Act about costs, QCAT may have regard to the steps the party has taken to attempt to resolve the issue informally.<sup>85</sup> As noted in one of the submissions to the review, provision for possible consequences would give greater weight to the Act's encouragement of informal resolution. This new provision should also include a note referring to the recommended new section giving examples.

4.120 Finally, the Commission considers that the initial references to the encouragement of informal resolution in the overview provisions in Chapter 2 and Chapter 3 of the Act should include a note referring to the relevant provisions under which QCAT is required or empowered to consider a neighbour's attempts at informal resolution, namely:

- section 65(a)–(b) for Chapter 3, and the recommended new provision based on section 65(a) for Chapter 2; and
- the recommended new provision about costs.

4.121 In the Commission's view, the combined effect of these recommendations will provide a stronger focus on informal resolution and give greater overall coherence to the provisions in the Act directed to that end. This approach, which focuses on modifications to the existing provisions, is preferred to the introduction of a new scheme for mandatory pre-QCAT mediation, as was suggested by some submissions. In the Commission's view, such a scheme would remove the flexibility that is so important to informal dispute resolution, and introduce an unnecessary layer of complexity.

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<sup>83</sup> Section 35 of the Act gives QCAT power to make orders in relation to fencing work for a dividing fence. QCAT also has power to make certain orders about dividing fences under ss 38 and 39 of the Act in limited urgent circumstances in relation to unauthorised construction or demolition.

<sup>84</sup> Recommendation 4-4 above further provides that the list of examples should include a reference to the notice to contribute for fencing work which is required to be used before making certain types of applications to QCAT. Whether use of the notice procedure alone is sufficient to satisfy QCAT that the neighbour has made a reasonable effort to reach agreement will be a matter for QCAT to determine on the facts of each case.

<sup>85</sup> An enabling Act may include provisions about the conduct of proceedings for jurisdiction conferred by the Act, including QCAT's powers for proceedings, which may add to, otherwise vary or exclude the provisions of the QCAT Act: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(7)(b). A modifying provision ordinarily prevails over the provisions of the QCAT Act to the extent of any inconsistency, but the enabling Act may expressly state how the provisions of the QCAT Act apply in relation to the modifying provision: s 7(2), (5).

**Recommendations**

- 4-7** The provisions in the Act that encourage neighbours to resolve issues informally should use consistent language and, accordingly, sections 30(1), 56(1) and 60(1) should be amended to provide that neighbours are encouraged 'to attempt to resolve the issue informally'.
- 4-8** Chapter 2 of the Act should be amended to include a new provision, based on section 65(a), to the general effect that QCAT may make an order under section 35 if it is satisfied that the neighbour has made a reasonable effort to reach agreement with the adjoining owner.
- 4-9** The Act should be amended to include a new provision to the general effect that, in deciding whether to award costs against a party to a proceeding in the interests of justice, QCAT may have regard to the steps the party has taken to attempt to resolve the issue informally. This provision should be expressed to apply without limiting the provisions about costs in the QCAT Act.
- 4-10** Each of the following provisions should include a note referring to the non-exhaustive list of examples in Recommendation 4-3 above:
- (a)** section 65(a)–(b), for tree disputes;
  - (b)** the new section based on section 65(a), for dividing fence disputes, in Recommendation 4-8; and
  - (c)** the new section about costs in Recommendation 4-9.
- 4-11** The initial references in the overview provisions of Chapter 2 and Chapter 3 of the Act to the encouragement of informal resolution (section 7(3) and section 41 as amended by Recommendation 4-2 above) should include a note referring to the following provisions:
- (a)** section 65(a)–(b), and the new section based on section 65(a) in Recommendation 4-8; and
  - (b)** the new section about costs in Recommendation 4-9.

**The role of information and education in facilitating informal resolution**

4.122 As discussed in Chapter 6 of this Report, a key element in assisting people to resolve dividing fence and tree issues with their neighbours is education. This includes accessible information about the Act and the relevant legal rules. More generally, as is apparent from figure 4-3 above, the encouragement for neighbours to resolve issues informally also requires information and guidance about dispute resolution options.

### **Information on what to do and where to go**

4.123 As explained earlier, there are a number of key sources of information about the Act and the ways people might attempt to resolve issues about dividing fences and trees, including information about services or agencies that can provide additional assistance.

4.124 DRB has also been involved in the development of a new online dispute resolution tool for neighbourhood disputes:<sup>86</sup>

The online pathway will show clients the range of options for their circumstances and dispute types (eg, trees, fences, noise, barking dogs etc) and encourage them to explore less formal options first.

The pathway aims to make DJAG and other neighbour related services in Queensland easier to find and therefore more accessible. It will be located on the Your Rights Crime and the Law franchise websites; will be easily found through a Google search; and is planned for launch later in 2015.

4.125 This new online tool is now available on the Queensland Government website.<sup>87</sup> It automatically generates links to relevant information from a range of sources based on selected inputs about the person's situation and issue. In addition to dividing fences and trees, it covers many common neighbourhood issues.

### **Information on how to do it**

4.126 There is also some information available to assist people to put that knowledge into action.

4.127 For example, the QAILS' *Queensland Neighbourhood Disputes* website includes sample letter templates that people can use to write to their neighbours.<sup>88</sup> Community legal centres may also provide direct practical assistance to clients (in drafting letters, for example).

### **Conflict coaching**

4.128 In addition, DRB provides conflict coaching in its initial contact with clients as part of its informal dispute resolution services for neighbour disputes:<sup>89</sup>

For example, if the client has not yet spoken to their neighbour the Intake Officer may assist them with 'how' they will approach and talk with their neighbour about their concerns. The Intake Officer may also direct them to information about trees and fence disputes. ... Clients may also be referred to other services such as

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<sup>86</sup> Information provided by DRB, 14 August 2015 (Submission 54).

<sup>87</sup> See Queensland Government, *How to resolve neighbourhood disputes* (2 September 2015) <<http://www.qld.gov.au/law/housing-and-neighbours/resolve-disputes/>>. Sources of information pulled together by this tool include the Dispute Resolution Centres, QCAT, the Department of Natural Resources and Mines, Legal Aid Qld, and QAILS. The information is 'general' information and not legal advice.

<sup>88</sup> See QAILS, *Write to your neighbour*, Queensland Neighbourhood Disputes <<http://www.qldneighbourhoods.com/writing-to-your-neighbour.html>>.

<sup>89</sup> Information provided by DRB, 14 August 2015 (Submission 54).

Community Legal Centres. These clients are often seeking to self-manage their dispute.

4.129 'Conflict coaching' is a type of dispute resolution process that focuses on helping people to improve their effectiveness in dealing with conflicts and resolving disputes, for example, by considering options for managing a particular conflict and developing a plan for working through the conflict with the other party.<sup>90</sup>

4.130 In the four years since the commencement of the Act, DRB has handled a significant number (15 190) of initial contacts about neighbourhood issues, with a small proportion of these (1636 or 11%) going on to open a case to prepare for mediation, and a modest number of those proceeding to mediation (324 of cases opened or 20%).<sup>91</sup>

4.131 Interim results from a recent client feedback trial about DRB's initial assistance to neighbours about fence and tree issues suggests a high rate of satisfaction (although the sample size is small). Of the 79 people to participate in the survey, 97% said their query was answered; 99% said the information they received was clear; 100% said they knew what to do next; and 97% said that, based on their experience, they would recommend the service to others.<sup>92</sup>

### Submissions

4.132 Some submissions to the review made suggestions about practical measures to assist people with informal resolution.

4.133 QAILS commented on the 'surprising' experience that many people have not attempted to discuss the issue with their neighbour before seeking advice from a community legal centre, and submitted that agencies should advise people to try to speak to their neighbours. It also noted the template letters provided on its website 'to assist people [who] might not feel comfortable engaging in conversation with their neighbours'.

4.134 Caxton Legal Centre Inc observed that, in its experience, the materials available on the Queensland Government website 'seem to have assisted [their] clients to gain some understanding of their rights'. This respondent submitted, however, that a detailed agreement form 'should be created and made available for

<sup>90</sup> D Spencer, *Principles of Dispute Resolution* (Lawbook Co, 2011) [9.170]; R Brinkert, 'Conflict Coaching: Advancing the Conflict Resolution Field by Developing an Individual Disputant Process' (2006) 23(4) *Conflict Resolution Quarterly* 517, 518; C Noble, *Conflict Coaching: A Preventative Form of Dispute Resolution* (May 2002) Mediate.com <<http://www.mediate.com/articles/noble1.cfm>>, reprinted from *Interaction* (2002) 15(1).

<sup>91</sup> Information provided by DRB, 14 August 2015 (Submission 54). The figures, as follows, cover the span of years from 2011–12 to 2014–15 and were drawn from DRB's 'Mediation Organiser' database:

First contacts	Preparation for mediation	Mediation
15 190 first contacts seeking assistance for neighbourhood issues	1636 (11%) of first contacts opened a case to prepare for mediation	324 (20%) of cases opened to prepare for mediation proceeded to mediation
11 187 (74%) of those were about fences or trees	659 (40%) of those were about fences or trees	154 (48%) of those were about fences or trees

<sup>92</sup> Information provided by DRB, 11 September 2015. The trial was conducted by the South Queensland Dispute Resolution Centre in August 2015 with individuals in the Brisbane area. Eighty-three people were canvassed, and 79 people opted to participate. DRB has indicated the trial will continue and be expanded across the six Dispute Resolution Centres across Queensland.

parties to more carefully document fencing agreements during initial voluntary agreements’:

Unfortunately, for some clients, they have trusted their neighbours and, in the interests of maintaining neighbourly relations have not documented what has been promised or agreed in any detail.

Arguably, this is an issue for education and it would be helpful if there was a more detailed agreement form that could be easily accessed when people are in the initial stages of discussing building a fence with their neighbours.

4.135 DRB submitted that initial contact with DRB should be encouraged ‘through greater acknowledgement and promotion’ of its role. DRB considered it ‘highly probable’ that the majority of clients who made initial contact with DRB received the help they needed from that contact to resolve or manage their dispute, and did not need to proceed further to mediation or the formal justice system.<sup>93</sup> DRB also referred to its independence and the skills and expertise of its staff.

### ***The Commission’s view***

4.136 The Commission considers that the availability of appropriate information and assistance is necessary to ensure the effectiveness of the Act in encouraging informal resolution of neighbourhood disputes.

4.137 The Commission acknowledges, and sees some merit, in the submission from DRB that it is well-placed to act as an initial contact point for disputes between neighbours. It observes that, if properly supported to do so, DRB could provide a central gateway for informal resolution assistance. This would likely require specific legal expertise to ensure that accurate and consistent information is provided about the Act and that appropriate referrals are made.<sup>94</sup> Consideration might therefore be given to appropriate measures to support DRB’s continued role in this regard including, if necessary, the provision of any additional resources such as one or more dedicated senior legal officers.

4.138 The Commission observes that the Queensland Government’s website, including the new online dispute resolution tool, is a key source of information for members of the public about the Act and their informal resolution options. It acknowledges the suggestion in the submissions that this information could be improved. One improvement to which consideration might be given is the inclusion on the website of express reference to DRB’s information, referral and conflict coaching role, in addition to its role in providing mediation services. This is a matter for ongoing review by DJAG.

4.139 The Commission also acknowledges that community legal centres provide significant practical assistance for neighbours and are in a good position in terms of their experience and expertise to identify and develop helpful materials and tools.

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<sup>93</sup> DRB also considered that this view is reinforced by the comparatively low number of neighbourhood dispute matters lodged in QCAT: see later in this chapter for QCAT application numbers.

<sup>94</sup> The Commission does not envisage that DRB would provide legal advice, but be supported to provide appropriate information and referrals.



The Commission observes that their capacity to do so will, however, depend on the availability of resources.

4.140 The Commission agrees with the suggestion from Caxton Legal Centre Inc that a sample agreement form for voluntary dividing fence agreements might be of assistance. However, as noted in Chapter 2, the approved form for the notice to contribute to fencing work can be used in this way.<sup>95</sup>

## RESOLVING DISPUTES FORMALLY

### QCAT and formal dispute resolution

4.141 The Act allows neighbours to apply to QCAT for orders about dividing fences and trees in particular circumstances, if the issue cannot otherwise be resolved informally.<sup>96</sup>

4.142 Making an application to QCAT brings the issue within a formal dispute resolution process where the outcome may be decided by the tribunal, rather than by the parties. In this sense, proceedings in QCAT fall into the 'determinative' category of dispute resolution processes.<sup>97</sup>

4.143 However, QCAT's processes are intended to be more informal than a court and often involve the use of ADR to resolve disputes without requiring the tribunal to decide the outcome.<sup>98</sup>

4.144 The Act sets out when a neighbour may apply to QCAT and the orders that QCAT can make about dividing fences and trees.<sup>99</sup> In addition, a number of general provisions apply under the QCAT Act and the Rules made under that Act ('QCAT Rules'),<sup>100</sup> including provisions about applications, parties, ADR processes, hearings, costs, assessors, decisions and appeals.

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<sup>95</sup> See [2.153] above.

<sup>96</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 7(4), 30(3), 31(6), 32(6), 37(1), 38(1), 39(1) (dividing fences) and 41(2)(c), 58(5), 60(2)(b), 62(1) (trees). There may also be circumstances in which a person may apply to the appropriate court for a common law or equitable remedy outside the scope of the Act. See s 5 of the Act which provides that, unless otherwise expressly provided for in the Act, the Act does not affect the operation of another Act or law.

<sup>97</sup> See [4.5]–[4.7] above.

<sup>98</sup> One of the objects of the QCAT Act is 'to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick': *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b). See also s 4(b)–(c) which require the tribunal to 'encourage the early and economic resolution of disputes before the tribunal', including through ADR processes if appropriate, and to 'ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice'. This reflects a general trend that modern tribunals are intended to be less formal, less expensive and more timely than the courts: see, eg, Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 5 September 2014) vol 1, 13.

<sup>99</sup> This is discussed in Chapters 2 and 3 of this Report. As to QCAT's jurisdiction under the Act, see also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 10, 11, discussed in *Neighbourhood Disputes Act Discussion Paper* (2015) [4.30]–[4.40].

<sup>100</sup> *Queensland Civil and Administrative Tribunal Rules 2009* (Qld).

4.145 QCAT has jurisdiction in many different kinds of proceedings. It has standard rules and practices that it can apply. However, it tailors its processes, when appropriate, for the different needs of different jurisdictions.<sup>101</sup>

4.146 The QCAT Act is the subject of a separate statutory review.<sup>102</sup> The Commission is mindful that some of the matters identified in submissions to its review of the Act raise issues of wider and more general relevance to QCAT, and would be better addressed as part of any review of the QCAT Act or QCAT's processes. Nevertheless, the Commission also considers there are some specific matters that might be addressed by amendments to the Act.

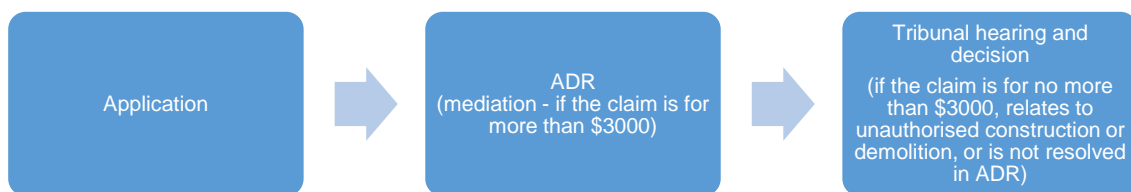
### Overview of QCAT's processes for dividing fences and tree disputes

4.147 Once an application under the Act is filed in the QCAT registry, there may be several steps before the matter is ended.<sup>103</sup>

4.148 The three main stages are of application, ADR and (if the ADR process does not resolve the dispute) a tribunal hearing. However, there are different intermediate steps, depending on the type of dispute.

#### Dividing fence disputes

4.149 Dividing fence disputes about fencing work will usually fall within QCAT's MCD jurisdiction which applies if the claim in the dispute is no more than \$25 000.<sup>104</sup> The process for dealing with these MCD matters — shown in figure 4-4 below — is intended to be more abbreviated than QCAT's general civil dispute process, in order to reduce the time and expense to the parties.<sup>105</sup>



**Figure 4-4: QCAT process for dividing fence disputes**

<sup>101</sup> Other areas in which QCAT has jurisdiction include human rights matters (anti-discrimination, children's matters, adult guardianship), civil matters (building disputes, retail shop leases, MCD), and administrative and disciplinary matters: Queensland Civil and Administrative Tribunal, *Annual Report 2014–15*, 9, 16.

<sup>102</sup> Department of Justice and Attorney-General, *Review of the Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (4 May 2015) Queensland Government <<http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-queensland-civil-and-administrative-tribunal-act-2009>>. The review is required under *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 240. Public consultation on that review closed on 11 May 2015.

<sup>103</sup> A proceeding does not start until the principal registrar accepts the application, whether or not on conditions: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 36. A proceeding ends under the QCAT Act when the application is withdrawn, dismissed, transferred to a more appropriate forum, settled or decided.

<sup>104</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 Dictionary (definitions of 'minor civil dispute' para 1(f) and 'prescribed amount'). However, the Act does not impose a monetary limit on dividing fence disputes: see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33(1).

<sup>105</sup> Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 10. Figure 4-4 is based on information provided by QCAT, 23 July 2015.

4.150 If the claim is for no more than \$3000 (and unless otherwise ordered by QCAT), the application is listed for hearing without first being referred to mediation. This also applies if the dispute relates to unauthorised construction or demolition of a dividing fence.<sup>106</sup>

4.151 If the claim is for more than \$3000, it will be referred to mediation in an attempt to resolve the dispute without a tribunal decision. If it is not resolved in mediation, it will proceed to a tribunal hearing. The hearing will not ordinarily be held on the same day as the mediation. However, QCAT is to give its decisions and oral reasons on the day of the hearing to avoid delay to the parties in learning the outcome.<sup>107</sup>

4.152 In 2014–15, QCAT received 313 applications under the Act about fencing work. In the same period, 64 applications were referred to mediation. An estimated 7 to 8% of applications in the same period were withdrawn.<sup>108</sup>

4.153 This is a small proportion of all MCD matters. In 2014–15, QCAT received a total of more than 16 000 lodgements in its MCD jurisdiction, with an overall clearance rate of 113%.<sup>109</sup>

<sup>106</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 — Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [3]. In dividing fence applications, reference is made to the amount of the contribution being sought by the applicant in determining the amount of the 'claim': Information provided by QCAT, 20 July 2015.

<sup>107</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 — Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [4]–[16]. If the claim is for no more than \$5000, the application may be heard by QCAT justices of the peace: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 206C(f), 206L(1).

<sup>108</sup> Information provided by QCAT, 20 July 2015. The figures for dividing fence disputes applications for the span of years between 2011–12 and 2014–15 are as follows:

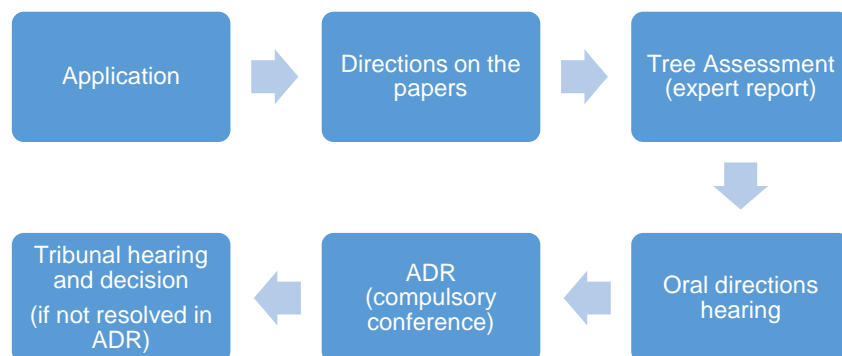
	Applications filed	Applications referred to mediation
2011–12	242, including 59 applications made under the former <i>Dividing Fences Act 1953</i> (Qld) before the NDA commenced	Not stated
2012–13	252	Not stated
2013–14	321	86
2014–15	313	64

<sup>109</sup> See the following figures from QCAT's Annual Reports for 2011–12 to 2014–15:

	Total MCD lodgements	MCD clearance rate
2010–11	17 871	91%
2011–12	17 414	95%
2012–13	16 070	113%
2013–14	16 934	112%
2014–15	16 054	113%

### Tree disputes

4.154 Tree disputes are not part of the MCD jurisdiction, but fall within QCAT's original jurisdiction. Unlike dividing fence disputes, the current process for tree disputes — shown in figure 4-5 below — involves more steps.<sup>110</sup>



**Figure 4-5: Current QCAT process for tree disputes**

4.155 The tree dispute process needs to accommodate a wide range of dispute types (for example, complaints about overhanging branches and leaf litter, damage or injury, and obstruction of sunlight or views), as well as the potential need for expert input.

4.156 In 2014–15, QCAT received 173 tree dispute applications under the Act. In the same period, 60 tree assessments were made, and 23 applications went to a compulsory conference.<sup>111</sup>

4.157 It is estimated that approximately 52% of all tree disputes relate to overhanging branches and general leaf litter, with a further 30% relating to damage to property, and the remaining 18% relating to obstruction of views (9%), obstruction of sunlight (5%) and dangerous trees (4%).<sup>112</sup>

<sup>110</sup> Figure 4-5 is based on information provided by QCAT, 23 July 2015. This relates to applications made under s 62(1) of the Act. The Act does not impose a monetary limit on tree disputes: see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 61.

<sup>111</sup> Information provided by QCAT, 7 July 2015. As to the appointment of tree assessors, see Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for applications for orders to resolve other issues about trees*, 1 July 2013. Tree assessments have tended to be required as a matter of routine in tree dispute matters, although the number of tree assessments relative to the number of applications made appears to have dropped off in more recent years, as shown in the following figures:

	Applications filed	Compulsory Conferences	Tree Assessments
2011–12	153	41	132
2012–13	270	52	226
2013–14	183	31	90
2014–15	173	23	60

Note: the numbers of compulsory conferences and tree assessments represent totals for each period, not necessarily directly referable to the total number of applications filed during the same period.

