



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 33

Dividing Fences

REPORT

NOVEMBER 1975

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Professor R.W. Harding, Chairman

Mr. E.G. Freeman

Mr. D.K. Malcolm

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Tel: 25 6022).

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TO: THE HON. N. McNEILL, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. The Law Reform Commission was asked to consider and report on the law relating to dividing fences.

THE WORKING PAPER

2. The Commission issued a working paper on this project in December 1973. A copy of the working paper is attached as Appendix II to this report.

A list of those who commented on the working paper is contained in Appendix III of this report. All comments have been taken into consideration, even though not specifically referred to.

THE EXISTING LAW IN WESTERN AUSTRALIA

Introduction

3. The law relating to dividing fences is basically contained in the *Dividing Fences Act 1961-1969* (in this report referred to as “the Act”). The Act was the first attempt to provide Western Australia with comprehensive legislation for regulating the rights and responsibilities of adjoining land owners with respect to boundary fences.

The Act does not interfere with the right of adjoining owners to contract out of the Act and to enter into an agreement relating to the cost of erecting or repairing dividing fences (s.6).

The scheme of the Act

4. The Act imposes a liability on adjoining “owners” whose lands are not divided by a “sufficient fence” or whose lands are divided by a fence in need of repair, to contribute equally (except in the case of negligence, see s.15(7)) to the construction or repair, as the case may be, of the fence (ss.7 and 14). If the “owners” fail to reach agreement, under s.9 the court

may determine the need for and the kind of fence to be constructed. In determining the type of fence to be constructed, the court is required to be guided by the type of fence usually constructed in the locality, the purpose for which the adjoining lands are used, and the type of sufficient fence (if any) prescribed under local by-laws (s.9 (3)).

Under s.13 of the Act if the owner who has constructed a fence has not given a notice pursuant to s.8, the owner of the adjoining land may subsequently be liable to pay half the value of the fence if he uses his land in any of the ways specified in s.13 (construction or occupation of a building).

Where the owner of the adjoining land cannot be located for service of a fencing notice required by s.8 of the Act, the court is empowered by s.11 of the Act to authorise the construction of a dividing fence. The owner of the adjoining land may subsequently be liable to pay half the value of the fence.

A more detailed outline of the Act is set out in paragraphs 4 to 13 of the working paper.

DISCUSSION AND RECOMMENDATIONS

General requirements of dividing fence legislation

5. The Commission considers that a basic purpose of dividing fence legislation is to provide a simple framework to which adjoining owners may refer and which will facilitate agreement between them as to contribution to the cost of construction or repair of a dividing fence. The legislation should also provide for the determination of any issues which cannot be settled by agreement. Such legislation should in no way interfere with the right of adjoining owners to reach agreement without reference to the Act.

In general, the Commission agrees that the courts should be the final arbiter of fencing disputes, but should base their decisions on guidelines laid down by the Act. Such guidelines should be in simple and precise terms. However, the Commission considers it would be impracticable to devise precise criteria to cover every circumstance and that the courts should be given a residual discretion.

6. While the Commission considers that the present Act fulfils many of the general requirements of dividing fence legislation outlined in paragraph 5 above, it is of the opinion that there are specific provisions which require amendment.

Liability

General

7. Under s.7 of the Act, owners of adjoining land are liable to contribute to the construction of a dividing fence when their lands are not divided by a “sufficient fence” (as defined).

The essence of this provision is that the mere fact of ownership alone will attach liability to a person where no fence or a less than sufficient fence divides his land from that of his neighbour. This liability does not arise until one owner serves the required notice (under s.8) on his neighbour, informing him of his intention to construct a dividing fence. If the need for a new fence is disputed, the court has the power (s.9(1)) to determine whether or not an existing fence is a sufficient fence. If an existing fence is in fact a sufficient fence as defined in s.5 of the Act, there is no right to claim contribution towards the cost of constructing a new fence from the adjoining owner. Thus, the whole question of liability for construction or replacement of a dividing fence depends firstly on ownership of the land concerned, and secondly on whether any existing fence is a sufficient fence as defined in the Act.

8. In paragraphs 18 to 21 of the working paper, the Commission discussed the basic issue of liability. The possibility was discussed of liability attaching, not by virtue of ownership alone, but by reason of an owner having a use for the fence proposed. In paragraph 53(1) of the working paper the question was asked, whether the liability of an adjoining owner to contribute to the cost of a dividing fence should be based on ownership alone, or on use, or on some other basis.

9. About one half of the commentators on the paper, including the Local Government Association of W.A. and the City of Stirling, were of the view that ownership should be the sole basis for liability to contribute to the cost of construction or repair of a dividing fence.

10. A number of commentators, including the Department of Local Government, the W.A. Federation of Ratepayers and Progress Associations, the Law Society of Western Australia, the Master Builders' Association of W.A., and the City of Nedlands considered that an adjoining owner should not be required to contribute towards the cost of a dividing fence unless he had a use for it.

The Pastoralists and Graziers Association of W.A. was of the opinion that the liability of an adjoining owner to contribute to the cost of constructing a dividing fence should be based on ownership alone, except however for pastoral leases outside the South West Agricultural areas which should be based solely on use.

The Country Shire Councils' Association of W.A. considered that no liability should exist until the adjoining owner connected his fence to that of the constructing owner.

11. The Commission supports the test of liability based on ownership as in the present Act. However, in relation to the type of fence to be ordered (see paragraphs 14 and 15 below) and the extent of an owner's contribution (see paragraphs 16 to 18 below), the courts should take into consideration the respective needs of and resulting benefits to each owner.

“Owner”

12. Under s.7 of the Act liability is imposed on adjoining “owners”. In s.5 the term “owner” is defined as including a person who is entitled to the freehold estate in possession of land, or who is entitled to receive the rents and profits of land whether as beneficial owner, trustee or mortgagee in possession. It also includes the holder of a lease which has an unexpired term of at least five years at the time the fencing action is commenced.

Under s.19 provision is made in regard to the apportionment as between a landlord and his tenant of dividing fence costs. The section provides that unless otherwise agreed between the landlord and the tenant then:

where the unexpired term of the lease is less than five years the landlord pays the whole of the costs;

where it is between five and seven years, the landlord pays three quarters of the costs and the tenant one quarter;

where it is between seven and twelve years, the landlord and the tenant contribute equally;

and where it is more than twelve years, the tenant pays the whole of the costs.

The Commission recognises that the lease agreement will in most cases set out the liability as between landlord and tenant as to maintenance and repair of dividing fences.

The Commission supports this method of clearly defining those persons who may be called upon to contribute as “owners” to the cost of construction or repair of a dividing fence and does not recommend any change in this respect.

“Sufficient fence”

13. Under s.5 of the Act a “sufficient fence” is defined as a fence prescribed as sufficient by a local authority by-law made under s.210 of the *Local Government Act* or a fence agreed upon by the parties which does not fail to comply with any such by-law. In the absence of such a by-law a “sufficient fence” is defined by paragraph (c) of that definition as any substantial fence ordinarily capable of resisting the trespass of cattle and sheep, or by paragraph (d) as a fence determined to be a “sufficient fence” by the court under the Act.

Where the test of a sufficient fence is its ability to resist the trespass of cattle and sheep (paragraph(c)) that test provides a safeguard to a farmer whose land adjoins a residential property. In such circumstances, the farmer cannot be required to contribute to the cost of the replacement of a fence complying with that test by a fence of a higher standard. However, this test is inadequate in urban localities since (unless the local authority has prescribed a sufficient fence under s.210 of the *Local Government Act*), if an existing dividing fence does comply with the test an owner cannot compel the adjoining owner to contribute to the cost of replacing the fence by a fence of a higher standard. If the Commission’s recommendation in paragraph 18 below - that the court be given a discretion to determine the extent of contribution payable by each party - is accepted, the safeguard provided to the farmer by the

test of the ability of a fence to resist the trespass of cattle and sheep would be unnecessary. The interests of the farmer, whether as a claimant or respondent, in respect of the cost of a fence would be safeguarded by the court; see paragraph 18 below. The Commission would accordingly recommend that paragraph (c) of the definition of sufficient fence be repealed. (See recommendation (1)).

Type of fence

14. Under s.9 of the Act the courts are empowered to determine the kind of fence to be constructed. Section 9(3) provides the court with a discretion as to the type of fence to be ordered and lays down certain guidelines which the court must consider before making its decision. The main features of these are -

- (a) the purpose for which the respective lands are used are to be taken into account;
- (b) the need to maintain a reasonable standard of fencing. The court must accordingly have regard to fences prescribed as sufficient under local authority by-laws, and the kind of fence usually constructed in the locality.

15. The Commission considers that in general the provisions in s.9(3) of the Act relating to the type of fence a court may order to be constructed are adequate. However the Commission is of the view that the courts should be bound to order the construction of a fence of a standard at least equal to that prescribed in the by-law or if there is no such by-law, of a standard at least equal to the standard of good fencing in the locality. (See recommendation (2) (a)). This should ensure that a basic standard of fencing is maintained for each locality. The Commission also recommends that s.9(3) should be amended to make it clear that the courts should also take into account the respective benefits to the constructing owner and the adjoining owner when ordering the type of fence to be constructed. (See recommendation (2) (b)).

Contribution

16. Section 7 of the Act provides for adjoining owners to contribute in equal proportions to the construction of a dividing fence. Arguments in favour of retaining the provision for equal contributions are that it is straightforward and precise, gives the parties a clear indication of their respective rights and liabilities and may facilitate the making of fencing orders by the courts. Contrary arguments are that it is too inflexible and fails to allow the courts to take into account the differing circumstances of each case; for example where land is used for agricultural or pastoral purposes and the adjoining land is used for residential purposes.

