



MACKAY REGIONAL COMMUNITY LEGAL CENTRE Inc.

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DIVIDING FENCES



ACKNOWLEDGEMENT OF COUNTRY

MRCLC acknowledges the Traditional Custodians of the land on which we work and live.

We recognise their continuing connection to land, water and community.

We pay respect to Elders past, present and emerging.





DISCLAIMER

The content in this publication is intended only to provide a summary and general overview on matters. It is not intended to be comprehensive, nor does it constitute legal advice.

We attempt to ensure that the content is current, but we do not guarantee its currency.

You should seek legal or other professional advice before acting or relying on any of the content in this publication.

This presentation is current as at 12 November 2021



ABOUT THE MACKAY REGIONAL COMMUNITY LEGAL CENTRE INC.

- ▶ Free and confidential legal advice and referrals throughout the Mackay, Whitsunday and Isaac Regional Council areas.
- ▶ 1 hour appointments available between 9:00am – 4:00pm Monday to Friday, either by telephone or in person.
- ▶ Legal advice evenings twice per month.
- ▶ Outreach to Sarina, Cannonvale, Proserpine and Bowen.

OVERVIEW

The Act

Definitions

Neighbours' responsibilities

Resolving disputes

Questions

THE ACT

- ▶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (“the Act”)
- ▶ Section 7 Overview:
 - ▶ ‘Sufficient dividing fence’ required if one adjoining owner requests it.
 - ▶ Generally, neighbours must contribute equally to building and maintaining a dividing fence, and must not attach something that alters or damages it.
 - ▶ Neighbours are encouraged to attempt informal resolution of an issue.
 - ▶ If neighbours cannot resolve the issue it may be taken to QCAT for resolution.

THE ACT

- ▶ The Act excludes:
 - ▶ Specific types of land
 - ▶ Stock routes
 - ▶ South Bank public land
 - ▶ State plantation forest
 - ▶ A fence, or part of a fence, that is a barrier of a regulated pool is excluded
 - ▶ Retaining walls

DEFINITIONS

▶ Fence

- ▶ Structure, ditch, embankment, hedge/similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the entire boundary separating the land of adjoining owners, and includes –
 - ▶ A gate, cattle grid or apparatus necessary for the operation of the fence
 - ▶ Natural or artificial watercourse separating the land
 - ▶ Foundation or support built solely for the support and maintenance of the fence
- ▶ A fence is not a retaining wall or wall that is part of a house, garage or other building.

DEFINITIONS

- ▶ Dividing fence
 - ▶ A fence on the common boundary.
 - ▶ A fence that isn't on the common boundary if it is not possible to build one on the boundary because of natural physical features or the adjoining land is pastoral land separated by a watercourse, lake or other natural or artificial feature that doesn't stop the passage of stock.

DEFINITIONS

- ▶ Sufficient dividing fence
 - ▶ Three definitions –
 - ▶ If two parcels of residential land, between 0.5m and 1.8m high and consists substantially of prescribed material.
 - ▶ If two parcels of pastoral land, a fence that restrains livestock from grazing on the adjoining land.
 - ▶ Otherwise, if the owners agree or QCAT decides.
- ▶ 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.
- ▶ Prescribed material
 - ▶ Wood including timber palings and lattice panels
 - ▶ Chain wire
 - ▶ Metal panels or rods
 - ▶ Bricks
 - ▶ Rendered cement
 - ▶ Concrete blocks
 - ▶ Hedge or other vegetative barrier

CASE EXAMPLE

- ▶ Egan v North Goonyella Bodycorp Two [2021] QCAT 110
 - ▶ Existing dividing fence on common boundary
 - ▶ Mr Egan wanted a new dividing fence
 - ▶ Bodycorp said it needed maintenance only
 - ▶ Magistrate Aberdeen:
 - ▶ Preferred Mr Egan's evidence
 - ▶ Found that the existing fence is not a sufficient dividing fence
 - ▶ Order – fence be replaced and cost equally shared

DEFINITIONS

- ▶ Fencing work
 - ▶ Design, construction, modification, replacement, removal, repair or maintenance of part or all of the dividing fence
 - ▶ Surveying or preparation of land, including trimming, lopping or removal of vegetation, along or on either side of the common boundary for a purpose mentioned above
 - ▶ Planting, replanting and maintenance of a hedge or similar vegetative barrier as the dividing fence
 - ▶ Cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as the dividing fence
 - ▶ Obtaining an approval required for fencing work.