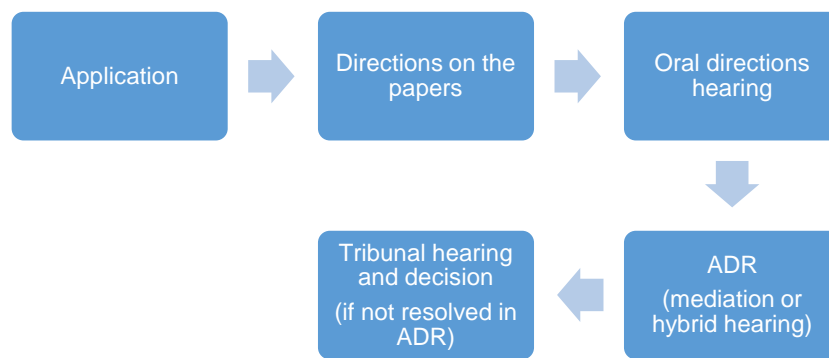
<sup>112</sup> Information provided by QCAT, 7 September 2015. This relates to applications commencing in 2014–15 (an estimated total of 158).

4.158 QCAT has informed the Commission that it will shortly be replacing its single tree dispute process with two separate processes:<sup>113</sup>

- one to deal with ‘general leaf litter’ matters; and
- another to deal with other tree disputes.

4.159 This will mean that different processes will apply ‘depending on the nature and complexity of the issues in dispute’. Overall, the changes are intended to reduce the number of times the parties will need to engage with or attend QCAT and, consequently, the time taken to finalise applications.<sup>114</sup>

4.160 Under the new process for leaf litter matters, it is proposed to hold an oral directions hearing as soon as possible after the application is filed, to try to resolve or narrow the issues in dispute early.<sup>115</sup> As shown in figure 4-6 below, the new process would also be streamlined so that a tree assessment would no longer ordinarily be required. Additionally, it would substitute mediation or a hybrid hearing in place of a compulsory conference as the preferred ADR process.



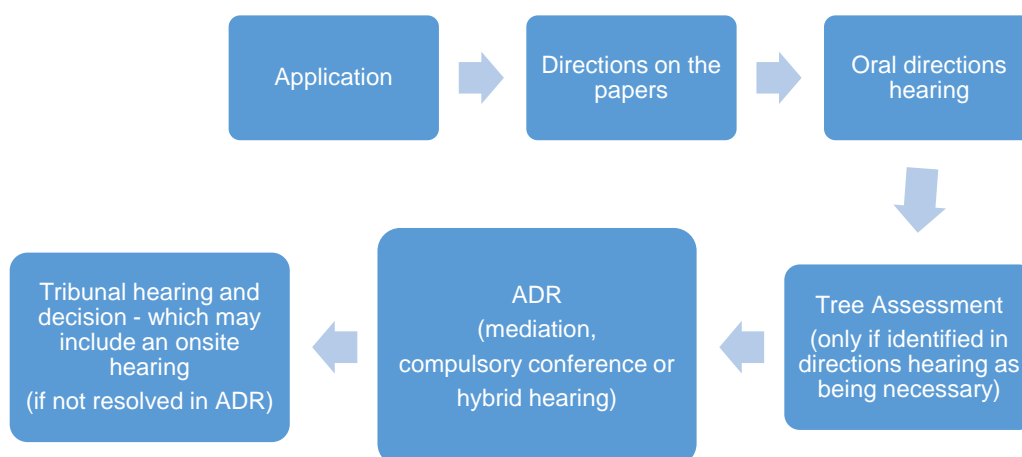
**Figure 4-6: New QCAT process for tree disputes about general leaf litter**

4.161 In contrast, the new process for other tree disputes would continue to provide for tree assessments. However, this would be required only if it is identified in the directions hearing as being necessary in the particular case. Mediation and hybrid hearings would also be added to compulsory conferences as ADR options for these matters. This process is outlined in figure 4-7 below:

<sup>113</sup> Information provided by QCAT, 23 July 2015 and 7 September 2015. Figures 4-6 and 4-7 are also based on information provided by QCAT, 23 July 2015.

<sup>114</sup> Information provided by QCAT, 7 September 2015.

<sup>115</sup> Ibid. This may also involve a compulsory conference.



**Figure 4-7: New QCAT process for all tree disputes (other than general leaf litter)**

4.162 QCAT anticipates that the proposed new processes will be implemented in the near future. The changes were identified as part of ongoing reviews of QCAT's processes. QCAT has explained that it regularly reviews its processes for different jurisdictions 'to ensure [they are] as effective and efficient as possible both from QCAT's point of view and that of the parties'.<sup>116</sup>

#### **Debt disputes relating to dividing fences or trees**

4.163 Applications to recover debts of up to \$25 000 relating to dividing fences or trees are dealt with under QCAT's MCD jurisdiction.<sup>117</sup> This includes applications made under section 58(5) of the Act to recover the amount — up to \$300 — for which a tree-keeper is liable for cutting and removing particular overhanging branches.<sup>118</sup> As explained above, the MCD jurisdiction involves a more abbreviated process.

4.164 Relatively few debt dispute applications are made under the Act. In 2014–15, QCAT received eight such applications, two relating to trees and six relating to dividing fences.<sup>119</sup>

<sup>116</sup> Information provided by QCAT, 23 July 2015 and 7 September 2015.

<sup>117</sup> Information provided by QCAT, 7 July 2015. The Act does not impose a monetary limit on dividing fence and tree debt disputes, but if a debt dispute is for no more than the \$25 000 limit of the MCD jurisdiction, it may be dealt with in that jurisdiction: see *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 58(5) (note); and *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sch 3 Dictionary (definition of 'minor civil dispute' paras 1(a), (f), (2)), discussed in *Neighbourhood Disputes Act Discussion Paper* (2015) [4.35]–[4.36].

<sup>118</sup> Section 58 is discussed in Chapter 3 of this Report.

<sup>119</sup> Information provided by QCAT, 20 July 2015. The figures for the four years since the Act started are as follows:

	Dividing Fence Debt Applications	Tree Debt Applications	Total
01 Nov 2011– 30 June 2012	7	4	11
2012–13	1	2	3
2013–14	4	2	6
2014–15	6	2	8

## Ensuring the process is accessible

4.165 In considering whether the dispute resolution processes under the Act are fair, just and effective, the Commission has had regard to a number of matters relating to the accessibility of the QCAT process. In particular, the Commission has considered matters raised in the submissions to the review relating to the timeliness, expense and degree of formality of the process.

### **Application timeframes**

4.166 An application to QCAT about a tree may be made at any time; use of a notice procedure is not a required step before applying (other than for the recovery of a debt).<sup>120</sup>

4.167 In contrast, an application to QCAT for an order about contributions to fencing work must be made within a certain timeframe. The right to apply arises if a notice to contribute has been given to the other adjoining owner but has not, 'within one month' of that notice, resulted in an agreement. Either owner may then apply to QCAT 'within two months' after the notice was given.<sup>121</sup>

4.168 In most of the other jurisdictions in which a similar notice procedure is required, there is also a time limit on applications to the relevant tribunal or court. In most cases, the time limit is one month after giving the notice.<sup>122</sup>

### **Discussion Paper**

4.169 In the Discussion Paper, the Commission sought submissions on whether the timeframes, in sections 31(6) and 32(6) of the Act, for applications to QCAT for contributions to fencing work are appropriate.<sup>123</sup>

### **Submissions**

4.170 The LGAQ, Ipswich City Council and a member of the public<sup>124</sup> considered the current application timeframes to be appropriate. Caxton Legal Centre Inc also submitted that the timeframes under the notice procedure 'generally seem to be able to be managed' by their clients.

4.171 However, some respondents raised concerns that the timeframe may not be long enough. Strata Community Australia (Qld) submitted that the one month timeframe for reaching an agreement under the notice procedure is 'not appropriate when one or both parties are a Body Corporate' and should be extended to two months, observing that the body corporate's procedures may require additional time:

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120 See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 58(5), 62(1).

121 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 31(6), 32(6).

122 See *Common Boundaries Act 1981* (ACT) ss 4(3)(b), 5(3)(b) (one month has passed); *Dividing Fences Act 1991* (NSW) s 12(2) (within one month); *Fences Act* (NT) s 8(1) (within one month); *Fences Act 1968* (Vic) ss 18, 25, 26 (after 30 days). Cf *Dividing Fences Act 1961* (WA) s 9(1) (within 21 days).

123 *Neighbourhood Disputes Act Discussion Paper* (2015) [4.46], Question 4-5.

124 Submission 49.

Depending upon the costs of the proposed works (and the relevant spending limitations of the Body Corporate), the decision in relation to whether or not to contribute may have to be approved at a General Meeting of the Body Corporate. A Notice of General Meeting must be prepared and sent to all lot owners at least 21 days prior to the date of the General Meeting.

4.172 QAILS also observed that the timeframes ‘can be tight, particularly where parties to a dispute need to seek external assistance’, such as legal advice.

4.173 The Townsville Community Legal Service Inc submitted that the timeframes could be ‘extended to three months without adverse impact on either parties’ interests’.

4.174 In contrast, the Body Corporate for RSL Centre Surfers Paradise commented that the requirement to wait a minimum time before applying to QCAT can cause unnecessary delay if the neighbour has already attempted to reach agreement but without first using the notice procedure:

aggrieved landowners, who often have already provided their neighbour with ample notice of their fencing concerns, are denied access to ... the tribunal until they have submitted the form and after waiting the mandatory one month time period. ... it forces the aggrieved landowner, regardless of how much time has already expired, to wait a further month to reach an agreement before bringing any further application.

### ***The Commission’s view***

4.175 The Commission considers that it is appropriate for the Act to set a time limit on applications to QCAT about contributions to fencing work, under section 31(6) and 32(6). This ensures a continuing connection between the notice procedure and the application to QCAT. As such, it provides fairness to the parties by ensuring that an application is made only after a recent attempt at agreement has been made.

4.176 The waiting time before applying to QCAT should not be unnecessarily drawn out. Where the neighbours are unable to agree, it is appropriate to allow an application to be made to QCAT quickly to bring an end to the dispute.

4.177 On the other hand, the Commission notes the concern raised in some of the submissions that the existing time limit — of at least one month after the notice is given and before two months from that time has ended — may be too short in some circumstances. Neighbours need adequate time to try to reach an agreement after the notice is given and, if an agreement is not reached, to prepare their application.

4.178 On balance, the Commission considers that it is appropriate to provide a slightly longer default timeframe for applications and that, accordingly, the existing time limits should be extended so that:

- if, within two months (rather than one month) after the notice is given, the adjoining owners cannot agree;
- either adjoining owner may, within three months (rather than two months) after the notice is given, apply to QCAT.



4.179 This would provide the neighbours with additional time to reach agreement or prepare for an application, whilst maintaining a relatively close temporal connection between the neighbours' attempts to reach agreement and the application to QCAT.

**Recommendation**

**4-12 Sections 31(6) and 32(6) of the Act should be amended to extend the existing timeframes so that:**

- (a) if, within two months (rather than one month) after the notice to contribute for fencing work is given, the adjoining owners cannot agree;**
- (b) either adjoining owner may, within three months (rather than two months) after the notice is given, apply to QCAT.**

**Application fees**

4.180 Applications to QCAT about a dividing fence or tree dispute must ordinarily be accompanied by a filing fee. The amount of the fee differs depending on the type of dispute and the amount being claimed:<sup>125</sup>

- Dividing fence disputes, and debt disputes relating to dividing fences or trees (in the MCD jurisdiction) —
  - for claims up to \$500 — \$23.80;
  - for claims more than \$500 but not more than \$1000 — \$61;
  - for claims more than \$1000 but not more than \$10 000 — \$108.70;
  - for claims more than \$10 000 — \$305;
- Tree disputes — \$305.

4.181 QCAT has explained that the difference in fees reflects the difference in complexity between MCD matters and tree disputes.<sup>126</sup>

4.182 The application fees for matters arising under the Act are consistent with those that apply to other matters for which QCAT has jurisdiction. In particular, \$305 is the standard application fee for the majority of the tribunal's matters, and the scale

<sup>125</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 38(1); *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) ss 5, 6, sch 1 pt 1.

<sup>126</sup> Information provided by QCAT, 7 September 2015.

of fees applying to dividing fence disputes applies to all MCD matters, not just those arising under the Act.<sup>127</sup>

4.183 Under the QCAT Act, a person may apply to have the application fee waived. Payment of the fee may be waived if the principal registrar is satisfied payment 'would cause, or would be likely to cause, the person undue financial hardship'.<sup>128</sup> Generally, this occurs 'only ... in special circumstances'.<sup>129</sup>

### **Discussion Paper**

4.184 In the Discussion Paper, the Commission observed that different application fees for QCAT apply for different types of disputes under the Act.<sup>130</sup>

### **Submissions**

4.185 Some of the respondents to the Discussion Paper commented on the cost of applying to QCAT for an order under the Act.

4.186 A member of public, who is a pensioner, submitted that the application fee to QCAT to deal with his neighbour's tree 'is more than the cost (quoted) of removing the tree'. He also considered it unfair that the cost should be borne by the affected neighbour rather than the tree-keeper. This respondent explained he had applied for waiver of the application fee but had not yet received a decision.<sup>131</sup>

4.187 Another member of the public similarly complained that the neighbour affected by a tree has to bear the cost of applying to QCAT:<sup>132</sup>

If we want to get QCAT to force [the tree-keeper] to do something, we will have to pay an application fee of \$305. Why should we have to pay this fee when as the tree owner, he is responsible for the proper care and maintenance of a tree growing on his land and ensuring that the trees do not interfere with the neighbour's use and enjoyment of their land?

4.188 This was raised specifically in the context of overhanging branches higher than 2.5 metres, which fall outside the notice procedure provided in the Act. Another

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<sup>127</sup> A small number of QCAT matters (predominantly in QCAT's human rights division) attract nil application fee. There are also different fees for appeals against a QCAT decision. See generally *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) pt 3; and Queensland Civil and Administrative Tribunal, *Fees and allowances* (1 July 2015) <<http://www.qcat.qld.gov.au/applying-to-qcat/fees-and-allowances>>. The application fees for matters under the Act differ from those that apply in the Magistrates Court, which are generally higher: see *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 5(1) sch 2 pt 1 item 1:

- for claims up to \$2500 — \$155.40;
- for claims more than \$2500 but less than \$10 000 — \$216.40;
- for claims of \$10 000 or more but less than \$50 000 — \$232.50.

<sup>128</sup> *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) s 10. The application for fee waiver must be in the approved form.

<sup>129</sup> Queensland Civil and Administrative Tribunal, *Fees and allowances: Financial hardship* (1 July 2015) <<http://www.qcat.qld.gov.au/applying-to-qcat/fees-and-allowances>>.

<sup>130</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.42].

<sup>131</sup> Submission 5 (also 5A, 5B and 5D).

<sup>132</sup> Submission 25.

respondent also noted in this context that ‘proceeding through QCAT still cost[s] money’.<sup>133</sup>

4.189 QAILS observed that the cost of applying to QCAT for tree disputes ‘is a major disincentive’ for many clients of community legal centres:

Although the Act clearly sets out parties’ rights and responsibilities, once clients are told about the fee, they often choose not to use this process, even for those clients that may be able to seek a fee waiver or have the other party refund these costs. Properly advised, landholders are aware that they might not obtain a successful order and, even if they do, the order may not be enforced. This review should consider the prohibitive impact of this QCAT fee.

4.190 A member of the public also stated that:<sup>134</sup>

affected neighbours with limited financial means and fearing protracted legal battles with cashed-up property speculators, will usually take the path of least resistance and bow to the neighbour’s demand ...

4.191 Another member of the public suggested that application costs should be shared equally between both parties, which might encourage dispute resolution without resort to QCAT.<sup>135</sup>

### ***The Commission’s view***

4.192 The Commission considers that the fees prescribed for applications to QCAT are a matter for the QCAT Act and its regulations and should generally be considered in the wider context of QCAT’s overall operation.

### ***Applications in the absence of the other party***

4.193 Under the QCAT Act, the tribunal has power in particular circumstances to hear and decide a matter in the absence of one of the parties. This applies if:<sup>136</sup>

- the person has not attended the hearing, and QCAT is satisfied the person has been given notice of the hearing by the principal registrar; or
- QCAT is satisfied the person can not be found after reasonable inquiries have been made.

4.194 In addition to this general provision, which relates to QCAT’s powers at a hearing, the Act includes a specific provision about applications to the tribunal in the absence of the other party. Section 37 of the Act applies to applications for an order authorising the carrying out of fencing work, including the way in which contributions for the work are to be apportioned. It provides that:

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<sup>133</sup> Submission 31.

<sup>134</sup> Submission 26.

<sup>135</sup> Submission 49.

<sup>136</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 93. QCAT also has power to grant an interim injunction in a proceeding ‘whether or not it has given any person whose interests may be affected by the order an opportunity to be heard’: s 59(2).

- the owner may apply to QCAT for an order ‘in the absence of the adjoining owner’; and
- QCAT may make an order if ‘satisfied that the owner could not locate the adjoining owner after making all reasonable inquiries’.

4.195 It also provides for when the owner may recover the adjoining owner’s contribution under the order and when the adjoining owner may seek a variation of the order.

4.196 Section 37 was included in the Act to address the situation where it is impractical to use the notice to contribute procedure because, for example, the adjoining owner cannot be located.<sup>137</sup>

4.197 Similar provision is not made in relation to tree disputes.

### ***Discussion Paper***

4.198 In the Discussion Paper, the Commission observed that an owner may sometimes encounter practical difficulties in locating or giving a notice to contribute to the adjoining owner and that, to deal with this situation, section 37 of the Act allows an owner to apply to QCAT in the absence of the adjoining owner.<sup>138</sup>

### ***Submissions***

4.199 QCAT submitted that section 37 could be extended to apply to tree disputes where the tree is causing damage or potential damage. However, it noted that ‘this has not been a significant issue in the matters that have come before QCAT to date’.

4.200 The Townsville Community Legal Service Inc made a general comment that there is a question about whether QCAT should be able to make an order in the absence of the other adjoining owner.

### ***The Commission’s view***

4.201 Section 37 of the Act is intended to facilitate access to QCAT — and thereby to a remedy about fencing work — in circumstances where the adjoining owner can not be located.

4.202 The Commission considers that it may be equally important for a neighbour whose land is affected by a tree to be able to apply for a remedy if the tree-keeper can not be located.

4.203 In those circumstances, the Commission considers it appropriate for the Act to include a provision, similar to section 37, allowing an affected neighbour to apply to QCAT for an order, in the absence of the tree-keeper, authorising a person to carry out urgent work on a tree. The orders should be limited to those mentioned under section 66(2)(a), (b)(i) of the Act — namely, to prevent serious injury to a person or

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<sup>137</sup> Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 24.

<sup>138</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [2.96]–[2.98].

to remedy, restrain or prevent serious damage to the neighbour's land or property on the neighbour's land.

4.204 The new provision should also include provisions, modelled generally on section 37(3)–(4), about the affected neighbour's ability to recover from the tree-keeper any expenses for the work as stated in the order, and for the tree-keeper to seek a variation of the order.

### ***Recommendation***

**4-13 Chapter 3 of the Act should be amended to include a provision, modelled on section 37, to:**

- (a) allow a neighbour whose land is affected by a tree to apply to QCAT for an order, in the absence of the tree-keeper, authorising urgent work to be carried out on the tree; and**
- (b) allow QCAT to make an order if it is satisfied that:**
  - (i) the affected neighbour could not locate the tree-keeper after making all reasonable inquiries; and**
  - (ii) an urgent order is necessary to prevent serious injury to a person or to remedy, restrain or prevent serious damage to the neighbour's land or property on the neighbour's land.**

### ***Representation of parties***

4.205 Under section 43(1) of the QCAT Act, it is a general rule that parties to a proceeding before QCAT are to represent themselves. This is to ensure that QCAT 'remains as informal and as economical as possible'.<sup>139</sup>

4.206 Section 43(2) of the QCAT Act provides some exceptions to the general rule. It provides that a party may be represented by a lawyer or other appropriate person in some circumstances, including if:

- the party is a child or a person with impaired capacity;
- the enabling Act (such as the NDA) states that the person may be represented; or
- QCAT gives leave for the party to be represented.

<sup>139</sup>

Queensland, *Parliamentary Debates*, Legislative Assembly, 19 May 2009, 352 (CR Dick, Attorney-General and Minister for Industrial Relations). This reflects the wider trend that, for tribunals to provide a low cost alternative to the courts, 'self-representation is the norm': Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 5 September 2014) vol 1, 13.

4.207 Under section 43(3) of the QCAT Act, QCAT may consider certain matters as ‘circumstances supporting the giving of leave’ for a party to be represented, including that:

- the proceeding is likely to involve complex questions of fact or law;
- another party to the proceeding is represented; or
- all the parties agree to the party being represented.

### **Legal representation**

4.208 Overall across all QCAT matters, leave for legal representation is infrequently requested but, when requested, is granted in most cases.<sup>140</sup>

4.209 Self-represented parties can face difficulties in formulating and presenting their cases and skilled representation may improve a party’s chance of success.<sup>141</sup> It has also been recognised that representation may ‘facilitate efficient identification and resolution of the issues’.<sup>142</sup> On the other hand, legal representation in tribunals can lead to increased costs and ‘creeping legalism’, where tribunals are ‘seen by users as increasingly formal bodies’.<sup>143</sup>

4.210 The Queensland Law Society has advocated for legal representation as of right for particular QCAT proceedings, including building disputes, consumer, trader and debt disputes, and other civil disputes such as residential tenancy, body corporate, retirement village and tree disputes.<sup>144</sup> Conversely, QPILCH considers that the current position under the QCAT Act is working well, and cautions that ‘special care needs to be taken to ensure that the benefits of tribunals are not undermined by lawyers’.<sup>145</sup>

### **Representation by a real estate agent**

4.211 For proceedings under the Act, representation will usually require leave from QCAT. However, section 34 of the Act specifically provides that, in a dividing fence proceeding, an adjoining owner may be represented by a real estate agent. This was included in the Act to provide a practical and inexpensive way for absentee

<sup>140</sup> Justice Alan Wilson, President, QCAT, ‘Letter to the editor: Legal representation in QCAT’ (2013) 33(1) *Proctor* 9. It was explained there that, in 2011–12, legal representation was sought in 4% of cases and granted in 86% of those matters.

<sup>141</sup> See, respectively, eg, H Genn, ‘Tribunals and Informal Justice’ (1993) 56 *Modern Law Review* 393; P Lewis, ‘Litigants in person and their difficulties in adducing evidence: a study of small claims in an English county court’ (2007) 11 *International Journal of Evidence & Proof* 24.