17. In paragraph 53(5) of the working paper the Commission raised the question as to the extent of each owner's contribution to the cost of construction or repair of a dividing fence. The majority of the commentators (who were from the Perth metropolitan area and may well have directed their comments to urban situations) were of the opinion that a strict limitation of each owner's contribution to one half of the cost of the construction or repair of the fence was too inflexible. They considered it would be fairer to limit an adjoining owner's liability for contribution to one half of the cost of a fence adequate for his purposes provided that it accorded with the general standard of fencing in the locality or the minimum standard of fencing prescribed under by-laws.

The Pastoralists and Graziers Association of W.A. also agreed with the view. The Association also considered that if either party wanted to further upgrade a fence he could do so but should not be able to claim from his adjoining owner.

18. After giving further consideration to this matter, the Commission is of the view that the legislation should provide that generally both owners should contribute equally to the cost of construction of a dividing fence. In the majority of cases the needs of neighbouring owners would be similar and they would benefit equally from a dividing fence.

However, there are cases where there is some imbalance between the parties as to their respective needs and to the degree of benefit each will receive from the type of fence ordered to be constructed.

For example, in a residential area the situation may arise where a constructing owner wishes to construct an expensive brick wall and his adjoining owner neither requires nor can afford such a dividing fence.

Alternatively, where a factory abuts on a residential lot, the factory owner may wish to construct an expensive mesh fence ten feet high for which the residential owner has no need.

Again, where farm land adjoins residential lots, the owner of the farm land may not require a fence of a standard usual for residential lots: see paragraph 13 above.

The Commission considers that courts should be empowered to decide the extent of contribution payable by each party. This discretion should be exercised when there is some imbalance between the parties whether as to their respective needs or as to the degree of benefit each will receive from the type of fence to be constructed. The Commission recommends that s.7 of the Act should be amended to empower the courts to decide on the extent of contribution payable by adjoining owners when there is any such imbalance. The Commission also recommends that in the absence of proof to the contrary, it should be presumed that each owner has equal needs and will benefit equally from the construction of the fence. (See recommendation (3)).

Neighbour cannot be found

19. Section 11 of the Act provides for the situation where an owner who desires to construct a dividing fence cannot locate the adjoining owner. Provision is made for an application to the court which may authorise the construction of a specified fence (s.11(1)). If the adjoining owner or his successor is later located, notice may be served on him claiming a contribution of one half of the then value of the fence (s.11(2)).

The Commission is of the view that the basic justification for the inclusion of s.11 still remains irrespective of the fact that the section is rarely used. The owner proposing to construct the dividing fence must, before he can avail himself of this section, have made all reasonable inquiries to locate his adjoining owner in an effort to comply with the notice provisions of the Act (s.11(1)). In such circumstances, the failure to serve proper notice is no fault of the constructing owner and he should not be prevented from claiming contribution

when the adjoining owner is located. Accordingly, the Commission recommends that s.11 should be retained.

Defining boundary lines

20. Section 12 of the Act deals with the situation where owners of adjoining lands do not agree as to the position of the common boundary line between those lands upon which either of the owners desires a dividing fence to be constructed.

One of the owners may give notice to the other owner of his intention to have the line defined by a surveyor. In the event of such a notice being given, the other owner within seven days of the notice having been given to him is required -

- (a) to define the line by pegs, if he is satisfied of the accurate position of the boundary line, or
- (b) to employ a surveyor to define the boundary line.

If within one month of the giving of the notice, that other owner -.

- (a) has defined the common boundary line by pegs, or
- (b) has failed to have the common boundary line defined by a surveyor,

then the owner who gave the notice may have the line defined by a surveyor. If the boundary line when defined by the surveyor is found to be in the same position as the pegs placed by the other owner then that other owner is entitled to recover the costs of the survey from the owner who gave the notice. However, in all other cases where a surveyor has been employed for the purposes of s.12 all reasonable expenses are to be paid in equal shares.

21. The dividing fence legislation in Queensland and New South Wales contain provisions which are to the same effect as s.12 of the Act: see The *Dividing Fences Act of 1953* (Qld.) s.13 and *Dividing Fences Act 1951* (N.S.W.) s.12.

A similar provision to s.12 of the Western Australian Act is found in the *Fences Ordinance 1972* (Northern Territory) s.12. That section however provides that if the boundary line when ascertained by the surveyor is found to be in substantially the same position as that defined by the pegs placed there by the owner who received the notice of intention to have the line surveyed, then that owner is entitled to recover only the costs incurred by him in placing the pegs. If a surveyor has been employed by either party to define the common boundary line all reasonable expenses of the survey are to be borne by the adjoining owners equally.

There are no corresponding provisions to s.12 in the fencing legislation of Victoria, South Australia, Tasmania and New Zealand.

22. The Western Australian, Queensland and New South Wales legislation offers protection in regard to the surveyor's costs to the owner to whom the notice was given in the event of that owner's belief as to the position of the common boundary line being correct. The legislation in these States does not however offer a similar protection to the owner giving the notice in the event of his belief as to the position of the common boundary line being correct.

The Commission considers that the protection offered by the Western Australian Act in regard to the surveyor's costs should be given not only to the owner receiving the notice but also to the owner giving the notice, since both parties are unable to agree on the position of the boundary fence.

The Commission therefore recommends that s.12 be amended so as to offer protection in regard to the surveyor's costs not only to the owner to whom the notice was given in the event of his belief as to the position of the common boundary line being correct but also to the owner giving the notice in the event of that owner's belief as to the position of the line as pegged by him being correct. (See recommendation (4)).

Adverse possession

23. Where a person is in unauthorised possession of land (i.e. in adverse possession of land) for a continuous period of twelve years, then at the end of that period the owner of the land loses his right to bring an action for the recovery of the land and in consequence he may lose his title to the land in favour of the person in unauthorised possession:

Limitation Act 1935 ss.4 and 30, *Transfer of Land Act 1893* ss.222, 223 and 223A.

Where a dividing fence is constructed otherwise than on the common boundary, then in the absence of some special arrangements between the adjoining owners such as a lease of the land in question (which would be uncommon), adverse possession will run against the owner on whose land the fence is constructed in favour of the other owner.

Section 9(2) of the *Dividing Fences Act* gives some relief to this rule by providing that where the court has determined that the dividing fence is to be constructed otherwise than on the common boundary of adjoining lands, the occupation of the land on either side of the fence is not to be adverse possession against the owner of the land.

The legislation of New South Wales, Queensland, Victoria, Tasmania, the Northern Territory and New Zealand have provisions similar to s.9(2) but in addition -

- (a) in Queensland and the Northern Territory, the provision applies in the case of an agreement under the Act between the adjoining owners to construct the fence otherwise than on the boundary line, and
- (b) in Victoria and Tasmania, the provision applies in the case of an agreement between the adjoining owners to construct the fence otherwise than on the boundary line, and whether or not the agreement is under the Act.

The Commission recommends that s.9(2) of the Act should be extended to cases where the fence by agreement (whether pursuant to the Act or not) is constructed otherwise than on the common boundary. (See recommendation (5))

Contribution after fence erected

24. Under s.13 of the Act, an owner is permitted to erect a fence and then at a later stage seek contribution from the then owner of the adjoining land when that owner completes or has completed a substantial building, or occupies or permits the occupation of a building on that land. The right to claim contribution can be exercised against the adjoining owner whether or

not he was the owner when the fence was constructed, but can be exercised only by the owner who actually constructed the fence.

The section appears to run contrary to the main theme of the present Act in that no communication or negotiation has taken place between the parties prior to the erection of the fence and the party liable to contribute has had no say as to the type of fence to be constructed.

25. In paragraph 53(4) of the working paper the following questions were asked –

In cases where a fence has already been constructed, but no contribution paid -

- (a) should the right to claim contribution be confined to the constructing owner, or should any of his successors in title be able to claim?
- (b) should the liability to contribute be restricted to the person who was the adjoining owner when the fence was erected, or should any of his successors in title be liable to contribute?

The Department of Local Government (which was of the opinion that liability to contribute should be based on use and not ownership - see paragraph 10 above) considered that the right to claim a contribution should be available to successive owners but that this right should not pass beyond the owner who first becomes entitled to claim a contribution from an adjoining owner. In other words, the right should not go further than the person who is the owner at the time that the adjoining land first comes into use. The Department considered that the liability of an adjoining owner should not be restricted to the person who was an adjoining owner at the time of construction, but that it should be limited to the adjoining owner who first makes use of his land.

The Master Builders' Association of W.A. considered that the successors in title to the constructing owner should be entitled to claim contribution where the constructing owner had not already done so. In such circumstances, where a builder fenced a property and sold it at a price which included the whole cost of the fence, the purchaser would be able to claim one half of the cost of the fence from the adjoining owner.

The majority of commentators, including the Law Society, City of Stirling and the Pastoralists and Graziers Association of W.A. considered that the right to claim contribution should be limited to the owner carrying out the fencing work and only against the adjoining owner at the time the fencing work is carried out. This view is based on the need for certainty. A purchaser of land would take free of any right to claim a contribution or liability to pay the contribution. It would also encourage the speedy settlement of fencing disputes and promote good relations between neighbours.

26. In its deliberations, the Commission considered the case where a purchaser of a block of land in a subdivision contracts with the vendor that he will not claim against the vendor in respect of the cost of erection or maintenance of a dividing fence between the land purchased and land still owned by the vendor. The Commission believes that it would not be in the interests of certainty and simplicity to permit such a purchaser who constructs a fence to claim contribution from a successor in title from the vendor. The situation is under the control of the purchaser who may elect either to put up a fence at his own cost or to wait until such time as the adjoining land is no longer owned by the vendor.

