

FIRST PRINT

## DIVIDING FENCES BILL 1991

NEW SOUTH WALES



### EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to replace the Dividing Fences Act 1951 with new legislation designed to up-date and rationalise the law relating to dividing fences.

The Bill implements the majority of the recommendations of the New South Wales Law Reform Commission as summarised in its Report entitled "Dividing Fences" of December 1988 (Report LRC 59 1988). The Bill is based on the draft Bill contained in Appendix A to that Report.

The main features of the Bill include the introduction of a single concept of "fencing work" (which includes both the construction and repair of a dividing fence), a new expanded definition of "fence" and the general principle that adjoining land owners are liable to contribute in equal proportions to the carrying out of fencing work in respect of a dividing fence of a standard not greater than the standard for a "sufficient dividing fence". Most of the provisions of the existing legislation have been adapted and modified by the Bill. The Crown, and other bodies such as local councils in respect of certain land, will continue to be not bound by the legislation.

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### PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act commences on a day or days to be appointed by proclamation.

Clause 3 contains definitions for the purposes of the proposed Act. In particular, "fence" is given a wider meaning than in the existing Act and will include "living" fences such as hedges. "Fencing work" is defined to mean the design, construction, replacement, repair or maintenance of a dividing fence and the surveying or preparation of land for such a purpose.

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Clause 4 provides that when a Local Court or local land board has to determine the standard for a "sufficient dividing fence", the Court or board is to consider the existing dividing fence (if any), the uses of the adjoining lands, the privacy or other concerns of the owners, the kind of dividing fence usual in the locality, local council policy as to dividing fences and any relevant environmental planning instrument.

Clause 5 provides that the intervention of a road or watercourse between 2 parcels of land does not prevent the owners of those parcels of land from being taken to be adjoining owners if a fence on either side of the road or watercourse is used or is capable of being used as a dividing fence by the owners.

#### **PART 2—LIABILITY FOR FENCING WORK**

Clause 6 provides that adjoining owners are liable to contribute to the carrying out of fencing work that results in the provision of a dividing fence of a standard not greater than the standard for a sufficient dividing fence. This provision applies whether or not a dividing fence already separates the land.

Clause 7 provides that adjoining owners are liable to contribute in equal proportions to the carrying out of fencing work in respect of a dividing fence of a standard not greater than the standard for a sufficient dividing fence. However, the additional cost of fencing work to meet a standard above that of a sufficient dividing fence will be met by the owner wanting the better quality dividing fence.

Clause 8 provides that an owner who deliberately or negligently damages or destroys a dividing fence (whether or not that act took place before the commencement of the proposed section) will be liable for up to the whole cost of restoring the fence to its state before the damage or destruction. The liability for damage caused by the negligent or deliberate act of an owner arises also when it is the act of a person who enters the land concerned with that owner's permission.

Clause 9 provides that an adjoining owner will be able to carry out fencing work in respect of a damaged or destroyed dividing fence which requires urgent repair (for example, to prevent the escape of livestock or for reasons of safety or security) without serving a notice to fence. The other owner is to be liable for half the cost (or more if the fence has been destroyed or damaged by the negligent or deliberate act of the owner).

Clause 10 expressly extinguishes any obligation that may exist under the common law (for example, in relation to a fencing easement) to perform fencing work.

#### **PART 3—PROCEDURE AND IMPLEMENTATION**

Clause 11 provides that an owner of adjoining land may require the other adjoining owner to contribute to the carrying out of fencing work by serving a notice. The notice must specify the boundary line or other line proposed for the dividing fence, the proposed type of fencing work and the estimated cost. An adjoining owner is not liable to contribute to the cost of fencing work carried out before an agreement is made concerning the work or before the matter has been determined by a Local Court or local land board.

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Clause 12 provides that adjoining owners may attend a Community Justice Centre in an attempt to reach an agreement concerning the carrying out of fencing work. If adjoining owners do not agree within 1 month after a notice to fence has been served, one of them may apply to a Local Court or local land board for an order determining the manner in which the work is to be carried out.

Clause 13 provides that a Local Court or local land board has jurisdiction to hear and determine matters arising under the proposed Act. As a preliminary step in determining an application made to a Local Court or local land board under the proposed Act, the Court or board may transfer the dispute to another tribunal (i.e. from the Local Court to a local land board or from the board to a Court) if it is more appropriate that the other tribunal determine the application because of the subject-matter of the dispute. Such a transfer is final and not subject to review. The clause also provides that a Local Court may refer the parties to an arbitrator under the Arbitration (Civil Actions) Act 1983.