NEIGHBOURS' RESPONSIBILITIES

- ▶ Ownership of dividing fence
 - ▶ Under common law a dividing fence is owned equally by adjoining owners if it is on the common boundary
- ▶ Liability for fencing work
 - ▶ If there is no sufficient dividing fence an adjoining owner is liable to contribute to fencing work
 - ▶ Can be labour or materials
 - ▶ Adjoining owner's liability is enforceable only if the neighbours have agreed under the Act or QCAT has ordered it
 - ▶ An adjoining owner is liable to contribute even if there is already a dividing fence, or if one or both parcels of land are vacant

NEIGHBOURS' RESPONSIBILITIES

- ▶ Contribution between neighbours – generally
 - ▶ Adjoining owners are liable to contribute equally to fencing work for a sufficient dividing fence
 - ▶ An adjoining owner who wants a fence to a standard greater than a sufficient dividing fence is liable for the work to the extent it is greater than the standard

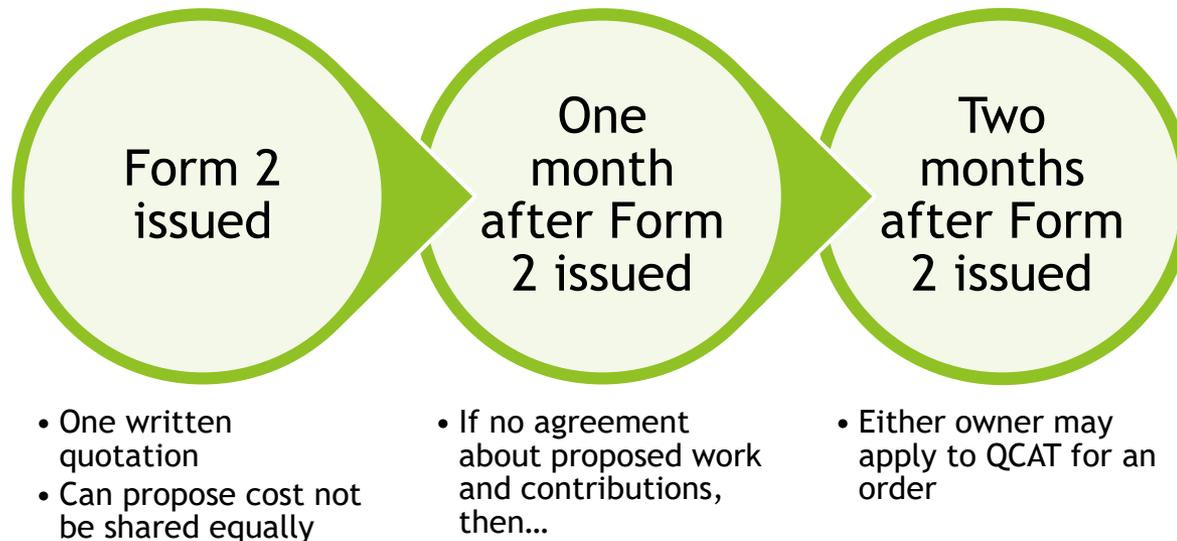
NEIGHBOURS' RESPONSIBILITIES

- ▶ Contribution between neighbours – negligent or deliberate act or omission
 - ▶ If an owner or person who has entered an owner's land with express consent damages or destroys a dividing fence by a negligent or deliberate act or omission, the owner must restore the fence
- ▶ Attaching things
 - ▶ An owner or person who has entered an owner's land with express consent must not attach a thing to a dividing fence that unreasonably and materially alters or damages the fence
 - ▶ Carport, shade sails, lattice work, canvas, signs

RESOLVING DISPUTES

- ▶ Neighbours are encouraged to resolve disputes themselves
- ▶ To obtain a contribution from an adjoining owner, an owner must give a Form 2 Notice to Contribute for Fencing Work (“Form 2”)
 - ▶ The Form 2 must be given and the neighbours must agree before the work is done
 - ▶ Except for urgent fencing work or with QCAT’s permission
- ▶ An owner can apply to QCAT about
 - ▶ Fencing work for which a Form 2 has been given
 - ▶ Unauthorised fencing work

RESOLVING DISPUTES



CASE EXAMPLE

- ▶ Petrie v Peters [2013] QCAT 641
 - ▶ Mr Petrie wanted the existing dividing fence replaced
 - ▶ Mr Petrie took a quote to Mr Peters who said he would think about it
 - ▶ One week later Mr Petrie had the fence replaced
 - ▶ Mr Petrie sought half the cost of the fence from Mr Peters
 - ▶ Mr Petrie had not issued Mr Peters a Form 2
 - ▶ Member Favell:
 - ▶ “Because the requirements of section 31 were not complied with and there was no notice given it follows that, in the circumstances here, QCAT does not have the jurisdiction to make the orders sought”
 - ▶ “If no notice to contribute was given then the application cannot be made”
 - ▶ Order – Mr Petrie’s application was dismissed