27. The Commission agrees with the view expressed by the majority of commentators (see paragraph 25 above) and accordingly recommends that the right to claim contribution for fencing work should as a general rule be limited to an owner carrying out that work (who complies with the notice provisions in the Act) and only against the adjoining owner at the time such work was carried out.

28. The Commission nevertheless recognises that there could be circumstances where a person who erected a fence without complying with the notice requirements of s.8 should be excused from such failure and not be deprived of a right to contribution. The Commission accordingly recommends that in respect of dividing fences constructed after 30 June 1976, a new section be inserted which permits the court, if it considers there was reasonable excuse for failure to serve the notice by an owner who had previously constructed a dividing fence, to allow that owner a right of contribution against the person who was the owner of the adjoining land at the time the fence was constructed where such person is still the owner of that adjoining land at the time when application is made to the court for permission to claim a contribution. (See recommendation (6) (a)).

The constructing owner in such circumstances would therefore be afforded some protection, yet would not be offered a means of avoiding the notice procedures under s.8.

29. The present s.13 provides that once an adjoining owner is liable to contribute, his liability is one half of the value of the fence as at the date of service of notice. With this formula alone, the Commission sees the possibility of the adjoining owner being asked to contribute to a standard of fence far in excess of his needs. The Commission therefore recommends that the new section should also provide that the extent of the adjoining owner's liability should be -

One half of the value of the existing fence at the date of the service of the notice under the section, or one half of the cost of a sufficient fence at the date of service of such notice, whichever is the lesser.

(See recommendation (6) (b)).

The Commission further recommends that the new section would not apply to any case where the court has made an order under s.11(1) of the Act since that section has its own built-in provisions to enable a constructing owner to make a claim against the other owner when he is subsequently located. (See recommendation (6)).

30. The Commission also recommends that the existing s.13 should only continue to apply to dividing fences constructed before 30 June 1976. (See recommendation (7)).

Repair of a dividing fence

31. Under s.15 of the Act the courts are empowered to determine the kind and extent of repairs to be effected to a dividing fence which is in need of repair. Subsection (3) provides that the court shall be guided by the kind of fence in use in the locality, the purposes for which the lands that are or will be separated by the fence are used and the type of sufficient fence prescribed under local by-laws. The Commission considers that s.15 should be amended to make it clear that the courts should also take into account the respective benefits to each of the owners when ordering the kind and extent of repairs to be effected. The Commission recommends that s.15 be amended accordingly. (See recommendation (8)).

32. Section 14 of the present Act provides that when a dividing fence is in need of repair, adjoining owners are liable to contribute in equal proportions to its repair. In s.5 “repair” is defined to include re-erection and re-alignment.

The Commission considers that the requirement of equal contribution is too inflexible and incapable of dealing adequately with the varying circumstances of each case. As with construction of a dividing fence, the Commission is of the view that the court should be granted power to determine the proportion of contribution payable by each owner when there is some imbalance between the parties whether as to their needs or as to the degree of benefit each will receive from the dividing fence. The Commission also recommends that in the absence of proof to the contrary, it should be presumed that each owner has equal needs and will benefit equally from the dividing fence.

The Commission recommends that s.14 be amended accordingly. (See recommendation (9)). Consequential amendments would be required to s.15(2), (3), (4) and (5) to allow an owner to propose contribution in other than equal shares, to permit an adjoining owner to object to the apportionment of contribution proposed, and to empower the court to determine the issue. (See recommendation (9)).

33. Under s.15(5) of the Act the courts are empowered to determine the line upon which repairs to a fence are to be effected.

Section 15(5a) provides that where the court has determined that the repairs to a fence are to be effected otherwise than on the common boundary of adjoining lands, the occupation of the land on either side of the fence is not to be adverse possession against the owner of the land.

The Commission considers that the rule in s.15(5a) of the Act should be extended to cases where repairs to a fence are effected by agreement (whether pursuant to the Act or not) otherwise than on the common boundary and the Commission recommends that the provisions of s.15(5a) should be so extended. (See recommendation (10)).

Fences on other side of road

34. Section 16 of the Act relates to the situation, often found in rural areas, where a fence has been constructed along a boundary between an owner's land and a road and such fence is utilised by an owner of other land, for example on the other side of the road. The section provides that the owner of the other land is liable so long as he makes use of the fence to contribute in equal proportions to the repair of that part of the fence involved.

35. A similar provision is contained in s.335(12) of the *Local Government Act 1960*. That subsection provides that the owner of the other land who makes use of the fence is liable (so long as he or his tenant uses the fence) to pay to the owner of the land on whose boundary the fence has been constructed -

- (a) half the cost of the repairs of that part of the fence involved, and
- (b) interest at the rate of five per cent per annum on half the value for the time being of that part of the fence involved.

The liability under subsection (12), however, only arises where gates registered under s.335 are maintained across the road and the road is under the control of a shire, as distinct from a town or city.

The Commission understands that in rural areas it is not uncommon for fences of considerable length and significant value to be used in accordance with these provisions.

New Zealand and the Australian States of New South Wales, Queensland and Tasmania have similar provisions to s.16 of the Western Australian Act, except that in New Zealand and in Tasmania the other owner is required to pay interest at ten per cent on half the value of the fence.

In South Australia, the owner who constructs the fence can institute court proceedings for the recovery from the other owner of a contribution towards the cost of the construction or repair of the fence and the court may order that other owner to make such contribution as it

considers just in view of the benefit which he derives in consequence of the construction or repair of the fence - (s.11).

Victoria has no corresponding provision to s.16 of the Western Australian Act.

In the Northern Territory, the other owner is liable to pay to the owner who constructed the fence half the value of the fence at the time when he first made use of the fence, as well as being liable to contribute to the cost of its repair.

The Commission recommends that s.16 be amended to provide that the owner who makes use of a fence on the other side of the road should pay interest to the owner of the land on the boundary of which the fence is erected at the rate of eight per cent per annum on one half of the value from time to time of that part of the fence involved. (See recommendation (11) (a)). The Commission also recommends that s.16 be amended to provide that the liability of the owner making use of the fence to contribute to the repair of the fence is not necessarily a liability to contribute in *equal* proportions and that the provisions of the Act relating to repair are to apply as if the fence were a dividing fence and the lands adjoining lands. (See recommendation (11) (b)).

In the event of these recommendations being implemented, the Commission further recommends that s.335(12) of the *Local Government Act* be repealed since that subsection would then be redundant. (See recommendation (11)).

Liability of local authorities

36. At present a local authority is liable to contribute to the construction or repair of a dividing fence in respect of land owned by it with the exception of land vested in it for public reserves, public parks and for other public purposes as may be prescribed. Reserves for open spaces, streets, roads, or public rights of way have been prescribed by the *Dividing Fences Regulations 1971* (G.G. 23 Dec. 1971, p.5322).

37. In paragraph 53(6) of the working paper the question was raised whether local authorities should be liable to contribute to fences dividing private land from public reserves

under their control and if so, should local authorities be liable to contribute to the cost of the fences erected before the introduction of legislation imposing such liability on them?

38. A number of commentators, including the Commonwealth Department of Services and Property, the City of Stirling, the Law Society and the Pastoralists and Graziers Association of W.A. considered that this exception should be abolished. The Citizens Advice Bureau of W.A. agreed with this view and stressed the need for privacy where an owner's land adjoins a public reserve.

Of those commentators who favoured imposing liability on local authorities, only three considered that the liability should be retrospective to include existing fences.

39. The Department of Local Government, the Local Government Association of W.A., the Country Shire Councils' Association of W.A., the Shires of Rockingham, Wanneroo and Swan and the Master Builders' Association of W.A., all opposed local authorities being liable in any way. The City of Nedlands considered that there should be no such liability unless the local authority considered that the fence benefited the locality and was of similar construction to other fences in the locality. Reasons given by these commentators included -

- (a) the cost would be prohibitive;
- (b) most purchasers of land were aware that local authorities were exempt from liability for dividing fences in this situation;
- (c) the location of a reserve adjacent to privately owned land often adds to the value of the latter.

40. Under the *Town Planning and Development Act 1928*, s.20, the power to approve subdivisions of land vests in the Town Planning Board. The Board may give its approval upon such conditions as it sees fit. A local body has no statutory power to approve subdivisions with or without conditions. However, the Commission understands that the Board often refers an application to a local body for its comments and in such cases a local body may suggest that the Board require a subdivider to fence land which is to be dedicated to the council for public purposes, such as a public park.

41. It appears to the Commission that the most controversial area of the present immunity of local authorities is where the land vested in them for public purposes (see paragraph 36 above) adjoins land used for residential purposes. The Commission considers that local authorities should (in addition to their existing liability) be liable to contribute to the cost of construction or repair of a fence which separates land (other than a street, road or public right of way) of which the local authority is the “owner”, as defined, and the land of an adjoining owner in a residential locality on which a private dwelling house is erected or being constructed. The Commission considers that this recommendation should, however, only apply to fences constructed after 30 June 1976. (See recommendation (12)).

Liability of the Crown

42. Section 4 provides that the Act does not bind the Crown. Some commentators on the working paper suggested that it would be unreasonable to attach liability to local authorities if the Crown were not also liable. The Commission sought the view of the Under Secretary for Lands. He considered that to make the Crown liable to contribute to the costs of fencing work where Crown lands and reserves adjoin private land would place a heavy financial burden upon the State.

The Commission considers that the Crown should be bound wherever the land (not being a street, road or public right of way) in respect of which it would otherwise be exempt from liability, adjoins land in a residential locality on which a dwelling house is erected or being constructed. The Commission considers that this recommendation also should only apply to fences constructed after 30 June 1976. (See recommendation (13)).

