

Your Ref: Neighbourhood Tree and Dividing Fences Legislation

Quote in reply: Property and Development Law Section: 21000345/94

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Neighbourhood Disputes Resolution Bill consultation
Department of Justice and Attorney-General
Strategic Policy
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Brisbane Qld 4001

By email: NeighbourhoodDisputesResolution@justice.qld.gov.au

Dear Officers

PROPOSED QUEENSLAND NEIGHBOURHOOD TREE AND DIVIDING FENCES LEGISLATION

Thank you for the opportunity to provide comments on the draft *Neighbourhood Disputes Resolution Bill 2010* which was tabled by the Attorney-General on 12 May 2010. This response has been compiled with the assistance of the Property and Development Law Section who have a wealth of expertise and practice in this area.

Dividing Fences

1. Orders in absence of owners for fencing work

1.1. Clause 37 of the proposed bill recognises that QCAT may make an order in the absence of an adjoining owner. However the Society is concerned with clause 37(6) which states that:

“This section applies even if, since the order was made, the owner or the adjoining owner has stopped owning the relevant parcel of land consisting of the adjoining land.”

1.2. This clause is problematic as it places an unreasonable onus on a former owner to seek permission of the current landowner to enter the land and carry out the required work. The former owner is placed in a tenuous position if the current landowner unreasonably refuses consent to enter the property, requiring the former owner to apply to QCAT for further directions. Furthermore, as the tribunal encourages self-representation, a former owner may not be aware of his or her rights to make an application to have the order varied so that the current landowner is responsible for fencing work.

1.3. To overcome this issue, the Society suggests that any order include a reference to future owners/assigns and there be an addition to clause 36, which specifies matters for QCAT consideration in dividing fence matters, as follows:

“(f) if there is to be a change of ownership of an owner or an adjoining owner.”

- 1.4. To that end, the Society suggests that a copy of the title search be included in an application under the proposed Bill to illustrate not only that the parties have standing, but to indicate if there will be a change of ownership by reference to a Settlement Notice on the title.
- 1.5. Alternatively, the Society suggests, in order to ensure that a successor in title is bound, to make the order attach to the land under the Act. In those circumstances it would also assist if, like a vegetation protection order, the order is notified to the Registrar of Titles. The Registrar may then make a notation on the title stating that the land is subject to an order to carry out fencing work or remove a tree, for example. This may be done by way of administrative advices which are placed on the register and which are capable of being searched by a prospective purchaser or their solicitor.

2. *Liability and Implied Consent to enter the land*

- 2.1. The Society is also concerned that the proposed bill gives a person (including their employees and agents) a right to entry with seven days notice in clause 93, however it does not limit the liability of the landowners that:

- (a) the entry is at that person’s risk; and
- (b) the entry is subject to that person taking reasonable precautions not to damage, destroy or in any way adversely affect the property.

- 2.2. When clause 58 is read with clause 26, it places the onus on the owner to pay to the adjoining owner the cost of the fencing work required in the event the fence is destroyed or damaged by a negligent or deliberate act or omission of a ‘person who has entered the owner’s land with the express or implied consent of the owner.’ The effect of these clauses is that an adjoining landowner or its employees may enter a person’s land with consent, destroy or damage the dividing fence, and then require the owner to restore the dividing fence or pay for the cost of restoration in accordance with clauses 26(2) and 26(3)(a).

- 2.3. The Society is also apprehensive about the use of the term ‘implied consent’ and its retrospective operation in clause 26 (1)(b):

‘This section applies if, whether before or after the commencement of this section, a dividing fence is damaged or destroyed by a negligent or deliberate act or omission of... a person who has entered the owner’s land with the express or implied consent of the owner.’

- 2.4. At common law, there is implied consent to enter the land if there is no barrier to access leading up to the dwelling. In the High Court case of *Halliday v Nevill* (1984) 155 CLR 1, Gibbs CJ, Mason, Wilson and Deane JJ observed at paragraphs 6-8:

“While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts... The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling-house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the

entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house.”

- 2.5. Therefore the absence of an entry barrier to a property will, in most circumstances, be considered to be implied consent to enter the land. Which is disastrous for owners under the proposed Bill as it opens the floodgates and confers a financial obligation and liability on the owners to make good a third party’s negligent act, negligent omission or deliberate act in damaging or destroying the dividing fence.
- 2.6. Furthermore, the retrospectivity clause in that the clause applies ‘whether before or after the commencement of this section’ has the effect of increasing litigation in this area as presently section 16(2A)(c) of the *Dividing Fences Act 1953* is limited to only acts of the owner.
- 2.7. We suggest that it could not be the intention of the Bill to increase litigation or to make an owner responsible for the acts of others who come on to their property as if they were the acts of the owner themselves.
- 2.8. It is the Society’s view that the proposed bill should confirm that there is no assumption of liability on the part of the owner under the Act in relation to actions or omissions carried out by third parties. Further there should be a reference in the Act that the owner may recover from a third party any costs in relation to their acts or omissions in relation to the dividing fence. The Society also considers that the reference to retrospectivity in clause 26(1)(b) be removed.