<sup>142</sup> Productivity Commission, ‘Access to Justice Arrangements’ (Inquiry Report No 72, 5 September 2014) vol 1, 14. On balance, however, the Productivity Commission recommended that, in ‘tribunals, where matters are relatively simple in legal and factual terms and equality between parties is likely to be the norm, the use of legal representation should be limited’ and that ‘legal representation should only be allowed with leave and that leave should only be granted in exceptional cases where one party would otherwise be significantly disadvantaged’: *ibid* 373, Rec 10.1.

<sup>143</sup> Productivity Commission, *above n 142*, 13–14.

<sup>144</sup> See Queensland Law Society, Submission to Department of Justice and Attorney-General (Qld), *Review of the Queensland Civil and Administrative Tribunal Act 2009*, 22 February 2013, [12].

<sup>145</sup> QPILCH, Submission No 58 to Productivity Commission, *Access to Justice Arrangements*, 4 November 2013, 40–41.

owners to participate in QCAT proceedings.<sup>146</sup> There is no similar provision in the Act for tree disputes.

### **Discussion Paper**

4.212 In the Discussion Paper, the Commission observed that, whilst the Act provides for an adjoining owner to be represented by a real estate agent in a dividing fence matter, there is no similar provision for tree disputes. It sought submissions on whether the parties to a dividing fence or tree dispute should be entitled to appoint an agent to represent them in proceedings before QCAT.<sup>147</sup>

### **Submissions**

4.213 QCAT submitted that representation by an agent 'would be inconsistent with section 43 of the QCAT Act'. It considered that 'property agents' should be authorised to represent a property owner only if there is an agreement between them about the property.

4.214 Strata Community Australia (Qld) submitted that the parties should be entitled to appoint an agent to represent them in QCAT proceedings, particularly if one of the parties is a body corporate:

The Body Corporate will be required to be represented by some authorised person. It is unfair to limit the representation to Committee Members (who are volunteers) and Body Corporate Managers (who are not specialist advocates). [This is] particularly [the case] given the potential backlash against these people in the event of an outcome being reached at QCAT that all of the lot owners are not satisfied with.

4.215 The Queensland Arboricultural Association also submitted that parties should be able to appoint an agent to represent them.

4.216 Other respondents who addressed this question focused on legal representation.

4.217 The Queensland Law Society expressed support for the appointment of agents to represent a party 'as long as that encompasses a right to legal representation'. In its view, access to legal representation is 'imperative' in facilitating resolution of disputes, observing that 'many potential resolutions are thwarted by virtue of the fact that the parties themselves are unaware of their legal position'.

4.218 A member of the public commented that many people 'do not have the expertise or ability to present their own case', and that 'the cost of employing a

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<sup>146</sup> See *Neighbourhood Disputes Act Discussion Paper* (2015) [4.80]. See also, for example, Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 2011, 2301 (PT Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister for State):

many people are investor owners of real estate properties and they may indeed be an investor owner of a real estate property in Brisbane but live in Cairns. Therefore it is not practical for them to appear in the tribunal and therefore the most appropriate and inexpensive way for them, and the fairest way for the other party to deal with it, is via a real estate agent who in other respects represents [them] in many matters concerning tenants and, indeed, tradespeople and the like.

<sup>147</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.80], Question 4-9.

solicitor to state the case can be prohibitive' for pensioners.<sup>148</sup> The 'considerable expense' of engaging a lawyer to assist in dealing with a tree dispute was also noted by another member of the public.<sup>149</sup>

4.219 Caxton Legal Centre Inc considered that 'particular attention is required when older people seek leave' to be represented in QCAT hearings. It observed that disputes about dividing fences and trees can 'cause extraordinary levels of stress' for older clients, particularly in cases involving bullying:

Unfortunately, we have noted that certain bullying behaviours associated with elder abuse are sometimes evidenced in disputes involving elderly neighbours (typically pensioners) and younger, more robust and affluent neighbours. This occurs in certain tree and fence disputes and seems to be a particular issue in areas where gentrification of suburbs is occurring.

4.220 That respondent also commented that many older clients 'may struggle to cope with proceedings due to health problems and will be more effectively represented by a support person or lawyer'. It submitted that the list of circumstances favouring representation, in section 43(3) of the QCAT Act, should therefore be extended to include an additional circumstance — that 'the party is vulnerable due to disability or advanced age'.

4.221 On the other hand, the Townsville Community Legal Service Inc considered that the 'discretion' to allow representation by a lawyer or other agent 'should only be exercised where there are good reasons to do so'. It considered that the existing factors in section 43 of the QCAT Act are 'adequate'.

4.222 Another member of the public similarly submitted that 'QCAT should remain an avenue that avoids legal costs where possible unless the applicant has special circumstances necessitating such representation'.<sup>150</sup>

### ***The Commission's view***

4.223 The Commission acknowledges the concern in the submissions that there are some situations in which a party to a proceeding under the Act may wish to be represented by a lawyer or other agent. In general, however, the Commission considers that parties should be represented only in special circumstances where it is required in the interests of justice. This is a question that is best addressed on a case-by-case basis.

4.224 Section 43 of the QCAT Act provides for self-representation as the norm, whilst allowing for particular circumstances in which a party may be represented (by a lawyer or other appropriate person), including where QCAT gives leave. The Commission agrees with the submission from the Townsville Community Legal Service Inc that this approach is adequate for proceedings under the Act between neighbours. If there is a need in a particular case for representation by a third person, the tribunal has discretion to grant leave.

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148 Submission 44.

149 Submission 40.

150 Submission 49.



4.225 The Commission does not, therefore, consider it necessary for the Act to continue to include separate provision for an adjoining owner to a dividing fence proceeding to be represented by a real estate agent, nor for such provision to be extended to the parties to a tree dispute. Section 34 of the Act does not appear to be frequently utilised and the situation it was intended to address — the absence from the local jurisdiction of one of the adjoining owners — can appropriately be addressed by an application for leave under section 43 of the QCAT Act.

4.226 The Commission also notes the submission about changing section 43 of the QCAT Act to include an additional circumstance about vulnerability. In the Commission's view, any changes to the existing position under section 43 of the QCAT Act are more properly a matter for consideration in the wider context of that Act and of QCAT's processes. The Commission notes, in particular, that section 43 has been raised as part of the separate review of the QCAT Act.<sup>151</sup>

4.227 Finally, the Commission observes that the representation of a body corporate in QCAT proceedings is an internal matter for the body corporate in question.<sup>152</sup> If there is a need for representation by another person, such as a lawyer or other agent, this can relevantly be dealt with under section 43 of the QCAT Act.

### **Recommendation**

**4-14 The Act should be amended to omit section 34.**

### **Other matters about QCAT hearings**

4.228 As explained in the Discussion Paper, QCAT is intended to provide an 'accessible, fair, just, economical, informal and quick' forum for dealing with disputes, including through the use of ADR.<sup>153</sup> This means the way QCAT deals with disputes will usually differ from that of a court. For instance:<sup>154</sup>

- QCAT must act with as little formality and technicality and with as much speed as permitted;

<sup>151</sup> Department of Justice and Attorney-General, 'Review of the Queensland Civil and Administrative Tribunal Act 2009 (Qld)' (Consultation Paper, December 2012) 16–17 <<http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-queensland-civil-and-administrative-tribunal-act-2009>>.

<sup>152</sup> See, in particular, *Body Corporate and Community Management Act 1997* (Qld) ss 33(2), 95(1) which provide that a body corporate for a community titles scheme may sue and be sued in its corporate name, and has all the powers necessary for carrying out its functions, including entering into contracts, acquiring and dealing with property, and employing staff. Further, ss 100(1) and 119(2) provide that, if the body corporate is required to have a committee, decisions of the committee are decisions of the body corporate, and the body corporate manager may be authorised to exercise some or all of the powers of an executive member of the committee.

<sup>153</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 3(b), 4(b)–(c).

<sup>154</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.30] ff. See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 28(3)(a)–(d), 29, 30, 32, 94; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 82.

- QCAT is not bound by the rules of evidence, and may inform itself in any way it considers appropriate;
- QCAT must take all reasonable steps to ensure the parties understand its practices, procedures and decisions;
- the principal registrar must give parties and potential parties reasonable help to ensure their understanding of QCAT's practices and procedures, including help to complete forms;
- QCAT may conduct an 'expedited hearing' for some types of disputes, including MCD; and
- QCAT may conduct proceedings by remote conferencing (for example, teleconferencing or videoconferencing) or on the basis of documents without the parties appearing at a hearing.

4.229 QCAT is also required to act fairly and according to the substantial merits of the case, and must observe the rules of natural justice.<sup>155</sup> Although it is not bound by the rules of evidence, QCAT is still required to ensure, as far as is practicable, that all relevant material is disclosed to it to enable it to decide the proceeding with all the relevant facts.<sup>156</sup> Accordingly, it must give the parties a reasonable opportunity to call or give evidence and has wide powers to call and examine witnesses. It may also, however, place limits on the giving of evidence and cross-examination of witnesses.<sup>157</sup>

4.230 Parties may also appeal the tribunal's final decision.<sup>158</sup>

4.231 All of these provisions are of general application under the QCAT Act.

### ***Discussion Paper***

4.232 In the Discussion Paper, the Commission sought submissions on the general question of what changes should be made to the dispute resolution processes in the Act to better promote fairness, justice and effectiveness.<sup>159</sup>

### ***Submissions***

4.233 Few respondents addressed this question directly, although some raised general concerns about aspects of the QCAT process as part of their submissions,

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<sup>155</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(2), (3)(a). The common law rules of 'natural justice' (commonly referred to as 'procedural fairness') impose procedural standards on decision-makers to ensure a fair hearing and determination for the persons affected by the decision: see generally JRS Forbes, *Justice in Tribunals* (Federation Press, 3rd ed, 2010) ch 7.

<sup>156</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(e).

<sup>157</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 95–98.

<sup>158</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) pt 8.

<sup>159</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.103] ff, Question 4-12.

including in relation to expert and other evidence, timeliness, and procedural clarity.<sup>160</sup>

### ***The Commission's view***

4.234 The Commission notes the concerns raised in the submissions about the evaluation of evidence, the time taken to deal with disputes, and the clarity of the process. Those matters relate to the specifics of individual cases and, more generally, the operation of QCAT, including QCAT's role in ensuring the parties understand its processes and procedures. In the Commission's view, these are more properly a subject for consideration in any review of QCAT's operation and its regulation under the QCAT Act.

4.235 The Commission notes in this regard that QCAT's case management processes, including those relating to neighbourhood disputes, are subject to ongoing internal review,<sup>161</sup> and that the QCAT Act is the subject of a separate statutory review.<sup>162</sup>

### **The role of the minor civil disputes jurisdiction**

4.236 As explained above, dividing fence disputes (and debt disputes about dividing fences and trees) are ordinarily dealt with in QCAT's MCD jurisdiction. This jurisdiction is intended to provide people with 'cheap and expeditious access to justice which may otherwise be beyond their means', using simplified and abbreviated procedures.<sup>163</sup>

4.237 QCAT has explained that, accordingly, the MCD jurisdiction is 'only suited to simpler, less complex matters' which do not require extensive case management:<sup>164</sup>

[These matters] are not allocated to a registry case manager. They are generally not seen by a QCAT decision maker (eg, Adjudicator) until the hearing. Therefore there is no opportunity before the hearing to consider what course the matter should follow or what dispute resolution process would be most appropriate; there is no opportunity to issue directions to the parties about submissions or filing of evidence; and no opportunity to determine how expert evidence will be handled.

4.238 This is reflected in the process outlined in figure 4-4 above, and in the lower application fees for most MCD matters.

4.239 The capacity for more active case management may also be constrained by resources:<sup>165</sup>

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160 Submissions 4, 5, 22, 23, 26, 29, 35, 40, 49.

161 See Queensland Civil and Administrative Tribunal, *Annual Report 2014–15*, 28, 39.

162 See [4.146] above.

163 Explanatory Notes, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 10.

164 Information provided by QCAT, 7 September 2015.

165 Ibid.

In Brisbane a team of five staff process over 7200 MCD applications received in the 2014–15 financial year. Outside of Brisbane MCDs are processed by court registries. Magistrates hear the MCDs outside of SEQ [South East Queensland] and adjudicators hear the applications throughout SEQ.

4.240 Presently, tree disputes under the Act fall within QCAT’s original jurisdiction, and are not part of its MCD jurisdiction. As explained earlier in this chapter, tree disputes encompass a wide scope, ranging from simpler issues about leaf litter to potentially much more complex complaints about damage, injury, or obstruction of sunlight or views. QCAT has highlighted a number of factors that distinguish tree disputes from those that are suitable to the MCD jurisdiction:<sup>166</sup>

- Tree disputes require more active case management at both the registry and tribunal level than would be possible in the MCD jurisdiction.
- The need for more structured dispute resolution options than would be possible in the MCD jurisdiction.
- The need for expert evidence.
- Moving the jurisdiction to MCD would remove the option to do proposed agreements based on an arborist’s report — this is likely to drive more disputes to hearing — which in turn doesn’t promote improved neighbour relationships.
- Damage to land or property could easily exceed the \$25 000 limit [of the MCD jurisdiction] ...

### ***Discussion Paper***

4.241 In the Discussion Paper, the Commission sought submissions on whether there should be any change to QCAT’s MCD jurisdiction for matters arising under the Act. Specifically, it asked whether the MCD jurisdiction should include all dividing fence and tree disputes for any amount, or should exclude all dividing fence and tree disputes.<sup>167</sup>

### ***Submissions***

4.242 Few respondents addressed this issue.

4.243 QCAT expressed the view that tree disputes should not be included in the MCD jurisdiction.

4.244 The Townsville Community Legal Service Inc considered that all disputes under the Act within the limit of \$25 000 should be capable of being dealt with in the MCD jurisdiction, with other matters possibly going to the Magistrates Court.

4.245 The Queensland Arboricultural Association submitted that the MCD process for dividing fence matters should be changed to provide for additional input from other

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<sup>166</sup> Ibid (Submission 61).

<sup>167</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.64], Questions 4-7 and 4-8.

experts, such as building engineers, 'especially where it is clear that the matter requires a multidisciplinary approach'.

### ***The Commission's view***

4.246 The Commission considers it generally appropriate for dividing fence disputes under the Act to continue to be dealt with by QCAT as MCD matters, since that jurisdiction is intended to provide speedy access to a QCAT order in cases involving relatively low monetary amounts.

4.247 The Commission also considers that there are significant differences between dividing fence disputes and tree disputes which justify different processes. In particular, the Commission accepts that the process for dealing with tree disputes must be able to accommodate various dispute types ranging in complexity. The potential breadth and complexity of issues arising in tree disputes is apparent not just from the types of orders that QCAT can make but from the list of factors QCAT is required and permitted to consider, including the safety of any person, the contribution the tree makes to the local ecosystem and public amenity, and any impact the tree has on soil stability, the water table or other natural features of the land or locality.<sup>168</sup>

4.248 The Commission also considers that QCAT is best placed to determine the appropriate case management process for dealing with different dispute types, having regard to its obligations as a tribunal to act both fairly and quickly, its experience with different matters, and its wider processes and procedures.

4.249 QCAT has recently developed proposed new processes for tree disputes, which it anticipates will 'reduce the time taken to finalise applications and improve client service'.<sup>169</sup> The Commission considers it important to retain this ability for QCAT to adapt and improve its processes on an ongoing basis.

4.250 For these reasons, the Commission does not consider that any legislative change should be made to the MCD jurisdiction as it applies to neighbourhood disputes under the Act.

### **The use of ADR within QCAT**

4.251 As outlined earlier in this chapter, QCAT's processes for dealing with tree disputes and (some) dividing fence disputes usually include an ADR process.

4.252 The Act does not itself include provisions about ADR for neighbourhood disputes before QCAT. However, the tribunal has its own general powers and procedures for this under the QCAT Act.<sup>170</sup>

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<sup>168</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 3 pt 4 div 4.

<sup>169</sup> Information provided by QCAT, 7 September 2015.

<sup>170</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ch 2 pt 6 divs 2–4, discussed in *Neighbourhood Disputes Act Discussion Paper* (2015) [4.52]–[4.63].

4.253 The use of ADR is intended to ‘form part of the fabric of QCAT’,<sup>171</sup> and is recognised as an important aspect of active case management.<sup>172</sup>

### **Compulsory conferences**

4.254 At present, tree disputes will often be referred to compulsory conference prior to being listed for hearing.<sup>173</sup> The purposes of a compulsory conference are:<sup>174</sup>

- (a) to identify and clarify the issues in dispute in the proceeding;
- (b) to promote a settlement of the dispute the subject of the proceeding;
- (c) to identify the questions of fact and law to be decided by the tribunal;
- (d) if the proceeding is not settled, to make orders and give directions about the conduct of the proceeding;
- (e) to make orders and give directions the person presiding over the conference considers appropriate to resolve the dispute the subject of the proceeding.

4.255 It has been explained that the QCAT compulsory conference process ‘is most closely akin’ to evaluative (or advisory) mediation:<sup>175</sup>

In its classic form, evaluative mediation involves the mediator assisting the parties in resolution by pointing out the strengths and weaknesses of their cases, and predicting what a judge would be likely to do. Most often, this involves elements of ‘private caucus’ where the mediator will privately discuss their view of a party’s case, aiding the parties and their lawyers with a cost/benefit analysis of moving forward. An evaluative mediator has a direct influence over the outcome of the mediation.

...

The compulsory conference process enables the tribunal member conducting the process wide latitude to assist the parties in determining whether the expectations they hold are realistic.

4.256 The compulsory conference also goes beyond the aims of mediation to narrow and define the issues to assist in the hearing if the matter is not resolved.<sup>176</sup>

4.257 If a settlement is reached in a compulsory conference, the member, adjudicator or principal registrar presiding at the conference can make orders to give

<sup>171</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 May 2009, 352 (CR Dick, Attorney-General and Minister for Industrial Relations).

<sup>172</sup> Productivity Commission, ‘Access to Justice Arrangements’ (Inquiry Report No 72, 5 September 2014) vol 1, 364–5.

<sup>173</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 67(1); Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for applications for orders to resolve other issues about trees*, 1 July 2013, [11].

<sup>174</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 69.

<sup>175</sup> B Cullen Mandikos, ‘QCAT compulsory conferences: Much more than “mediation”’ (2010) 30(9) *Proctor* 23.

<sup>176</sup> *Ibid.*

effect to the settlement, with such orders having the same effect as orders made by QCAT after deciding the proceeding.<sup>177</sup>

4.258 If the proceeding is not completely resolved at a compulsory conference, the person presiding at the conference may help the parties draw up an agreed list of issues in dispute to assist in the hearing.<sup>178</sup>

4.259 In 2014–15, QCAT referred 23 tree dispute applications to compulsory conference, and 20 were resolved at compulsory conference.<sup>179</sup>

### Mediation

4.260 For MCD involving more than \$3000, including dividing fence disputes, QCAT adopts mediation as the usual ADR process.<sup>180</sup> Mediation would also be a possible option under QCAT's proposed new processes for tree disputes.

4.261 The purpose of mediation in a QCAT proceeding is 'to promote the settlement of the dispute'.<sup>181</sup>

4.262 The mediation may be conducted by a QCAT member or adjudicator, the principal registrar of the tribunal, a mediator under the *Dispute Resolution Centres Act 1990* (Qld) or another person approved by the principal registrar as a mediator for the tribunal.<sup>182</sup>

4.263 If a settlement is reached by the parties at mediation, provision is made for QCAT to make orders giving it effect. Such orders have the same effect as if they were made by QCAT after deciding the proceeding.<sup>183</sup>

<sup>177</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 70(1), 84.

<sup>178</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010 — Compulsory Conferences and Mediations*, 20 April 2010, [4].

<sup>179</sup> Information provided by QCAT, 7 July 2015. The figures for tree disputes for the span of years from 2011–12 to 2014–15 are as follows:

	Compulsory Conferences	Resolved at Compulsory Conference	Partially resolved at Compulsory Conference	Not resolved at Compulsory Conference
2011–12	41	21	10	10
2012–13	52	34	0	18
2013–14	31	21	0	10
2014–15	23	20	Not stated	2

Note: the numbers resolved, partially resolved or not resolved represent totals for each period, not necessarily directly referable to the number of compulsory conferences held during the same period.

<sup>180</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 75(1); Queensland Civil and Administrative Tribunal, *Practice Direction No 4 of 2011 — Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [4].

<sup>181</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 77.

<sup>182</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 79.

<sup>183</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 85, 88. Section 85 is discussed at [4.70] above.

4.264 If the dispute is not resolved in the mediation, the mediator may help the parties complete a list of issues in dispute, to be used at the hearing.<sup>184</sup>

4.265 The mediation of MCD (including dividing fence disputes) is conducted by mediators from DRB, using an abbreviated mediation process, and mediators from QCAT.<sup>185</sup>

4.266 In 2014–15, QCAT referred 64 dividing fence dispute applications to mediation, with 35 (55%) of those resulting in an agreement. This is consistent with the overall combined agreement rate of 50% for mediations of all MCD in that period.<sup>186</sup>

4.267 The agreement rate across all MCD mediations has steadily increased since QCAT commenced operation.<sup>187</sup> The mediation model used for MCD mediations is also undergoing change, from the ‘facilitative’ approach to an ‘advisory’ model.<sup>188</sup>

4.268 This change was the result of a review commissioned by QCAT to assess several possible mediation models, which determined that an advisory model would be more suitable for MCD matters:<sup>189</sup>

To that time, QCAT mediations had been conducted using a strictly ‘facilitative’ model of mediation. This model discouraged the provision of any information by the mediator and supported a focus on interest based negotiation. The advisory style of mediation advocated by KPMG enables the mediator to provide information to parties so as to address gaps in their knowledge regarding QCAT processes. In many cases this information can be used to strengthen the quality of reality testing with parties and foster negotiability. Parties retain ownership of

<sup>184</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 6 of 2010 — Compulsory Conferences and Mediations*, 20 April 2010, [4]; and *Practice Direction No 4 of 2011 — Arrangements for the mediation and determination of minor civil disputes*, 1 November 2011, [10]–[14].

<sup>185</sup> Information provided by QCAT, 20 July 2015. DRB uses an eight step mediation process lasting 1 to 1¼ hours: Information provided by DRB, 14 August 2015 (Submission 54).

