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Neighbours

Nicholas Comino  Solicitor, Western Sydney Community Legal Centre

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[32.10] Neighbours are people who live close enough to notice or 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 cannot discuss a problem respectfully and politely with your neighbour, 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 parties live. (For more on community justice centres see Chapter 18, Dispute resolution.)

**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 Land and Property Information NSW: see Contact points at [32.250], 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.

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**Dividing fences and boundaries**

[32.20] **Dividing fences**

In NSW, the Dividing Fences Act 1991 (the Act) is the main legislation that regulates and attempts to settle many of the contentious issues about fences. It does not apply to many government authorities, crown land, reserves, and roads.

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 many structures that are different from a simple fence, for instance a ditch, embankment, hedge, foundation, or gate. Retaining walls are specifically excluded from the definition of a fence, although the Local Court or tribunal can make orders on the retaining wall where it supports a dividing fence.

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**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 tribunal 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 a minimal fence such as a natural boundary or vegetation, might be "sufficient"; in many suburban environments, a wooden paling or pre-painted steel fence is sufficient.
[32.30] 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 [32.40]). If an agreement can’t be reached, the Local Court or NSW Civil and Administrative Tribunal (“the tribunal”) can make orders about fencing work. See [32.60] for more information on fencing orders.

If one owner wants a better fence
An owner should pay the additional cost if they want a fence of a higher standard than is required for a sufficient dividing fence, unless the neighbours agree to another arrangement.

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.

Where part of the fence is also a swimming pool
The owner of the swimming pool is responsible for the costs associated with complying with the Swimming Pools Act 1992 (NSW), s 33. If the pool fence separates two swimming pools on separate properties, the owners equally share the costs of that part of the fence.

What about the retaining wall
A retaining wall is not considered part of a dividing fence, and is specifically excluded under the Act. However, the Local Court or tribunal has jurisdiction to make an order in relation to a retaining wall where it provides support for a dividing fence. A neighbour is not usually liable to make a contribution to the cost of a retaining wall.

A retaining wall may be treated as a structure on one owner’s property, although where the wall is on the boundary it can be unclear who built it or whether the retaining wall is on either side of a boundary. If the retaining wall is entirely on one owner’s property, it would normally be considered a structure on that person’s property and is that person’s responsibility to maintain. The conveyancing act makes it illegal to remove support for a retaining wall. There is also a general right of “support” where an owner can reasonably expect that their land will have support from a neighbour’s land.

Retaining walls will be subject to council regulations and might be registered as an easement on the property title. It is generally appropriate to seek advice on the specific circumstances of a particular retaining wall, as the failure of a retaining wall can result in substantial damage to both properties.

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 (Dividing Fences Act, 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 a written agreement with the neighbour or seeking an order from the tribunal or Local Court, has no grounds under the Act for recovering the cost. The only exception to this is if urgent work is required (see below).

[32.40] 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 tribunal 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
Councils may vary in their rules regarding 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. If there is no agreement or order, entering a neighbour’s property to do fencing work without their permission can be
trespass at criminal or civil law. 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 tribunal (see The NSW Civil and Administrative Tribunal at [32.50]) can enter the neighbour’s land at any “reasonable” time to do the work.

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**[32.50] 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 NCAT or the Local Court, 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.

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**The NSW Civil and Administrative Tribunal**

The NSW Civil and Administrative Tribunal has jurisdiction to determine disputes under the Dividing Fences Act and certain other Acts. The tribunal’s hearings are similar to those in a Local Court.

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**[32.60] 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.

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**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 Tribunal 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 Land and Property Information or from the local council.

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**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 NCAT (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 tribunal, 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 tribunal 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. 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 Tribunal for an order about the position of the fence and any compensation required.

[32.70] 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 and Spatial Information Act 2002 (NSW)).

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 for a boundary determination under the Real Property Act 1900 (NSW).

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.

[32.80] 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 (NSW). 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 (NSW), s 123 to restrain or remedy a failure to follow a development consent.

[32.90] 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 1969 (NSW), 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 27, 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.

[32.100] 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 (NSW) 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.

[32.110] 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 (NSW), 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 (NSW).

[32.120] 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 Planning and the Environment, which can issue fines for causing water pollution (see Chapter 23, 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 [32.130]).