3. *Intention to construct or demolish without consent*

- 3.1. The Society is concerned that clause 38(1) of the draft Bill will increase the number of matters brought before QCAT as it allows ‘an owner [who] believes on reasonable grounds that an adjoining owner intends to construct or demolish a dividing fence without authorisation’ to apply to QCAT.
- 3.2. The Society calls for caution in introducing a clause that may induce baseless or vexatious claims, where one owner does not have substantive evidence or proof that an adjoining owner intends to construct or demolish a dividing fence.
- 3.3. To overcome this issue, the Society recommends that the draft bill reflect that:

‘If an owner suspects or believes on reasonable grounds that an adjoining owner intends to construct or demolish a dividing fence, the owner is encouraged to approach the adjoining owner in order to attempt to resolve issues about fencing work, to avoid a dispute arising.

If the owners are unsuccessful in resolving their dispute, the owner may provide written notice to the adjoining owner:

- outlining its concern regarding the fencing work;
- confirming that the owner’s consent is required to carry out any fencing work, subject to the Act; and
- that the owner attends to apply to QCAT in the event fencing work is carried out without authorisation.’

Neighbourhood Trees

4. *Adverse impact on property contracts*

4.1. The Society is concerned that the operation of Part 8 of the proposed bill has the impact to significantly alter the termination rights of buyers and sellers in relation to QCAT orders made under the Act.

4.2. In particular, clause 85 places an obligation on the seller to disclose a QCAT application or order prior to entry into the contract, and even if the seller does disclose the application or order after a contract for sale is formed but prior to settlement, the buyer is still free to terminate the contract up until settlement.

4.3. The standard REIQ House & Residential Land sale contract contains at clause 7.4(2):

(2) The Seller warrants that at the Contract Date and at settlement there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the Property.

A breach of this warranty by a seller would already bring with it termination rights for the buyer.

4.4. The proposed provision is to the disadvantage of the seller as it does not recognise that:

(a) a contract is not always prepared by a legal practitioner, as in most cases it is prepared by a real estate agent or a lay person who may not be aware of the significance of disclosure and the impact it has on a party's termination rights; and

(b) sellers should be provided an opportunity to remedy the disclosure defect prior to settlement along the same principles as section 214 of the *Body Corporate and Community Management Act 1997*. Section 214 of the *Body Corporate and Community Management Act 1997* provides a seller an opportunity to vary a disclosure statement if the Seller becomes aware that information previously provided is inaccurate.

4.5. The proposed clause 86 continues the obligation for a seller to do works pursuant to a QCAT order notwithstanding the change of ownership of the property. In a similar way to our concerns outlined in clause 1.2 above, this obliges the seller to access a property they no longer have possession or ownership of to carry out the order. In our view this is problematic as access to the property for the purposes of carrying out works may be difficult and there are undesirable liability consequences for the incumbent owner of the property should the seller, or their employees or contractors, become injured whilst effecting the terms of the order. Earlier we highlighted the problems associated with dividing fences becoming damages in the process of carrying out works.

4.6. In order to overcome these issues, the Society recommends:

(a) Redrafting clauses 85 and 86 of the proposed Bill;

(b) In relation to clause 85, adopting the principles set out in section 214 of the *Body Corporate and Community Management Act 1997*, however with particular reference to Neighbourhood disputes in section 85 as follows:

(1) This section applies if:

(a) the contract has not been settled, and

(b) the seller becomes aware that there has been no disclosure of a QCAT application or order to the buyer at the date of the contract.

(2) The seller must, within 14 days of the Contract Date give the buyer a copy of the QCAT application or order made under this Act.

(3) The buyer may cancel the contract if—

(a) it has not already been settled; and

(b) the buyer would be materially prejudiced if compelled to complete the contract; and

(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the QCAT application or order.’

(c) In relation to clause 86, we propose that an incumbent owner of a property should be entitled to carry out the work under the QCAT order and seek repayment of the costs associated from the seller as a debt.

(d) Inserting a further relevant consideration for QCAT when making orders in relation to trees:

“s72 (i) if there is an impending sale or a change of ownership of an owner or an adjoining owner.”

5. *Liability and indemnity*

5.1. Clause 58 of the proposed Bill specifies the notice requirements a neighbour may give to an adjoining owner (“tree keeper”) regarding permission for the tree keeper (or their contractor) to enter the neighbour’s property to remove the overhanging branches.

5.2. Similar to concerns outlined in clause 2 above, the Society is apprehensive that there is no limitation of liability afforded to the neighbour in relation to the tree keeper or their contractors entering the neighbour’s property. This is in light of the fact that maintenance, cutting and removal of trees and tree branches is inherently dangerous, requiring significant workplace health and safety measures to be taken.

5.3. The Society therefore recommends that clauses 58 and 60 reflect that:

(a) A person enters an owner’s land at their own risk; and/or

(b) A person who enters an owner’s land to carry out work under Chapter 3 indemnifies the owner against any damage or personal injury that occurs on the owner’s land.

Thank you for the opportunity to provide comments and submissions to the proposed legislation.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Lawyer, Louise Pennisi on 3842 5872 or l.pennisi@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Peter Eardley
President