<sup>186</sup> Information provided by QCAT, 20 July 2015. The figures given for dividing fence mediations for 2013–14 and 2014–15 are as follows (the numbers referred to mediation in the preceding years were not provided):

	Applications filed	Applications referred to mediation		Mediated agreements
2013–14	321	<b>Total</b>	<b>86</b>	<b>50 (58%)</b>
		\$0–3000	59	36 (61%)
		\$3001–25 000	27	14 (52%)
		>\$25 000	0	0
2014–15	313	<b>Total</b>	<b>64</b>	<b>35 (55%)</b>
		\$0–3000	32	19 (60%)
		\$3001–25 000	32	16 (50%)
		>\$25 000	0	0

<sup>187</sup> Agreement rates for MCD mediations conducted by DRB were 36% in 2009–10, 47% in 2010–11, 48% in 2011–12, 45% in 2012–13, 52% in 2013–14, and 52% in 2014–15: Information provided by DRB, 14 August 2015 (Submission 54). The combined overall agreement rate for all MCD mediations was 33% (in Brisbane) in 2012–13, 52% in 2013–14 and 50% in 2014–15: Information provided by QCAT, 20 July 2015.

<sup>188</sup> Information provided by QCAT, 20 July 2015.

<sup>189</sup> Information provided by QCAT, 7 September 2015 (Submission 61).



decisions however the advisory model enables mediators to assist parties to more satisfactorily consider what is in their best interests.

4.269 QCAT anticipates that the change in approach will improve settlement rates.<sup>190</sup> DRB has stated that '[e]arly results from the implementation are very encouraging with a 59% state-wide agreement rate reported for all MCDs mediated by DRB in June 2015'.<sup>191</sup>

4.270 QCAT has explained that it will also soon be trialling the use of 'desktop conferencing' to conduct mediations. Whilst MCD mediations are usually conducted face-to-face, remote mediations are also sometimes conducted by teleconference to assist the parties. Desktop conferencing would go a step further by enabling the parties to 'see', as well as hear, the mediator.<sup>192</sup>

While providing a level of accessibility, teleconference mediation removes the advantages associated with face to face communication. The desktop conferencing trial will utilise Skype/Lync technology to enable mediators to engage with parties in their homes, offices etc. Mediators will benefit from the ability to read non-verbal cues in a way that is not possible when mediating by teleconference. This technology will also support the sharing of documents electronically during the conduct of the mediation.

### **Hybrid hearings**

4.271 QCAT's proposed new processes for tree disputes would also provide the option of using a 'hybrid hearing'.<sup>193</sup>

4.272 A hybrid dispute resolution process is one in which the dispute resolution practitioner plays multiple roles, first using one process and then a different one.<sup>194</sup>

4.273 Hybrid hearings were introduced by QCAT in 2012, with the intention of being used in certain types of proceedings, namely, "one issue" disputes, animal management cases, or [proceedings] where parties have travelled a long distance to attend QCAT'.<sup>195</sup>

Alternative dispute resolution (ADR) processes are an important part of how QCAT meets [its] obligation [to deal with proceedings in a way that is accessible, fair, just, economical, informal and quick]. Usually, if a dispute can't be settled during ADR, then it is listed for hearing on a later date.

<sup>190</sup> Information provided by QCAT, 20 July 2015.

<sup>191</sup> Information provided by DRB, 14 August 2015 (Submission 54). DRB mediators are being trained in the new model.

<sup>192</sup> Information provided by QCAT, 7 September 2015 (Submission 61) and 20 July 2015. Tribunals' use of such technologies to assist in resolving small claim disputes has recently been advocated in Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, 5 September 2014) vol 1, 375–7.

<sup>193</sup> QCAT has already 'successfully' used hybrid hearings in some tree disputes: P Feil, 'ADR in QCAT: New "hybrid hearings" join resolution tools' (2013) 33(8) *Proctor* 30.

<sup>194</sup> NADRAC, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (September 2003) Australian Government Attorney-General's Department, 5 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

<sup>195</sup> Queensland Civil and Administrative Tribunal, *Practice Direction No 1 of 2012 — Hybrid hearings*, 3 September 2012, [1]–[4].

However, in some proceedings when parties do not reach an agreement during ADR, it is not practical or efficient to list the proceeding for hearing on a later date. ...

In response, QCAT has developed a process called a hybrid hearing.

4.274 In QCAT's hybrid hearing process, the hearing is followed, on the same day, by a mediation between the parties. The hearing proceeds as usual, with the parties' evidence and submissions being heard. At the end of the hearing, the QCAT member records the decision in writing and places it, with brief reasons, in a sealed envelope. The decision is then reserved and the matter adjourned.<sup>196</sup>

4.275 The member then holds a mediation between the parties, without the parties knowing the member's decision. This is to give the parties the opportunity to reach an agreement, after hearing all the evidence and submissions, rather than having a decision made for them by QCAT.<sup>197</sup>

- (a) During the hearing, parties will hear all of the evidence and submissions of the other party. Parties may have a different view about reaching an agreement afterwards.
- (b) During the mediation, parties will not know what the Member is going to decide and can make their own agreement.
- (c) Parties can be confident that if they don't reach an agreement and the Member does make a decision, the decision is not affected by anything said or done by the parties during the mediation.
- (d) Mediation gives the parties the opportunity to make an agreement between them rather than have a decision made for them. Research shows that parties are more likely to honour an agreement they reach together, rather than a decision that is made for them by someone else.
- (e) Mediation gives the parties an opportunity to find middle ground instead of one party winning and one party losing. Sometimes, even the party who 'wins' a tribunal hearing is not happy with the result.
- (f) QCAT may be limited in the kinds of orders it can make to resolve a dispute. The parties may be able to find creative ways to solve a dispute that the tribunal could not order.
- (g) Mediation gives parties the opportunity to say things to each other that are 'off the record'.
- (h) Disputes often arise because the parties are not communicating well, or have stopped communicating. Mediation often provides the first opportunity for the parties to speak to each directly. The Member can assist in opening the lines of communication between them.
- (i) Parties may need to work together in the future. Reaching an agreement together may help maintain working relationships.

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<sup>196</sup> Ibid [10]–[14].

<sup>197</sup> Ibid [6].

4.276 If the proceeding is settled at mediation, the member will make the orders necessary to give effect to the settlement, and destroy the sealed envelope containing the proposed decision. The parties will not be told what the proposed decision was.<sup>198</sup>

4.277 If the proceeding is not settled in mediation, the member will instead make the decision contained in the sealed envelope and the orders necessary to give it effect.<sup>199</sup>

### **Conciliation**

4.278 When the Act was introduced, the initial intention had been for QCAT to use 'conciliation' as the preferred ADR process for dividing fence and tree disputes. The conciliator's role would have been to:<sup>200</sup>

- assist the parties to identify issues in dispute, develop options, consider alternatives and try to reach an agreement; and
- provide advice on matters in dispute and options for resolution, but not make a determination.

4.279 There is considerable variation in what is meant by the term 'conciliation'.<sup>201</sup>

4.280 By way of example, the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) provides for the conciliation of tenancy disputes where the conciliator's functions, under section 401 of that Act, are:

- (a) to encourage the settlement of a dispute by facilitating, and helping to conduct, negotiations between parties to the dispute; and
- (b) to promote the open exchange of information relevant to the dispute by the parties; and
- (c) to provide to the parties information about the operation of [the] Act relevant to a settlement of the dispute; and
- (d) to help in the settlement of the dispute in any other appropriate way.

*Examples of facilitating and helping conduct negotiations—*

- 1 facilitating telephone conferencing
- 2 interviewing the parties, together or separately

<sup>198</sup> Ibid [17]. See also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 85.

<sup>199</sup> Ibid [18].

<sup>200</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).

<sup>201</sup> See NADRAC, *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (September 2003) Australian Government Attorney-General's Department, 5 <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>>.

4.281 For conciliations under the *Anti-Discrimination Act 1991* (Qld), the conciliator may also ‘explain the law’ to the parties.<sup>202</sup>

4.282 As explained at [4.57] above, there is also often a significant overlap between ‘conciliation’ and ‘mediation’, depending on the extent to which the mediator plays an advisory role.

4.283 Under the National Mediator Accreditation System, mediators are required to meet additional requirements when using ‘a blended process such as advisory or evaluative mediation or conciliation, which involves the provision of advice’. In particular, they must ensure that, within the professional area in which advice is to be given, they:<sup>203</sup>

- (i) have current knowledge and experience;
- (ii) hold professional registration, membership, statutory employment or their equivalent; and
- (iii) are covered by current professional indemnity insurance or have statutory immunity ...

### **Discussion Paper**

4.284 In the Discussion Paper, the Commission discussed the range of ADR processes used for dividing fence and tree disputes under the Act, and sought submissions on whether there should be one form of ADR process used for all disputes under the Act and, if so, which process.<sup>204</sup>

### **Submissions**

4.285 The Townsville Community Legal Service Inc thought that the ‘mode and method’ of ADR for disputes under the Act should be ‘consistent’, and the Queensland Arboricultural Association commented that disputes should be referred ‘to the mediation service’.

4.286 However, the other respondents who addressed this question considered it appropriate to retain options for different types of ADR processes.

4.287 QCAT expressed the view that ‘the tribunal is best able to meet its objectives by having the flexibility to apply different ADR processes to disputes under the Act’.

4.288 The Queensland Law Society noted that some disputes under the Act can be complex or involve large sums of money, and supported the option of referring

<sup>202</sup> Anti-Discrimination Commission Queensland, *All about conciliation conferences* (28 May 2014) <<http://www.adcq.qld.gov.au/resources/brochures-and-guides/brochures/Conciliation-conferences>>. See also *Anti-Discrimination Act 1991* (Qld) ch 7 pt 1 div 3.

<sup>203</sup> Mediator Standards Board, *National Mediator Accreditation System: Part III Practice Standards* (1 July 2015) 10.2(b) <<http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas>>. The Standards are discussed at n 45 above. QCAT has also explained that amendment to the QCAT Act and QCAT Rules is likely to be required to enable the tribunal to provide conciliation for disputes, including dividing fence and tree disputes: Information provided by QCAT, 7 September 2015.

<sup>204</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [4.47]–[4.63], Question 4-6.

matters to external mediators if they might benefit from ‘a higher level of intervention than is available within QCAT’.

4.289 This respondent also noted the initial intention under the Act to use a conciliation process, ‘where a neutral third party could play a more active role’. The Society suggested that a conciliation process similar to that used for residential tenancy disputes and anti-discrimination matters could be adopted.

4.290 Strata Community Australia (Qld) thought the parties should have some choice in the process, observing that the ‘interests of ADR are better served if the parties are committed to a meaningful engagement’ in the process and that, if they have a say in the process that is used, ‘they are more likely to be committed to it’.

4.291 DRB emphasised that its informal facilitative mediation model is ‘highly effective’ in resolving disputes under the Act.

### ***The Commission’s view***

4.292 The Commission considers that the use of ADR within QCAT in dealing with disputes about dividing fences and trees is of significant importance and value. Available data, referred to above, indicates that the ADR processes adopted by QCAT are successful in helping many people to reach their own resolutions, without requiring a final decision to be imposed by the tribunal.

4.293 The Commission is also of the view that the advantages of ADR require continued flexibility so that new and alternative processes can be developed on an ongoing basis to meet the changing needs of the parties, and QCAT’s objectives of dealing with disputes fairly and quickly.

4.294 The Commission also considers it beneficial for ADR processes in neighbourhood disputes to include those in which the dispute resolution practitioner plays a more active advisory or evaluative role, helping the parties to test their cases and develop options to resolve the dispute. Although such a process under the name of ‘conciliation’ has not been introduced for disputes under the Act, it is clear that QCAT has adopted processes with substantially similar features in the form of compulsory conferences and advisory mediation.

4.295 The Commission considers that the question whether to introduce an additional process, which may or may not be called ‘conciliation’, more properly requires broader examination in the context of QCAT’s wider jurisdiction, and not just in relation to neighbourhood disputes. Consideration would need to be given, for example, to the potential added expense and more limited availability of a process where the practitioner — who would need to be appropriately qualified — provides legal advice.

4.296 For these reasons, the Commission does not consider that the Act should provide for one form of ADR process for all dividing fence and tree disputes, nor that it should make provision for ‘conciliation’ of disputes under the Act.



# Chapter 5

## Compliance, Enforcement and Penalties

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### INTRODUCTION

5.1 The terms of reference require the Commission to consider the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with orders made by the Queensland Civil and Administrative Tribunal ('QCAT').<sup>1</sup>

5.2 In this context, the Commission has had regard to the following additional matters identified in the terms of reference:

- the simplicity and ease of use of the Act for members of the community; and
- the operation of the Act in relation to other statutes or laws.

5.3 Ultimately, a dispute resolution process is intended to provide an outcome for the parties. However, reaching an agreement or obtaining an order from QCAT will go only part of the way to achieving this unless the required steps are taken to give the agreement or order effect. Accordingly, as an extension of the dispute resolution processes considered in Chapter 4, this chapter considers matters relating to compliance, enforcement and penalties. It focuses in particular on QCAT orders.

5.4 The Act includes a small number of provisions relating to these issues. In addition, provisions of general application to QCAT relating to compliance, enforcement and penalties apply under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). Further, the enforcement procedures under the *Uniform Civil Procedure Rules 1999* (Qld) ('UCPR') for orders made by the

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<sup>1</sup> The terms of reference are set out in full in Appendix A to this Report.

Magistrates Courts, District Court and Supreme Court ('the courts') are also relevant to the enforcement of QCAT orders made under the Act.<sup>2</sup>

5.5 The Commission is mindful that many of the issues raised in submissions to the review about compliance and enforcement under the Act are of wider and more general relevance to QCAT and its governing legislation, and to the enforcement procedures of the courts. With some limited exceptions where the Commission considers specific amendments to the Act to be appropriate, the Commission's general approach is that these issues are better addressed as part of any review of the QCAT Act and/or the relevant rules and procedures of the courts.<sup>3</sup>

## FINAL ORDERS MADE UNDER THE ACT

5.6 As explained earlier in this Report, QCAT has power under the Act to hear and decide various matters about dividing fences and trees and to make a range of orders in those proceedings.<sup>4</sup>

5.7 An order made under the Act will require one or both of the neighbours to perform some action. Common examples are an order to pay an amount of money to the other neighbour (a 'monetary order'), and an order to carry out work to build or repair a fence or to prune or remove a tree (a 'non-monetary order'). Usually, the order will specify a time within which the money must be paid or the work must be carried out. Non-monetary orders will also usually specify the work required or the way it is to be performed. An order may contain both monetary and non-monetary elements. An order may also be conditional. For example, an order for the payment of money by one party may be conditioned on the completion of work by the other party.<sup>5</sup>

5.8 Typical examples of QCAT orders about dividing fences and trees are provided in figure 5-1 below.<sup>6</sup>

<sup>2</sup> The QCAT Act provides a scheme for the enforcement of QCAT orders as if they were orders made by a court: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 129–132, discussed later in this chapter.

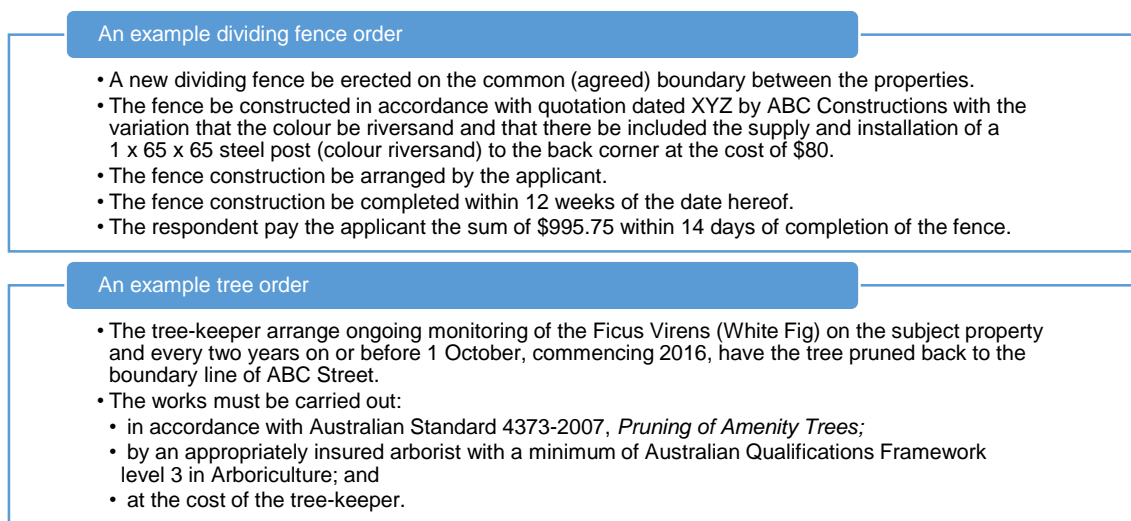
<sup>3</sup> The QCAT Act is the subject of a separate statutory review: Department of Justice and Attorney-General, *Review of the Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (4 May 2015) Queensland Government <<http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-queensland-civil-and-administrative-tribunal-act-2009>>. The review is required under *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 240. Public consultation on that review closed on 11 May 2015.

<sup>4</sup> Not all final QCAT decisions will result in an order. The tribunal may decide, for example, to dismiss the application.

<sup>5</sup> In some cases, it may be unclear or in dispute whether the conditions of the order have been complied with: see, eg, *Thompson v Todhunter* (Unreported, Queensland Civil and Administrative Tribunal, Adjudicator Davern, 25 July 2013).

<sup>6</sup> The examples, which have been de-identified, are taken from information provided by QCAT, 1 September 2015 (sample fence decision, matter no 0000016/15) and the decision in *Nighfind v Sterlite Pty Ltd* (Case No NDR041-14, Member Howe, 1 October 2014) from the register of QCAT tree orders kept under s 79 of the Act and available at <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>.





**Figure 5-1: Example QCAT orders**

5.9 Under the QCAT Act, a decision of the tribunal is binding on all the parties to the proceeding, and takes effect when it is made or such later date or time as stated in the decision.<sup>7</sup> Those provisions are of general application to all QCAT orders, including orders made under the Act about dividing fences and trees.

5.10 The Act also contains specific provisions about orders made under Chapter 3 of the Act ('tree orders').

5.11 Section 78 of the Act provides that such an order lapses 10 years after the day on which it is made, unless the order expressly provides otherwise.<sup>8</sup>

5.12 Section 79 of the Act further provides that QCAT must keep a register of tree orders (other than obsolete orders) made under the Act.<sup>9</sup> This is intended to assist prospective buyers to search for orders that may affect the land in relation to a tree.<sup>10</sup> The register is to be kept in electronic form and in such a way that a search of the register for particular land will show:

- the existence of an order affecting the land;
- the time for carrying out the order; and
- the person responsible for carrying out the order.

<sup>7</sup> Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 126(1), 127.

<sup>8</sup> QCAT may also revoke a tree order, on application or on its own initiative, if it considers the order has been satisfied: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 78(2).

<sup>9</sup> If an order is revoked, information about that order must be removed from the register within 14 days after the revocation: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 80(3). The register is available at <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>.

<sup>10</sup> Explanatory Notes, *Neighbourhood Disputes Resolution Bill 2010* (Qld) 5. As explained in Chapter 3 of this Report, ss 82–87 of the QCAT Act provide 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.

5.13 Section 81 provides that a person may, without payment of a fee, search the register and obtain a certified copy of the information about an order included in the register.<sup>11</sup>

## COMPLIANCE

5.14 To carry out fencing work or work relating to trees in compliance with a QCAT order, it will often be necessary for one neighbour to enter onto the other neighbour's land, or for the work to be carried out by a contractor. There may also be practical difficulties in complying, or complying in exact terms, with a QCAT order.

5.15 The Act includes specific provisions that address some of these issues. The QCAT Act also makes provision for some circumstances in which it is not possible to comply with an order. These are discussed below.

## Entry onto land

5.16 Section 94 of the Act provides for a person's right to enter a neighbour's land to carry out work.<sup>12</sup> It applies if QCAT has ordered the person to carry out fencing work or work relating to trees (or the person has agreed with the neighbour to carry out such work). It provides that the person, or their employee or agent, may enter the neighbour's land at a reasonable time and to a reasonable extent needed to carry out the work. However, the person must give the owner and any lessee of the land at least seven days written notice first, and is not authorised to enter a dwelling on the land.<sup>13</sup>

5.17 Similar provisions apply in the dividing fences legislation of the other Australian jurisdictions. In South Australia, at least two days' written notice is required before entering the land. However, the remaining jurisdictions do not require notice to be given.<sup>14</sup>

5.18 QCAT will also sometimes make provision in its orders about access to the neighbour's land for the purpose of carrying out the work for a dividing fence or tree. As shown in the examples in figure 5-2 below, this may include a requirement for neighbours to give access to their land and may sometimes include specific reference to section 94 of the Act.<sup>15</sup>

<sup>11</sup> In a legal or other action or proceeding, a document purporting to be a certified copy of information in the register is evidence of the information: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 81(3); *Acts Interpretation Act 1954* (Qld) s 36 sch 1 (meaning of 'proceeding').

<sup>12</sup> Entry onto land by a tree-keeper to cut overhanging branches in accordance with a notice from the affected neighbour, or by a local government to carry out work for a QCAT tree order, is governed by ss 57(3)(c), (4) and 88(3)–(6) of the Act, respectively, and not s 94.

<sup>13</sup> Those conditions were included as protections for the landowner: Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 6.

<sup>14</sup> See *Common Boundaries Act 1981* (ACT) s 22(4) (where entry must be in accordance with the tribunal's directions); *Dividing Fences Act 1991* (NSW) s 20; *Fences Act* (NT) s 22; *Fences Act 1975* (SA) s 18; *Boundary Fences Act 1908* (Tas) s 44; *Fences Act 1968* (Vic) s 33; *Dividing Fences Act 1961* (WA) s 21.

<sup>15</sup> The examples, which have been de-identified, are taken from information provided by QCAT, 1 September 2015 (sample fence decisions) and orders from the register of QCAT tree orders kept under s 79 of the Act and available at <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>.

