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Although written for Australia, much of this handbook applies to Canada as well.
Lots of common sense advice. - cjk

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

12th EDITION



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Neighbours

Nicholas Comino Mid North Coast Community Legal Centre

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[34.10] Neighbours are people who live close enough to notice or can be affected by other people's actions at home. This chapter looks at some of the issues that arise when neighbours do not agree, and their legal rights and responsibilities.

Negotiating with neighbours

While some problems between neighbours give rise to legal rights, there are many legal issues that are not legal although they can be distressing for the parties involved. Legal options are generally expensive and often do not resolve underlying issues.

In general:

- Problems between neighbours can often be solved by a polite but direct conversation. Talk about it early (before anyone becomes angry), directly (to be sure there is no misunderstanding) and respectfully (neighbours have to keep living near one another).
- If you feel that you can discuss a problem respectfully and politely with your neighbor, there are mediation services available that can help you explain how you feel about a particular issue and help work towards a solution. In NSW, the Community Justice Centre provides a free mediation service that can arrange a mediation at a location near where the

Strata title units

When disputes arise between neighbours in strata title units, they may be resolved under special strata titles law (see chapter 29, Housing).

parties live. (For more on community justice centres see chapter 20, Dispute resolution without going to court.)

Contacting the neighbour

You can find out a neighbour's name by introducing yourself, or enquiring locally. It is also possible to do a property search at NSW Department of Lands (formerly Land and Property Information NSW: see Department of Lands in Contact points at [34.280]), which maintains a register of all land in NSW and of owners and parties with interests in the land. This will only be helpful if the neighbours own the premises they are living at, because tenants' names do not usually appear on the register.

The local council will also have a record of the owner of the land in the Council's land register.

Dividing fences and boundaries

[34.20] Dividing fences

The law about the position of, and payment for, dividing fences in NSW is contained in the *Dividing Fences Act 1991*.

What is a dividing fence?

A dividing fence is a fence separating the lands of different owners, whether it is actually on the common boundary or not (s.3).

A fence is defined broadly to include any structure, ditch, embankment, hedge, foundation, or gate. Retaining walls are specifically excluded from the definition of a fence, although the Local Court or local land board can make orders on the retaining wall where it supports a dividing fence.

A 'sufficient dividing fence'

What is considered a 'sufficient' fence under the Act depends on the circumstances, but would usually be a fence that is similar to other fences in the area and is not unreasonably expensive. The Act (s. 4) lists the factors the court or local land board takes into account if there is a dispute about the standard of fencing required as:

- the standard of the existing fence (if any)
- the way in which the land on either side is used or intended to be used
- privacy or other concerns of the owners
- the kinds of dividing fences usual in the area
- local council policy requirements relating to height restrictions and style
- relevant requirements in environmental planning instruments.

In some circumstances having no fence at all will be 'sufficient'; in others it may be appropriate to have, for example, a 1.5 metre wooden paling fence.

[34.30] Fencing costs

Who is responsible for the cost of a dividing fence

In general, adjoining owners equally share the cost associated with a 'sufficient dividing fence'. This needs to be agreed clearly in writing before the work starts to avoid problems later.

Who is responsible for the cost of maintaining a dividing fence

There is no clear distinction between building a new fence and repairing an old one. If a fence needs to be repaired, then the owners should work out an agreement and share the cost as above. However, there are some exceptions such as where an owner has deliberately or negligently damaged the fence.

Who can make an order about fencing work

It is always best to work out, in writing, an agreement with an adjoining owner on how the fence will be built and paid for. The Act encourages adjoining owners to do this through a fencing agreement (see [34.40]). If an agreement can't be reached, the Local Court or Local Land Board can make orders about fencing work. See [34.60] for more information on fencing orders.

If one owner wants a better fence

An owner must pay the additional cost if they want a fence of a higher standard than is required for a sufficient dividing fence.

If the fence is damaged by an owner

An owner will have to pay the full cost if the existing fence is damaged, either deliberately or negligently, by that owner or someone else who entered the land with their express or implied permission.

If the fence is damaged by a tenant, the owner must pay for the work even if they plan to claim the cost from the tenant (s.8).

Where there is a commercial lease

Tenants under a fixed-term commercial lease are responsible for fencing costs if the lease has more than five years to run at the time of the notice (s.3).

The landlord of a residential property is usually responsible for paying for fencing.

Where one owner is a public authority

Public authorities with control over parks, reserves and so on do not have to contribute to fencing costs. People living next to these properties may be able to negotiate with the authority for a contribution.

If an owner proceeds without consultation

An owner who goes ahead and builds a new fence without consulting the adjoining owner, and either coming to an agreement or seeking an order, has no grounds under the Act for recovering the cost. They may, in fact, be liable for trespass if they enter the neighbour's land without permission. The only exception to this is if urgent work is required (see below).

[34.40] Fencing agreements between adjoining owners

Notice to Fence

The *Dividing Fences Act* requires an owner to notify the adjoining owner to see if an agreement can be reached if they believe that fencing work is needed and they want the cost shared. This is called a '*Notice to carry out fencing work*' under s.11 of the Act.

There is no set form, except that it has to be in writing and must include the following:

- an adequate description of the boundary on which the fencing work is to be carried out, or if it is impracticable to carry out fencing work on the common boundary, the line where it is proposed to carry out the work
- the type of fencing work proposed, such as whether it is a wooden paling fence or pre-painted steel fence
- the estimated cost of the fencing work
- the notice should state the proposed proportions for payment if it not going to be shared equally between owners.

An adjoining owner is not liable for fencing work before an agreement is not reached unless the Court or local land board has determined the matter or fencing work is urgent (see s.9).

