

BANNERMANS FACT SHEET:

Fences, Trees and Retaining Walls

Boundary Issues between adjoining owners

We have recently seen a significant increase in the number of disputes concerning retaining walls, dividing fences and damage by trees from adjoining properties.

This area of law has undergone considerable legislative reform in recent years and there are many interesting aspects to consider, including:

- Dividing Fences Act 1991: This Act now applies to retaining walls which provide support for a fence separating the land of adjoining owners, whether on the common boundary of adjoining land or on a line other than the common boundary. Interestingly, the fence may be a gate, ditch, hedge or similar vegetative barrier.
- Section 177 of the Conveyancing Act 1919 states that a duty of care exists in relation to the right of support for land. It allows a person (e.g. an adjoining land owner) to bring an action in negligence for any damage caused by the removal of any natural support or of any structure that has replaced that natural support.

- Easements, although not registered on title at the NSW Land and Property Management Authority, may effectively exist under a development application condition specifying liability for repair or maintenance.
- The Tree (Disputes Between Neighbours) Act 2006 now provides the right to seek full compensation for damage caused by trees to fences and retaining walls.

There are also many practical considerations, including:

- What actions should occur to preserve rights for contribution from the adjoining owners.
- What proportion of repair and maintenance should be sought from the adjoining owner.
- What role do Tree Preservation Orders take in these types of matters.
- What role does the Access to Neighbouring Land Act 2000 have.
- Which forum or legislation best applies to the individual situation.
- Disclosure issues to notify the scheme's insurer.



Key Points

- (1) Dealing with fencing, retaining walls and tree disputes is a specialised area.
- (2) Owners corporations should consider advice to ensure that rights are preserved and adequate compensation is sought.
- (3) This area of law continues to evolve.