Liability of statutory bodies

43. The Commission in dealing with the liability of the Crown (see paragraph 42 above) has considered the position of statutory bodies set up to exercise public functions. In the absence of express statutory provision, there appears to be some difficulty in determining in any case whether such a statutory body is a servant or agent of the Crown and is therefore entitled to the immunity of the Crown - see *Council of Town of Gladstone v. Gladstone Harbour Board* [1964] Qd. R. 505 (also discussed in a case note at 39 A.L.J. 29) where the

question at issue was whether the Gladstone Harbour Board was entitled to the immunity of the Crown.

The Commission gave consideration to making a recommendation that in the interest of simplicity the liability of all statutory bodies to contribute to the cost of construction or repair of a dividing fence should be the same as the Crown, irrespective of whether a particular statutory body was entitled to the immunity of the Crown. Such a course would, however, result in some statutory bodies at present liable under the *Dividing Fences Act* becoming partially exempt.

The Commission considers that it would be unwise to interfere with the existing law on that question in this way. The Commission has therefore decided against recommending a special provision for statutory bodies set up to exercise public duties. So the position will accordingly be that if such a statutory body is a servant or agent of the Crown it will only be bound by the Act to the same extent as the Crown. If, however, a statutory body is not entitled to the immunity of the Crown, it will be bound in the same way as any other subject of the Crown.

Reserves for public purposes

44. Public reserves and public parks may be held by the Crown, local authorities, bodies corporate or by private individuals. Under the *Land Act 1933*, a large number of public reserves and public parks have by Order in Council been vested by the Governor in local authorities, incorporated boards (such as the National Parks Board) appointed under the *Parks and Reserves Act 1895* and private trustees (who are usually prominent persons in the particular locality). The Commission understands that the use of private trustees is now rare.

The Commission has in this report made recommendations dealing with the liability of the Crown and local authorities to contribute to the construction or repair of a dividing fence where public reserves and public parks owned by them adjoin land in a residential locality on which a dwelling house is erected or being constructed and which land is used for residential purposes.

The position of trustees or other persons in whom land is vested as a public reserve, public park or for such other purposes as may be prescribed (or who have the care, control and

management of such land) remains to be considered. At present such persons are exempt from liability to contribute to the construction or repair of a dividing fence (see definition of “owner” in s.5 of the Act). The Commission considers that such persons should be liable to contribute to the cost of construction or repair of a fence which separates any part of that land (other than a street, road or public right of way) and the land of an adjoining owner in a residential locality on which a dwelling house is erected or being constructed. The Commission, however, considers that this recommendation also should only apply to fences constructed after 30 June 1976. (See recommendation (14)).

Court having jurisdiction

45. In paragraph 53(8) of the working paper the question was asked whether jurisdiction to determine disputes under the Act should be given to a civil court instead of the Court of Petty Sessions.

All but one of those who commented were of the view that jurisdiction should be transferred to a civil court. The Citizens Advice Bureau of W.A. considered that expense should be the deciding factor and suggested either a small claims tribunal or adjudication by a Commissioner for Consumer Protection. The Local Government Association of W.A. and the City of Nedlands both thought that provision should be made for arbitration of fencing disputes.

With respect to the specific court to hear the disputes, the majority of commentators considered that the Local Court should be given jurisdiction in all cases irrespective of the amount involved. However, the Law Society and two other commentators expressed the view that jurisdiction should depend upon the amounts involved in each case.

The Commission agrees with the majority of commentators that jurisdiction for dividing fence disputes should be transferred to the Local Court. The Commission considers that the Local Court should be given such jurisdiction in all cases irrespective of the amount involved. This recommendation is based on the view that the issues involved in the majority of dividing fence cases lend themselves to being dealt with by the Local Court. (See recommendation (15)).

Right of appeal

46. Under the Act an order of the court is final in relation to -

- (a) the need for and the type of fence to be constructed (s.9 (4));
- (b) right to claim contribution for an existing fence (s.13 (6));
- (c) need for and the type of repairs to be effected (s.15(6))

While there are no express provisions excluding the right of appeal where an adjoining owner cannot be found (s.11) or in respect of the recovery of money payable under the Act (s.18), the Commission is not aware of any such appeals having been made.

47. In paragraph 53(9) of the working paper the question was asked whether there should be a right of appeal against all decisions made under the Act.

The majority of commentators considered there should be a right of appeal against all decisions made by the court of first instance. The City of Stirling, the Citizens Advice Bureau of W.A. and Mr. Iddison S.M. opposed any appeal. Mr. Iddison considered that the delay involved in an appeal could put a season's yield at risk in farming areas and that in any event a right of appeal would tend to defeat the purposes of the legislative framework. The Commonwealth Department of Services and Property considered that there should only be an appeal to establish the use of land, as otherwise an appeal could be used as a delaying tactic.

48. The Commission recognises that there are arguments against giving a right to appeal in dividing fence disputes. In particular it has been argued that the sum involved in the majority of disputes is too small to warrant giving a right of appeal and that appeals would only serve to heighten antagonism between neighbours. However, the Commission does not consider that these reasons justify denying the right of appeal to a person who considers that the court's decision was mistaken. Accordingly, the Commission recommends that the right of appeal in fencing disputes be as for other civil matters. (See recommendation (16)).

The Commission also considered the appropriate appellate court. There is a precedent for giving appellate jurisdiction to the District Court (see cl.23 of the Finance Brokers Control Bill 1975). This court would have the merit of being more accessible than the Supreme Court in country areas. It would also seem to be the more appropriate court having regard to the amounts of money which would normally be involved. The Commission therefore recommends that appeals under the Act should be to the District Court. (See recommendation (16)).

Substantial compliance

49. In paragraph 53(10) of the working paper the question was asked whether the legislation should be amended to ensure that substantial, even though not strict, compliance with an agreement or order is sufficient compliance.

All commentators on this question other than the Local Government Association of W.A. considered that substantial, even though not strict, compliance was acceptable.

The Commission supports the view of the majority of commentators on this matter and recommends accordingly. (See recommendation (17)). To require strict compliance could in some cases lead to unjust results if a claim for contribution was defeated by some minor variation in the fencing work from that agreed upon or ordered by the court.

Damage to a dividing fence

50. Under s.15(7) (c) of the Act, if a dividing fence is damaged by fire or a falling tree due to an owner's neglect that owner is liable. Section 15(8) provides that if the owner liable fails to repair the fence as soon as practicable, the adjoining owner can repair the damage and claim the cost from him. In paragraph 53(11) of the working paper the question was asked whether this provision should be extended to cover all cases where the fence is damaged or destroyed due to an owner's negligence.

A number of commentators answered this question affirmatively, and one commentator suggested that this provision should be extended to include intentional damage.

51. The Commission recommends that the provision referred to in paragraph 50 above should be extended to all cases where one owner would be liable at general law for any damage to a dividing fence. (See recommendation (18)).

Definition of “cost”

52. At present the term “cost” as applied to the construction or repair of a dividing fence is not defined in s.5 of the Act. The Commission believes that the term should be defined to include the reasonable and proper cost of work on a fence, and reasonable remuneration for the supervision and labour of an owner when he is or has been personally engaged on the work. (See recommendation (19)).

Application to the court in the event of dispute

53. The Commission’s attention was drawn by a firm of Perth solicitors to a recent appeal to the Full Court of the Supreme Court of Western Australia in *Petkovic v. Christoe*: unreported decision of the Full Court delivered on 21 March 1974. In that case one of the parties had erected a fence (without giving notice under s.8 of the Act) and the case involved, inter alia, a dispute as to which side of the boundary line the supporting piers should have been erected on. During the hearing of the appeal, the Full Court raised the point whether this question could have been brought before the Court of Petty Sessions under the *Dividing Fences Act*. However, the Court was unable to find any provision in the Act under which either of the parties could have proceeded under the Act.

The same firm of solicitors suggested to the Commission that the deficiency in the *Dividing Fences Act* shown by this case could be overcome by inserting a provision in the Act to enable an owner to apply to the Local Court for directions as to the costs, location and nature of construction of a dividing fence which had been erected or was to be erected and granting the magistrate power to make such order as he thought fit.

The Law Reform Committee of South Australia in its report on fencing (26th Report of the Law Reform Committee of South Australia) made such a recommendation and suggested that the court be given wide jurisdiction. The Committee’s recommendation has recently been implemented in the *Fences Act 1975*. The Commission considers that the suggestion made by

the firm of solicitors should be adopted and that a provision should be included in the Western Australian Act to the effect that in the absence of a specific provision in the *Dividing Fences Act* or any other Act a person may apply to the court to have any matter incidental to any dispute in relation to the construction or repair of dividing fences or to any liability arising under the Act determined. The proposed section would enable such determination to be made. (See recommendation (20)).

Rules of court

54. The Commission considers that rules should be enacted which would enable fencing disputes to be dealt with expeditiously. For example, a summons with provision for a return hearing date should be prescribed, and the Local Court should also have power (whether by rules of court or statute) to grant liberty to have any further dispute determined at a later date, thereby avoiding the need for a separate action. (See recommendation (21)).

Retaining walls

55. In the case of *Petkovic v. Christoe* (see paragraph 53 above), the dispute related to a structure which was partly a dividing fence and partly a retaining wall. This gave rise to difficulties in ascertaining the extent to which the *Dividing Fences Act* applied. The Commission is at present considering problems arising from the use of retaining walls in its project on the law as to the rights and obligations of adjoining owners when altering ground levels on their land (Project No. 44) and will in that project further consider this matter.