Does a Notice to Fence need to be formally served on an adjoining owner?

Section 21 states that a notice can be served by delivering it personally, or sending it by post to

the owner's usual or last known residential or business address.

What kind of agreements can be made?

Adjoining owners can come to whatever agreement they like about the cost, type and position of the fence, as long as both are happy with the agreement and it conforms to any council rules and government environmental planning requirements. Agreements should also include practical issues such as how and when contributions are to be collected

Why the agreement should be in writing

Any agreement about fencing, including the type, position and contributions to cost, should be in writing, and signed. Then, if either owner does not carry out their part of the agreement within the agreed time (or if there is no written agreement, within three months) the other owner can go ahead with the work and later recover the cost as a debt in the Local Court (s.15). Without a written agreement of all the details, recovery of the adjoining owner's contribution might not be possible.

If one owner is prepared to pay in full

If an owner is prepared to pay the full amount for the fence, they are not obliged under the *Dividing Fences Act* to come to an agreement with their neighbour about the design. However, in the absence of agreement or otherwise compliance with the Act, there is no right to enter the adjoining owner's property.

Council requirements

Different councils have different requirements in relation to fencing, and the owner should always check with the local council as to whether an approval is required for the type of fence proposed. Council regulations can regulate issues such as the height of the fence at different points, the material to be used, and so on.

Can a neighbour refuse access?

Section 20 gives a general right to enter neighbouring property to complete fencing work if the provisions of the Act have been followed. In the absence of an agreement or order, entering a neighbour's property to do fencing work without their permission can be a trespass. This applies even where one owner is paying the whole amount for the fence.

Entering a neighbour's land to do the work

Under the Act, an owner (including the owner's employees or agents) doing fencing work under either an agreement with a neighbour or an order of the Local Court or the Land Board (see The Land Board at [34.50]) can enter the neighbour's land at any 'reasonable' time to do the work.

[34.50] Urgent repairs to a dividing fence

Section 9 of the Act allows an owner to make urgent repairs to a dividing fence without contacting the adjoining owner and recover a contribution at a later date. What is urgent will vary according to the actual circumstances. For instance, a fence destroyed by fire could be repaired under this provision where livestock are likely to escape.

If there is a dispute

If the other owner claims that the work was not necessary, the first owner can apply to the Local Court or the Land Board, within a month, to review the need for the work and liability for cost.

If the adjoining owner refuses to pay

If the adjoining owner simply refuses to pay their share, the first owner can recover the cost as a debt in the Local Court.

Keep records!

Records of the damage and the work completed should be kept in case it is necessary to take action to recover the adjoining owner's share of the cost.

The Land Board

The Land Board is a community-based tribunal established to deal with disputes under the *Dividing Fences Act* and certain other Acts. The board's hearings are similar to those in a Local Court, and legal representation is usual. A person could also elect to have an agent to act on their behalf in the proceedings.

[34.60] Fencing orders If neighbours can't agree

If neighbouring owners cannot agree on the position, type or the cost of the dividing fence, a fencing order may be needed before work can go ahead.

If the owner cannot be found

If an owner cannot be found to receive the notice (or notice to attend court) after a reasonable effort, the Local Court or the Land Board can go ahead and hear the case in their absence. The absent owner then has one month after being served with a copy of the court order to apply for a variation in the order.

For a fee, you can find out the name of the owner from the Department of Lands or from the local council.

Mediation through the Community Justice Centre

The Community Justice Centre is a free mediation service funded by the NSW Government. A mediator can help individuals explain their point of view, and help work through the issues that are preventing an agreement. The Community Justice Centre can arrange mediation at a range of venues across the state, or telephone mediation where face to face mediation is not feasible.

Applying for an order

If there is no agreement one month after the notice has been served, either owner can apply to the Local Court or Land Board (whichever is more convenient) for an order (s.12).

The Land and Environment Court may also have jurisdiction to make a fencing order under s.13A of the Act. This is usually where a tree has caused or is likely to cause damage to a dividing fence. It can also be where a tree is part of a dividing fence and has caused, or is likely to cause, damage to property or injury to any person.

Objections to fencing orders

When one owner applies for a fencing order, the other is notified.

If the second owner objects, a hearing is held, and the court, or board, makes a decision based on the evidence. The owner who loses may have to pay part of their neighbour's legal costs.

If an owner does not come to the hearing, the orders can be made in their absence.

Orders that can be made

Orders can be made under the Act as to:

- where the fence is to be erected (see If the fence is not on the boundary below)

- the nature and standard of the work
- how costs are to be shared
- which part of the fence is to be constructed or repaired by each owner
- the time in which the work is to be carried out
- whether, in the circumstances, a dividing fence is required at all.

Time limits

Owners must comply with a fencing order within the time specified in the order, or if a time is not specified, within three months of the order.

If an owner does not do so, the other owner can go ahead and carry out the work and then recover the cost as a debt in the Local Court.

If the fence is not on the boundary

A dividing fence is usually constructed on the common boundary between two properties.

If it is not possible to put the fence on the common boundary because of the physical features of the land, another position can be chosen. The court can issue an order determining this position if the owners can't agree (s.11(2)).

An owner who comes to occupy a part of their neighbour's land as a result does not obtain any title or interest in that piece of land, but the court can issue an order for an amount and method of compensation.

Appeals against fencing orders

Fencing orders of the Local Court or Local Land Board are final (s.19). Appeals to the Supreme Court of NSW may be available where a magistrate has made an error of law, and not because the magistrate has made a poor decision on the facts. This means that appeals are rarely successful. Anyone considering an appeal should seek legal advice first. Appeals to the Supreme Court are only available on a question of law rather than a decision of the local court. A person cannot appeal simply because they are dissatisfied with the result.