Examples about giving access	Examples about giving notice	Examples about section 94
<ul style="list-style-type: none"> <li>• Each party shall ensure that access is provided to the fencing contractor to complete the work.</li> <li>• The parties are to allow each other reasonable access and supervision of the fencing work.</li> <li>• The tree-keeper will give access to the arborist engaged by the neighbour to carry out the tree works.</li> <li>• The tree-keeper will not unreasonably refuse access.</li> </ul>	<ul style="list-style-type: none"> <li>• The neighbour will give the tree-keeper not less than 14 days notice in writing of the arborist's intention to access the property to attend to the tree works.</li> </ul>	<ul style="list-style-type: none"> <li>• The fencing contractor has the right to enter the respondent's land for work under section 94 of the Act.</li> <li>• The tree-keeper will take all reasonable steps to ensure compliance with section 94 of the Act by providing written notice of the intention to enter the land and carry out the work at least seven days prior to entering the land, and directing the arborist to enter the land for the purpose of completing the work only at a reasonable time, and only to a reasonable extent needed to carry out the work.</li> </ul>

**Figure 5-2: Example access provisions in QCAT orders**

### **Discussion Paper**

5.19 In the Discussion Paper, the Commission observed that the Act gives a statutory right of entry onto a neighbour's land to facilitate compliance with a QCAT order.<sup>16</sup>

### **Submissions**

5.20 The Surveyors Board of Queensland commented on section 94, observing that '[t]here are occasions where access is required for necessary repair or maintenance, and an owner unreasonably withholds consent to entry'. The Board suggested that 'more flexible entry provisions' should be considered:

for example, [consent for] entry is deemed to be given if not explicitly given in the seven day period; perhaps with an option for application by the 'refusing owner' to ask QCAT to grant an urgent stay on access if there are genuine reasons for access being denied (eg, safety issues).

### **The Commission's view**

5.21 In the Commission's view, the existing provision in section 94 of the Act for access to another person's land to carry out work required under a QCAT order (or in accordance with an agreement between the neighbours) is appropriate and does not require amendment.

5.22 The current provision strikes an appropriate balance between the need to ensure a right of access and the need to ensure that access occurs in reasonable circumstances and with safeguards, including adequate prior notice.

5.23 The Commission further notes that, if there are concerns that a relevant person may unreasonably refuse necessary access, QCAT may make specific provision about access in the order.

<sup>16</sup> *Neighbourhood Disputes Act Discussion Paper (2015) [4.88].*

## Substantial compliance

5.24 Section 91 of the Act provides that ‘substantial compliance’ with an order (or agreement or notice) mentioned in the Act ‘is adequate for this Act’.

5.25 This recognises that minor deviations from precise specifications are a practical reality of the sort of work required by an order, such as the building of a fence over lopsided terrain. For example, the order might require that a ‘flat top picket fence’ be constructed but, due to the nature of the work, the resulting fence may have minor variations in the ground to fence top height of up to 90 mm although retaining a generally flat top finish. In that situation, the tribunal has recognised that the variation is not of such magnitude as to constitute non-compliance.<sup>17</sup>

5.26 Similar provision to section 91 of the Act is made in some of the other jurisdictions for dividing fences.<sup>18</sup> None of the submissions to the review raised concerns about this provision.

## Renewal of final decision

5.27 Sections 133 and 134 of the QCAT Act include provisions for the ‘renewal’ of a final decision (including an order) if there are problems in complying with the decision. This is a provision of general application, capable of applying to orders made under the Act about dividing fences and trees, as well as orders made in QCAT’s other jurisdictions.

5.28 Under section 133, a party may apply to QCAT for a renewal of a final decision if:<sup>19</sup>

- (a) it is not possible for the tribunal’s final decision in a proceeding to be complied with; or
- (b) there are problems with interpreting, implementing or enforcing the tribunal’s final decision in a proceeding.

5.29 The renewal procedure has been described as being concerned with issues about the clarity of the order or whether the order is able to be performed.<sup>20</sup> For example, QCAT has granted a renewal application where an order requiring the respondents to carry out rectification of building work could not be complied with because the first respondent contractor had gone into liquidation and the second respondent did not hold an appropriate licence for the work. In that case, QCAT renewed the order to allow the applicant to engage new builders to carry out the work.<sup>21</sup>

<sup>17</sup> *Franchi v Yazdani (No 2)* [2015] QCAT 112, [11] (Adjudicator Bertelsen).

<sup>18</sup> *Dividing Fences Act 1991* (NSW) s 16; *Fences Act 1968* (Vic) s 30I. See also *Fences Act 1975* (SA) s 23(2).

<sup>19</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 133(1)–(2). See also s 135 under which QCAT, on its own initiative or on application, may correct clerical mistakes, errors arising from an accidental slip or omission or other similar defects of form in a decision.

<sup>20</sup> *Kokkinos v Laing* [2015] QCAT 248, [9] (Member Allen).

<sup>21</sup> *Avenell v Oxygen Pools Pty Ltd* [2010] QCAT 284 (President Wilson J), cited in *Bruce v Sneesby* [2011] QCAT 392, [19] (Member Deane).

5.30 However, QCAT has held that a party's refusal to comply with an order does not constitute grounds for renewal.<sup>22</sup> In that situation, the issue is one of enforcement of the existing order, as described later in this chapter.<sup>23</sup>

5.31 An application for renewal of a final decision must be made within 28 days after the day the party is given notice of the decision, although QCAT may exercise its general power to extend the time limit in some circumstances.<sup>24</sup>

5.32 A renewal application does not involve a fresh hearing on the merits.<sup>25</sup> The orders QCAT can make on a renewal application are:<sup>26</sup>

- (a) the same final decision it made when the proceeding was originally decided; or
- (b) any other appropriate final decision that it could have made, under this Act or an enabling Act, when the proceeding was originally decided.

5.33 If QCAT makes a decision on a renewal proceeding, the final decision cannot be renewed again.<sup>27</sup>

5.34 Renewal applications do not appear to be frequently made.<sup>28</sup>

<sup>22</sup> *Bruce v Sneesby* [2011] QCAT 392, [20]–[22] (Member Deane), followed in *Ash v Australian Retirement Homes Ltd* [2013] QCAT 55, [18] (Member Deane); *Smith v Andrews* [2014] QCAT 356, [9] (Member Allen); and cited in *Wadley Properties No 1 Pty Ltd v Davis (No 2)* [2012] QCAT 545, [7] (Member Allen).

<sup>23</sup> *Bruce v Sneesby* [2011] QCAT 392, [22] (Member Deane); *Bielby v Beilby* [2010] QCAT 649, [17]–[18] (Member Fitzpatrick), and the other cases cited in n 22 above.

<sup>24</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 61, 133(3)(c)(i); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rr 4, 89(b), sch Dictionary (definition of 'relevant day' para (b)). QCAT may act under s 61 to extend a time limit on application or on its own initiative, but can not make such an order if it would cause 'prejudice or detriment' to a party that is not able to be remedied by an appropriate order for costs or damages: s 61(3). See, eg, *Bruce v Sneesby* [2011] QCAT 392, [9], [11]–[13] (Member Deane) in which time was extended to allow an application to be made on 29 September 2010 for renewal of a decision notified to the parties on 24 June 2010. Cf *Freshwater Point Management v Reeder* [2014] QCAT 584, in which Adjudicator Bertelsen did not grant an extension of time to allow a renewal application made four years after the original decision.

<sup>25</sup> *Layne v Samjam Investments Pty Ltd* [2015] QCAT 58, [30] (Member Hughes). See also *Mitchamy Developments Pty Ltd v Adams* [2011] QCAT 133, [13] (Member Cotterell); *Tasmanian Seafoods Pty Ltd v Chief Executive, Department of Primary Industries & Fisheries* [2010] QCAT 326. Cf 'reopening' of a proceeding under ss 136–141 of the QCAT Act in which QCAT must decide the issues in the proceeding by way of a fresh hearing on the merits: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 140(1)–(2). A party may apply for the reopening of a proceeding on special grounds only, namely, that: (a) the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or (b) the party would suffer a substantial injustice if the proceeding was not reopened because significant new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided: ss 8, 138(1), 139(4)(a), sch 3 Dictionary (definition of 'reopening ground').

<sup>26</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 134(2). Cf *Small Claims Tribunals Act 1973* (Qld) s 23 (repealed) under which the former Small Claims Tribunal was empowered to give leave to the person in whose favour an order operated to renew the reference of the claim if the order was not complied with and, on such renewal, to 'make any other order it is empowered by this Act to make'. The Exposure Draft of the Queensland Civil and Administrative Tribunal Bill 2009 (Qld) had included renewal provisions to similar effect (ss 129–130), but the provisions had been changed, to their current form, when the Bill was introduced into Parliament (ss 133–134).

<sup>27</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 134(4). The tribunal's decision on renewal under s 134 is taken to be the tribunal's final decision in the proceeding: s 134(3).

<sup>28</sup> Between 2011 and 2015, a total of nine renewal applications were made in relation to tree orders: Information provided by QCAT, 7 July and 7 September 2015. Figures for dividing fence orders were not provided.

## ENFORCEMENT OF QCAT ORDERS

5.35 As an administrative tribunal established by statute and subject to the supervision of the courts, QCAT does not have power to enforce its orders directly.<sup>29</sup> Instead, the QCAT Act relies on the existing enforcement processes of the courts.

5.36 This approach was adopted to provide a ‘standard enforcement provision’ to ensure decisions across the range of QCAT’s matters are able to be enforced.<sup>30</sup> Reliance on court enforcement is typical for administrative tribunals like QCAT.<sup>31</sup> It recognises the need for dedicated enforcement officers, such as sheriffs or bailiffs, to execute enforcement warrants.<sup>32</sup> It may also reflect the long-held idea under constitutional law principles that there should generally be a separation between the administrative and judicial branches of government.<sup>33</sup>

5.37 The enforcement process for QCAT orders, which is outlined below, applies to all QCAT orders, not just those made under the Act about dividing fences and trees.

<sup>29</sup> Although described as an administrative tribunal, QCAT (like its counterparts in other jurisdictions) also exercises functions of a judicial character. QCAT is also a court of record, with the consequence that it has power, even apart from statute, to punish for contempt in the face of the tribunal: see *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 164(1), 219; E Campbell, ‘Inferior and Superior Courts and Courts of Record’ (1997) 6 *Journal of Judicial Administration* 249. QCAT decisions made by judicial members or about cost-amounts may be appealed to the Court of Appeal: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 149.

<sup>30</sup> See Tribunals Review Independent Panel of Experts, ‘Queensland Civil and Administrative Tribunal: Stage 2 report on legislative amendments to implement the tribunal’ (Report, October 2008) [4.10]. The enforcement mechanism was modelled on those applying to the civil and administrative tribunals in Victoria, Western Australia and New South Wales: see the provisions cited in n 31 below.

<sup>31</sup> See, eg, *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 71 (tribunal orders are taken to have been filed in the Magistrates Court for enforcement under the *Court Procedures Rules 2006* (ACT)); *Civil and Administrative Tribunal Act 2013* (NSW) s 78 (monetary orders of the tribunal operate, when filed in the appropriate court, as a judgment of the court for a debt); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 121–122 (tribunal orders, when filed in the appropriate court, are taken to be orders of the court and enforceable accordingly); *State Administrative Tribunal Act 2004* (WA) ss 85–86 (tribunal orders, when filed in the appropriate court, are taken to be orders of the court and enforceable accordingly). A similar approach is also taken for other administrative bodies, such as the Anti-Discrimination Commission Queensland: see *Anti-Discrimination Act 1991* (Qld) ss 156(3)–(4), 157(2)–(3), 159(2)–(3), 160(3)–(4).

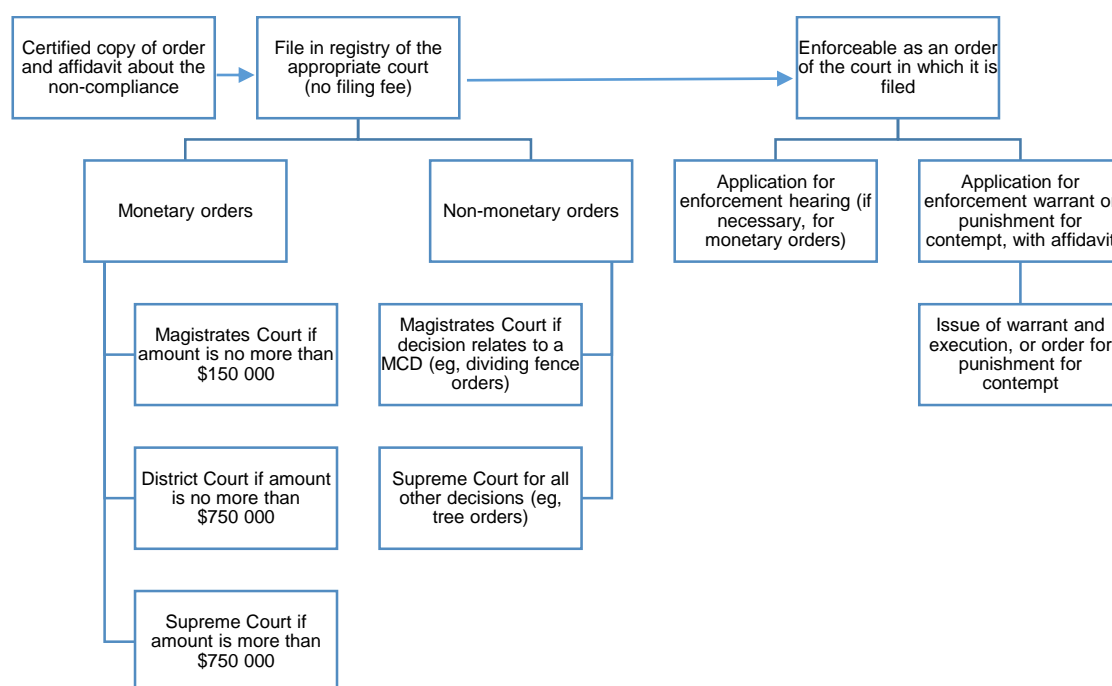
<sup>32</sup> When the legislation to establish QCAT was being developed, it was observed that ‘there is no equivalent position in the tribunal to the Sheriff in higher courts who is responsible for executing warrants for courts’: Tribunals Review Independent Panel of Experts, above n 30, [5.15]. Execution by enforcement officers is discussed at [5.48] below.

<sup>33</sup> The doctrine of the separation of powers is embodied in the *Australian Constitution*. Investing a federal administrative agency with judicial powers of the Commonwealth is contrary to ch III of the *Australian Constitution*, and orders made by such an agency can be enforced only after the independent exercise of judicial power: see E Campbell and M Groves, ‘Enforcement of administrative determinations’ (2006) 13 *Australian Journal of Administrative Law* 121, discussing *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. The same constitutional doctrine of the separation of powers does not apply to the States: *Australian Workers’ Union of Employees, Queensland v State of Queensland* [2012] QCA 353, [51], [59] (Holmes, Muir and White JJA). Nevertheless, some limitations apply to State courts exercising federal jurisdiction under *Kable v DPP (NSW)* (1996) 189 CLR 51, and judicial independence remains an important general principle for Queensland legislation: see generally Office of Queensland Parliamentary Counsel, ‘Institutional integrity of courts and judicial independence’ in *Principles of Good Legislation: OQPC Guide to FLPS* (30 June 2014) <[http://www.legislation.qld.gov.au/Leg\\_Info/flp.htm](http://www.legislation.qld.gov.au/Leg_Info/flp.htm)>.

## Current enforcement process

5.38 Sections 131 and 132 of the QCAT Act provide for the enforcement of final decisions made by QCAT.

5.39 The general mechanism is the same for both monetary and non-monetary orders: a person may (without fee) file a certified copy of the order along with an affidavit about the other party's non-compliance in the registry of the appropriate court, upon which it is taken to be an order of that court and enforceable accordingly.<sup>34</sup> As shown in figure 5-3 below, the appropriate court for enforcement differs depending on whether the order is a monetary or non-monetary order, whether it relates to a minor civil dispute ('MCD') or otherwise, and, if it is a monetary order, the amount to be paid under the order.<sup>35</sup>



**Figure 5-3: Current process to enforce QCAT orders**

<sup>34</sup> General information about the enforcement process is also available at QCAT, *Enforcing a QCAT decision* (1 October 2015) <<http://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision>>. In 2014, amendments to the QCAT Act were proposed to omit the preliminary requirement for a copy of the QCAT order to be filed in the appropriate court before it becomes enforceable as an order of the court. However, the proposed amendments lapsed when Parliament was dissolved on 6 January 2015, following the calling of the State election: see Explanatory Notes, Justice and Other Legislation Amendment Bill 2014 (Qld) 3, 34–5, in relation to ss 108–109 of that Bill proposing to amend ss 131 and 132 of the QCAT Act.

<sup>35</sup> As explained in Chapter 4 of this Report, dividing fence disputes about fencing work will usually fall within QCAT's MCD jurisdiction. This applies if the claim in the dispute is no more than \$25 000. Applications under the Act to recover debts relating to dividing fences or trees are also usually dealt with under QCAT's MCD jurisdiction. However, tree disputes under the Act are not part of the MCD jurisdiction.

5.40 Under section 131, a monetary order can be enforced by filing it in the registry of ‘a court of competent jurisdiction’. This will depend on the amount to be paid under the order. A Magistrates Court is the appropriate court for amounts of no more than \$150 000.<sup>36</sup> If the amount is up to \$750 000, the District Court will be the appropriate court, and for amounts greater than that, the appropriate court is the Supreme Court.<sup>37</sup>

5.41 Under section 132, a non-monetary order (or a monetary order to the extent it does not require payment of an amount to a person) can be enforced by filing it in the registry of the ‘relevant court’. This is defined in section 132(7) to be a Magistrates Court if the order relates to a MCD, or the Supreme Court in other cases. The Supreme Court may, however, transfer a proceeding for the enforcement of the order to the District Court or a Magistrates Court.<sup>38</sup>

5.42 Accordingly, the appropriate court under sections 131 and 132 for enforcement of orders made by QCAT under the Act is:

- a Magistrates Court —
  - for monetary orders about a dividing fence or tree, including debt dispute orders (unless the amount involved is more than \$150 000);
  - for non-monetary orders about a dividing fence (which are usually dealt with as a MCD); and
- the Supreme Court — for non-monetary orders about trees (which are not dealt with as MCD).

5.43 In practice, Magistrates Courts deal with enforcement of dividing fence orders, which are usually monetary orders. Enforcement of non-monetary orders in the Magistrates Courts is rare.<sup>39</sup> Similarly, the Supreme Court tends in practice to deal with the enforcement of monetary rather than non-monetary orders, and sees few non-monetary orders about trees.<sup>40</sup>

5.44 Once the order is filed in the registry of the appropriate court, it is taken to be an order of that court and is enforceable using the court’s general enforcement procedures under the UCPR.

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<sup>36</sup> See *Magistrates Courts Act 1921* (Qld) ss 2 (definition of ‘prescribed limit’), 4.

<sup>37</sup> See, respectively, *District Court of Queensland Act 1967* s 68(1)–(2); *Constitution of Queensland 2001* (Qld) s 58.

<sup>38</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 132(5), (7) (definition of ‘lower court’). The Supreme Court may transfer the order to the District Court or a Magistrates Court for enforcement if the order is of a kind that may be made by, or otherwise capable of being enforced in, that court.

<sup>39</sup> Information provided by Magistrates Courts Service, Brisbane, 4 August 2015. Magistrates Courts are not courts of equity, so they are limited in the orders they can make. Between 2011–12 and 2014–15, a total of 125 QCAT orders about neighbourhood disputes were lodged in the Magistrates Courts, and 17 enforcement warrants for such orders were issued: Information provided by Courts Reporting and Performance Unit, 15 September 2015.

<sup>40</sup> Information provided by Supreme, District and Land Courts Service, Brisbane, 6 August 2015. Data on the number of QCAT orders about neighbourhood disputes lodged in the court and the number of enforcement warrants issued for such orders was not provided for the Supreme Court.



5.45 As outlined in figure 5-3 above, this procedure involves an application by the person seeking to enforce the order for an 'enforcement warrant' or (if relevant) punishment for contempt of court.<sup>41</sup> The appropriate type of enforcement will depend on the nature of the order sought to be enforced and the circumstances of the non-complying party. Figure 5-4 below outlines the enforcement options for monetary and non-monetary orders.<sup>42</sup>

Monetary orders	Non-monetary orders
<ul style="list-style-type: none"> <li>• Seizure and sale of the person's property</li> <li>• Redirection of debts payable to the person</li> <li>• Redirection of the person's earnings</li> <li>• Charging order charging all or part of the person's legal or equitable interest in annuities, stocks, bonds, shares, etc (Supreme Court only)</li> </ul>	<ul style="list-style-type: none"> <li>• Punishment for contempt of court (resulting in a fine or imprisonment)</li> <li>• Seizure and detention of the person's property (which may be returned if the person complies)</li> <li>• Substituted performance by a person appointed by the court (rare)</li> </ul>

**Figure 5-4: Types of enforcement**

5.46 Whereas a warrant to enforce a monetary order is directed toward recovery of the amount owing (for example, by selling property of the person and applying the proceeds to the debt), an application to enforce a non-monetary order is usually made to impose some form of punishment on the person for the non-compliance (for example, a fine or imprisonment for contempt).

5.47 Although there is provision in the UCPR for a charging order or an order for substituted performance to enforce a non-monetary order, these types of enforcement are very rare.<sup>43</sup> The most common types of enforcement for orders made under the Act are enforcement warrants for seizure and sale of property and the redirection of debts or earnings, which both apply to monetary orders.<sup>44</sup>

5.48 The UCPR contains a number of rules about enforcement, including the following:

<sup>41</sup> A court (and QCAT) also has power to punish a person for contempt in the face of the court on its own initiative or on application of the registrar: see *Uniform Civil Procedure Rules 1999* (Qld) rr 922, 928; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 219. QCAT's powers in relation to contempt are discussed later in this chapter.

<sup>42</sup> See *Civil Proceedings Act 2011* (Qld) pt 13 div 3; *Uniform Civil Procedure Rules 1999* (Qld) ch 19 pts 4–8, ch 20 rr 898(2), 899, pts 6–7.

<sup>43</sup> Information provided by Supreme, District and Land Courts Service, Brisbane, 6 August 2015. There is no approved form on the Courts website for an enforcement warrant for substituted performance: see Queensland Courts, *Forms* (30 October 2015) <<http://www.courts.qld.gov.au/forms>>.