RESOLVING DISPUTES

- ▶ QCAT's jurisdiction
 - ▶ Hear and decide any matter under the Act
 - ▶ If there is more than one fence on the boundary QCAT may decide which one is the dividing fence and order the removal of the other
 - ▶ If there is a fence on adjoining land that is not a dividing fence QCAT may order its removal if QCAT considers it necessary to allow fencing work for a dividing fence

CASE EXAMPLE

- ▶ Williams v Williams [2017] QCAT 109
 - ▶ Following a boundary dispute in mid-2015 the Williams built a wire and post fence wholly on their land
 - ▶ Paul Williams applied to QCAT for a 2m Colourbond fence on a 67.5m section of the boundary, equal contribution from the Williams and an order that the Williams' fence be removed
 - ▶ Need for security and safety – history of conflict, one-year-old son and 20-year-old disabled son who cannot swim
 - ▶ Adjudicator Stanton:
 - ▶ The existence of the Williams' fence must not be taken into account in deciding whether a sufficient dividing fence exists
 - ▶ A wire fence would be the standard for a sufficient dividing fence as they are common in the area
 - ▶ The Act clearly allows for construction of a dividing fence to a greater standard than a wire fence
 - ▶ Due to Paul Williams' safety and privacy concerns it was reasonable for a fence to be constructed to a greater standard than a wire fence
 - ▶ Satisfied that the Williams' existing fence would need to be removed for the 67.5m section
 - ▶ Order – Williams to remove their fence, Williams to pay half the cost of a wire fence, Paul Williams to pay the balance

RESOLVING DISPUTES

▶ Orders

- ▶ The line on which the fence is built, whether or not it is on the common boundary
- ▶ The work to be done, including the kind of fence
- ▶ Contributions apportioned or reapportioned
- ▶ The part of the fence to be built or repaired by either owner
- ▶ The time by which the work must be done
- ▶ Any other work to be done which is necessary for the fencing work including work for a retaining wall
- ▶ That no dividing fence is required for all or part of the boundary
- ▶ That a fence has been used, or could reasonably be used as a dividing fence
- ▶ Amount of compensation payable for damage or destruction
- ▶ That an owner remove a thing attached to a fence and restore it
- ▶ Amount of compensation payable for the removal of a fence on an adjoining owner's land

RESOLVING DISPUTES

- ▶ Sufficient dividing fence matters for QCAT consideration
 - ▶ QCAT can consider all the circumstances of the application including
 - ▶ Any existing or previously existing dividing fence
 - ▶ The purposes for which the two neighbouring parcels of land are used or intended to be used
 - ▶ The kind of fence normally used in the area
 - ▶ Whether the fence is capable of being maintained by the neighbours
 - ▶ Any local government policy or law for the area
 - ▶ Any requirement for fencing work in a development approval
 - ▶ Any written agreement between the neighbours for the purposes of the Act

CASE EXAMPLE

- ▶ Roberts v Greinke [2018] QCATA 48
 - ▶ Ms Roberts sought a 1.8m Colourbond fence
 - ▶ The Greinkes wanted a steel mesh fence
 - ▶ The Greinkes had aesthetic, amenity and structural concerns
 - ▶ Justice Daubney:
 - ▶ Agreed that while a Colourbond fence would be a new type of fence, all the fences in the area were different anyway
 - ▶ Disagreed that a Colourbond fence would stifle breeze or cause a claustrophobic environment
 - ▶ Agreed that the Greinke's concerns about safety of Colourbond fence in high winds
 - ▶ Order – Colourbond fence to be built only with engineer certification, Greinkes to pay half the cost of a lesser fence and Ms Roberts to pay the balance including engineer costs

CASE EXAMPLE

- ▶ Johnston v Nelson & Anor [2020] QCAT 473
 - ▶ The Nelsons removed part of the existing chain wire fence on the common boundary without Mrs Johnston's consent
 - ▶ The Nelsons built a retaining wall on their land
 - ▶ Mrs Johnston sought removal of the retaining wall and reinstatement of the original fence
 - ▶ Adjudicator Gaffney:
 - ▶ The Act allows an order to be made for removal of the retaining wall if necessary for fencing work to be carried out
 - ▶ Removal of the retaining wall would be necessary to rebuild the original fence
 - ▶ Did not exercise discretion to order reinstatement of the original fence
 - ▶ Noted QCAT could have compensated Mrs Johnston
 - ▶ Order – the Nelsons remove the rest of the original fence

QUESTIONS



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