Determining where the boundary is

The *Dividing Fences Act* lays down a procedure for determining the boundary and sharing survey costs if there is a dispute about where the boundary actually is:

- The owner who is concerned about the boundary should first serve the other owner with written notice that they intend to have the boundary surveyed.
- If the second owner agrees, the cost should be shared equally.
- If the second owner disagrees that a survey is required, they can mark out with pegs where they think the position of the boundary is.
- A registered surveyor should then conduct the survey, marking out the boundary on the ground or on existing structures according to the land title documents.
- If the survey shows that the boundary is on the position pegged out by the second owner, the owner who served the notice must pay for it. Otherwise costs are shared equally (s.18).

If there is still a dispute about where the fence should go, either owner can apply to the Local Court or the Land Board for an order about the position of the fence and any compensation required.

[34.70] The position of the boundary

A dispute about the position of the boundary between two blocks of land can usually be resolved by having a survey done by a licensed surveyor and giving a copy of the survey to your neighbour (see *Surveying Act 2002*).

Applying for a boundary determination

If adjoining owners cannot agree to share the cost of a surveyor, they can apply to Land and Property Information (a division of the Department of Lands) for a boundary determination under the *Real Property Act 1900*.

An owner of land can do this by:

- filling in a form (available from Land and Property Information)
- enclosing copies of any information or documents that support their position
- paying a lodgment fee, usually \$92, and undertaking to pay the survey costs.

Land and Property Information give notice of the application to the other landowner, who then has an opportunity to make submissions in reply.

What Land and Property Information will do

Land and Property Information must consult a surveyor before making a decision, and usually asks for a survey to be carried out by a surveyor appointed by it.

The applicant must pay the costs of the survey, which can be several hundred dollars, and may be required to pay in advance.

Notification of adjoining owners

Before a determination is made the adjoining owners must be given notice of the proposed decision. They have not less than 21 days to reply.

The decision

The decision will be based on all the evidence. If the evidence does not lead to a clear conclusion, the decision will be on the basis of what Land and Property Information determines to be 'just and reasonable in the circumstances'.

Appeal

A person unhappy with a decision may appeal to the Land and Environment Court within 28 days of receiving notice of the decision.

[34.80] Encroaching buildings

If something has been built across the boundary between two properties, the situation may be covered by the *Encroachment of Buildings Act 1922*. An encroachment means a building, and includes overhangs or any part of a building below ground or on the ground that crosses the boundary.

Does the building encroach?

If there is a dispute between owners about whether or not a building is encroaching, either owner may apply to the Land and Environment Court to decide the boundary. The court will probably call in a licensed surveyor (s.9).

If there is encroachment

If a building does encroach, the Land and Environment Court can make orders about the encroachment including:

- compensation
- transfer or lease of the affected land
- grant of an interest such as an easement
- removal of the part of the building causing the problem (s.3(2)).

If encroachment is due to an extension

If the problem has arisen as a result of a neighbour's recent extension, the local council should be advised. If the council finds that the building is different from the approved building plans, it may make an order that the extension be removed or altered to comply with the approved plans.

Anyone may also take action under the *Environmental Planning and Assessment Act 1979* (s.123) to restrain or remedy a failure to follow a development consent.

[34.90] Adverse possession

A survey may show that a person living on one block of land has occupied a part or all of an adjacent block for some time.

The owner of the adjacent block may have lost the right to remove them if the occupation has continued for more than 12 years (*Limitation Act* s.27(2)). The person using the land may then claim it under adverse possession.

If the land is Torrens title

If the land is Torrens title under the *Real Property Act* (rather than old system title – see chapter 29, Housing) the application for adverse possession must be for the whole piece of land (or in special circumstances part of the land), not just the part of it that is being used. The person making the claim must apply to Land and Property Information to amend their title.

If the land is old system title

If the land is old system title the practical result of the change is a shift in the boundary, but the precise circumstances under which it can occur are highly technical.

The land can only be claimed and changes to title confirmed by way of Supreme Court proceedings, which can be expensive and lengthy.

Legal advice

Adverse possession for Torrens title or old system is a complicated and technical area and legal advice is essential.

[34.100] Crossing boundaries and trespass

Many disputes between neighbours occur because people, animals or things cross the boundary between properties. This boundary exists even if there is no fence.

The occupier of a property (for example, the owner or tenant) usually has the right to refuse to give someone permission to come onto the land. Anyone who enters land without permission or refuses to leave after permission is withdrawn is, usually, considered a trespasser.

A person is not a trespasser if they accidentally fall or are pushed onto someone's property.

If a person refuses to leave when asked

An occupier can ask a trespasser to leave, and show them the way out. If the person refuses, the occupier can call the police and ask for them to be removed and charged with trespass under the *Inclosed Lands Protection Act 1901* if the land is fenced or enclosed (including part enclosure by a natural feature).

Sometimes, permission to enter is implied. For example, there is implied permission (or licence) for people to come onto a property for the purpose of knocking on the front door or delivering goods.

Trespass is also a civil tort, which may mean that an occupier can sue for damage caused by the trespasser. Most trespassing causes no damage, and in most cases it is not worth the time and expense.

Rights of way and easements

Sometimes a neighbour has a formal right of way (easement) across a property, either because it has been expressly created or because there is a longstanding custom of using the land for, say, a short cut.

A neighbour with a right of way can only cross the land; no other use is allowed. Usually, a right of way can be ended only by the agreement of both landowners.

Easements are generally recorded on the certificate of title, a copy of which is held at Land and Property Information.

Can a person enter to retrieve something?