<sup>44</sup> Information provided by Magistrates Courts Service, Brisbane, 4 August 2015; and Supreme, District and Land Courts Service, Brisbane, 6 August 2015. Between 2011–12 and 2014–15, a total of 17 enforcement warrants for orders about neighbourhood disputes were issued by Magistrates Courts with one for payment by instalments and the remaining for seizure and sale of property: Information provided by Courts Reporting and Performance Unit, 15 September 2015. Data for the Supreme Court was not provided.

- An application for an enforcement warrant must be filed with a copy of the warrant being sought and a statement or affidavit in support of the application.<sup>45</sup>
- There is no filing fee for an application for an enforcement warrant. However, if the warrant relates to the seizure and sale of property, a security deposit of up to \$2500 may be required to cover the expense of executing the warrant.<sup>46</sup>
- An application for an enforcement warrant can be made without notice to the other party and, unless the court or a registrar otherwise directs, is to be dealt with by the registrar without a formal hearing.<sup>47</sup>
- Before applying for an enforcement warrant, a person may apply for an enforcement hearing to obtain information to facilitate enforcement of a monetary order. This enables the person to identify the debtor's financial position so that the appropriate enforcement warrant can be sought.<sup>48</sup>
- Enforcement proceedings must generally be started within six years after the day the order was made.<sup>49</sup>
- With some exceptions, enforcement warrants are executed by court enforcement officers.<sup>50</sup>
- An enforcement warrant ends one year after it is issued, or the earlier time stated in the warrant.<sup>51</sup>

<sup>45</sup> *Uniform Civil Procedure Rules 1999* (Qld) rr 817(1), 906(1). An application for punishment for contempt may also require an affidavit in support: r 926(3). Approved forms for an application, warrant and statement (monetary orders) or affidavit (non-monetary orders) in support are available on the Queensland Court's website at <<http://www.courts.qld.gov.au/forms>>. See Forms 9, 46, 74–79, 84–87 and 90.

<sup>46</sup> Information provided by Supreme, District and Land Courts Service, Brisbane, 6 August 2015. See also Queensland Courts, *Common questions: Enforcement warrants — Civil* (3 August 2015) <<http://www.courts.qld.gov.au/representing-yourself-in-court/money-disputes-up-to-150000/enforcement-warrants/common-questions>>. The security deposit applies if the warrant, once issued, is to be executed by court enforcement officers, as is commonly the case in relation to recovery of property. An application for punishment for contempt may also attract a filing fee: see *Uniform Civil Procedure Rules 1999* (Qld) r 926(2); *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4(1) sch 1 item 1(4).

<sup>47</sup> *Uniform Civil Procedure Rules 1999* (Qld) rr 817(2), (5), 906(2), (4). This does not apply to an application for punishment for contempt, which must be served on the respondent personally and is to be decided at hearing at which the respondent is to appear: see rr 926(3), 927.

<sup>48</sup> *Uniform Civil Procedure Rules 1999* (Qld) ch 19 pt 2. In the Magistrates Courts, enforcement hearings are usually held only if the amount involved is more than \$1000: Information provided by the Magistrates Courts Service, Brisbane, 4 August 2015. Between 2011–12 and 2014–15, a total of 32 enforcement hearing summonses were lodged in relation to QCAT orders about neighbourhood disputes under the Act: Information provided by Courts Performance and Reporting Unit, 15 September 2015.

<sup>49</sup> Outside that time, the court's leave to start enforcement proceedings is required: *Uniform Civil Procedure Rules 1999* (Qld) rr 799, 894.

<sup>50</sup> *Uniform Civil Procedure Rules 1999* (Qld) rr 820(3), 908(3). This applies to enforcement warrants relating to non-monetary orders and warrants for seizure and sale of property. A person may also engage, at a fee, an enforcement officer to execute (by service) other enforcement warrants such as for redirection of debts. The enforcement officer of a court is the sheriff, a deputy sheriff or a bailiff of the court: *Civil Proceedings Act 2011* (Qld) s 4 sch 1 Dictionary (definition of 'enforcement officer'); *Uniform Civil Procedure Rules 1999* (Qld) r 4(2).

<sup>51</sup> *Civil Proceedings Act 2011* (Qld) s 91. The warrant must state the date, within one year after its issue, that the warrant ends: *Uniform Civil Procedure Rules 1999* (Qld) rr 820(1)(b), 908(1)(b).

5.49 Importantly, the UCPR limits the circumstances in which a conditional order may be enforced. Rules 796 and 905 provide that a monetary or non-monetary order that is subject to a condition may be enforced only if:<sup>52</sup>

- (a) the condition has been satisfied; and
- (b) a court has given leave to enforce the order.

## General issues

### *Discussion Paper*

5.50 In the Discussion Paper, the Commission sought submissions on whether any difficulties have arisen in respect of non-compliance with QCAT orders about trees. The Discussion Paper also asked whether the Act should contain provisions about compliance and enforcement of QCAT orders about dividing fences and trees (and, if so, what provisions should apply), and whether there should be a simplified process for the enforcement of non-monetary orders.<sup>53</sup>

### *Submissions*

5.51 A number of respondents to the review expressed concerns about the enforcement of QCAT orders, particularly in the context of trees.

5.52 Some respondents commented on the difficulties they had experienced when faced with a tree-keeper's ongoing refusal to comply with the order.<sup>54</sup> Some also expressed the view that the current process places an additional 'burden' on the applicant and is 'frustrating', 'confusing' or too expensive.<sup>55</sup> The Queensland Association of Independent Legal Services Inc ('QAILS') submitted that:

enforcement of QCAT orders is fraught with difficulty for the majority of clients, who have no idea that getting an order from QCAT is often just the beginning of another lengthy process ... Non-monetary, open-ended orders (including regular maintenance of branches, roots, etc) are particularly difficult to enforce.

5.53 Caxton Legal Centre Inc also submitted that enforcement is 'problematic', but stated that it is 'unable to propose an easy solution'.

5.54 Many respondents agreed that there should be a simplified process for the enforcement of QCAT orders.<sup>56</sup> The Ipswich City Council and Local Government Association of Queensland ('LGAQ') submitted that '[a]ny process that reduces red tape, provides clear instructions and a consistent approach is welcomed'. Strata Community Australia (Qld) suggested there should be a process similar to obtaining

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<sup>52</sup> Unless a court orders otherwise, if a person fails to satisfy a condition a court has included in the order, the person entitled to the benefit of the order loses the benefit: *Uniform Civil Procedure Rules 1999* (Qld) rr 796(2), 905(2)(a).

<sup>53</sup> *Neighbourhood Disputes Act Discussion Paper* (2015), Questions 3-19, 4-10 and 4-11.

<sup>54</sup> Submissions 4, 22, 40.

<sup>55</sup> Submissions 49, 22, 40, 4 respectively.

<sup>56</sup> Submissions 16, 37, 39, 49, 57, 61, 62.

a default judgment where the applicant for enforcement must prove that the order was served on the respondent and not complied with in the time stated in the order.

5.55 Some considered QCAT should have the power to enforce its own orders, rather than requiring parties to use the courts' enforcement process.<sup>57</sup> One member of the public commented, for example, that, 'if one is encouraged to go to QCAT for tree resolution and then receives an order', this should come 'with a guarantee of enforcement'.<sup>58</sup>

5.56 Particular concern was raised about the difficulty of enforcing non-monetary orders that require ongoing maintenance work. The Townsville Community Legal Service Inc observed, for example, that a recurring issue for its clients is how to enforce such orders in a cost-effective way — if the tree-keeper fails to comply, the neighbour has to decide between different processes such as enforcement through the courts, an application to QCAT for renewal of the order, or a fresh application to QCAT for a new order. This respondent suggested that applications for renewal might be preferred by some clients because of the potential cost of enforcement through the courts. It further suggested that the Act should 'make clear where enforcement and compliance application[s] need to be made'.

5.57 QCAT agreed that there should be a simplified process to enforce non-monetary orders but observed that, in practice, the enforcement of non-monetary orders 'will always have difficulties where one party does not engage or there is a dispute about whether there has been compliance'.

### ***The Commission's view***

5.58 The Commission notes the concerns that enforcement of QCAT orders made under the Act can be difficult.

5.59 One of the consequences of the existing mechanism for enforcement of QCAT orders is that parties need to use a separate (non-QCAT) process to enforce an order, which may involve significant additional costs.

5.60 Another potential difficulty is that, whilst there are several enforcement warrant options for monetary orders, there are fewer practical options for non-monetary orders.

5.61 Further, there are limits on the availability of the courts' enforcement mechanisms where orders are conditional. As explained above, QCAT orders under the Act will in many cases include both monetary and non-monetary elements, often with the payment of money by one party conditioned on the completion of required work by the other party. In many instances, it may be unclear or in dispute whether the conditions of the order have been complied with.

5.62 Disputes about non-compliance may also be compounded when a non-monetary order requires work to be undertaken on an ongoing basis, as sometimes arises under tree orders.

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<sup>57</sup> Submissions 22, 40, 49.

<sup>58</sup> Submission 22.

5.63 The Commission observes that these difficulties are not unique to orders made by QCAT under the Act, but reflect issues common to the enforcement of other orders.<sup>59</sup> As such, any significant reform to the general enforcement mechanisms applying to QCAT orders is a matter for consideration in any review of the QCAT Act, and of the courts' enforcement processes.

5.64 To the extent that people may be unaware of the enforcement process for QCAT orders and what this involves, this may be a matter for ongoing public education and information. The Commission also observes that some assistance for self-represented parties seeking to undertake enforcement procedures in the Supreme Court is available from the Queensland Public Interest Law Clearing House ('QPILCH') Self-Representation Service.<sup>60</sup>

5.65 The Commission has, however, considered whether there is scope to include any additional mechanism specific to disputes under the Act to assist non-defaulting parties to carry out work under the order, and makes some recommendations about this below.

### **Provision for the non-defaulting party to carry out the work**

5.66 As was observed by QCAT in its submission, enforcement poses marked difficulties if one of the parties refuses to comply with the order or there is a dispute about whether the order has been complied with. This is particularly the case in relation to non-monetary orders that require a party to carry out work, or where orders are conditional.

5.67 One option for the non-defaulting party may be to apply to QCAT for a renewal of the order in different terms. However, as explained above, QCAT does not consider that the renewal process is available where the only issue is a party's refusal to comply.<sup>61</sup>

5.68 In some cases, the failure of one party to comply with an order may be addressed in the way the original order is framed. QCAT sometimes makes 'guillotine' orders which build in the consequences of non-compliance by providing an alternative order on default — for example, that the other party may carry out the

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<sup>59</sup> These difficulties have received some recent media attention in the context of QCAT building disputes: see, eg, S Moody, 'Leak washes up anomaly: Costly flaw exposed in Qld Civil and Administrative Tribunal', *Gladstone Observer* (Gladstone), 11 September 2015, 3; 'Leak case exposes flaw in QCAT orders', *Morning Bulletin* (Rockhampton), 10 September 2015, 8.

<sup>60</sup> See generally, QPILCH, *Self Representation Service* (2015) <<http://www.qpilch.org.au/cms/details.asp?ID=564>>.

<sup>61</sup> Information provided by QCAT, 7 September 2015: 'There must be some other issue with the order'. See [5.30] above.

work and recover the cost from the defaulting party.<sup>62</sup> A typical example of such an approach for orders about trees is given in figure 5-5 below.<sup>63</sup>

An example guillotine tree order

- The tree-keeper is to arrange to have the following works carried out on the trees the subject of the dispute:
  - 4 x *Pinus elliotii* (Slash Pine) and 1 x dead tree located along the side boundary are to be removed.
- All tree works must be carried out by an arborist with minimum Australian Qualifications Framework Level 3 in Arboriculture and appropriate insurance cover.
- The tree works are to be carried out within 90 days of the date of this order.
- If the tree-keeper fails to comply with those orders, the applicant may engage an arborist with a minimum of Australian Qualifications Framework Level 3 in Arboriculture and appropriate insurance cover to perform the works, and may recover the costs of the works from the tree-keeper.

**Figure 5-5: Example QCAT ‘guillotine’ order about work relating to trees**

5.69 However, such orders are not used frequently by QCAT<sup>64</sup> and may not always prove a practical solution. Questions about the degree to which the person has complied with the initial order may still arise, so that it may be unclear whether the ‘alternative’ order is enlivened.

5.70 Formerly, the *Dividing Fences Act 1953* (Qld) had provided a statutory right for the non-defaulting party to a fencing order to carry out the fencing work if the other adjoining owner failed to comply with the order within the stated time. It also gave the person the right to recover the defaulting owner’s contribution to the costs of the work under the order.<sup>65</sup>

5.71 This provision was not included in the Act when the *Dividing Fences Act 1953* (Qld) was replaced. However, similar provision is made in the dividing fences legislation of several of the other Australian jurisdictions.<sup>66</sup>

5.72 Provision to allow the non-defaulting party to carry out the work required by an order is also made in New Zealand with respect to the removal or trimming of trees on neighbouring land. Section 338(5)–(6) of the *Property Law Act 2007* (NZ)

<sup>62</sup> Provision for alternative orders is also made in New Zealand in relation to fencing orders. If a Disputes Tribunal makes a ‘work order’ against a party (to make good a defect in any property or a deficiency in the performance of services), it shall at the same time make a money order to be complied with ‘as an alternative to compliance with the work order’. If neither the work order nor the alternative money order has been complied with, the non-defaulting party may apply to the Tribunal and the Tribunal may vary the work order, make another order, grant leave to the party to enforce the alternative money order (as an order of the District Court), or discharge the order. This applies to any of the matters about which Disputes Tribunals have jurisdiction, including matters under the *Fencing Act 1978* (NZ): see *Disputes Tribunals Act 1988* (NZ) ss 2 (definition of ‘work order’), 10(2), 18(5), (8), 19(1)(a), (d), (3), 45–46, sch 1 pt 2.

<sup>63</sup> This de-identified example is a composite adapted from the decisions in *Sigvard v Palavieng* (Case No NDR107-13, Member Dr Cullen, 17 March 2014), *Smith v French* (Case No NDR123-14, Member Gardiner, 9 June 2015) and *Westerland v Price* (Case No NDR084-14, Member Dr Cullen, 11 June 2015) from the register of QCAT tree orders kept under s 79 of the Act and available at <<http://www.qcat.qld.gov.au/matter-types/tree-disputes/tree-order-register>>.

<sup>64</sup> Information provided by QCAT, 7 September 2015: ‘guillotine’ orders are, however, used in interlocutory processes, for example, if the applicant does not comply with a direction to file submissions, the application is dismissed.

<sup>65</sup> *Dividing Fences Act 1953* (Qld) ss 10, 14 (repealed). These provisions applied to the construction and repair of a dividing fence, respectively. The provisions applied if the adjoining owner did not comply with the order within the time stated in the order or, if no time was stated, within three months after the date of the order.

<sup>66</sup> See *Dividing Fences Act 1991* (NSW) s 15; *Fences Act* (NT) s 9; *Boundary Fences Act 1908* (Tas) s 13; *Fences Act 1968* (Vic) s 30F; *Dividing Fences Act 1961* (WA) s 10.

provides that, in the event of non-compliance with an order and ‘with the agreement of the defendant or with the leave of the court’, the applicant may enter the defendant’s land to carry out the work and may recover the reasonable cost of the work from the defendant. In granting leave, the court may impose any conditions it thinks fit in relation to relevant matters, such as the time by which and the manner in which the work must be carried out.<sup>67</sup>

### **The Commission’s view**

5.73 Although the Commission is of the general view that consideration of reforms to the existing enforcement mechanism for QCAT orders is a wider and more general issue than that raised by this review, it considers there is scope to provide an additional specific mechanism to assist in giving effect to QCAT orders made under the Act.<sup>68</sup>

5.74 This would be of particular relevance where one of the parties is refusing to comply with an order or where there is an ongoing conflict or dispute about whether or to what extent the order has been complied with.

5.75 Although orders might sometimes be framed as ‘guillotine’ orders to address the possibility of non-compliance, this will not always be practical or effective.

5.76 The Commission favours an approach that would allow the non-defaulting party to carry out the work and recover the cost from the defaulting party. However, the Commission is concerned that an automatic statutory right, such as the one formerly included in the *Dividing Fences Act 1953* (Qld), does not provide for the other party to be heard or given notice. Nor does it accommodate potential conflicts about whether the initial order has in fact been complied with, or complied with to a sufficient degree.

5.77 On balance, the Commission considers that such issues should be ventilated before QCAT rather than in enforcement proceedings in a court, so that a decision about whether there has been compliance, and any appropriate further orders, can be made. Accordingly, the Commission considers that the Act should be amended to include provisions, similar to those in section 338(5)–(7) of the *Property Law Act 2007* (NZ), to the general effect that:

- On application by a party, if QCAT is satisfied that an order made under the Act about fencing work or work relating to trees has not been complied with in the time stated in the order, QCAT may order that:
  - the non-defaulting party may carry out the work required under the order (personally or by an employee or agent);<sup>69</sup> and

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<sup>67</sup> *Property Law Act 2007* (NZ) s 338(7).

<sup>68</sup> An enabling Act may include provisions (which may add to, otherwise vary, or exclude provisions of the QCAT ACT) about the enforcement of QCAT’s decisions in a proceeding for jurisdiction conferred by the enabling Act: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(7)(c).

<sup>69</sup> Section 94 of the Act, discussed earlier in this chapter, would apply to allow entry onto the land to carry out work under the order.

- the non-defaulting party may recover as a debt the reasonable expenses of carrying out the work, and the costs of the application, from the party in default.<sup>70</sup>

5.78 A party should be able to bring an application not less than 14 days after the time for compliance with the order has ended. The Act should also provide that a copy of the original order is to be filed with the application. Otherwise, the usual requirements under the QCAT Act for the way in which an application is made and for notice of the application to be given to the other party should apply.<sup>71</sup>

### **Recommendation**

- 5-1 The Act should be amended to include provisions to the general effect that:**
- (a) On application by a party (the ‘non-defaulting party’), if QCAT is satisfied that an order made under the Act about fencing work or work relating to trees (the ‘original order’) has not been complied with in the time stated in the order by the party required to do so (the ‘defaulting party’), QCAT may order that:**
    - (i) the non-defaulting party may carry out the work required under the original order (personally or by an employee or agent); and**
    - (ii) the non-defaulting party may recover as a debt the reasonable expenses of carrying out the work, and the costs of the application, from the defaulting party;**
  - (b) An application for such an order may be made not less than 14 days after the time for compliance with the original order has ended; and**
  - (c) A copy of the original order is to be filed with the application.**

### **Assistance from local government**

5.79 Section 88 of the Act provides an additional enforcement procedure for a QCAT order requiring a tree-keeper to carry out work on a tree. It was included in the Act as ‘a solution of last resort’.<sup>72</sup>

<sup>70</sup> The provisions should clarify that a debt of up to \$25 000 may be recovered in MCD proceedings under the QCAT Act. Similar provision for the recovery as a debt of the ‘reasonable expenses’ incurred by a neighbour is made in s 58(4)–(5) of the Act in relation to particular overhanging branches. As to QCAT’s power to award costs, see the discussion later in this chapter.

<sup>71</sup> For example, the applicant would be required, within seven days after the application is accepted, to give notice of the application to the other party under *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 37(2); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 19(1)(b)(iii), (2).

<sup>72</sup> Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, ‘Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process’ (November 2010) 18.



5.80 It provides that, if the tree-keeper fails to comply within the period stated in the order, the neighbour may (not less than seven days after the end of the stated period) ask the local government to take action under the section.

5.81 If the local government decides to take action under the section, an appropriately qualified person authorised by the local government may enter the tree-keeper's land for either of the following purposes:<sup>73</sup>

- (a) to inspect the tree to determine if the work has been carried out as required by the order;
- (b) to carry out the work if the work has not been carried out as required by the order.

*Examples for paragraph (b)—*

- 1 Some work has been carried out but not in the way required by the order.
- 2 No work has been carried out.

5.82 Ordinarily, at least seven days written notice must be given to the tree-keeper before the person enters the land. The person is to enter the land only to a reasonable extent needed to carry out the work, and is not authorised to enter a dwelling on the land. The person must also be in possession of, and produce on request, a written authority from the local government.<sup>74</sup>

5.83 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 as if they were unpaid amounts under section 95 of the *Local Government Act 2009* (Qld) or section 97 of the *City of Brisbane Act 2010* (Qld).<sup>75</sup>

5.84 A local government may, but is not required, to take action under this section.<sup>76</sup>

<sup>73</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(3). 'Appropriately qualified' means having the qualifications or experience appropriate for carrying out functions under this section: s 88(8).

<sup>74</sup> See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 88(4)–(6), 89, 90. Prior notice is not required if: (a) the tree-keeper consents to entry; (b) entry is required because of the existence or likelihood of a serious risk to safety; or (c) entry is required urgently and the chief executive of the local government has authorised entry without notice. In the latter two cases, notice must, however, be given within 10 business days after the entry has been made.

<sup>75</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(7). The *Local Government Act 2009* (Qld) s 95 and the *City of Brisbane Act 2010* (Qld) s 97 provide that a local government may register a charge over rateable land if the owner of the land owes the local government for overdue rates and charges. Such a charge takes priority over any other encumbrances over the land, except those in favour of the State or a government entity. Those provisions do not limit the other remedies a local government has to recover overdue rates and charges: *Local Government Act 2009* (Qld) s 95(6); *City of Brisbane Act 2010* (Qld) s 97(6). In particular, a local government may recover overdue rates or charges by bringing court proceedings for a debt against the person or, in limited circumstances and in accordance with specific procedures, by selling land in which the liable person has an interest: see, generally, *Local Government Regulation 2012* (Qld) s 134, ch 4 pt 12 div 3; *City of Brisbane Regulation 2012* (Qld) s 126, ch 4 pt 12 div 3.

<sup>76</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 88(2).

5.85 Similar provision allowing local councils to carry out tree work is included in the *Trees (Disputes Between Neighbours) Act 2006* (NSW).<sup>77</sup>

### **Discussion Paper**

5.86 In the Discussion Paper, the Commission referred to the procedure given in section 88 of the Act allowing local governments to carry out work on a tree under a QCAT order where the tree-keeper has not complied.<sup>78</sup>

### **Submissions**

5.87 A small number of submissions commented on the role of local governments in assisting with the enforcement of QCAT orders.