SUMMARY OF RECOMMENDATIONS

56. While the Commission considers that the *Dividing Fences Act 1961* fulfils many of the general requirements of dividing fence legislation, it is of the opinion that certain provisions require amendment. In particular, the Commission recommends -

- (1) that the definition of “sufficient fence” in s.5 be amended to recognise not only rural situations but also urban situations;

(see paragraph 13 above)

- (2) that s.9(3) be amended -
 - (a) to require the court to order the construction of a fence at least equal in standard to that prescribed by local authority by-law, or if no by-law exists, to the standard of good fencing in the locality;
 - (b) to require the court to take into account the respective benefits to the constructing owner and the adjoining owner when ordering the type of fence to be constructed;

(see paragraph 15 above)

- (3) that s.7 be amended to empower the courts to decide on the extent of contribution payable by adjoining owners where there is some imbalance between the parties whether as to their respective needs or as to the degree of benefit each will receive from the type of fence to be constructed. In the absence of proof to the contrary, it should be presumed that each owner has equal needs and will benefit equally from the construction of the fence;

(see paragraph 18 above)

- (4) that s.12 be amended so as to offer protection in regard to the surveyor's costs (where owners of adjoining lands cannot agree as to the position of their common boundary line) to either owner in the event of his belief as to the position of the line being correct, and not merely to the owner to whom the notice of intention to survey is given;

(see paragraphs 20 to 22 above)

- (5) that the rule in s.9(2) of the Act (which provides that where the court has determined that the dividing fence is to be constructed otherwise than on the common boundary then occupation of the land on either side of the fence is not to be adverse possession against the owner of the land) should be extended to cases where the fence by agreement (whether pursuant to the Act or not) is constructed otherwise than on the common boundary;

(see paragraph 23 above)

- (6) a new section be enacted in respect of fences constructed after 30 June 1976 which would
- (a) permit the court, if the court in its discretion considers that there was reasonable excuse for failure to serve notice by an owner who had previously constructed a dividing fence, to allow the constructing owner a right of contribution against the person who was the owner of the adjoining land at the time the fence was constructed where such person is still the owner of that adjoining land when application is made to the court for permission to claim a contribution;
(see paragraph 28 above)
 - (b) provide that the extent of an adjoining owner's liability should be -
one half of the value of the existing fence at the date of the service of the notice under the new section or one half of the cost of a sufficient fence at the date of service of such notice, whichever is the lesser;
(see paragraph 29 above)
- (The new section would not apply to any case where the court has made an order under subsection (1) of section 11 of the Act.)
- (7) that the existing s.13 should only continue to apply to fences constructed before 30 June 1976;
(see paragraph 30 above)
- (8) that s.15 be amended to require the court to take into account the respective benefits to each of the owners when ordering the kind and extent of repairs to be effected;
(see paragraph 31 above)
- (9) that s.14 be amended to empower the courts to decide on the extent of contribution payable by each adjoining owner towards the cost of repair of a dividing fence when there is some imbalance between the parties whether as to their needs or as to the degree of benefit each will receive from the dividing

fence. In the absence of proof to the contrary, it should be presumed that each owner has equal needs and will benefit equally from the dividing fence;

(see paragraph 32 above)

- (10) that s.15(5a) of the Act (which provides that where the court has determined that repairs to a fence are to be effected otherwise than on the common boundary then occupation of the land on either side of the fence is not to be adverse possession against the owner of the land) should be extended to cases where the repairs to the fence are effected by agreement (whether pursuant to the Act or not) otherwise than on the common boundary;

(see paragraph 33 above)

- (11) that s.16 be amended to provide that -

- (a) an owner who makes use of a fence on the other side of the road should pay interest to the owner of the land on the boundary of which the fence is erected at the rate of eight per cent per annum on one half of the value from time to time of that part of the fence involved;
- (b) the provisions of the Act relating to repair are to apply as if the fence were a dividing fence and the lands adjoining lands;

(In the event of this recommendation being implemented, s.335 (12) of the *Local Government Act* should be repealed.)

(see paragraph 35 above)

- (12) that in addition to their existing liabilities, local authorities in whom land is vested for public purposes become liable to contribute to the cost of construction or repair of a fence which is constructed after 30 June 1976 and which separates that land (other than a street, road or public right of way) and the land of an adjoining owner in a residential locality on which a dwelling house is erected or being constructed;

(see paragraph 41 above)

- (13) that the Crown become liable to contribute to the cost of construction or repair of a fence which is constructed after 30 June 1976 and which separates land (other than a street, road or public right of way) owned by the Crown and the land of an adjoining owner in a residential locality on which a dwelling house is erected or being constructed;
- (see paragraph 42 above)
- (14) trustees or other persons in whom land is vested as a public reserve, public park or for such other purpose as may be prescribed (or who have the care control and management of such land) should be liable to contribute to the cost of construction or repair of a fence which is constructed after 30 June 1976 and which separates any part of that land (other than a street, road or public right of way) and the land of an adjoining owner in a residential locality on which a dwelling house is erected or being constructed;
- (see paragraph 44 above)
- (15) that the Local Court (in place of the Court of Petty Sessions) be granted jurisdiction, irrespective of the amount involved;
- (see paragraph 45 above)
- (16) that an appeal should lie from the decision of the Local Court in all cases to the District Court but no further;
- (see paragraph 48 above)
- (17) that a new section be enacted to provide that substantial, even though not strict, compliance with an agreement or a court order under the Act will be sufficient compliance;
- (see paragraph 49 above)
- (18) that the provision in s.15(7) (c) be extended to cover all cases where one owner would be liable at general law for any damage to a dividing fence;
- (see paragraphs 50 and 51 above)

- (19) that the term “cost” be defined in s.5 to include the reasonable and proper cost of work on a fence, and reasonable remuneration for the supervision and labour of an owner when he is or has been personally engaged in the work;

(see paragraph 52 above)

- (20) that a provision should be included in the Act to the effect that in the absence of a specific provision in the *Dividing Fences Act* or in any other Act a person may apply to the court to have any matter incidental to a dispute in relation to the construction or repair of dividing fences or to any liability arising under the Act determined;

(see paragraph 53 above)

- (21) that rules of court should be made which would enable fencing disputes to be dealt with expeditiously.

(see paragraph 54 above)

SUGGESTED IMPLEMENTATION OF THE COMMISSION’S RECOMMENDATIONS

57. Appendix I to this report contains a copy of the reprint of the *Dividing Fences Act 1961-1969* amended with suggested amendments in italics to incorporate the Commission’s recommendations.

The Commission recognises, however, that its recommendations may be implemented in other ways and by different drafting techniques and that consideration might be given to the preparation of a new Act. The Commission would be available to liaise with Parliamentary Counsel in this matter.

CHAIRMAN

MEMBER

MEMBER

APPENDIX I

SUGGESTED IMPLEMENTATION OF THE COMMISSION'S RECOMMENDATIONS

Approved for Reprint, 2nd February, 1972.

WESTERN AUSTRALIA.

DIVIDING FENCES.

10° Elizabeth II., No. XLIV.

No. 44 of 1961.¹

(Affected by Act No. 113 of 1965)

[As amended by Act

No. 5 of 1969. assented to 21st April, 1969; and reprinted pursuant to the *Amendments Incorporation Act, 1938.*]

AN ACT relating to the Construction and repair of Dividing Fences between Certain Lands and for incidental and other purposes.

[Assented to 23rd November, 1961]

BE it enacted -

PART I - PRELIMINARY

Short title
commencement
and
arrangement.
Amended by
Act No.5 of
1969, s.1.

1. (1) This Act may be cited as the *Dividing Fences Act, 1961-75.*
- (2) This Act shall come into operation on a day to be fixed by proclamation.¹
- (3) This Act is arranged as follows:-

PART I. - PRELIMINARY, ss. 1-6.

PART II. - CONSTRUCTION OF DIVIDING FENCES, ss. 7-13B.

PART III. - REPAIR OF DIVIDING FENCES, as. 14-16.

¹ Proclaimed to come into operation on 1/1/62. See Gazette 15/12/61, p.3704.

PART IV. - MISCELLANEOUS, ss. 17-26.

- Repeal. 2. (1) The *Cattle Trespass, Fencing, and Impounding Act, 1882-1957*, and the *Ordinance 4 William IV No. 4* (An Act to regulate the Fencing of Town and Suburban Allotments) are repealed.
- Savings. (2) (a) All notices, orders, agreements, instruments and generally all acts of authority that originated under either of the enactments repealed by this Act, and are subsisting or in force on the coming into operation of this Act, shall enure for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.
- (b) All matters and proceedings commenced under either of those repealed enactments, and pending or in progress on the coming into operation of this Act, may be continued, completed and enforced under this Act.
- (3) The provisions of subsection (2) of this section do not affect the application of the provisions of the *Interpretation Act, 1918*, to this Act.
- Savings as to certain Acts. 3. Nothing in this Act affects the provisions of the *Land Act, 1933*, the *Local Government Act, 1960*, the *Vermin Act, 1918*, or the *Bush Fires Act, 1954*, and where any provision of those Acts is inconsistent with any provision of this Act the former provision, to the extent of the inconsistency, prevails.
- Crown not bound by Act. 4. (1) This Act shall bind the Crown to the extent provided in subsection (2) of this section.
- (2) *The Crown shall be liable to contribute under this Act to the cost of construction or repair of a dividing fence that separates land of which the Crown is an owner (other than a street, rood or public right of way) and the land of an adjoining owner in a residential locality on which a dwelling house is erected or being constructed at the date of service of any notice on the Crown under this Act PROVIDED THAT nothing in this subsection shall apply to any dividing fence erected before the thirtieth day of June One thousand nine hundred and seventy-six.*
- Interpretation. Amended by No. 5 of 1969 s.2. 5. In this Act, unless the contrary intention appears, -
- “cost” includes the reasonable and proper cost of construction or repair of a fence, and reasonable remuneration for the supervision and labour of an owner when he is or has been personally engaged on such work;*
- “dividing fence” means a fence that separates the lands of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary;*

“lease” includes an original or derivative lease or an under-lease or an agreement for a lease;

“local court” means a local court established or deemed to be established under the Local Courts Act 1904;

“municipality” means a municipality under the Local Government Act, 1960;

“owner”, in relation to land, includes

- (a) every person who jointly or severally, whether at law or in equity -
 - (i) is entitled to land for any estate of freehold in possession; or
 - (ii) is entitled to receive or is in receipt of or if the land were let to a tenant would be entitled to receive the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; or
- (b) every person who is the holder of a lease of land the unexpired term of which is not less than five years at the time -
 - (i) notice to fence is given by or to him pursuant to section eight;
 - (ii) he makes application to a local court under subsection (1) of section eleven;
 - (iii) a copy of an order made pursuant to subsection (2) of section eleven is given to him; or
 - (iv) notice is given by or to him pursuant to section fifteen; or
- (c) without limiting the generality of the foregoing, any municipality, trustee or other person in whom land is vested pursuant to the Land Act, 1903.