There is no implied permission to enter a neighbour's land to retrieve something that has crossed the boundary (such as a ball, a kite or an animal). Express permission must be obtained by, for example, calling out, telephoning, or entering and knocking on the door to explain why it is necessary to come onto the land.

[34.110] Entry of animals

An animal accessing a neighbour's property without consent of the occupier may also be a trespass. Where an animal trespasses on land, the owner of the land can impound it and keep it for collection up to four days, after which it must be taken to the council pound. The person holding the animal must ensure that there is adequate food, water and shelter for the animal and advise the animal's owner if possible.

Impounding of animals

An animal can be impounded by the local council under the *Impounding Act 1993*, except that dogs can only be impounded under this Act if they are in a national park, nature reserve or similar area (s.7). In most other areas dogs can only be impounded under the *Companion Animals Act 1998*.

[34.120] Entry of water

Water flowing from one block of land to another due to natural situations and events (such as the slope of the land, rainfall or floods) does not normally raise legal issues.

Where legal action may be possible

An occupier may have a right to take legal action for compensation if a flow of water is the direct or indirect result of a neighbour's activities, and it causes damage.

Examples of a neighbour's actions that can lead to damage include:

- a deliberate act (for example, a neighbour deliberately directs a hose onto the land), in which case the flow is a trespass
- ongoing activity that could come into the legal category of nuisance (for example, a sprinkler, or construction work that interferes with or redirects a natural watercourse onto neighbouring land)
- negligence (for example, because of the careless construction of a tank).

Entry of water with permission

Sometimes water flows from one property to another with permission. A typical example is a drainage easement to allow water to drain from one property to or over another.

If there is no agreement it may be possible to have the easement extinguished by special application to the Supreme Court.

In special circumstances it may be possible to obtain an easement for the drainage of water across other property by special applications to the Supreme Court or the Land and Environment Court (*Conveyancing Act 1919* s.88K and *Land and Environment Court Act 1979* s.40).

These applications to the Supreme Court are complicated and certain steps must be taken before proceedings are commenced. Legal advice should be obtained for these types of applications.

Easements are recorded on the certificate of title, held at Land and Property Information. A drainage easement can be terminated only with the agreement of both owners.

Shared waterways

There may be particular problems if neighbours share a stream, lake or other waterway.

If one person's activities pollute the water, a complaint should be made to the Department of Environment and Climate Change, which can issue fines for causing water pollution (see chapter 25, Environment and planning).

The local council may also be able to help.

If access to pipes is needed

Access to water and sewerage pipes that cross a neighbour's land can be another problem.

It is necessary to seek the owner's permission to go onto their property to repair pipes, and the owner is entitled to refuse. If this happens an application for access may be made under the *Access to Neighbouring Land Act 2000* (see [34.130]).

[34.130] Access to neighbouring land

An owner or occupier of land can apply to the Local Court for an order permitting the applicant to enter a neighbour's property to complete work on their own land. This can

take the form of a Neighbouring Land Access Order or a Utility Services Access Order, or both. The process should only need to be used where adjoining owners are not able to reach an agreement.

A person may not apply for an order under the Act if access is available or prohibited under some other legislation.

Work that may be done under such an order includes:

- construction, repair and maintenance
- ascertaining the course of sewers and drains
- removing, pruning or replacing hedges, trees or shrubs
- connecting or disconnecting services
- inspections.

Notification of affected neighbours and mediation

As with dividing fences, the Act emphasises that neighbours should make a significant attempt

to reach an agreement before making an application to the local court. The court can refuse to make an order if the applicant has not made a reasonable effort to reach agreement (s 11). An applicant must also give 21 days notice of their intention to seek an order from the court (s 10).

A person given an order under the *Access to Neighbouring Land Act* must, as far as possible, restore the land to the state it was in before the order was made. The person given the access order must also indemnify the owner of the land to which access is granted against damage to land or personal property arising from access. The Local Court can make an order for compensation for damage or injury arising from an access order.

Appeals against a Local Court's decision to grant or refuse an access order, on questions of law only, may be made to the Land and Environment Court within 30 days of the decision.

[34.140] Noise and pollution

Most issues with pollution and noise are dealt with in more detail in chapter 25, Environment and planning.

[34.150] Smoke, smells and air pollution

Disputes can arise between neighbours over such pollutants as:

- smoke from chimneys or incinerators
- burning off in backyards
- hot air from air-conditioner exhausts
- smells caused by animals and birds
- chemical smells from factories.

The local council or the Department of Environment and Climate Change can be contacted for information and advice about the regulations in these areas, and what can be done if there is a problem.

For example, there are strict regulations about backyard burning in most of NSW, and people can be fined for not complying with them.

Industrial premises

Some types of premises that cause large-scale industrial pollution are scheduled under the *Protection of the Environment Operations Act*, which means they must operate according to certain standards and requirements. Scheduled premises include most factories and industrial warehouses, hospital incinerators, and so on.

Complaints about pollution from these premises should be made to the Department of Environment and Climate Change. Fines and other penalties can be imposed if there has been a breach of regulations (see chapter 25, Environment and planning).

[34.160] Noise Barking dogs

The most common neighbourhood complaint is about noise, and the noise most often complained about is made by barking dogs.

Council orders about dogs

Under the *Companion Animals Act*, a local council can issue an order to prevent nuisance behaviour in animals, including the persistent barking of dogs.

Other noises

Other intrusive noises include:

- loud music
- rowdy parties
- noisy machines
- air-conditioners
- lawn mowers
- manufacturing machinery
- burglar alarms.

Restrictions on when noises can be made

Under the *Protection of the Environment Operations Act* and Regulations there are restrictions on the times that certain things can be used if they cause excessive noise. Information on what these times are can be obtained from the Department of Environment and Climate Change or your local council.