5.88 Some members of the public observed that they had been unable to obtain assistance from the local government.<sup>79</sup> One of these respondents explained that, when contacted under section 88, the local government had responded that it could not assist 'primarily because of resource limitations'.<sup>80</sup>

5.89 QCAT submitted that, anecdotally, local governments are reluctant to act under section 88 and suggested that 'incentives' might be provided for local government assistance.

5.90 However, both the LGAQ and the Brisbane City Council ('BCC') expressed the view that local governments should not be involved in resolving neighbourhood disputes under the Act.

5.91 The LGAQ submitted that the imposition on local governments of further obligations regarding fences or trees 'is very strongly opposed as a form of cost shifting on councils'. It expressed the view, in relation to dividing fences, that resolving disputes between neighbours 'is a matter involving private property, a common law issue, and as such local government has no jurisdiction, involvement or regulatory role'.

5.92 The BCC submitted that it 'should not be given the responsibility of enforcing orders made by QCAT in respect of private neighbourhood disputes', noting that access to local government enforcement options is not available to private litigants in other types of proceedings. It also observed that non-complying tree-keepers may be 'unlikely to respond amicably' to the Council's involvement. The BCC further explained that the mechanism for recovery of the Council's costs under section 88 is 'impractical', noting that the sale of land for arrears of rates is a lengthy process used as a last resort. It suggested that section 88 should, therefore, be omitted or that, if it is retained, 'the recovery action must remain solely at Council's discretion'.

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<sup>77</sup> *Trees (Disputes Between Neighbours) Act 2006* (NSW) ss 17–17A. The council may recover the reasonable costs of carrying out the work from the person in default in a court of competent jurisdiction and the court order may be registered as a charge on the land to secure the payment: ss 17(8), 17A.

<sup>78</sup> *Neighbourhood Disputes Act Discussion Paper* (2015) [3.169] ff, [4.90]–[4.92].

<sup>79</sup> Submissions 4, 40, 22.

<sup>80</sup> Submission 22.

### ***The Commission's view***

5.93 The Commission acknowledges that section 88 of the Act does not appear to have been frequently utilised. Nevertheless, the Commission considers it appropriate for the Act to continue to include provisions to allow a local government to carry out work under a tree order if the tree-keeper has failed to comply, particularly for cases where the tree poses a significant danger. It sets out the circumstances in which a local government may take such action, if it decides to do so, including important safeguards for the tree-keeper.

5.94 The Commission has considered whether the Act should be amended to require a local government to take action under section 88, for example, by giving QCAT power to make an order directing the local government to carry out the necessary work. On balance, however, the Commission is persuaded that the provision should continue in its present terms. The Commission is concerned that, if assistance were made obligatory, local governments would need to establish new procedures with additional attendant expenses, which may have unintended implications.

5.95 Neither does the Commission consider it necessary for section 88 to be amended to provide an alternative mechanism for local governments to recover the costs of work carried out under that section.

## **PENALTIES**

### **Current provisions for penalties and other sanctions**

5.96 Most provisions for penalties and other sanctions relevant to the Act are contained in the QCAT Act and are of general application to all QCAT proceedings, including provisions about costs orders, offences, and punishment for contempt. However, the Act also contains a specific penalty provision in relation to orders about trees.

### **Costs orders**

5.97 As explained in Chapter 4 of this Report, the usual rule under the QCAT Act is that each party bears the party's own costs.<sup>81</sup> However, section 102 of the QCAT Act provides that QCAT may make an order requiring a party to pay all or a stated part of the costs of another party to the proceeding if it considers 'the interests of justice require it' to do so. In deciding whether to award costs under that section, QCAT may have regard to various factors including:<sup>82</sup>

- whether a party is acting in a way that unnecessarily disadvantages another party to the proceeding (for example, by not complying with a direction from the tribunal without a reasonable excuse, not complying with the QCAT Act

<sup>81</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100. See also *Choi v Mee Wah To (No 3)* [2014] QCAT 030, [10] (Member Forbes); *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412, [24], [29] (Wilson J, President). An enabling Act may provide otherwise: s 100.

<sup>82</sup> See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 48(1)(a)–(g), 102(3). QCAT also has power to award costs in some additional limited circumstances under the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) ss 85, 86.

or the enabling Act, vexatiously conducting the proceeding, or failing to attend the hearing without reasonable excuse);

- the nature and complexity of the dispute;
- the relative strengths of the claims made by each of the parties; and
- the financial circumstances of the parties.

5.98 In the case of MCD matters, QCAT is generally limited to an award of costs against an unsuccessful respondent for the amount of the application fee paid by the applicant.<sup>83</sup>

5.99 Costs are awarded to 'indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings', not to punish the unsuccessful party.<sup>84</sup>

5.100 Costs orders have been made in some cases under the Act but are not common.<sup>85</sup>

### **Offence for non-compliance with non-monetary orders**

5.101 Section 213 of the QCAT Act makes it an offence for a person, without reasonable excuse, to contravene a decision of the tribunal. This applies to an order or direction given by QCAT as well as QCAT's final decision, but does not apply if or to the extent that the decision is a monetary decision.<sup>86</sup> The maximum penalty prescribed for the offence is 100 penalty units — presently, \$11 780.<sup>87</sup>

5.102 A complainant may take a proceeding for an offence under section 213 by making a written complaint to a justice under the *Justices Act 1886* (Qld).<sup>88</sup> That Act contains detailed provisions about the procedures for making and dealing with such complaints. In general, it provides for a summons to be issued requiring the

<sup>83</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(2); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 83. However, if the MCD is a 'minor debt claim', QCAT may order the party to pay an amount for the application filing fee, a fee charged for electronically filing a document, a service fee and travelling allowance at the prescribed rate, or a business name or company search fee: *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) ss 4, 84, sch Dictionary (definition of 'minor debt claim').

<sup>84</sup> *Latoudis v Casey* (1990) 170 CLR 534, 543 (Mason CJ), quoted in *Coral Homes Qld Pty Ltd v Queensland Building Services Authority* [2014] QCAT 093, [28] (Member Ryan). If QCAT makes a costs order under the QCAT Act or an enabling Act, it must fix the costs if possible, having regard to the nature of the proceeding or in accordance with the rules: see *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 107; *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 87.

<sup>85</sup> Information provided by QCAT, 7 September 2015 (Submission 61). See *Johnson v Fraser* [2014] QCAT 614 (costs of the expert tree assessment); *Werndly v Orchard* [2014] QCAT 377 (costs of the original application including legal costs).

<sup>86</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 8 sch 3 Dictionary (definition of 'decision', para (a)), 213(2).

<sup>87</sup> See *Penalties and Sentences Act 1992* (Qld) ss 5(1)(e), (2), 5A(1); *Penalties and Sentences Regulation 2015* (Qld) s 3. The present value of one penalty unit is \$117.80.

<sup>88</sup> *Acts Interpretation Act 1954* (Qld) ss 42, 44(1), (2)(d), (4); *Justices Act 1886* (Qld) s 42(1). A complaint must be made within one year from the time when the matter of complaint arose: *Justices Act 1886* (Qld) s 52(1). The approved form for a complaint is available on the Queensland Court's website at <<http://www.courts.qld.gov.au/forms>>. See *Justices Act 1886* Form 4.

defendant to appear before a Magistrates Court for the complaint to be heard and decided.<sup>89</sup>

### **Offence for non-compliance with a tree order**

5.103 In addition to section 213 of the QCAT Act, section 77 of the Act includes a specific offence provision for non-compliance with an order made under Chapter 3 of the Act (a 'tree order').

5.104 It provides that a person must not fail to comply with 'a requirement imposed on the person' by a tree order, unless the person has a reasonable excuse.<sup>90</sup> The maximum penalty prescribed under that section is 1000 penalty units — presently \$117 800, a substantially higher amount than for the general non-compliance offence under the QCAT Act.<sup>91</sup>

5.105 It was explained when the Bill was introduced that the 'high penalty will encourage compliance and highlights the serious consequences that might occur from failing to remedy the nuisance as ordered by QCAT'.<sup>92</sup>

5.106 Proceedings for an offence against section 77 are a matter for complaint under the *Justices Act 1886* (Qld).<sup>93</sup>

### **Other offences under the QCAT Act**

5.107 The QCAT Act also contains a number of other general offences in relation to witnesses (for example, failing without reasonable excuse to answer questions or produce a document as required), giving false or misleading information, and improperly influencing participants in proceedings.<sup>94</sup> The maximum prescribed penalty for each of those offences is 100 penalty units.<sup>95</sup>

### **Contempt**

5.108 The QCAT Act also gives QCAT power to punish for a contempt of the tribunal. Section 218 of the QCAT Act sets out the circumstances in which a person may be in contempt of the tribunal, including if the person:<sup>96</sup>

- insults an official while the official is sitting on or attending a proceeding;

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<sup>89</sup> See *Justices Act 1886* (Qld) ss 53, 54, 142, 144–6, pts 4, 6.

<sup>90</sup> A similar offence is included in the *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 15, also with a prescribed maximum penalty of 1000 penalty units.

<sup>91</sup> See n 87 above.

<sup>92</sup> Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 38.

<sup>93</sup> See [5.102] above.

<sup>94</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 214, 216–217.

<sup>95</sup> As to the value of a penalty unit and the procedure for dealing with such offences, see n 87 and [5.102] above.

<sup>96</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 218(1)(a)–(f). An 'official' means the principal registrar or a member, adjudicator, assessor, registrar, registry staff member or Magistrates Court staff member: s 218(3).

- obstructs or assaults a person attending a proceeding;
- obstructs or hinders a person from complying with a decision of the tribunal or a notice given by the tribunal to give evidence;
- unreasonably interrupts a proceeding;
- creates or continues a disturbance in or near a place where the tribunal is sitting; or
- contravenes an undertaking the person has given to the tribunal.

5.109 A person may also be in contempt if the person commits an offence against section 213 of the QCAT Act or any of the other offences, mentioned above, in that part of the Act.<sup>97</sup>

5.110 QCAT has the protection, powers, jurisdiction and authority of the Supreme Court, and is to comply with the UCPR, in relation to contempt.<sup>98</sup> Under the UCPR, the court has power to direct that the person be brought before it to hear the contempt charge and, if it decides the person has committed a contempt, may punish the person by making an order that may be made under the *Penalties and Sentences Act 1992* (Qld), including for a fine or imprisonment.<sup>99</sup>

5.111 QCAT's powers to punish for contempt may be exercised on application or on its own initiative, but may be exercised only by a judicial member.<sup>100</sup>

5.112 Contempt proceedings before QCAT are not common, and QCAT does not consider contempt to be a 'preferred option' for enforcing compliance with its orders.<sup>101</sup>

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<sup>97</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 218(1)(g), referring to offences against ch 5 pt 1 of that Act, including ss 214, 216 and 217, referred to at [5.107] above. If a person's conduct is both contempt of the tribunal and an offence, the person may be proceeded against either for the contempt or the offence, but is not liable to be punished twice for the same conduct: s 221(2).

<sup>98</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 219(1)–(2).

<sup>99</sup> See generally *Uniform Civil Procedure Rules 1999* (Qld) ch 20 pt 7. Those provisions apply with the necessary changes as prescribed under *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 99, for example, that a reference to a 'court' is taken to be a reference to the 'tribunal'. The court may also impose a punishment on conditions: r 930(4). At common law, contempt must be proved beyond reasonable doubt: *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ), 535 (McHugh J), cited in *Rayner v Trabme Pty Ltd* [2013] QCATA 212, [58] (Wilson J, President).

<sup>100</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 219(4)–(5).

<sup>101</sup> Information provided by QCAT, 7 September 2015 (Submission 61). QCAT has explained that there have been only two known contempt applications related to neighbourhood disputes under the Act and both were resolved without the need for a final hearing.

## Whether any changes are required

### *Discussion Paper*

5.113 In the Discussion Paper, the Commission sought submissions about 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.<sup>102</sup>

### *Submissions*

5.114 Some submissions to the review suggested changes to the penalties provided under the Act.

5.115 One member of the public submitted that ‘deliberate breaches of [the] rules should automatically incur a penalty that directly reflects the seriousness of the breach’.<sup>103</sup>

5.116 Strata Community Australia (Qld) considered that there should be a pecuniary penalty of between \$2000 and \$5000, and an entitlement for the applicant to seek recovery of its enforcement costs and damages for the non-compliance, upon proof that the order was served on the respondent but was not complied with in the stated time.

5.117 Another member of the public submitted that there should be penalties, sanctions or costs in circumstances where the actions of a party to a dispute are frivolous or vexatious, particularly if safety or danger is in issue.<sup>104</sup> In this respondent’s view, this ‘would provide a disincentive to baseless or unreasonable complaints and an incentive to compromise in solving disputes’.

5.118 The Queensland Arboricultural Association suggested that the Act should provide for ‘full cost recovery in the event that non-compliance is found to be deliberate’.

5.119 A member of the public suggested that penalties should be ‘defined in detail and promulgated to all parties’.<sup>105</sup>

5.120 QCAT did not express a view about changes that should be made to the Act to improve the appropriateness of the existing penalties. However, it commented that the prosecution process for offences is not widely understood so that ‘[p]enalty offences would generally not be effective to encourage compliance with orders’. It stated that private prosecutions for offences could be made easier to understand. It suggested that another option to improve enforcement and compliance with QCAT orders might be to give QCAT ‘specific power (through a judicial member) to deal with offences under section 213 of the QCAT Act’, although ‘additional resourcing would be required’.

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102 *Neighbourhood Disputes Act Discussion Paper* (2015) [4.119]–[4.121], Question 4-13.

103 Submission 26.

104 Submission 29.

105 Submission 49.

5.121 QCAT explained that it does not have any information about whether section 77 of the Act has ever been used. It commented that section 77 could be extended to orders about dividing fences ‘for the sake of consistency’, but queried whether this would have any real utility.

### **The Commission’s view**

5.122 The focus of the Act is on assisting neighbours to resolve their disputes about dividing fences and trees in a ‘friendly, timely and accessible’ way.<sup>106</sup>

5.123 As a starting point, therefore, the Commission questions whether it is appropriate or in keeping with the objects of the Act to retain the offence provision in section 77 of the Act for non-compliance with a requirement imposed on a person by an order made under Chapter 3 (a ‘tree order’).

5.124 As explained above, section 77 applies if a person does not comply with ‘a requirement imposed on the person’ by the order. It is not specifically limited to a requirement to carry out work on a tree and may, therefore, extend to a requirement to pay an amount of money. If so, section 77 goes further than section 213 of the QCAT Act, which does not apply to the extent that the decision is a monetary decision.

5.125 It is unclear whether any complaint has been filed under section 77. It is equally unclear whether section 77 has any deterrent effect. Although a tree order might be made specifically to remedy or prevent serious injury or damage, the Commission is not persuaded that it is necessary to provide a significantly higher penalty for non-compliance with a tree order than for any other order under the Act.<sup>107</sup> Neither does the Commission consider it necessary to make every non-compliance with a requirement imposed by a tree order an offence.

5.126 The Commission notes that, as previously stated, section 213 of the QCAT Act provides that a person must not, without reasonable excuse, contravene a decision of the tribunal, although it does not apply to the extent that the decision is a monetary decision. The Commission considers that this section is sufficient to deal with contravention of an order made by QCAT under the Act, including a tree order.

5.127 More generally, the Commission considers that the appropriate response under the Act to deal with non-compliance is not punishment but practical measures to give effect to the order. To this end, the Commission has made recommendations earlier in this chapter to provide a mechanism for a non-defaulting party to carry out the work under an order in the event of non-compliance.

<sup>106</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations). See *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 3 (Objects of the Act), discussed in Chapter 6 of this Report.

<sup>107</sup> A penalty should be proportionate to the offence, penalties within legislation should be consistent with each other, and a higher penalty should be provided for an offence of greater seriousness than for a lesser offence: Office of Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* (2008) [3.6.2]. Extremely high penalty levels may raise the question whether the provision has sufficient regard to the rights and liberties of the persons potentially subject to the penalty: *ibid.*



5.128 The Commission also observes that QCAT has general powers under the QCAT Act to dismiss proceedings that are frivolous, vexatious or misconceived,<sup>108</sup> to award costs in appropriate cases, and, in extreme cases, to punish for contempt.

5.129 For these reasons, the Commission considers that section 77 of the Act is unnecessary and should be removed, and that it is not necessary or appropriate for the Act to include any new penalty provisions.

5.130 The Commission has considered the suggestion that QCAT be given specific power to deal with offences against section 213 of the QCAT Act, rather than relying on the procedure for making complaints under the *Justices Act 1886* (Qld). However, this would represent a significant change and is more properly a matter for consideration in any wider review of the QCAT Act and QCAT's general powers.

### ***Recommendation***

**5-2 The Act should be amended to omit section 77.**



# Chapter 6

## Key Conclusions and Recommendations

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### INTRODUCTION

6.1 This chapter provides a summary of the key conclusions and recommendations made by the Commission in this Report as they relate to the terms of reference. Suggestions made by the Commission about enhancing public education and awareness are also discussed.

### OBJECTS OF THE ACT

6.2 The terms of reference require the Commission to consider whether the objects of the Act remain valid and whether the Act is meeting those objects.<sup>1</sup>

6.3 The DJAG review found that two of the most common causes of complaints between neighbours were dividing fences and nuisance trees. It identified a need to modernise the *Dividing Fences Act 1953* (Qld), and to provide an alternative to

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<sup>1</sup>

The terms of reference are set out in full in Appendix A to this Report.

complex and expensive common law claims to deal with nuisance trees between neighbours.<sup>2</sup>

6.4 The Act was introduced to meet those needs by providing clearer rules and more effective dispute resolution options, including by conferring jurisdiction on the Queensland Civil and Administrative Tribunal ('QCAT') to make orders about dividing fences and trees.<sup>3</sup> Its focus is on helping neighbours to avoid and reduce disputes, and to resolve them in a 'friendly, timely and accessible manner'.<sup>4</sup>

6.5 Accordingly, section 3 of the Act provides that the objects of the Act are:

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

6.6 It appears that neighbourhood disputes, including those about dividing fences and trees, continue to be a source of concern for neighbours. This is evident from the number of requests for information and advice received by community legal centres and the Dispute Resolution Branch of DJAG ('DRB').

6.7 In the four years since the introduction of the Act:

- Community legal centres across Queensland have provided 7164 information contacts, 6479 advice contacts and 25 community legal education ('CLE') activities relating to neighbourhood disputes;<sup>5</sup> and

<sup>2</sup> Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Neighbourhood Disputes Resolution Bill 2010: Results of Consultation Process' (November 2010) 3 at Department of Premier and Cabinet (Qld), *Cabinet documents* (24 April 2015) <<http://rti.cabinet.qld.gov.au/cabinet.aspx>>.

<sup>3</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations); Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 1–5.

<sup>4</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 2010, 4372 (CR Dick, Attorney-General and Minister for Industrial Relations).

<sup>5</sup> Information provided by Queensland Association of Independent Legal Services Inc, 15 September 2015. These figures, for the years 2011–12 to 2014–15, were drawn from the national Community Legal Services Information System. 'Neighbourhood disputes' includes complaints about neighbours and other neighbourhood disputes, including matters falling outside the Act. Community legal centres also provide casework and law reform activities. Broken down for each of the four years, the figures are as follows:

	Information	Advice	CLE activities	New cases	Law reform activities
2011–12	1699	1738	11	113	1
2012–13	2036	1696	4	78	0
2013–14	1786	1609	3	89	0
2014–15	1643	1436	7	81	1

Caxton Legal Centre Inc has indicated that, in the previous three years, it has provided a total of 380 legal advices, with 138 of those relating to fences and 89 relating to trees: Information provided by Caxton Legal Centre Inc, 19 August 2015 (Submission 58). Other neighbourhood disputes forming part of the total of 380 include complaints about neighbours (59), noise (10), and other neighbourhood disputes not classified (84). The total of 380 does not include cases involving peace and good behaviour order applications which sometimes relate to escalating fence or tree disputes: *ibid*.

- DRB has handled 15 190 initial contacts about neighbourhood issues, with 11 187 (74%) of those relating to fences or trees.<sup>6</sup>

6.8 It also appears that there is a relatively strong and consistent demand for the resolution of disputes before QCAT. In the four years since the introduction of the Act, QCAT has received:<sup>7</sup>

- a total of 1146 applications about dividing fences; and
- a total of 789 applications about trees.

6.9 Data provided by DRB and QCAT also suggest that many issues are successfully resolved at mediation or another form of ADR, whether outside or as part of the QCAT process:

- In the four years since the introduction of the Act, DRB has conducted 324 mediations for disputes between neighbours, with 154 (48%) of those relating to fences or trees and an agreement rate of 84%;<sup>8</sup>
- In 2014–15, QCAT referred 64 dividing fence applications to mediation, with an agreement rate of 55%;<sup>9</sup> and
- In 2014–15, QCAT received 173 tree dispute applications, and resolved 28 such applications after compulsory conference or a tree assessment without the need to progress to hearing.<sup>10</sup>

6.10 Although the actual incidence of neighbourhood disputes is not known, a comparison between the high number of information and advice requests made to community legal centres and DRB, with the number of applications lodged with

<sup>6</sup> Information provided by DRB, 17 August 2015 (Submission 54). The figures cover the span of years from 2011–12 to 2014–15 and were drawn from DRB's 'Mediation Organiser' database.

<sup>7</sup> Information provided by QCAT, 7 and 20 July 2015. The figures for dividing fence and tree dispute applications (including debt dispute applications) for the span of years between 2011–12 and 2014–15, and for dividing fence applications filed under the former *Dividing Fences Act 1953* (Qld) ('DFA') between 2009–10 and 2011–12, are as follows:

	Dividing Fence Applications	Tree Applications	Dividing Fence Debt Dispute Applications	Tree Debt Dispute Applications
2009–10	136, under former DFA	—	—	—
2010–11	153, under former DFA	—	—	—
2011–12	242, including 59 applications made under former DFA	153	7	4
2012–13	252	270	1	2
2013–14	321	183	4	2
2014–15	313	173	6	2

<sup>8</sup> Information provided by DRB, 17 August 2015 (Submission 54). The figures cover the span of years from 2011–12 to 2014–15 and were drawn from DRB's 'Mediation Organiser' database.

<sup>9</sup> Information provided by QCAT, 20 July 2015. In 2013–14, 86 of 321 dividing fence applications were referred to mediation, with an agreement rate of 58%. Figures for preceding years were not provided.