Nothing in this definition shall apply to a street road or public right of way vested in a municipality or other person or in respect of which a municipality or other person has the care control and management.

“repair” includes re-erect and re-align and inflexions of the word “repair” include corresponding meanings;

“road” has the same meaning as in the Local Government Act, 1960;

“section” means section of this Act;

“street” has the same meaning as in the Local Government Act, 1960;

“sufficient fence”, in relation to a dividing fence, or a boundary fence

referred to in section sixteen, means -

(a) any fence prescribed by a by-law under paragraph (e) of section two hundred and ten of the *Local Government Act, 1960*, as a sufficient fence for the part of the district of a municipality wherein it is proposed to erect the dividing fence or the dividing fence is erected or wherein the boundary fence is erected; or

(b) any fence of the description and quality agreed upon by the parties concerned which does not fail to comply with any by-law referred to in paragraph (a) of this interpretation; or

where no such by-law or agreement is made, means -

(d) any fence determined to be a sufficient fence by a *local court* pursuant to this Act;

“surveyor” means a surveyor licensed under the *Licensed Surveyors Act, 1909*, whose name appears in the register kept under section twelve of that Act.

Parks and reserves.

5A. (1) *An owner of a public reserve, public park or land reserved for such other public purpose as may be prescribed under this Act shall not be liable to contribute to the cost of construction or repair of a dividing fence which separates any part of that reserve, park or land and the land of an adjoining owner unless such adjoining land is in a residential locality and a dwelling is erected or being constructed thereon at the date of service of any notice on that owner under this Act.*

(2) *No liability shall arise under the provisions of subsection (1) of this section in respect of a dividing fence erected prior to the thirtieth day of June One thousand nine hundred and seventy-six.*

Act not to interfere with agreements.

6. Nothing in this Act affects any covenant, contract or agreement made between landlord and tenant or between the owners of adjoining lands, or between any other persons relative to the cost of erecting or repairing dividing fences.

PART II. - CONSTRUCTION OF DIVIDING FENCES.

7. *Subject to this Act -*

Liability of owners of adjoining lands to fence.

(a) *the owners of adjoining lands not divided by a sufficient fence are liable to join in or contribute in equal proportions to the construction of a sufficient fence between those lands;*

(b) *in the absence of agreement between the owners of adjoining lands as to the proportion of the cost of construction of the dividing fence to be borne by each owner, the local court on the application of either owner shall determine the proportion to be borne by each owner having regard to the respective needs of each owner and the degree of benefit each will*

receive from the type of dividing fence to be constructed, and, in the absence of proof to the contrary it shall be presumed that each owner has equal needs and will benefit equally from the construction of the dividing fence.

Notice to fence to be given. 8. An owner of land desiring to compel the owner of adjoining land to join in or contribute to the construction of a dividing fence under this Act may give him a notice which shall -

- (a) specify the boundary to be fenced, or if on account of the physical features of the adjoining lands it is impracticable to construct a fence on the common boundary of those lands, the line upon which it is proposed to construct the *dividing* fence;
- (b) contain a proposal for fencing the common boundary or other line;
- (c) specify the kind of *dividing* fence proposed to be constructed;
- (d) *specify the proportion of the cost of the construction of the dividing fence to be borne by each of the owners.*

Proceedings in default of agreement. 9. (1) If within twenty-one days after the giving of a notice referred to in section eight, the owner giving and the owner receiving the notice do not agree as to all or any of the following matters -

- (a) as to the need for the construction of the dividing fence;
- (b) the boundary or line upon which it is proposed to construct the *dividing* fence;
- (c) the kind of dividing fence that is to be constructed;
- (d) *the proportion of the cost of the construction of the dividing fence to be borne by each of the owners; or*
- (e) *the time within which the dividing fence is to be constructed;*

a *local court* held nearest to the place where it is proposed to erect the fence, on the *application* of either of those owners may make an order determining all or any of *such* matters and in making such an order the court may also determine –

- (i) the boundary or line upon which the dividing fence is to be constructed;
- and
- (ii) the compensation in the form of an annual payment to be paid by the one owner to the other owner in consideration of loss of occupation of any land.

(2) Where an order made under subsection (1) of this section determines

that a dividing fence is to be constructed otherwise than on the common boundary of adjoining lands, or where the owners of such adjoining lands so agree or in respect of an existing dividing fence have agreed and whether or not such agreement is made pursuant to this Act, the occupation of land on either side of that *dividing fence* in pursuance of or as a result of the order or agreement is not and shall not be deemed adverse possession as against the owner of the land or affect the title to or possession of the land except for the purposes of this Act.

(3) When making an order under this section, the *local court* shall be guided as to the type of sufficient fence the court orders to be constructed by the kind of fence usually constructed in the locality where it is proposed to construct the fence, the purpose for which the lands that will be separated by the fence are used, *the degree of benefit each owner will receive* and the type of sufficient fence (if any) prescribed under a by-law made by the municipality for that locality.

(4) A *dividing fence* ordered to be constructed by a *local court* under this section shall be at least equal in standard to a sufficient fence then prescribed under a by-law made by the municipality for that locality.

Proceedings on failure to carry out agreement or order.

10. (1) Where the owner giving and the owner receiving a notice given pursuant to section eight agree as to the construction of the *dividing fence* to which the notice relates, or where, in default of such agreement, an order of a *local court* is made pursuant to section nine, and in either case either of those owners fails within the time named in the agreement or order, or, if no time is named, within three months after the date of the agreement or order, to perform his part of the agreement or to comply with the order, then the other of those owners may construct the whole fence as agreed upon or determined by the order.

(2) The owner who constructs the *dividing fence* pursuant to subsection (1) of this section may recover from the owner in default *the proportion of the cost of construction of the dividing fence agreed to be borne by him or ordered by a local court to be paid by him*.

Cases where owner of adjoining land cannot be found.

11. (1) Where the owner of land satisfies the *local court* held nearest to the place where he proposes to construct a dividing fence, that he has made reasonable inquiries and has been unable to ascertain the whereabouts of the owner of the adjoining land for the purpose of giving a notice as required by section eight, the *local court* may, upon application in the prescribed form by the firstmentioned owner for an order authorising the construction of a dividing fence as set out in the application, proceed *ex parte* to make an order authorising the applicant to construct a *dividing fence* of the kind specified in the order upon the boundary or line specified therein *and determining the proportion of the cost of construction of that fence to be paid by the adjoining owner*. In making such an order, the court may have regard to all or any of the matters referred to in section nine of this Act.

(2) Where a person constructs a dividing fence in compliance with an order made under subsection (1) of this section, if afterwards during the

continuance of that fence, the person ascertains the whereabouts of the owner of the adjoining land, whether or not such owner was the owner of the land at the time of the construction of the *dividing* fence, the person may give to such owner a copy of the order.

(3) The owner to whom the copy of the order is given shall, after the expiration of one month from the date the notice is given to him, be liable to pay to the person who constructed the dividing fence the *proportion of the cost of construction* of the *dividing* fence set out in the order.

(4) If the owner to whom the copy of the order is given considers the order inequitable *or the cost of the dividing fence constructed pursuant to such order excessive*, the *local court* that made the order may, on the *application* of that owner made within one month after the giving to him of the copy of the order -

- (a) relieve *that owner* from a portion of the sum claimed; and
- (b) *make such other order* as the court may think fit.

(6) Where an owner has obtained an ex parte order under subsection (1) of this section he shall, within twenty-one days, give or cause to be given to the clerk of the council of the municipality of the district in which the fence referred to in that order is to be constructed, a copy of that order, and if the owner fails to comply with this subsection he is not entitled to recover any portion of the cost of constructing the *dividing* fence from the owner to whom the copy of the order is given under this section.

(7) Where a copy of an order has been given to the clerk of a council in accordance with the provisions of subsection (6) of this section, the clerk shall record details of the order in the register of orders that the council is required to keep pursuant to section six hundred and ninety-four of the *Local Government Act, 1960*, as if the order were an order relating to the land of the owner whose whereabouts cannot be ascertained, and in respect of which land the *dividing* fence is to be constructed, made by the council under the provisions of that Act.

Proceedings for defining boundary line by surveyor.

12. (1) When the owners of adjoining lands do not agree as to the accurate position of the common boundary line between those lands upon which either of the owners desires a dividing fence to be constructed pursuant to this Act, either one may give notice to the other of his intention to have that line defined by a surveyor. *Either owner may prior to the survey being commenced define the line by pegs.*

(3) If within one month from the giving of a notice pursuant to subsection (1) of this section, the owner to whom the notice was given -

- (a) has defined the common boundary line by pegs; or
- (b) has failed to have the common boundary line defined by a surveyor;

then the owner who gave the notice may have that line defined by a

surveyor.