Complaints can generally be made to the local council or police depending on the urgency and nature of the problem.

[34.170] Taking action about noises and smells

When noises or smells from a neighbour's property cause problems, there are a number of things you can try.

Talk to the neighbour

Explain the problem and ask them to stop what they're doing, or change it, or do it only at certain times.

Try mediation

Anyone involved in a neighbourhood dispute can contact a Community Justice Centre to arrange a mediation conference. Sometimes the police or the Local Court will not deal with a complaint unless the parties have tried this. (For more on community justice centres, see chapter 20, Dispute resolution without going to court.)

Complain to the police

For urgent noise problems only (such as a loud, late party), complain to the police.

Complain to the council

For ongoing non-urgent problems, complain to the local council. It has powers under the *Protection of the Environment Operations Act*, the *Local Government Act*, the *Companion Animals Act* and the *Environmental Planning and Assessment Act* to make orders about offensive noise, noise at unreasonable hours, smoking chimneys and the emission of fumes, steam or dust from other sources. The council can impose pollution-control conditions for noise or air emissions on new building development, and is responsible for ensuring that these are observed.

Complain to the Department of Environment and Climate Change

For complaints about large-scale industrial pollution, including noise and emission of odours or fumes from scheduled premises (see Industrial premises at [34.150]), contact the Department of Environment and Climate Change. The authority also handles complaints about backyard burning and noisy vehicles, and can provide advice and information on pollution regulations in general.

Apply for a noise abatement order

For noise problems, apply to the Local Court for a noise abatement order. This means attending a court hearing and proving that there is or has been an offensive noise that is likely to recur. The chamber registrar can help.

Go to court

If the pollution is serious and is causing a nuisance, sue the neighbour for compensation, or apply to the Supreme Court for an order to stop the activity (see Nuisance at [34.240]). If noise or air pollution occurs because a neighbour is not complying with the *Environmental Planning and Assessment Act* or development approval conditions, you can seek a court order that the activity cease and the breach be remedied. In this case, the neighbour can be sued even if the activity is not, in legal terms, a 'nuisance' (s.123).

The council can also issue noise abatement notices requiring owners to take steps to control barking dogs.

[34.180] Animals

The owner's responsibility

A person who owns or keeps animals on their property is responsible for any damage caused to adjoining property if they do not take reasonable care to control them (see also chapter 3, Accidents and compensation).

What councils can do

Local councils can issue orders about animals kept on private property, particularly dogs, cats and birds, under the *Companion Animals Act* and the *Local Government Act 1993*. For example, if animals are causing excessive smells or noise on a neighbour's property the council can require that their numbers be reduced or that they be moved.

If problems arise

Where problems arise because property is being fouled by a neighbour's cats or dogs, for example, it is good idea to first approach the neighbour to try to solve the problem in a friendly way. A Community Justice Centre may be able to help.

Local council orders can be sought if negotiation is not successful.

Dogs

Uncontrolled dogs

If an uncontrolled dog comes onto someone's land, the occupier is entitled to seize the dog and deliver it to its owner, or to the local council pound if this is 'reasonably necessary' to prevent damage to property (s.22).

Dangerous dogs

As well as dealing with the noise made by barking dogs (see Barking dogs at [34.160]) the local council can also declare a dog to be a dangerous dog, in which case the owner must meet strict requirements.

These requirements include keeping the dog on a leash in public and putting up warning signs where it is kept.

A dog can be declared dangerous if it has attacked, killed, threatened or chased a person or another animal.

Complaints about dangerous dogs should be made to the local council (*Companion Animals Act* s.34).

If a dog must be injured or destroyed

If it is 'reasonably necessary' for the protection of any person or animal from injury or death, a dog may be injured or destroyed. All reasonable steps must be taken to ensure that an injured dog receives any necessary treatment.

If a dog is killed, it must be done in such a manner that it dies quickly and with as little suffering as possible. The matter must be reported to council and to the owner of the dog.

Cats

Under the *Companion Animals Act* a cat owner must ensure that the cat is identified (with the cat's name and the owner's address or telephone number) by a collar or a microchip.

Cats are prohibited in food preparation and food consumption areas, and in wildlife protection areas.

Local councils can issue orders against a cat owner to prevent the cat from causing a nuisance (through persistent and unreasonable noise or repeatedly damaging anything outside the property on which the cat is ordinarily kept).

Any person may lawfully seize a cat if that action is reasonable and necessary for the protection of any person or animal.

Failing to return an animal

A person who seizes a dog or cat under the provisions of the Act may be fined if they do not return it to its owner or deliver it to the council as soon as possible.

[34.190] Trees

People often have problems with neighbours' trees – for example, overhanging branches, invasive tree roots and falling trees. Trees have also attracted a significant amount of regulatory attention.

The main legislation governing trees is the *Trees (Disputes Between Neighbours) Act 2006*. This allows a landowner to apply to the Land and Environment Court for an order to 'remedy, restrain or prevent damage to property on the land, or prevent injury to any person' relating to a tree in a neighbouring residential area.

Trimming neighbouring trees

In general, it is legal for a landowner to cut overhanging branches or protruding roots from a neighbour's tree back to the boundary of their land. This is called 'self-help'. It is also sensible to notify the neighbour before taking action, to seek cooperation and avoid misunderstanding.

The cuttings remain the property of the owner of the tree, and may need to be returned. However, simply trimming the neighbour's tree and throwing the branches back over the fence without consulting the neighbour first isn't a good idea.

Anyone cutting overhanging branches could be held responsible for any damage caused to the tree in the process, and if extensive pruning is required it is a good idea to get it done by a professional.

Who owns the pieces?