<sup>10</sup> Information provided by QCAT, 7 July 2015. The numbers resolved represent totals for that period, not necessarily directly referable to the number of compulsory conferences or tree assessments held during the same period. ADR processes in QCAT are discussed in Chapter 4 of this Report.

QCAT may also suggest that many neighbours are able to resolve their issues informally.<sup>11</sup>

6.11 The Commission has also received numerous submissions, including from members of the community, which detail incidents of neighbourhood disputes about dividing fences and trees, and provide feedback about the operation and effectiveness of the Act.

6.12 The validity of the Act's objects, and whether the objects are being met, can be judged only in light of the relatively short time in which the Act has been operating. This is particularly so for the new statutory scheme for trees which was introduced by the Act.

6.13 That said, the Commission considers that the objects of the Act remain valid. There is a continuing need in the community for a State-wide statutory framework that sets out rules about the rights and responsibilities of neighbours in relation to dividing fences and trees, and provides simple and accessible mechanisms for resolving disputes between neighbours about dividing fences and trees.

6.14 Overall, the Commission considers that the Act is meeting its objects. The Act generally provides clear rules about responsibilities for dividing fences and trees and effective and accessible mechanisms to facilitate the resolution of disputes.

6.15 However, the Commission considers that there is room for improvement. The Commission makes a number of recommendations for amendments to the Act. Most are for relatively small changes, but some are more substantial.

6.16 The Commission generally recommends only minor changes to Chapter 2 of the Act, which deals with dividing fences.

6.17 The more substantial recommendations for change are directed toward Chapter 3 of the Act, which deals with trees. The present structure of Chapter 3 is confusing, largely due to the significantly different rights and obligations that attach in different categories of cases. The Commission recommends that the structure of Chapter 3 be reorganised so that the relevant provisions are more easily understood and applied.<sup>12</sup>

6.18 The Commission's key conclusions and recommendations for amendments to the Act as they relate to each of the terms of reference, are summarised below.

## **ALLOCATION OF RESPONSIBILITIES, LIABILITIES AND RIGHTS**

6.19 The terms of reference require the Commission to consider whether the allocation of responsibilities, liabilities and rights under the Act promotes resolution by neighbours of issues relating to dividing fences and trees.

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<sup>11</sup> Informal resolution is discussed in Chapter 4 of this Report.

<sup>12</sup> Chapter 3, Rec 3-1.

## Dividing fences

6.20 With one relatively minor exception, the Commission considers that Chapter 2 of the Act generally provides for a fair allocation of the responsibilities, liabilities and rights of adjoining owners in relation to dividing fences.

6.21 The Commission recommends that section 25 of the Act, which creates a liability in a person who acquired or acquires an interest or title in certain land from the State to contribute to the cost of an already constructed dividing fence, should not apply if the fence was constructed more than five years before the person acquired or acquires the interest or title.<sup>13</sup>

## Trees

6.22 The Commission considers that, subject to some exceptions, the Act strikes the right balance in the allocation of responsibilities, liabilities and rights of tree-keepers and neighbours. The Commission recommends three amendments to alter the rights of a neighbour under Chapter 3 of the Act.

6.23 At present, the Act does not apply to trees on a parcel of land more than 4 hectares. The Commission recommends that the scope of Chapter 3 of the Act be extended, in a limited way, to give a neighbour affected by a tree on land more than 4 hectares (to which Chapter 3 of the Act would otherwise apply) the right to apply to QCAT under Part 5 of Chapter 3 of the Act but not to access Part 4 of Chapter 3 (the notice procedure for particular overhanging branches).<sup>14</sup>

6.24 The Commission concludes that there should not be any other changes to the current application or exemption provisions in section 42 of the Act.

6.25 Second, the Commission recommends that the scope of the Act be narrowed to limit QCAT's power to make an order about severe obstruction of sunlight under section 66(3)(b)(i) to sunlight that existed at the time the neighbour took possession of the land.<sup>15</sup>

6.26 Third, the Commission recommends that the scope of the Act be narrowed to limit QCAT's power to make an order about severe obstruction of sunlight or severe obstruction of a view under section 66(3) of the Act to sunlight or a view that existed when the neighbour took possession of the land or no longer than six years before the neighbour's application is filed, whichever is the lesser.<sup>16</sup>

6.27 The Commission considers that the common law, as it relates to trees, should not be further altered by the Act.<sup>17</sup>

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<sup>13</sup> Chapter 2, Rec 2-3.

<sup>14</sup> Chapter 3, Rec 3-2.

<sup>15</sup> Chapter 3, Rec 3-14.

<sup>16</sup> Chapter 3, Recs 3-15, 3-16.

<sup>17</sup> This is discussed in Chapter 3 of this Report.

## DISPUTE RESOLUTION PROCESSES UNDER THE ACT

6.28 The terms of reference require the Commission to consider whether the dispute resolution processes under the Act are fair, just and effective.

6.29 Overall, the Commission considers that the dispute resolution processes under the Act are fair, just and effective.

6.30 The Commission recommends amendments to:

- provide a stronger focus on informal resolution by neighbours before approaching QCAT and to give greater overall coherence to the provisions in the Act directed to that end, including by providing examples of steps a neighbour might take to attempt to resolve an issue informally;<sup>18</sup> and
- give greater procedural consistency between tree disputes and dividing fence disputes before QCAT, and to improve the accessibility of QCAT proceedings, by:<sup>19</sup>
  - extending the timeframe for making an application to QCAT for orders about fencing work, under sections 31 and 32 of the Act;
  - extending the ability to apply to QCAT in limited circumstances in the absence of the other party from dividing fence disputes (under section 37 of the Act) to tree disputes; and
  - removing the provision in section 34 of the Act for an adjoining owner to a dividing fence dispute to be represented in QCAT proceedings by a real estate agent.

## SIMPLICITY, EASE OF USE, AND CLARITY OF THE ACT

6.31 The terms of reference require the Commission to consider the simplicity and ease of use of the Act for members of the community, including clarity of the legislative provisions.

### Dividing fences

6.32 The Commission considers that, overall, the provisions of Chapter 2 of the Act are clear and easy to understand. However, the Commission recommends a few minor amendments to provide more guidance as to the application of some of the definitions that apply for the purposes of that Chapter, including the key definition of 'land'.<sup>20</sup>

### Trees

6.33 The Commission considers that the structure of Chapter 3 of the Act is confusing and should be reorganised so that the relevant provisions are more easily

<sup>18</sup> Chapter 4, Recs 4-1 to 4-11.

<sup>19</sup> Chapter 4, Recs 4-12 to 4-14.

<sup>20</sup> Chapter 2, Rec 2-1; see also Rec 2-2 (regarding the definition of 'sufficient dividing fence').



understood and applied. The aim of the proposed restructure is to more clearly outline the rights and responsibilities of a neighbour and a tree-keeper, structured around each of the various potential tree issues faced by a neighbour, and the remedies available to a neighbour in each scenario. Of particular significance is the issue of overhanging branches and the jurisdiction of QCAT to resolve any tree disputes.<sup>21</sup>

6.34 Notwithstanding this view, the Commission makes a number of recommendations for changes to the Act based on its current drafting.

6.35 The Commission recommends changes to clarify the scope of Chapter 3 of the Act, including amending:

- section 42(5), to declare that Chapter 3 does not apply to land dedicated as a road for public use, including footpaths;<sup>22</sup>
- sections 48(1)(a) and 49(1)(a), to provide that a lot owner includes a lot owner under the BCCMA and BUGTA;<sup>23</sup>
- example 3 under section 59, to provide that QCAT's jurisdiction to deal with overhanging branches more than 2.5 metres above the ground is limited to a situation where the threshold requirements in sections 46(a)(ii) and 66(2) are met.<sup>24</sup>

## Dispute resolution

6.36 The Commission makes a number of recommendations in Chapters 4 and 5 of the Report which are directed toward the simplicity and ease of use of the Act for members of the community. In particular, the Commission considers the provisions in the Act encouraging neighbours to resolve issues informally should be expanded and makes recommendations about this in Chapter 4, as noted above.

6.37 The Commission also considers the Act should provide greater assistance to neighbours in enforcing orders made under the Act. As explained below, the Commission recommends provisions in the Act for non-defaulting parties to carry out the work under an order in certain circumstances to address this.

## QCAT'S POWERS TO RESOLVE ISSUES

6.38 The terms of reference require the Commission to consider whether the Act provides QCAT with sufficient powers to resolve issues.

## Dividing fences

6.39 The Commission considers that Chapter 2 of the Act generally confers QCAT with appropriate and sufficient powers to resolve dividing fence disputes.

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<sup>21</sup> Chapter 3, Rec 3-1.

<sup>22</sup> Chapter 3, Rec 3-3.

<sup>23</sup> Chapter 3, Recs 3-5, 3-6.

<sup>24</sup> Chapter 3, Rec 3-13.

However, to give QCAT greater flexibility to make orders to resolve dividing fence disputes in a wide range of circumstances, the Commission recommends amendments to the Act to clarify the scope of QCAT's powers, and to enhance QCAT's powers to make urgent orders to prevent the unauthorised construction or demolition of a dividing fence.<sup>25</sup> The Commission also recommends expanding the list of discretionary factors QCAT may take into account when considering whether a dividing fence is a sufficient dividing fence.<sup>26</sup>

## Trees

6.40 The Commission considers that Chapter 3 of the Act generally confers QCAT with appropriate and sufficient powers to resolve disputes in respect of trees.

6.41 The Commission notes however, that section 61 of the Act, which on its face purports to provide QCAT with a broad jurisdiction in respect of 'any matter in relation to a tree [where] ... land is affected by a tree', is misleading. Other provisions in Part 5 of the Act place limits upon QCAT's powers through requirements that must be satisfied before QCAT can make an order.<sup>27</sup>

6.42 The Commission recommends some expansion of the matters QCAT must consider in exercising its discretion, including:<sup>28</sup>

- any risks associated with the tree in the event of a normal weather event (rather than being limited to risks associated with an extreme weather event); and
- whether the tree detracts from the amenity of the land affected by the tree.

## REMEDIES AND PENALTIES INCLUDING FOR NON-COMPLIANCE WITH QCAT ORDERS

6.43 The terms of reference require the Commission to consider the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders.

6.44 The Commission recommends that the remedies available to a neighbour be enhanced by increasing the tree-keeper's liability under Part 4 of Chapter 3 from the current maximum contribution of \$300 to a maximum of \$500 or any greater amount prescribed by regulation.<sup>29</sup>

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<sup>25</sup> Chapter 2, Recs 2-7, 2-9.

<sup>26</sup> Chapter 2, Rec 2-8.

<sup>27</sup> See especially s 66(2)–(3) of the Act, discussed in Chapter 3 of this Report.

<sup>28</sup> Chapter 3, Recs 3-11, 3-12.

<sup>29</sup> Chapter 3, Rec 3-10.

6.45 The Commission recommends amendments to shift the focus away from punishment and toward a practical approach to deal with non-compliance with QCAT orders by:<sup>30</sup>

- making provision, in the event of non-compliance with a QCAT order requiring work to be carried out, for an application to be made to QCAT for an order allowing the non-defaulting party to carry out the work and recover the reasonable expenses of carrying out the work and the costs of the application from the defaulting party; and
- removing the offence in section 77 of the Act for non-compliance with a tree order.

## **OPERATION OF THE ACT IN RELATION TO OTHER ACTS OR LAWS**

6.46 The terms of reference require the Commission to consider the operation of the Act in relation to other Acts or laws.

### **Dispute resolution and compliance**

6.47 In considering the dispute resolution processes under the Act, the Commission has had regard to the provisions of general application in the QCAT Act and the QCAT Rules. For example, as noted above, the Commission recommends that section 34 of the Act, which provides for adjoining owners to be represented in QCAT proceedings by a real estate agent, should be omitted because it is unnecessary in light of section 43 of the QCAT Act. Section 43 of the QCAT Act provides for representation by a lawyer or other appropriate person with the tribunal's leave.

6.48 The Commission has also had regard to other Acts and laws in its consideration of issues relating to non-compliance. With one key exception,<sup>31</sup> the Commission takes the approach that the enforcement of orders is more appropriately a matter for any review of the QCAT Act and/or the relevant provisions of the UCPR dealing with the enforcement of court orders.

6.49 The Commission recommends the omission of section 77 of the Act, partly on the basis that section 213 of the QCAT Act provides an adequate offence provision for non-compliance with non-monetary decisions.<sup>32</sup>

### **Trees**

6.50 The Commission identifies some minor issues in respect of the operation of Chapter 3 of the Act in relation to other Acts and laws, which are the subject of recommendations.

6.51 The Commission highlights some confusion with the definition of a 'neighbour' in section 49 of the Act in the way the Act operates with the LTA, BCCMA,

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<sup>30</sup> Chapter 5, Recs 5-1, 5-2.

<sup>31</sup> See Rec 5-1 in which the Commission recommends new provisions in the Act to provide a mechanism for a non-defaulting party to carry out work under an order in the event of the other party's non-compliance.

<sup>32</sup> Chapter 5, Rec 5-2.

and BUGTA. This confusion concerns trees affecting either ‘scheme land’ comprised in a community titles scheme under the BCCMA or ‘a parcel of land the subject of a plan’ under the BUGTA. The Commission recommends the Act be amended to correct this confusion.<sup>33</sup>

### **OPERATION AND EFFECT OF SECTION 66(3)(b)(ii) OF THE ACT**

6.52 The terms of reference require the Commission to consider the operation and effect of section 66(3)(b)(ii) of the Act, including whether it should operate retrospectively having regard to section 178 of the *Property Law Act 1974* (Qld).

6.53 Under section 66(3)(b)(ii) of the Act, QCAT has jurisdiction to make an order to prevent a severe obstruction of a view, from a dwelling on a neighbour’s land, that existed when a neighbour took possession of the land, even if that occurred before the commencement of the Act.

6.54 The Commission considers, however, that a neighbour should not have an open-ended period within which to bring an application under section 66(3)(b)(ii) seeking to remedy a severe obstruction of a view. As noted above, the Commission recommends the scope of the Act should be narrowed, to further limit QCAT’s power under section 66(3) of the Act to make an order about severe obstruction of a view to a view that existed when the neighbour took possession of the land or ‘no longer than six years before the neighbour’s application is filed, whichever is the lesser’.<sup>34</sup> (The Commission recommends a similar limitation for severe obstruction of sunlight under section 66(3)(b)(i) of the Act.)<sup>35</sup>

### **OPERATION AND EFFECT OF SECTION 57 OF THE ACT**

6.55 The terms of reference require the Commission to consider the operation and effect of section 57 of the Act.

6.56 Overall, the Commission considers that no change should be made to the height or depth limits for a notice to cut and remove overhanging branches under section 57 (and Part 4 of Chapter 3) of the Act.

6.57 However, the Commission considers that the tree-keeper’s current maximum liability, under Part 4 of Chapter 3, of \$300 for expenses incurred is insufficient to meet the costs to the neighbour of having work done to cut and remove overhanging branches 2.5 metres or less above the ground.

6.58 As noted above, the Commission recommends that a tree-keeper’s liability be increased to a maximum of \$500 or any greater amount prescribed by regulation.<sup>36</sup>

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<sup>33</sup> Chapter 3, Recs 3-5 to 3-8.

<sup>34</sup> Chapter 3, Rec 3-16.

<sup>35</sup> Chapter 3, Rec 3-15.

<sup>36</sup> Chapter 3, Rec 3-10.

6.59 The Commission considers that the current frequency of one notice per 12 months is appropriate and should not be changed.

6.60 Finally, the Commission considers that the Act should be amended to provide that a notice to cut and remove overhanging branches must be in the approved form.<sup>37</sup> Where the approved form is used, it will ensure that the requirements for the notice are complied with. An added benefit of the approved form is that it contains other useful information for both the neighbour and tree-keeper.

## DISPUTES ABOUT RETAINING WALLS

6.61 The terms of reference require the Commission to consider whether the scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.

6.62 The Commission does not consider that the scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries beyond the limited jurisdiction conferred on QCAT under section 35(1)(f) to order work for a retaining wall.<sup>38</sup>

## PUBLIC EDUCATION AND AWARENESS

6.63 It is recognised that the 'viability' of a legislative scheme 'is often substantially dependent on the availability and quality of relevant information'. Accompanying education and information strategies are frequently beneficial when trying to impact on people's behaviour.<sup>39</sup>

6.64 The Queensland Government website gives general information about the Act and the ways people might attempt to resolve dividing fence and tree issues. It also directs people to other services or agencies for additional assistance — community legal centres and the Queensland Law Society (for help obtaining legal advice), Dispute Resolution Centres (for mediation), and QCAT (where an application to the tribunal might be appropriate).<sup>40</sup>

6.65 As explained earlier, community legal centres also play a valuable role in providing information and advice in relation to neighbourhood disputes,<sup>41</sup> and DRB provides a significant information and referral service for people seeking assistance with neighbourhood disputes.

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37 Chapter 3, Rec 3-9.

38 This is discussed in Chapter 2 of this Report.

39 Australian Public Service Commission, *Smarter Policy: Choosing policy instruments and working with others to influence behaviour* (Commonwealth of Australia, 2009) 9.

40 See, eg, Queensland Government, *Step-by-step guide to resolving tree and fence disputes* (3 September 2013) Your rights, crime and the law <<http://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/resolving-tree-and-fence-disputes/step-by-step-guide-to-resolving-tree-and-fence-disputes/>>.

41 For example, in addition to its self-help kits on dividing fences and trees and information provided in its *Queensland Law Handbook*, Caxton Legal Centre Inc offers face-to-face presentations for community groups and professional associations on a range of issues, including fencing laws: Caxton Legal Centre Inc, *Community Legal Education* <[https://caxton.org.au/community\\_legal\\_information.html](https://caxton.org.au/community_legal_information.html)>.

6.66 It is evident from the submissions made to the review that there is some confusion in the community about the operation and scope of the Act. Throughout this Report, the Commission makes a number of suggestions about public education and awareness, including for:

- community education about rights and obligations in respect of trees growing on footpaths and public parks, and vegetation protection orders;<sup>42</sup>
- information about the right to abatement and ways in which a member of the public may go about exercising their right;<sup>43</sup>
- information about the operation and effect of the notice provisions in Part 4 of Chapter 3 of the Act about overhanging branches 2.5 metres or less above the ground;<sup>44</sup> and
- the Queensland Government's website about neighbourhood disputes to include additional information about the services offered by DRB to assist neighbours to resolve issues informally.<sup>45</sup>

6.67 These suggestions are matters to which consideration might be given by the appropriate agencies.

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42 See [3.112], [3.126] of this Report.

43 See [3.270]–[3.271] of this Report.

44 See [3.301] of this Report.

45 See [4.138] of this Report.

# Appendix A

## Terms of Reference

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

#### Background

The objects of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (the Act) are to:

- provide rules about each neighbour's responsibility for dividing fences and for 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 arise between neighbours.

The Act gives jurisdiction to the Queensland Civil and Administrative Tribunal (QCAT) to hear and decide matters under the Act.

While QCAT hears and decides disputes about dividing fences and trees, the Dispute Resolution Branch (DRB) in the Department of Justice and Attorney-General (DJAG) provides free mediation services to assist neighbours to resolve disputes informally where possible. DJAG also provides online information to help citizens informally resolve fence and tree issues.

Under section 97 a review of the Act must start within three years of its commencement. The review must start by 1 November 2014. The review must consider whether the objects of the Act remain valid, whether the Act is meeting its objectives, and investigate any specific issues recommended by the Minister. Under section 97 of the Act, the Minister must, within six months after finishing the review, table a report about its outcome in the Legislative Assembly.

I, Jarrod Bleijie, Attorney-General and Minister for Justice, refer to the Queensland Law Reform Commission (the Commission) under section 10 of the *Law Reform Commission Act 1968*, the review of the Act.

#### Scope

The review of the Act is to consider:

1. Whether the objects of the Act remain valid;
2. Whether the Act is meeting its objects;
3. Without limiting its scope or form, the review will consider the following issues:

- a) whether the allocation of responsibilities, liabilities and rights under the Act promotes resolution by neighbours of issues relating to dividing fences and trees;
- b) whether dispute resolution processes under the Act are fair, just and effective;
- c) the simplicity and ease of use of the Act for members of the community, including clarity of the legislative provisions;
- d) whether the Act provides QCAT with sufficient powers to resolve issues;
- e) the appropriateness of the remedies and penalties provided in the Act, including for non-compliance with QCAT orders;
- f) the operation of the Act in relation to other Acts or laws;
- g) the operation and effect of section 66(3)(b)(ii) of the Act including whether it should operate retrospectively having regard to section 178 of the *Property Law Act 1974*;
- h) the operation and effect of section 57 of the Act; and
- i) whether [the] scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties' boundaries.

### **Consultation**

The review is to include public consultation about issues with the Act and associated solutions.

### **Timeframe**

The Commission is to provide a report on the outcomes of the review to the Attorney-General and Minister for Justice by 1 November 2015.

Dated the 27<sup>th</sup> day of October 2014

**Jarrod Bleijie**  
**Attorney-General and Minister for Justice**



# Appendix B

## List of Respondents

Body Corporate for RSL Centre Surfers Paradise	Local Government Association of Queensland (LGAQ)
Brisbane City Council (BCC)	Mackay Regional Council
Cairns Regional Council	Master Builders Queensland
Caxton Legal Centre Inc	Queensland Arboricultural Association
Department of Agriculture and Fisheries (DAF)	Queensland Association of Independent Legal Services Inc (QAILS)
Department of Housing and Public Works (DHPW)	Queensland Building and Construction Commission
Department of National Parks, Sport and Racing (DNPSR)	Queensland Civil and Administrative Tribunal (QCAT)
Department of Natural Resources and Mines (DNRM)	Queensland Law Society
Department of Transport and Main Roads (DTMR)	Queensland Spatial and Surveying Association
Dispute Resolution Branch, Department of Justice and Attorney-General (DRB)	Spatial Industries Business Association
Ipswich City Council	Statewide Conveyancing Shop Pty Ltd
Judge Orazio Rinaudo, Chief Magistrate	Strata Community Australia (Qld)
Livingstone Shire Council	Surveyors Board of Queensland
	Townsville Community Legal Service Inc

The Commission also received 37 submissions from 43 individuals.