(4) If the common boundary line when defined by a surveyor is found to be in the same position as defined by any pegs placed there by *either* owner pursuant to subsection (1) of this section, that owner is entitled to recover any costs of the survey, if any, incurred by him from the *other* owner, but in all other cases where a surveyor has been employed for the purposes of this section all reasonable expenses incurred shall be paid in equal shares by the owners of the adjoining lands.

Liability to
contribute to
cost of dividing
fence.
Amended by
No. 5 of 1969,
s.3.

13. (1) When an owner of land has constructed a dividing fence that separates his land from adjoining land if the fence is a sufficient fence, the owner of the adjoining land is liable to pay in accordance with the provisions of this section half of the amount of the value of the *dividing* fence.

(2) When an owner of land has, whether before or after the coming into operation of this Act, without giving a notice pursuant to section eight or pursuant to any corresponding provision of any Act repealed by this Act, constructed such a dividing fence and has not received from the owner of the adjoining land or any previous owner of it one-half of the amount of the value of the *dividing* fence, then if the adjoining owner -

(a) has completed or completes, or has caused or causes to be completed the construction of any substantial building or structure on his adjoining land; or

(b) has occupied or occupies a building or structure constructed on the adjoining land; or

(c) has permitted or permits the lawful occupation by a person of a building or structure erected on the adjoining land,

the owner who constructed the *dividing* fence may give to the owner of the adjoining land a notice claiming the payment of half of the amount of the value of the *dividing* fence as estimated at the date of the claim.

(3) Where the owner of the adjoining land -

(a) disputes the need for the dividing fence;

(b) claims that the dividing fence is not desirable;

(c) disputes the need for a dividing fence of the particular type that has been constructed;

(d) disputes the amount of the value of the dividing fence shown in the claim,

he may, within one month of the receipt of the claim, give notice to the claimant owner that he disputes the claim.

(4) The owner who constructed the *dividing* fence may, in default of agreement between the owners upon all or any of the matters referred to in subsection (3) of this section make *an application* in a *local court* held nearest to the place where the *dividing* fence was constructed *for an order that the owner of the adjoining land pay half of the amount of the value of the dividing fence.*

(5) The *local court* hearing *an application* made pursuant to subsection (4) of this section may, by order, determine -

(a) the need for the dividing fence;

(b) whether the *dividing* fence is desirable;

(c) the value of the *dividing* fence as at the date of the claim made under subsection (2) of this section; and

(d) the amount, if any, to be paid, and the period within which that amount is to be paid, by the owner of the adjoining land to the owner who constructed the *dividing* fence.

(6) An order of a *local court* made pursuant to subsection (5) of this section is final.

(7) If the owner of adjoining land on whom a notice of claim has been made pursuant to subsection (2) of this section does not -

(a) pay the amount of the claim within one month of the receipt by him thereof; or

(b) within that period give notice to the claimant owner that he disputes the claim in accordance with subsection (3) of this section,

he is liable to pay to the owner who constructed the dividing fence referred to in subsection (1) of this section, the amount of the claim.

(8) Where an owner of land who is liable, under an order of a *local court* made under subsection (5) of this section, to pay half of the amount of the value of a dividing fence, fails to do so within the period ordered by the court, the owner to whom the money is payable may proceed to recover the amount in accordance with section eighteen.

Transitional. 13A. *The provisions of section 13 of this Act shall only apply where the dividing fence has been constructed before the thirtieth day of June One thousand nine hundred and seventy-six.*

13B. (1) *Where a person is an owner of land and has, without giving a notice pursuant to section eight of this Act, constructed a dividing fence which separates his land from adjoining land then such owner may apply to a local court for an order permitting him to claim a contribution from the*

Contribution after fence erected.

owner of such adjoining land, notwithstanding his failure to give notice under section eight of this Act.

(2) The local court hearing an application pursuant to subsection (1) of this section may, if it is satisfied that -

(a) the dividing fence constructed is a sufficient fence;

(b) the owner who constructed the dividing fence should be excused for failing to give notice pursuant to section eight of this Act; and

(c) the owner of the adjoining land was the owner of such land both at the time the dividing fence was constructed and at the date of the application,

make an order permitting the owner who constructed the dividing fence to claim a contribution against the owner of the adjoining land of either -

(a) one half of the value of the dividing fence at the date of such order; or

(b) one half of the cost of a sufficient fence at the date of such order,

whichever is the less.

(3) Where the person to whom a notice of claim has been given pursuant to subsection (2) of this section -

(a) disputes the need for a dividing fence or the particular type of dividing fence that has been constructed; or

(b) disputes the amount of the claim,

he may, within one month of the receipt of the claim, give notice to the owner who constructed the dividing fence that he disputes the claim.

(4) The owner who constructed the dividing fence may, in default of agreement upon all or any of the matters referred to in subsection (3) of this section, make application to the local court held nearest to the place where the dividing fence was constructed for an order pursuant to subsection (5) of this section.

(5) The court hearing an application made pursuant to subsection (4) of this section may, having regard to the respective needs of the owners and the degree of benefit each receives from the dividing fence, by order determine the amount, if any, to be paid by the adjoining owner to the owner who constructed the dividing fence not exceeding the amount of the claim made pursuant to subsection (2) of this section, and the period within which the amount of the order is to be paid.

(6) If the person to whom a notice of claim has been given pursuant to

subsection (2) of this section does not -

(a) pay the amount of the claim within one month of the receipt by him thereof; or

(b) within that period give notice to the claimant owner that he disputes the claim in accordance with subsection (3) of this section,

he is liable to pay to the owner who constructed the dividing fence the amount of the claim.

(7) Where a person who is liable, under an order of a local court made under subsection (5) of this section, to pay an amount of money fails to do so within the period ordered by the court, the owner to whom the money is payable may proceed to recover the amount in accordance with section eighteen of this Act.

(8) The provisions of this section shall not apply to any case where the court has made an order under subsection (1) of section eleven of this Act.

(9) No liability shall arise under the provisions of this section in respect of a dividing fence erected prior to the thirtieth day of June One thousand nine hundred and seventy-six.

PART III. - REPAIR OF DIVIDING FENCES

14. Subject to this Act -

Liability of adjoining owners to repair dividing fence. Amended by No. 5 of 1969, s.4.

(a) when a dividing fence is in need of repair the owners of land on either side of the fence are liable to join in or contribute in equal proportions to the repair of the fence;

(b) in the absence of agreement between the owners of adjoining lands as to the proportion of the cost of repair of the dividing fence to be borne by each owner, the local court on the application of either owner shall determine the proportion to be borne by each owner having regard to the respective needs of each owner and the degree of benefit each will receive from the dividing fence, and, in the absence of proof to the contrary it shall be presumed that each owner has equal needs and will benefit equally from the dividing fence.

Procedure to compel contribution to repair dividing fence. Amended by No. 5 of 1969, s.5.

15. (1) The owner of land separated from adjoining land by a dividing fence may give a notice to the owner of the adjoining land requiring him to assist in repairing the fence.

(2) A notice given pursuant to subsection (1) of this section may state that the owner giving the notice -

(a) is prepared to repair the dividing fence at his cost and the cost of the owner to whom the notice is given, in the proportions stated in the notice;

(b) is prepared to permit the owner to whom the notice is given to repair the *dividing* fence at the cost of both the owners, *in the proportions stated in the notice*; or

(c) is prepared to bear *a proportion stated in the notice* of the cost of having the *dividing* fence repaired by a third party,

and shall contain a proposal for repairing the *dividing* fence upon the previous or other line, specifying the kind and extent of repairs and the line upon which they are to be effected.

(3) An owner who has been given a notice pursuant to subsection (1) of this section shall, within fourteen days of the receipt by him of the notice, advise in writing the owner giving the notice that -

(a) he is prepared to join in the repairing of the *dividing* fence in such one of the alternative manners set out in the notice as he specifies in the advice;

(b) he disputes the need for repairing the *dividing* fence and is not prepared to bear any portion of the cost of repairing the dividing fence;

(c) he objects to the kind and extent of repairs or the line upon which the repairs are to be effected; or

(d) *he does not agree to bear the portion of the cost of the repair of the dividing fence specified in the notice.*

(4) Where an owner who has been given a notice pursuant to subsection (1) of this section advises, in writing, the owner giving the notice that he disputes the need for repairing the *dividing* fence and is not prepared to bear any part of the cost of repairing it or objects to the kind and extent of repairs or the line upon which the repairs are to be effected *or does not agree to bear the portion of the cost of repair* as provided in subsection (3) of this section, the owner who gave the notice may make *an application in the local court* held nearest to the place where the fence is situated claiming that the owner of the adjoining land has failed to assist in repairing the *dividing* fence in accordance with this section.

(5) The *local court* hearing a complaint made pursuant to subsection (4) of this section may by order determine -

(a) whether the *dividing* fence is in need of repair;

(b) if so, the kind and extent of repairs and by whom the repairs are to be effected and the period within which they are to be carried out,

(bb) *the proportion of the cost of repairs to be borne by each of the owners,*

and if the court thinks it is necessary, the court may also determine -

- (c) the line upon which the repairs are to be effected;
- (d) the compensation to be paid by one owner to the other owner in consideration of any extra expense involved in the provision of additional fencing because of re-alignment; and
- (e) the compensation in the form of an annual payment to be paid by one owner to the other owner in consideration of loss of occupation of any of his land.

(5a) Where an order made under subsection (5) of this section determines that the repairs to a *dividing* fence are to be effected otherwise than on the common boundary of adjoining lands, *or where the owners of such adjoining lands so agree or in respect of repairs to an existing dividing fence have agreed and whether or not such agreement is made pursuant to this Act*, the occupation of land on either side of that repaired *dividing fence* in pursuance of or as a result of that order *or agreement* is not and shall not be deemed adverse possession as against the owner of the land or affect the title to or possession of the land except for the purposes of this Act.