The pieces cut off the tree are the neighbour's property and should be returned, with care, to their side of the boundary – although it may be worth checking first whether the neighbour actually wants them.

Who pays?

The owner of a tree causing problems on a neighbour's land does not have to contribute to the cost of pruning it. This can be a problem, especially if it is necessary to employ a professional.

If overhanging branches are causing ongoing damage, it may be possible to sue for costs and compensation on the grounds of nuisance (except where the *Trees (Disputes Between Neighbours) Act* applies (see below)).

Is there a tree preservation order?

It is important before cutting branches to find out if the tree is protected by a council tree preservation order. These orders prohibit removing or lopping trees of a certain size or species, and there are heavy fines for breaching them.

Different councils put orders on different trees according to local conditions, and people should check with the local council for a list of protected trees.

Damage from trees

If a neighbour's tree or branches are dangerous and fall because the neighbour carelessly failed to address the dangerous condition, the

neighbour could be liable in negligence for any damage (to the dividing fence, for example).

If a tree or branches (which do not overhang) fall onto adjoining land after being cut, or are thrown onto adjoining land, the person whose land they came from could be sued for damages in trespass.

Is it worth taking legal action?

In all these cases, it is only worth taking legal action if extensive damage has been caused. Negligence, trespass and nuisance are difficult to prove, and it is usually more effective to try to come to an agreement for compensation with the help of a Community Justice Centre.

Trees on private land in a residential zone

The *Trees (Disputes Between Neighbours) Act 2006* enables the Land and Environment Court to make orders in favour of an owner against an adjoining owner if a tree on the adjoining owner's property might cause damage or injury.

The Act does not allow the court to make orders for other purposes, such as lopping or removing trees that block views.

What trees does the Act apply to?

The Act only applies to trees on privately owned land in residential zones, or in similarly titled zones such as 'village township, industrial or business' zones (zones are defined in the relevant environmental planning instrument for the area).

The Act does not apply to trees on land owned or managed by a local council.

Application to the Land and Environment Court

You can make an application to the Land and Environment Court if the tree is located on land adjoining land where you are the owner or occupier. You must tell the adjoining owner and the local council about the application.

Negotiate first

The court cannot make any orders unless it is satisfied that you have made a reasonable effort to resolve the matter with the owner of the land on which the tree is situated. This means efforts must be made to resolve the matter before any application is made to the Land and Environment Court.

What matters must the court consider?

The court will try to hear the application at a convenient location, and is likely to inspect the tree.

You will have to satisfy the court that the tree concerned has caused, is causing or is likely in the near future to cause damage to your property, or that it is likely to cause injury to a person.

Before making a decision the court must consider:

- the location of the tree in relation to boundaries
- whether any consent or other authorisation would be required by the council for interference with the tree
- whether the tree has any historical, cultural, social or other such significance
- any contribution made by the tree to the local ecosystem and biodiversity
- any contribution made by the tree to the natural landscape and scenic value of the land on which it is situated, or the locality
- the intrinsic value of the tree to public amenity
- any impact of the tree on soil stability, the watertable or other natural features of the land or locally
- if damage to property or injury to a person is alleged, any actions by you that may have contributed to the damage, and any steps taken by the owner of the land where the tree is situated to prevent or rectify the damage.

What orders can the court make?

The court has broad powers to make whatever orders it thinks are needed to prevent damage

to property or injury to any person. This can include:

- specified action to be taken by the owner of the tree
- entry onto land for the purposes of carrying out an order
- the payment of costs associated with the carrying out of works under the order
- the payment of compensation for damage to property
- a requirement for a replacement tree.

An order of the court overrides any requirement to obtain a development consent or permission under the council's Tree Preservation Order for any action about the tree.

If an adjoining owner fails to comply with any order of the court, that person may be fined.

The council can agree to carry out the works required by an order of the court.

Entering the neighbour's land

The *Access to Neighbouring Land Act* allows an owner to apply to the Local Court for an access order to permit entry to a neighbour's land to remove, prune or treat a hedge, shrub or tree (see Access to neighbouring land at [34.130]).

[34.200] Privacy

Most people like to have a certain amount of privacy. Sometimes there are problems with neighbours who seem too interested in what is going on next door (always looking over the fence, or listening to what is happening).

There are no specific laws or regulations about a right to privacy between neighbours.

Tell the council

People should tell the local council about anything dangerous on neighbouring property, or anything that could cause damage if it escaped. The council can order safety measures on private property; for example:

- demolishing an unsafe wall
- removing flammable substances
- fixing buildings that are a fire risk
- removing vegetation that could harbour vermin.

Complaints to the local council

You can complain to your local council about:

- animals (barking, aggressive or trespassing dogs; cats, birds, possums; injured or dead animals)
- illegal building work

- graffiti
- footpaths and roads
- traffic devices
- street lighting
- abandoned cars
- the maintenance of beaches, pools, parks and cemeteries
- activities on council land
- gardens on nature strips
- health problems (pest infestations, cleanliness, food handling and preparations, food poisoning in restaurants and shops)
- illegal parking
- parking fines

- parking meters
- resident parking permits
- water or air pollution
- noise
- littering and dumping
- recycling
- rubbish collection
- the collection of shopping trolleys
- street markets and buskers
- trees and tree preservation orders.

How to complain if you're not happy with the council's response

First, try the council's complaint handling system. Ask the person on the front desk which department or officer you need to talk to. If they can't or won't help, ask to speak with the relevant director and, if that fails, the general manager or the public officer, and don't give up if they are out or busy. Try a fax or email.

If the council does not respond, follow up with the mayor or your local councillor, especially your ward

councillor (if your council has wards). If that fails, you might be able to get the Ombudsman, the relevant government department minister, your local member of parliament, or even the Independent Commission Against Corruption (if corruption is involved) to investigate.

