

DIVIDING FENCES ACT.

Act No. 8, 1951.

An Act to make provision for and in relation to the construction and repair of dividing fences between certain lands; to repeal the Dividing Fences Act, 1902; to amend the Local Government Act, 1919, and certain other Acts; and for purposes connected therewith. [Assented to, 31st May, 1951.]

George VI.
No. 8, 1951.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

1. This Act may be cited as the "Dividing Fences Act, 1951." Short title.

2. This Act is divided into Parts as follows:—

Division
into
Parts.

PART I.—PRELIMINARY—SS. 1-6.

PART II.—CONSTRUCTION OF DIVIDING FENCES—SS.
7-12.

PART III.—REPAIR OF DIVIDING FENCES—SS. 13-15.

PART IV.—GENERAL—SS. 16-23.

3. The Dividing Fences Act, 1902, is hereby repealed. Repeal of
Act No. 63,
1902.

4. Nothing in this Act shall affect any of the provisions of the Crown Lands Consolidation Act, 1913, the Pastures Protection Act, 1934, the Western Lands Act of 1901, the Closer Settlement Acts, the Mining Act, 1906, the Public Works Saving as
to certain
Acts.

Dividing Fences Act.

No. 8, 1951. Works Act, 1912, the Bush Fires Act, 1949, or any Act amending any of the said Acts, or repealing and replacing any of the said Acts with or without amendment.

Interpreta-
tion.

5. In this Act, unless the context or subject-matter otherwise indicates or requires:—

“Dividing fence” means a fence separating the lands of different owners whether on the common boundary of adjoining lands or on a line other than the common boundary.

“Fence” means a structure of posts and boards, palings, rails, galvanised iron, metal, or wire, enclosing or bounding land, or a wall, ditch, or embankment enclosing or bounding land, and includes any foundation, foundation wall, or support reasonably necessary for the support and maintenance of the fence, but does not include a wall which is part of a house or other building.

cf. Act No.
41, 1919,
s. 4.
cf. *Ibid.*

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

“Lessee” has a meaning corresponding with that of lease, and includes an original or derivative lessee or under-lessee and any person deriving title under or from a lessee or under-lessee shall be deemed to be a lessee for the purposes of this Act.

“Local land board” means the local land board constituted under the Crown Lands Consolidation Act, 1913, as amended by subsequent Acts, or under the Western Lands Act of 1901, as amended by subsequent Acts, for the land district or administrative district, as the case may be, in which the fence in relation to which the term is used is proposed to be constructed, or where such fence is proposed to be constructed on the boundary of or within two such districts, the local land board of either of such districts.

“Owner” includes every person who—

(a) jointly or severally, whether at law or in equity—

(i) is entitled to land for any estate of freehold in possession; or

(ii)

(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 thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; or

(b) at the time notice to fence is given by or to him pursuant to section eight of this Act, or at the time he makes application to a local land board or court of petty sessions under subsection one of section eleven of this Act or at the time a copy of an order made pursuant to subsection two of the said section is served on him, or at the time notice is given by or to him pursuant to section fourteen of this Act, is the holder of a lease the unexpired term of which is not less than five years,

but does not include any trustees or other persons in whom any land is vested as a public reserve, public park or for such other public purposes as may be prescribed or any person who has the care, control and management of any public reserve, public park or land used for such other public purposes as may be prescribed.

“Registered surveyor” means a person registered under the Surveyors Act, 1929, as amended by subsequent Acts, as a surveyor.

6. Nothing in this Act contained shall be deemed or taken to affect any covenant, contract or agreement in relation to fencing made before or after the commencement of this Act between the owners of adjoining lands.

Act not to affect agreements.
Vic. Act No. 3679, s. 31;
S.A. No. 1639, 1924, s. 23.

PART II.

CONSTRUCTION OF DIVIDING FENCES.

7. Subject to this Act the owners of adjoining lands not divided by a sufficient fence shall be liable to join in or contribute in equal proportions to the construction of a dividing fence between such lands.

