

**DIVIDING FENCES AND OTHER LEGISLATION AMENDMENT BILL 2008**

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**Second Reading**

**The Hon. PENNY SHARPE** (Parliamentary Secretary) [5.28 p.m.], on behalf of the Hon. Tony Kelly: I move:

That this bill be now read a second time.

The purpose of the Dividing Fences and Other Legislation Amendment Bill 2008 is to achieve four aims. Three of these relate to the powers and jurisdiction of a local land board and the Local Court concerning dividing fences. The final proposal relates to the powers of the Local Court to award costs under the Access to Neighbouring Land Act 2000. The proposed amendments to the Dividing Fences Act 1991 relate to expanding the jurisdiction available under the Act. These changes include a power to make an order relating to a retaining wall and vegetation. The proposed new power is appropriately limited in its scope to matters incidental to a dividing fence.

The dividing fences proposals as set out in the bill have been formulated in consultation with the government agencies responsible for legislation imposing requirements for tree preservation. These are the Department of Local Government, the Department of Planning and the Attorney General's Department. Some issues were raised in another place on the impact of these amendments on issues regarding retaining walls and vegetation. Such issues are becoming more prevalent in disputes between property owners, and one of the aims of these reforms is to update the dividing fences legislation to enable land boards to make more relevant, practical decisions without having to resort to other jurisdictions such as the Land and Environment Court.

While the bill will not solve all possible fencing problems between neighbours, it is designed to operate in a sensible way that will not cause additional problems. The interaction between dividing fences, these amendments and retaining walls was raised in another place. The scenario was raised as to implications of a dividing fence located on top of a retaining wall. I emphasise that the bill does not allow for an unfair contribution to be obtained for the repair of a retaining wall. In these circumstances if the owner of the retaining wall wishes to repair the wall, the scheme of the bill does not allow for an unfair contribution to be obtained for repair of the retaining wall.

The intention of the scheme set out in the bill is that only fencing work necessary for the immediate support of a fence will be caught within the scope of the power to order a contribution for fencing work. This will mean in practice that a contribution will not be available for the work that is necessary for repairing a retaining wall when those funds are spent purely on the maintenance of the retaining wall for its principal purpose as a retaining wall and not as part of a dividing fence. An example of the sort of fencing work that will be the subject of a contribution is work on the fence footings on top of a retaining wall. No expenses for the construction of the retaining wall itself are intended to be claimable. The operation of section 26 of the Dividing Fences Act as amended by the bill means that the Dividing Fences Act does not affect the operation of laws that affect the rights of persons to support a retaining wall. This means that the duty to preserve support for neighbouring land created by section 177 of the Conveyancing Act 1919 is preserved.

The scheme set out in the bill will also limit disputes by limiting the scope of the contribution available for fencing work involving vegetation. The amendments specifically provide that an adjoining owner, who desires to trim vegetation for a purpose other than for the provision of a sufficient dividing fence, is liable for the expenses of carrying out that work to the extent the work is for the other purpose. This provision is intended to avoid there being any incentive for the removal of vegetation for a purpose other than the construction or maintenance of a sufficient dividing fence. The limitation on the new power over vegetation will serve to avoid disputes between neighbours.

The first proposal is to permit a local land board or a local court to make a fencing order requiring construction or maintenance work to be done on a new or existing retaining wall but only to the extent necessary for the settlement of a dividing fences dispute. It also relates to any tree or vegetation but only to the extent necessary for settlement of a dividing fence dispute. The bill authorises an adjoining owner to include in a fencing notice matters relating to a retaining wall, tree or vegetation. A fencing notice under the Act allows an adjoining owner to claim a contribution for a share of fencing costs.

The final aspect to the first proposal is to allow a local land board and local court to fix a fair contribution between adjoining owners for the cost of the fencing work carried out when this affects a retaining wall, tree or vegetation. Such contributions by adjoining owners should generally be made in equal proportions. The Dividing Fences Act

1991 allows an order to be made under section 14 for the construction or repair of a dividing fence of a certain type. An order may also be made for the adjoining owners to contribute a proportion of the construction costs. A contribution for fencing costs may be enforced against an adjoining owner only for usually half the cost of a sufficient dividing fence. The Act defines a sufficient dividing fence in a way that means it is in general the usual type of fence for the relevant area. A contribution may not be enforced against an adjoining owner for half the cost of any fencing work for a fence that is more expensive and of a higher standard than a sufficient dividing fence.

The proposed extension of jurisdiction to allow an order to be made regarding a retaining wall and vegetation is specifically limited in the bill. The proposed amendments will authorise an order to be made for fencing work to be carried out provided it is associated with a retaining wall. But this order is limited only to the extent that such work is for the purpose of any foundation or support necessary for the support and maintenance of a dividing fence. The limited power to make an order regarding a retaining wall will ensure that the new power cannot be used for any other purpose other than the erection of a sufficient dividing fence and to allow for a fair contribution to fencing costs.