If your council has neighbourhood committees, it may be useful to get them involved. They will usually have some connections with council officers or councillors and knowledge of how council operates.

If you can't resolve the problem after all this, it may be that council is not the right body to deal with it. Although councils are usually willing to direct you to the right body or person, occasionally they are not sure themselves.

Depending on the nature of the problem, consider contacting the police, the Department of Environment and Climate Change, Sydney Water, Sydney Electricity, the Roads and Traffic Authority or some other public authority that deals with your area of concern.

The best approach may be to talk to the neighbour about the problem, or take direct action by building a higher fence, planting a tree or hedge, putting up curtains, or soundproofing.

Alterations like fencing or soundproofing may need local council approval.

If a neighbour's intrusions are threatening or intimidating, the police should be called.

Land use and development

[34.210] Getting development consent

Before a person can change the use of their land or do any building work on it, they must generally apply for development consent from their council.

If the structure to be built is a small structure it may not require development consent. Check with the Local Council (and the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008) for which structures are exempt development and would not require development consent. The types of exempt structures are aerials and antennae; air conditioning units; aviaries; awnings, blinds and canopies; some decks, balconies, patios, pergolas, terraces and verandahs; barbeques; cabanas, cubby houses, garden sheds and greenhouses; some carports; clothes hoists and clotheslines; driveways; retaining walls; flag poles; fowl and poultry houses;

letterboxes; landscaping structures; pathways and paving.

Input from adjoining owners

In many cases adjoining owners are given the opportunity to inspect plans and make objections if it appears that the building or development will affect their land.

Grounds for objecting to development

People can object to a neighbour's proposed land use or building on various grounds; for example:

- that the work or use may cause noise, air pollution, or damage to their land
- that it may cause traffic and parking problems
- that the building is:
 - out of character with the area
 - too tall
 - likely to block sunlight or obstruct a view
 - too close to a boundary.

If access to sunlight is threatened

An application to erect a building will generally not be rejected solely because the proposed building will block a neighbour's sunlight, even if the neighbour has had the benefit of uninterrupted sunlight to a part of their land for many years. However, the effect of the building on light and shade is one of the factors that should be taken into account by the council when assessing the application.

If there is a covenant

Some properties have private covenants to ensure open access to light and air or prevent a certain type of building. This can provide protection against overshadowing by a neighbour's extension but sometimes a development consent from the council overrides these private covenants.

Restrictions imposed by covenants and easements

Sometimes, a proposed building or land use contravenes a private right of an adjoining owner. These rights, which usually take the form of easements and covenants, are recorded on the certificate of title of the land.

An example of a covenant is an agreement between a number of landowners in a street or block not to build above a certain height (a restrictive covenant). Titles to properties in new residential subdivisions often contain covenants about matters that affect the appearance of the street (and thus amenity and property values for neighbours).

There is usually an implied or explicit agreement between the owners of terrace houses to maintain shared supporting walls. This is called a cross-easement for support. It may or may not be recorded on the certificate of title.

If a covenant is infringed

If private rights of this kind are infringed, a person may go to court to seek compensation or an order to stop the offending activity. However, in many local government areas new development consents override these covenants.

What must the council consider?

Local councils must consider a number of factors when deciding whether or not to grant development consent. These factors, which are set out in s.79C of the *Environmental Planning and Assessment Act*, include:

- the provisions of planning instruments
- the likely environmental, social and economic impacts of the development
- any submissions made about the development
- the public interest.

[34.220] Objections

If an occupier or owner objects to a neighbour's proposed land use or building in a development application, there are a number of steps they should take.

Talk to the neighbour directly

People may be willing to alter their plans when they realise there will be problems for others, especially if satisfactory alternatives can be found. Sometimes compromise is necessary on both sides.

Contact the local council

The council often notifies neighbours of development applications that could affect their properties, and invites them to make comments.

If the council does not do this, and owners are concerned about what is happening on a neighbouring property, they should contact the council's planning and building section.

The council should consider the opinion or wishes of an adjoining owner, but there are also certain factors that they must take into account in assessing applications, including impact on traffic, overshadowing and loss of local character, which could be pointed out to them.

Make a submission to the local council

A letter outlining the objections is usually adequate. A more detailed submission may be necessary for a major development project. A consultant town planner will be able to help you with your objections (see chapter 25, Environment and planning for suggestions).

Write to the local member of parliament

Also contact the responsible minister (at the time of publication, the Minister for Planning).

The Department of Planning has certain supervisory powers over councils, and the minister can intervene in some development decisions if it is considered necessary (see chapter 25, Environment and planning). Local members can represent the interests of residents.

Take legal action

Although a neighbour generally has no right of appeal to the Land and Environment Court where a council has decided to approve a development, there may be a right of action

challenging the approval on administrative or procedural grounds (for example, the council did not observe its policy of notifying neighbours likely to be affected or took into account an irrelevant consideration).

Approach the court

When a neighbour continues to use land without council approval or contrary to the local environmental plan, and the council will not take action to prevent the illegal use, anyone can approach the Land and Environment Court to obtain an injunction to stop the activity (*Environmental Planning and Assessment Act* s.123).

If private rights are infringed, a person may go to court to seek damages or an injunction to stop the activity.

For more information on land use and building controls and what neighbours can do, see chapter 25, Environment and planning.

[34.230] Conditions of consent

If the council issues a development consent to use land for a specific purpose or to carry out building works, it will usually be subject to a number of conditions about how the land is used or how the building is constructed; for example, hours of operation or construction, colour or texture of external surfaces, noise, drainage or landscaping.