Liability of owners of adjoining lands to fence.
Vic. Act No. 3679, s. 5;
S.A. No. 1639, 1924, s. 6.

8.

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Service of notices.

cf. Vic. Act No. 3679, s. 7; S.A. No. 1639, 1924, s. 7.

8. Any owner desiring to compel an adjoining owner to join in or contribute to the construction of a dividing fence under this Act may serve him with a notice in writing to fence which shall:—

- (a) specify the boundary to be fenced, or where on account of the physical features of the adjoining lands it is impracticable to construct a fence on the common boundary of such lands, the line upon which it is proposed to construct such fence,
- (b) contain a proposal for fencing the same, and
- (c) specify the kind of fence proposed to be constructed.

Proceedings in default.

cf. Vic. Act No. 3679, s. 8; S.A. No. 1639, 1924, s. 7.

9. (1) Where the person serving the notice to fence and the person served with such notice do not agree as to the construction of the fence, the boundary or line upon which it is proposed to construct such fence or the kind of fence, the local land board or the court of petty sessions having jurisdiction as hereinafter provided may, upon application of either of such persons, make an order determining the kind of fence to be constructed, what portion thereof shall be constructed by each person, the time within which it shall be constructed and, if necessary, the boundary or line upon which such fence is to be constructed and the compensation in the shape of an annual payment to be paid to either of the parties in consideration of loss of occupation of any land.

(2) Where an order under subsection one of this section determines that the fence is to be constructed otherwise than on the common boundary of adjoining lands the occupation of lands on either side of such fence in pursuance or as a result of any such order shall not be deemed adverse possession as against the owner nor affect the title to or possession of the land save for the purposes of this Act.

(3) (a) Where the line upon which it is proposed to construct the fence is otherwise than on the common boundary of adjoining lands, application as aforesaid shall be made to the local land board and may be so made at any time after the expiration of three months from the date of service of the notice to fence.

(b)

(b) Where it is proposed to construct the fence upon the common boundary of adjoining lands application as aforesaid shall be made to the court of petty sessions in the district in which the land on which such fence is to be constructed is situated and may be so made at any time after the expiration of one month from the date of service of the notice to fence. No. 8, 1951.

(4) In making any order under this section the local land board or the court of petty sessions, as the case may be, shall take into consideration the kind of fence usual in the locality where it is proposed to construct the fence and the purposes for which the adjoining lands are used.

(5) Any order of the local land board or court of petty sessions made under this section shall be final.

10. If the person serving the notice to fence and the person served with such notice agree as to the construction of such fence, or if in default of such agreement an order of the local land board or court of petty sessions is made as aforesaid, and in either case either of such persons fails within the time named in that behalf in such agreement or order, or, if no such time is named, within three months after the date of such agreement or order, to perform his part of such agreement or to comply with such order then the other of such persons may construct the whole fence as agreed upon or determined by the order, and may recover from the person in default half the cost of such construction.

Proceedings on failure to carry out agreement or order.
Vic. Act No. 3679, s. 9;
S.A. No. 1639, 1924, s. 9.

11. (1) Where the owner of any land satisfies the local land board or the court of petty sessions having jurisdiction as hereinafter provided that he has made reasonable inquiries and has been unable to ascertain the whereabouts of the owner of adjoining lands for the purpose of serving notice to fence as required by section eight of this Act, the local land board or the court of petty sessions may upon application by the first mentioned owner proceed ex parte to make an order authorising such first mentioned owner to construct a fence of the kind specified in such order upon the boundary or line specified therein.

Cases where owner or whereabouts of owner are not known.

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No. 8, 1951. A local land board shall have jurisdiction for the purposes of this subsection in any case where the line upon which it is proposed to construct the fence is otherwise than on the common boundary of adjoining lands and in all other cases the court of petty sessions in the district in which the land on which such fence is to be constructed is situated shall have jurisdiction for the purposes of this subsection.

