

Dividing Fences

Terms of Reference

In June 1972, the Committee was asked to consider and report on the law relating to dividing fences.

Background of Reference

When the Committee was formally reconstituted as a Commission in January 1973, it took over the conduct of this project and issued a working paper on the subject later that year. The paper compared the operation of the *Dividing Fences Act 1961* (WA) ("the Act") in Western Australia with similar legislation in other states. One of the primary purposes of the working paper was to clarify the circumstances under which an adjoining owner could be compelled to contribute to the construction or repair of a dividing fence and how to calculate the amount of such contribution.

Nature and Extent of Consultation

The Commission received a number of suggestions for reform from local government authorities, representative residents' bodies, government, legal practitioners, community organisations and members of the public.

Recommendations

The Commission's final report was tabled in Parliament in November 1975¹ and recommended that the Act be amended in the following ways:

- The test of a sufficient fence should not be its ability to prevent the trespass of cattle and sheep.²
- Section 9(3) should be amended to require the courts to take into account additional factors when ordering the type of fence to be constructed.
- Section 7 should be amended to empower the courts to decide upon the contribution to be made by adjoining owners where there is some imbalance between the parties.
- Section 12 should be amended to provide protection from surveyor's costs for either adjoining owner in the event of his or her belief as to the position of the common boundary line being correct.
- Section 9(2) should be amended to provide that adverse possession does not occur where adjoining owners have agreed that the fence is not on the common boundary.
- A new section should be enacted to provide for:
 - (a) An owner who had constructed a fence in the past to claim a right of contribution against an adjoining owner provided that the former had a reasonable excuse for failure to serve an earlier notice; and
 - (b) The liability of the adjoining owner to be half the value of the existing fence or half the value of a sufficient fence, whichever is the lesser.
- The application of s 13, which currently governs the liability of an adjoining owner to contribute to the cost of a dividing fence, should be limited to apply to dividing fences that were constructed before the new provision (described above) is enacted.
- Sections 14 and 15 should be amended to allow the courts to order the contribution of adjoining owners to fence repairs to be other than equal shares and to take into account the respective benefits to each of the adjoining owners when ordering the type of repairs.

¹ Law Reform Commission of Western Australia, *Dividing Fences*, Project No 33 (1975).

² Repeal sub-s (c) in the definition of "sufficient fence" in s 5.

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- Section 15(5a), which currently prevents a claim of adverse possession where the court had ordered that repairs to a fence are to take place otherwise than on the common boundary, should be extended to cases where repairs to a fence by agreement are not on the common boundary.
- Section 16 should be amended to provide that 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 which that fence is erected, and furthermore the provisions of the Act relating to repair should apply to that fence as if the fence were a dividing fence between adjoining land.
- The Act should be amended to provide for local authorities, the Crown, and trustees of public land to be liable to contribute to the cost of constructing or repairing a fence that separates their land from the land of an adjoining owner in a residential area.
- The Local Court, not the Court of Petty Sessions, should have jurisdiction over the Act.
- An appeal should lie in all cases from the Local Court to the District Court.
- A new section should be enacted to provide that substantial, rather than strict, compliance with an agreement or court order under the Act should be sufficient compliance.

Further recommendations were made pertaining to matters such as damage to a dividing fence, the definition of cost, application to the court for directions on any matter relating to the construction or repair of a dividing fence, and the ability to make court rules governing dividing fence disputes.

Legislative or Other Action Undertaken

There has been no legislative action taken to implement the Commission's recommendations. Although the Department of Local Government began a review of the Act in 2000³ which included consideration of the Commission's recommendations, it appears that the review is no longer being pursued.

Currency of Recommendations

Despite the lengthy period that has passed since publication of the Commission's final report, the passage of time has not affected the relevance of the Commission's recommendations. Nevertheless, it should be noted that the subject of dividing fences has been considered more recently by other law reform agencies.

In 1988, the New South Wales Law Reform Commission published a comprehensive report on dividing fences⁴ that led to the enactment of the *Dividing Fences Act 1991* (NSW). One of the key recommendations of that report was that mediation agreements made between adjoining owners about dividing fences should be binding in court. The Parliament of Victoria's Law Reform Committee has recently published a review of the fencing legislation in that state.⁵ It emphasised the need for voluntary mediation and also recommended that the Victorian Civil and Administrative Tribunal should have jurisdiction over dividing fence disputes to provide a more cost efficient means of settling disputes.

The issue of Crown liability for dividing fences has received different treatment in different states. South Australia⁶ and the Australian Capital Territory⁷ have legislated to provide for limited liability attaching to

3 Department of Local Government, *Review of the Dividing Fences Act 1961*, Issues Paper (August 2000).

4 New South Wales Law Reform Commission, *Dividing Fences*, Report No 59 (1988).

5 Victorian Law Reform Committee, *Review of the Fences Act 1968*, Final Report (1999). Available on the internet at <<http://www.parliament.vic.gov.au/lawreform/fences/default.htm>>.

6 *Fences Act 1975* (SA) s 20.

7 *Dividing Fences Act* (ACT) s 2.

the Crown, but the New South Wales Parliament rejected that approach⁸ when it implemented the *Dividing Fences Act 1991* (NSW).

Action Required

The Commission's recommendations may be implemented by non-controversial amendments to the current legislation. Full drafting instructions may be found in the Commission's final report. In view of the publication of more recent reports by the New South Wales Law Reform Commission and the Victorian Law Reform Committee, it may be prudent to consider the findings of those bodies in implementing the Commission's recommendations.

Priority – Low

Because it has been over 25 years since the Commission published its final report, the fact that the Commission's recommendations have not been adopted may indicate that the existing Act continues to provide a sufficient legislative framework for the resolution of dividing fences disputes. Nevertheless, the system may be easily and uncontroversially improved by implementation of the Commission's recommendations for reform.

⁸ Compare New South Wales Law Reform Commission, *Dividing Fences*, Report No 59 (1988) para 3.63 with s 25 of the *Dividing Fences Act 1991* (NSW). See also M H Hustler, "The Liability of the Crown under the New South Wales *Dividing Fences Act 1991*: A Need for Change" at <http://www.uws.edu.au/vip/mhustler/AP_Fence.html>.