If conditions are not observed

These conditions may be important to a neighbour's amenity. A resident who is inconvenienced by development work should talk to the neighbour about complying with the conditions. If this is not successful they may make a complaint to the council and request action to enforce compliance.

Action can also be taken by the resident in the Land and Environment Court to enforce conditions of development consent. However, this can be complex and expensive and should be discussed with a lawyer.

Applying for an order to create an easement

Application in the Supreme Court

In certain circumstances a person may apply to the Supreme Court for an order creating an easement over another person's land where this is 'reasonably necessary for the effective use or development' of the land (*Conveyancing Act 1919* s.88K). Examples are:

- a right of way (for either pedestrians or vehicles)
- a right to drain water
- a right to have access over another person's land for the purpose of erecting a building.

Compensation is normally required, as is payment of the other person's legal costs, making this an expensive option.

Application in the Land and Environment Court

An person may also apply for an easement under the *Land and Environment Court Act* (s.40) where the court has issued a development consent and:

- the easement is reasonably necessary for the development, and
 - the use of the land that benefits from the easement will not be inconsistent with the public interest, and
 - the owner of the land where the easement is to be can be adequately compensated, and
 - the applicant has made all reasonable attempts to obtain the easement, or an easement that would have the same effect, from the owner of the land.
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[34.240] Nuisance

The law relating to the tort of Nuisance has been mentioned a number of times. It is a technical area of law – the legal meaning of nuisance is different from the ordinary meaning. Only a few main points are considered here.

[34.250] When a complaint can be made

A person can complain of nuisance only if damage is caused by some continuing or regular activity or natural occurrence on a neighbour's

land that the neighbour either caused or did not try to prevent.

A nuisance complaint can no longer be made about a tree or trees that are covered by the *Trees (Disputes Between Neighbours) Act 2006*. See Trees at [34.190].

[34.260] Liability of public authorities

Public authorities are sometimes excused for causing a nuisance while performing necessary work. This depends on certain technical rules.

What is not nuisance

It is not nuisance if:

- the neighbour's activity is a 'reasonable' use of the land and care has been taken to prevent damage
- the person has put up with the problem without complaint for a long time
- the person suffered damage because they or their property are 'unusually sensitive' (for example, they are unusually sensitive to a smell, or unusually delicate plants were damaged).

What is a reasonable use of land?

It is for the court to decide what is reasonable – this usually depends on the character of the area. A noisy factory in an industrial area, for example, is not generally causing a nuisance unless the noise is exceptionally offensive.

[34.270] Taking action

Getting an injunction

Someone whose neighbour is causing a nuisance can apply to the Supreme Court for an order (injunction) against the neighbour to stop the nuisance. The process is expensive, complex and slow.

Getting an interim injunction

An injunction can be obtained quickly (an interim injunction) only in urgent cases, when the nuisance is serious.

Entering the neighbour's land

If the thing creating the nuisance is on the neighbour's land, a person may go onto the land, with permission, and do what is 'reasonably necessary' to stop the nuisance. The person must take great care to do no more than that, or they could find themselves liable for damages.

In the case of overhanging branches, a person can take direct action (self-help) on their own land to deal with the problem in some circumstances.

It may also be appropriate to take action under the *Access to Neighbouring Land Act* (see Access to neighbouring land at [34.130]).

[34.280] Contact points

If you are deaf or have a hearing or speech impairment and/or you use a tty or a computer with a modem, you can ring any number through the National Relay Service by phoning **133 677** (local and chargeable calls) or **1800 555 677** (free calls) or **1300 555 727** (Speak and Listen calls). For more information, see www.relayservice.com.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/.

Beachwatch

www.epa.nsw.gov.au/beach
ph: 1800 036 677 or 9995 5344

Community Justice Centres

www.cjc.nsw.gov.au
ph: 1800 990 777

Community Legal Centres NSW

www.clcnsw.org.au

Environment and Heritage, Office of

(incorporating the Environment Protection Authority)

www.environment.nsw.gov.au
ph: 131 555

Air pollution information and burning restrictions
Sydney 1300 130 520

Newcastle/Hunter 1800 817 838
Wollongong 1800 819 112

Environmental Defenders Office

www.edo.org.au/edonsw
ph: 1800 626 239 or 9262 6989

Heritage Office of NSW

www.heritage.nsw.gov.au
ph: 9873 8500

Land and Environment Court

www.lawlink.nsw.gov.au/lec
ph: 9113 8200

Lands, Department of

www.lands.nsw.gov.au
ph: 1300 052 637 or 9228 6666
For a complete list of regional offices, see Contact points for chapter 29, Housing.

Law Access NSW

www.lawlink.nsw.gov.au/Lawlink/lawaccess/ll_lawassist.nsf/pages/lawassist_index
ph: 1300 888 529

Law Assist

www.lawaccess.nsw.gov.au/lawassist

Local Government, Department of

www.dlg.nsw.gov.au
ph: 4428 4100

Planning, Department of

www.planning.nsw.gov.au
ph: 9228 6111

[34.290] Internet

- Australasian Legal Information Institute (AustLII) - www.austlii.edu.au
- Department of Planning and Infrastructure – www.planning.nsw.gov.au
- Division of Local Government – www.dlg.nsw.gov.au
- Environmental Defender's Office – www.edo.org.au/edonsw
- Law Access NSW, Law Assist – www.lawaccess.nsw.gov.au/lawassist
- Law and Justice Foundation of NSW – www.lawfoundation.net.au
- Legal Information Access Centre – <http://www.legalanswers.sl.nsw.gov.au/>
- NSW Legislation – www.legislation.nsw.gov.au
- Office of Environment and Heritage – www.environment.nsw.gov.au