(2) Any person who constructs a fence in compliance with such order may, if afterwards during the continuance of the fence he ascertains the whereabouts of the owner of the adjoining land (whether or not such owner was the owner at the time of the construction of the fence), serve such owner with a copy of the order, and shall, after the expiration of one month from the date of service thereof, be entitled to recover half the original cost of the fence forming the common boundary.

(3) If the person so served deems the order made inequitable, the local land board or court of petty sessions which made the same, may, on his complaint made within one month after service of the copy of the order, relieve the complainant from the whole or any portion of the sum claimed and may order that the position of the fence be altered on such terms as it may think fit.

Proceedings
for defining
boundary
line by
surveyor.
S.A. No.
1639, 1924,
ss. 14-16.

12. (1) Where the owners of adjoining lands do not agree as to the accurate position of the common boundary line between such lands upon which a fence is to be constructed pursuant to this Act, either one may give notice to the other of his intention to have the common boundary line defined by a registered surveyor.

(2) The owner to whom notice is given shall, within seven days after the service of the notice—

(a) if satisfied of the accurate position of the common boundary line, define the same by pegs;
or

(b) employ a registered surveyor to define the common boundary line,

and in either case shall notify the adjoining owner in writing of what he has done.

(3)

(3) If within one month from the service of the notice provided for in subsection one 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 registered surveyor,

then the owner who gave such notice may have the common boundary line defined by a registered surveyor.

(4) If the common boundary line when defined by a registered surveyor is ascertained to be in the same position as defined by any pegs placed there by the owner receiving the notice given in pursuance of subsection one of this section, such owner shall be entitled to recover any costs of the survey incurred by him from the owner giving such notice, but in all other cases where a registered surveyor has been employed all reasonable expenses incurred shall be paid in equal shares by the adjoining owners.

PART III.

REPAIR OF DIVIDING FENCES.

13. Whenever any dividing fence is out of repair the owners of land on either side thereof shall be liable to join in or contribute in equal proportions to the repair of such fence.

Liability of adjoining owners to repair.

cf. Vic. Act No. 3679, s. 16 ;
S.A. No. 1639, 1924, s. 17.

14. (1) The owner of any land separated from adjoining land by a dividing fence may serve a notice upon the owner of the adjoining land requiring him to assist in repairing such fence.

Procedure to compel contribution.
cf. Vic. Act No. 3679, s. 17 ;
S.A. No. 1639, 1924, s. 18.

(2) Where the person who has been served with the notice does not within one month after service of the notice assist in repairing the fence it shall be lawful for the person serving the notice to repair the fence and demand and recover from the person on whom the notice has been served one-half of the cost of repairing the same:

Provided

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Provided that—

- (a) if any dividing fence has been constructed partly by one owner and partly by another owner each shall bear the cost of repairing the part so constructed by him;
- (b) if any dividing fence or any portion thereof is damaged or destroyed by flood, fire, lightning, storm, tempest or accident, the owner of the land on either side may immediately repair the same without any notice to the other owner and shall be entitled to recover half the expenses of so doing from the owner of the adjoining land;
- (c) if any dividing fence has been damaged or destroyed by fire or by the falling of any tree or trees the owner of land through whose neglect the fire originated or caused injury to the fence, or the tree or trees fell, shall be bound to repair the fence so damaged or destroyed as aforesaid; and in default the adjoining owner may repair the same and demand and recover from the owner so liable and in default the whole of the cost of such repair.

Liability
of person
using fence
on further
side of
road.

cf. S. A.
No. 1639,
1924, s.
12.

15. If the owner of any land bounded by a road constructs a sufficient fence on the boundary of his land and the said road and any other owner of any land afterwards adopts any means whereby his land is in any way enclosed by the said fence, or afterwards avails himself of the said fence or renders the same of beneficial use to himself, the last mentioned owner shall so long as his land is so enclosed or he avails himself of the said fence or makes beneficial use thereof be liable to join in or contribute in equal proportions to the repair of such part of the fence as encloses his land or is availed or made beneficial use of by him.