The application of the Act to vegetation is limited, in that the removal of vegetation is to be added to the definition of "fencing work". This amendment will mean that vegetation may only be trimmed, lopped or removed under the Act if that work is fencing work done in connection with the preparation of land for the construction or repair of a dividing fence as defined by the Act. But this order is also limited to only the extent that such work is to be carried out for the purpose of the design, construction, replacement, repair or maintenance of the whole or part of a dividing fence. This limited power to make an order regarding a retaining wall or vegetation removal will ensure that the new power cannot be used for a purpose other than the erection of a sufficient dividing fence and for fair contribution to fencing costs.

The definition section 3 of the Dividing Fences Act 1991 currently excludes a "retaining wall" from the definition of a fence. The result of the exclusion of a retaining wall from the definition of a fence is that no order may be made affecting a retaining wall by a local land board or the Local Court. The complete exemption of retaining walls from the operation of the Act means that in making orders about a sufficient dividing fence, a local land board or court is often unable to fully resolve disputes between neighbours where a dividing fence consists of a fence constructed on or near a retaining wall. This may lead to dissatisfaction by the parties and it hinders the effective dispute resolution capabilities of a local land board or Local Court to resolve the dispute.

Implementation of the proposal will allow certain problems experienced by the local land board to be overcome for the first time. Problems arise because frequently a fence and a retaining wall are complimentary to each other. Thus a dispute between neighbours is only partly resolved if a land board or the court may only make orders in relation to the fence—not the retaining wall. The number of such problems is increasing in the experience of the senior chairperson of the local land board. At present the parties bringing a matter before a land board are unlikely to appear with the benefit of legal representation. Sometimes either or both have a misunderstanding that the land board has the power to make orders about a retaining wall when the retaining wall is integral to the structure of a dividing fence. The courts currently do not have the power to make orders in relation to a retaining wall when hearing dividing fence matters.

The experience of the senior chairperson of the local land board shows that it is often difficult or impossible to settle a dividing fence dispute where a tree or substantial vegetation stands on or near the boundary and affects the subject fence. In these circumstances the jurisdiction of the local land board and of the court does not permit any fencing order for the removal or trimming of the relevant vegetation. The local land boards and the local court should have the power to make an order affecting a tree to the extent necessary for the settlement of a dividing fence dispute.

The first proposal will not override other general laws applicable to the construction and maintenance of a retaining wall, including requirements for development approval. Similarly the proposal will not override any legislation providing protection to vegetation including trees. Legislation protecting vegetation includes the Environmental Planning and Assessment Act 1979. This allows for the making of environmental planning instruments that may contain provisions protecting or preserving trees or vegetation. An interim heritage order made under the Heritage Act 1977 may prevent a person from causing damage or destruction to a tree or other vegetation subject to the order.

In the event that any relevant work on a retaining wall would require development approval under planning legislation, the local land board or the Local Court will need to see any required development approval before a final order regarding a dividing fence is made. The local land board or the Local Court must also ensure that a proposed fencing order will apply in a way that is consistent with other legislation protecting vegetation. Amendments found in the bill ensure that the proposed limited power for an order to be made affecting a retaining wall, tree or other vegetation is reflected in the permissible scope of work that may be included in a fencing notice. An adjoining owner may serve a fencing notice to request a contribution for certain proposed fencing work. The bill also limits the amount of the contribution that may be claimed. An adjoining owner will only be liable to pay a contribution in respect of the removal or trimming of vegetation or for works proposed regarding a retaining wall to the extent that those works are necessary for the provision of a sufficient dividing

fence.

In view of the proposed limitations on the permissible scope of the fencing orders that refer to a retaining wall, tree or vegetation, it is appropriate for the existing general rule to apply that adjoining owners should make such contributions in equal proportions. Payment in equal proportions is fair and reasonable in the circumstances where a contribution only need be made to the cost of works affecting a retaining wall, tree or vegetation, to the extent those works allow for a sufficient dividing fence. A dividing fence will usually benefit both parties equally. However, an adjoining owner, as a result of fencing work relating to a retaining wall, tree or vegetation performed under the Act, may gain a particular benefit. A particular benefit arises where, for example, one owner has the benefit of relevant excavations beneath a retaining wall or has the benefit of clearing. The bill will allow an adjoining owner to construct a retaining wall or to clear vegetation that provides that owner with a particular benefit but prevents him or her from claiming a contribution for that work from the adjoining owner if that work is not part of constructing a sufficient dividing fence.