[32.130] 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 (Access to Neighbouring Land Act, s 11(2)). 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.

Noise and pollution

[32.140] Most issues with pollution and noise are dealt with in more detail in Chapter 23, Environment and Planning.

[32.150] 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 Planning and Environment 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 1997 (NSW), 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 Planning and Environment. Fines and other penalties can be imposed if there has been a breach of regulations (see Chapter 23, Environment and Planning).

[32.160] 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 1997 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 the Environment or your local council.

Complaints can generally be made to the local council or police depending on the urgency and nature of the problem.
[32.170] 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 18, Dispute Resolution.)

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 1997, the Local Government Act 1993, the Companion Animals Act 1998 and the Environmental Planning and Assessment Act 1979 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 Strata
If you and the other neighbour live in the same strata complex, noise or disruption can be a breach of the common by laws in a residential scheme. You can raise a complaint with the executive or the strata manager.

Complain to the Department of the Environment
For complaints about large-scale industrial pollution, including noise and emission of odours or fumes from scheduled premises (see Industrial premises at [32.150]), contact the Department of Planning and Environment. 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 [32.210]). If noise or air pollution occurs because a neighbour is not complying with the Environmental Planning and Assessment Act 1979 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.

[32.180] 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 1998 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 some-
one’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 [32.160])
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 protec-
tion 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 1998 a cat
owner must ensure that the cat is identified
(with the cat’s name and the owner’s ad-
dress 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 unreason-
able 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.

Trees

[32.190] People often have problems
with neighbours’ trees – for example, over-
hanging 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
(NSW). This allows a landowner to apply to the
Land and Environment Court for an
order to “remedy, restrain or prevent dam-
age 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 bound-
dary 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?
An owner of a tree would not normally have to pay the cost of removing overhanging branches. However, where the overhanging branches risk causing damage to a neighbour’s property or injury, the owner of the tree would have to pay those costs.

If overhanging branches are causing ongoing damage, it may be possible to sue for costs and compensation on the grounds of nuisance or under the Trees (Disputes Between Neighbours) Act (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 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 water table 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.

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**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 [32.130]).

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[32.200] 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.

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**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
• 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 Planning and Environment, Sydney Water, Sydney Electricity, Roads and Maritime Service 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.

Nuisance

[32.210] 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.

[32.220] 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 (see Trees at [32.190]).

[32.230] 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
- person has put up with the problem without complaint for a long time
- 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.

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**[32.240] 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* [32.130]).
Contact points

[32.250] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning 133 677 (TTY users, chargeable calls) or 1800 555 677 (TTY users, to call an 1800 number) or 1300 555 727 (Speak and Listen, chargeable calls) or 1800 555 727 (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) 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.tisnational.gov.au.

Community Justice Centres (CJC)
www.cjc.justice.nsw.gov.au
ph: 1800 990 777

Community Legal Centres NSW
www.clcnsw.org.au
ph: 9212 7333

Environment and Heritage, Office of
(incorporating the Environment Protection Authority)
www.environment.nsw.gov.au
ph: 131 555

EDO NSW
www.edonsw.org.au
ph: 1800 626 239 or 9262 6989

Heritage Office of NSW - see now Office of Environment and Heritage
www.environment.nsw.gov.au
ph: 131 555

Land and Environment Court
www.lec.justice.nsw.gov.au
ph: 9113 8200

Land and Property Information
formerly Lands, Department of
www.lpi.nsw.gov.au
ph: 1300 052 637 or 9228 6666
For a complete list of regional offices, see Contact points for Chapter 27, Housing.

Law Access NSW
www.lawaccess.nsw.gov.au
ph: 1300 888 529

Law and Justice Foundation of NSW
www.lawfoundation.net.au
ph: 8227 3200

Legal Information Access Centre
ph: 9273 1414

NSW Legislation
www.legislation.nsw.gov.au
www.austlii.edu.au

Local Government, Office of
www.olg.nsw.gov.au
ph: 4428 4100
Planning and Environment, Department of
www.planning.nsw.gov.au
ph: 9228 6333 or 1300 305 695

Development applications
NSW Department of Planning and Environment - NSW Planning Portal
www.planningportal.nsw.gov.au
or contact your local council