(5b) When making an order under this section, the *local court* shall be guided as to the kind and extent of repairs the court orders by the kind of fence in use in the locality where it is proposed to repair the *dividing fence*, the purpose for which the lands that are or will be separated by the *dividing fence* are used, *the degree of benefit each owner will receive from such repairs* and the type of sufficient fence (if any) prescribed under a by-law made by a municipality for that locality.

(7) Where an owner, who has been given a notice pursuant to subsection (1) of this section, fails to advise the owner giving the notice as provided in subsection (3) of this section within fourteen days after the receipt by him of the notice, the owner giving the notice may repair the *dividing fence* and demand and recover from the owner to whom the notice was given, *the proportion claimed in the notice* of the cost of repairing the *dividing fence* -

(7a) Notwithstanding anything contained in this section, where any dividing fence or any portion thereof is damaged or destroyed by flood, fire, lightning, storm, tempest or inevitable accident the owner of the land on either side of the fence may immediately repair it without any notice to the other owner and is entitled to recover half of the expenses of so doing from the owner of the adjoining land;

(7b) Notwithstanding anything contained in this section, where any dividing fence is damaged or destroyed in whole or in part and one owner is liable to the other for such damage or destruction other than pursuant to the provisions of this Act, then that owner is bound to the extent of his liability to repair or renew at his cost the fence so damaged or destroyed as soon as practicable after the damage or destruction occurs.

(8) If an owner of land who is liable under *paragraph (b) of subsection (5) or subsection (7b)* of this section to repair or renew or contribute towards the repair or renewal of a dividing fence fails to do so, the owner of the adjoining land may repair or renew the *dividing fence* and recover from the owner so liable and in default *to the extent of his liability*.

Liability of person using fence on further side of road.

16. (1) Where the owner of land bounded by a road constructs a sufficient fence on the boundary of the land and the road and another owner of land afterwards adopts any means whereby his land is in any way enclosed by that fence, or afterwards avails himself of that fence or renders it of beneficial use to himself, the lastmentioned owner is liable, so long as his land is so enclosed or he avails himself of the fence or makes beneficial use of it, *to the owner for the time being of the other land -*

(a) *to pay to that owner interest on half the value for the time being of so much of the fence as encloses his land or is availed of by him or rendered of beneficial use to him at the rate of eight per centum per annum;*

(b) *to join in or contribute to the repair of so much of the fence as encloses his land or is availed of by him or rendered of beneficial use to him as if that fence were a "dividing fence" within the meaning of this Act and the lands adjoining lands.*

(2) In this section "owner" includes any person who, at the time -

(a) of the construction of the fence referred to in subsection (1) of this section;

(b) of adopting any means whereby his land is in any way enclosed by the fence;

(c) of availing himself of the fence; or

(d) of rendering the fence of beneficial use to himself,

is the holder of a lease the unexpired portion of the term of which is not less than five years.

PART IV. - MISCELLANEOUS

17. In any proceedings under this Act a *local court* may award costs against either party to the proceedings.

Costs.

18. (1) Moneys that a person is, in pursuance of this Act, required or liable to pay may be sued for and recovered in a *local court*.

Method of recovering money payable under this Act.

(2) In proceedings for the recovery of moneys referred to in subsection (1) of this section, a certificate of a *local court* as to the making and contents of an order made by it under section nine or section eleven or section fifteen is evidence of the matters set forth therein.

Amended by
No. 5 of 1969,
s.6.

Apportionment
of the costs of
fencing as
between
landlord and
tenant.

19. (1) Where, under the provisions of this Act, a *dividing* fence is constructed or repaired, if the *dividing* fence divides any land held by a person as tenant of any landlord (*other than the Crown*) from any adjoining lands, the contribution payable in respect of the cost of such construction or repair as between that landlord and tenant shall, unless otherwise agreed upon by the parties concerned, be payable in the proportions following -

(a) if the interest of the tenant at the time of the construction or repair of the *dividing* fence is less than for a term of five years, the landlord shall pay the whole of the cost;

(b) if the interest of the tenant at such time is for a term of five years or more and less than for a term of seven years, the landlord shall pay three-fourths of the cost and the tenant shall pay one-fourth of the cost;

(c) if the interest of the tenant at such time is for a term of seven years or more and less than a term of twelve years, the landlord and the tenant shall each pay one-half of the cost;

(d) in case the interest of the tenant at such time is for a term of twelve years or more, the tenant shall pay the whole of the cost.

(2) Where either the landlord or the tenant pays a greater proportion of the cost than he is required to pay under this section, he may recover, in manner referred to in subsection (1) of section eighteen, the excess from his tenant or landlord, and any tenant may set off any sum recoverable by him under this section against any rent payable to his landlord.

(3) Notwithstanding the provisions of section 4 of this Act, the provisions of this section do not bind the Crown as landlord.

Purchaser
under option to
purchase liable
for amount of
contribution for
dividing
fence paid by
owner.

20. Where land, in respect of which a contribution has been paid by the owner thereof towards the cost of the construction or repair of a dividing fence, is at the time of the making of the contribution subject to an option to purchase, if that option is exercised the purchaser under the option shall on completion of the purchase pay to the owner the amount of the contribution so paid by the owner.

Power to enter
adjoining land.

21. Every person engaged in constructing or repairing a fence under this Act and his agents and servants may, at all reasonable times during the construction or repairing, enter upon the lands adjoining the fence and do upon those lands such acts, matters and things as are necessary or reasonably required to carry into effect the construction or repairing of the fence.

Notices to be in

22. (1) Any notice or demand to be given or made under this Act shall be in writing and signed by the person giving or making it, or by his attorney or agent.

writing,
method of
giving notices,
etc. c.f.s.31,
Act, No. 30 of
1918.

(2) Where a notice or demand is to be given or made under this Act to or on a person, not being a corporation, it shall be given or made -

(a) by delivering the notice or demand to him personally; or

(b) by sending the notice or demand by registered mail addressed to him at his usual or last known place of abode.

(3) Where a notice or demand is to be given or made under this Act to or on a corporation it shall be given or made -

(a) by delivering or leaving the notice or demand to or at the principal office of the corporation in the State; or

(b) by sending the notice or demand by registered mail addressed to the corporation at that principal office.

Sufficient
description of
land.

(4) The description of any land in a notice or demand given or made under this Act shall be regarded as a sufficient description of the land if the description allows no reasonable doubt as to what land is referred to in the notice or demand.

*Substantial
compliance.*

22A. No proceedings for the recovery of a proportion of the cost of construction or repair of a fence shall fail on the ground that the fence was not constructed in compliance with an agreement (whether or not such agreement was made pursuant to this Act) or order of the local court unless the agreement or order was not complied with in a respect or to an extent which was material.

Regulations.
Amended by
No. 113 of
1965, s.8.

23. (1) The Governor may make regulations not inconsistent with this Act prescribing forms, fees and all matters that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may impose a penalty not exceeding forty dollars for breach thereof.

Municipality
may be
required to
prescribe
“sufficient
fence”.

24. The council of a municipality constituted under the provisions of the *Local Government Act, 1960*, shall when required by the Minister for Local Government, make, for the purpose of interpreting “sufficient fence” in section five of this Act, a by-law under paragraph (e) of section two hundred and ten of the *Local Government Act, 1960*.

*Overall
jurisdiction.*

25. (1) Where any dispute arises in relation to the construction or repair of a fence, or any liability arising under this Act, any person affected by the dispute may by application to a local court seek a determination of the matter.

(2) Upon the hearing of an application under subsection (1) of this section the court may determine the matter in such manner as the court may think

fit.

(3) The provisions of this section shall only apply to the extent that they are not inconsistent with any other provision of this Act or any other Act.

Appeal

26. (2) Any person who is dissatisfied with an order or decision of a local court in proceedings under this Act to which the person was a party shall be entitled to appeal to the District Court.

(2) The District Court may, on the hearing of the appeal, do one or more of the following -

(a) affirm, vary, or quash the order or decision appealed against, and make in addition, any order or decision that should have been made in the first instance;

(b) remit the subject matter of the appeal to the local court for further hearing or consideration or for re-hearing;

(c) make any further or other order as to costs or any other matter that the case requires.

(3) An order or decision of the District Court made on an appeal under this section is final.

(4) Appeals under subsection (1) of this section shall be made in the manner and within the time prescribed by rules of court to be made by the District Court.

APPENDIX II



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 33

The Dividing Fences Act

WORKING PAPER

DECEMBER 1973

APPENDIX III

List of persons and bodies who commented on the working paper

Atkins, P.H.
Baker, H.A.
Brown, D.L.
Burton, R.H., S.M.
Butement, T.
Citizens Advice Bureau of W.A. Inc.
City of Nedlands
City of Stirling
Conveyancer, Crown Law Department
Country Shire Councils' Association of W.A.
Department of Local Government
Department of Services and Property (Western Australia Branch)
Dilworth, M.J.
Duffield, M.
Enright, M.
Firth, J. & E.
Iddison, R., S.M.
Institute of Legal Executives (Western Australia) (Incorporated)
Jackson, H.H.
Jervis, S.
Kott Wallace & Gunning
Law Society of Western Australia
Local Government Association of Western Australia (Inc.)
Master Builders' Association of Western Australia
McManus, I.M.
Pastoralists & Graziers Association of Western Australia (Inc.)
Patterson, B.J.
Shire of Rockingham
Shire of Swan
Shire of Wanneroo
State Housing Commission
Steere & Clarke
Town of East Fremantle
Under Secretary for Lands
Warwick, C.
Western Australian Federation of Ratepayers and Progress Associations (Inc.)