Finally, regarding the new proposed powers for an order to be made affecting a retaining wall or vegetation under the Dividing Fences Act 1991, I will mention that one of the consequential amendments in the bill allows for such an order to be made in any current proceedings before a local land board that have not been finalised before the bill commences. The second main purpose of the bill is to allow a local land board to make an order for the payment of a fixed amount by an adjoining owner under the Dividing fences Act 1991. This new power adds to the existing power to make an order for a proportion of fencing costs to be paid by each adjoining owner.

An order for the payment of a fixed amount, after being certified by a local land board, may be enforced as a judgement debt in a court of competent jurisdiction. Section 24 of the Dividing Fences Act 1991 presently allows an order made by a local land board for the payment of money by a person to be recovered as a debt in a court of competent jurisdiction. The practical difficulty with this provision is that a certificate issued by the relevant local land board under section 24 serves only as evidence of the making of the order. The party seeking to enforce a money order made under section 24 may need to commence fresh proceedings, usually in the Local Court. They would do so by issuing a statement of claim and going through the process of obtaining a fresh judgement for the debt, with the assistance of a section 24 certificate. No useful purpose is served by the need for the debt to be established in two sets of proceedings. The implementation of the proposal will allow a person with the benefit of an order for the payment of a fixed amount of money to file it in a court of competent jurisdiction as a judgement. They can then take advantage of the procedures of the court that are available to assist with the recovery of a debt. Dividing fence disputes commonly bring before a local land board people who, due to the nature of neighbourhood disputes, are in a highly charged and emotive state of mind. The need to embark on other proceedings to enforce a money order may unnecessarily prolong the dispute.

The third main proposal contained in the bill will allow the senior chairperson of the local land board discretion to sit alone or to direct a chairperson of a local land board to sit alone in a residential dividing fence hearing. The experience of the senior chairperson of the local land board indicates that in many cases it is appropriate for a dividing fence dispute to be heard by either the senior chairperson sitting alone or the chairperson of the relevant local land board. This is in circumstances where the subject fence is located in either the Sydney metropolitan area or a residential area of a regional city or town. In general, the lack of complexity of the subject matter of such disputes means that only the chairperson is required to sit in order for the dispute to be dealt with. The senior chairperson is in a position to decide at the outset if a matter is appropriate for only the chairperson or the senior chairperson to sit alone in the matter. The bill does not provide for such discretion to apply in the case of fencing matters located in non-residential areas. This is because by their nature such matters have proven in practice to be likely to be more complex.

The final proposal contained in the bill relates to the Access to Neighbouring Land Act 2000. The purpose of the proposal is to provide that an applicant for an access to land order must pay the legal costs of the landowner whose land is the subject of the access order. This will occur unless, in the discretion of the Local Court, the conduct of the parties to the application for access or any other relevant matter means that either another order or no order should be made. The amendments proposed in the bill will require the court to consider any attempts by the parties to reach agreement before the proceedings and whether the refusal to consent to access was unreasonable in the circumstances. The Access to Neighbouring Land Act 2000 was the subject of a review in 2005 to examine whether the Act was operating to meet the needs of all stakeholders. A report entitled "Review of the New South Wales Access to Neighbouring Land Act 2000" was subsequently tabled in Parliament. Respondents to the review highlighted deficiencies in the operation of the legal costs recovery provisions of the Act.

The current scheme governing recovery of the legal costs of an application for access to neighbouring land, which is contained in section 27 of the Act, provides that a costs order may be made at the discretion of the Local Court. In determining if an order should be made, the court may consider any attempts by the parties to reach agreement before the proceedings, whether the refusal to consent to access was unreasonable in the circumstances and any other matter it thinks fit. In practice, orders made by the court usually require the costs of the application to be borne equally by both the applicant for access and the owner of the land that is the subject of the access order. Submissions and anecdotal evidence received as part of the review indicated that it is more reasonable if the requirement were for the applicant to pay the legal costs of the owner of the land that is subject

to the access order. This is because only the applicant usually receives a benefit from an order for access. The proposed amendments will allow the Local Court to continue to have discretion to make an appropriate order for costs or no order based on an examination of all relevant circumstances.

The measures in this bill will improve the operation of the Dividing Fences Act 1991 and assist dispute resolution between adjoining owners. The proposed increase in the jurisdiction of the local land boards and the Local Court will allow a fencing dispute to be settled where the relevant dividing fence has an incidental impact on vegetation or a retaining wall. The controls on the application of the new jurisdiction will mean that any impact on vegetation or a retaining wall is likely to be minor. The amendment proposed to the Access to Neighbouring Land Act 2000 will provide a fairer method for the award of an order for legal costs following a hearing in a Local Court. I commend the bill to the House.