In this section "owner" includes any person who at the time of the construction of a fence referred to in this section or who at the time of adopting any means as aforesaid or availing himself of the fence or rendering the same of beneficial use to himself is the holder of a lease the unexpired term of which is not less than five years.

PART

PART IV.

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GENERAL.

16. In any proceedings under this Act the local land board or the court of petty sessions may award costs against either party.

Costs.

17. (1) Any moneys which any person is in pursuance of this Act required or liable to pay may be sued for and recovered in any court of competent jurisdiction.

Recovery of money payable.

(2) In any proceedings for the recovery of moneys as aforesaid the certificate of the local land board or of a court of petty sessions as to the making and contents of any order under section nine or section eleven of this Act shall be evidence of the matters set forth therein.

18. (1) Where, under the provisions of this Act, any fence is constructed or repaired which divides any lands held by any person as tenant of any landlord from any adjoining lands, the contribution payable in respect thereof as between such landlord and tenant shall, unless otherwise agreed upon, be payable in the proportions following:—

Apportionment of contribution between owner and lessee.
 Vic. Act No. 3679, s. 11;
 S.A. No. 1639, 1924, s. 21.

- (a) in case the interest of the tenant at the time of the construction or repair of the fence is less than for a term of five years, the whole contribution shall be payable by the landlord;
- (b) in case 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, three-fourths of the contribution shall be payable by the landlord and one-fourth of the contribution by the tenant;
- (c) in case the interest of the tenant at such time is for a term of seven years or more and less than for a term of twelve years, one-half of the contribution shall be payable by the landlord and one-half by the tenant;
- (d) in case the interest of the tenant at such time is for a term of twelve years or upwards, the whole of the contribution shall be payable by the tenant.

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(2) In case either such landlord or such tenant pays more than his proper proportion of such contribution he may recover 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.

Position of person with option to purchase.

19. Where any land in respect of which a contribution has been paid by the owner towards the construction or repair of a dividing fence is at the time of such payment subject to an option to purchase then in the event of the option to purchase being exercised the purchaser shall on completion of the purchase pay to such owner the amount of the contribution paid by such owner.

Power to enter adjoining land.

Vic. Act No. 3679, s. 33; S.A. No. 1639, 1924, s. 24.

20. 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 thereon such acts, matters and things, as are necessary or reasonably required to carry into effect the construction or repairing of the fence.

Service of notice. cf. Act No. 41, 1919, s. 628.

21. (1) The service of any notice under this Act may be—

- (a) personal; or
- (b) by delivering the notice at the usual or last known place of abode or business of the person to be served and leaving the same with some person apparently above the age of fourteen years resident or employed thereat; or
- (c) by registered letter.

(2) Proof by affidavit or orally that the notice has been served in accordance with this section shall be conclusive evidence of service.

(3) For the purpose of this section a justice of the peace is hereby authorised to take and receive an affidavit whether any matter to which the affidavit relates is or is not pending in any court.

(4)

(4) The description of any land in any notice under this Act need not particularly define the land provided that it allows no reasonable doubt as to what land is referred to therein. No. 8, 1951.

22. The Local Government Act, 1919, as amended by subsequent Acts, is amended by omitting from paragraph (e) of subsection three of section two hundred and thirty-two the words and figures "Dividing Fences Act, 1902," and by inserting in lieu thereof the words and figures "Dividing Fences Act, 1951". Amendment
of Act No.
41, 1919,
s. 232.
(Fee
simple.)

23. (1) The Governor may make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act. Regula-
tions.

(2) Such regulations shall—

- (a) be published in the Gazette;
- (b) take effect from the date of publication or from a later date to be specified in such regulations;
- (c) be laid before both Houses of Parliament within fourteen sitting days after publication if Parliament is in session, and, if not, then within fourteen sitting days after the commencement of the next session.

If either House of Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after such regulations have been laid before such House disallowing any regulation or part thereof, such regulation or part shall thereupon cease to have effect.