Clause 14 enables a Local Court or local land board to make orders about the fencing work in dispute. For example, the court or board may make an order determining the boundary or line on which the fencing work is to be carried out, how the contributions for the work are to be apportioned, what kind of dividing fence is to be constructed or what kind of work is required on an existing dividing fence. The court or board may order that no dividing fence is required in respect of the adjoining lands.

Clause 15 provides that if an agreement is reached or an order is made by the Local Court or local land board and an adjoining owner fails to perform his or her obligations within the time specified in the order or within 3 months, the other owner will be able to carry out the work agreed on or determined by the order and recover the agreed or determined amount (or half the cost of the work if no amount has been agreed or determined) from the defaulting owner.

Clause 16 provides that substantial compliance with the terms of an order or agreement is sufficient for the purposes of the proposed Act, subject to the owner who performs the fencing work being liable to the other adjoining owner for any defect or omission.

Clause 17 provides that, in the absence of an adjoining owner, a Local Court or local land board may make an order authorising the carrying out of fencing work. The owner carrying out the work will be able, if the other adjoining owner's whereabouts are subsequently ascertained, to serve a copy of the order on that owner and recover that owner's contribution as specified in the order of the Court or board.

Clause 18 deals with the procedure when adjoining owners do not agree on the position of the common boundary line for the purposes of carrying out fencing work.

Clause 19 provides that an order of a Local Court or local land board under the proposed Act is final except for a right of appeal on errors of law.

#### PART 4—MISCELLANEOUS

Clause 20 enables an adjoining owner who carries out fencing work to enter the land adjoining the dividing fence at any reasonable time for the purpose of carrying out the work.

Clause 21 provides that service of a notice by personal delivery or ordinary post is sufficient.

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Clause 22 provides that leave may be granted to serve a notice demanding contribution from an adjoining owner up to 12 months after the fencing work has been carried out but only if the owner has mistakenly taken action in respect of the fencing work under some other Act or the Local Court or local land board considers it just or equitable to grant the leave.

Clause 23 enables a Local Court or local land board to award costs against either party in proceedings under the proposed Act.

Clause 24 provides that any money required or liable to be paid is recoverable as a debt in a court of competent jurisdiction.

Clause 25 provides that the Crown and local councils or other trustees in respect of public parks, public reserves or public roads are not bound by the proposed Act.

Clause 26 provides that the proposed Act does not affect any covenant or any contract or agreement between adjoining owners in respect of a dividing fence or fencing work nor does it affect any law relating to retaining walls or easements of support. Any provisions relating to fences in other Acts are also not affected by the proposed Act.

Clause 27 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 28 repeals the Dividing Fences Act 1951 and the Dividing Fences Regulations 1957.

Clause 29 gives effect to the Schedule containing provisions of a savings and transitional nature.

Clause 30 gives effect to the Schedule of amendments to other Acts.

Schedule 1 provides that certain matters arising under the Dividing Fences Act 1951 are to be continued under that Act as if that Act had not been repealed and provides that references to the 1951 Act are to be read as references to the proposed Act.

Schedule 2 contains consequential amendments to other Acts.

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# **DIVIDING FENCES BILL 1991**

NEW SOUTH WALES



No. , 1991

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## **A BILL FOR**

An Act to provide for the apportionment of the cost of dividing fences; to repeal the Dividing Fences Act 1951; and to amend certain other Acts.

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The Legislature of New South Wales enacts:

**PART 1—PRELIMINARY**

**Short title**

1. This Act may be cited as the Dividing Fences Act 1991.

**Commencement**

2. This Act commences on a day or days to be appointed by proclamation.

**Definitions**

3. In this Act:

“**adjoining owners**” means the owners of land on either side of a common boundary;

“**dividing fence**” means a fence separating the land of adjoining owners, whether on the common boundary of adjoining lands or on a line other than the common boundary;

“**fence**” means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners, and includes:

- (a) any gate, cattlegrid or apparatus necessary for the operation of the fence; and
- (b) any natural or artificial watercourse which separates the land of adjoining owners; and
- (c) any foundation or support necessary for the support and maintenance of the fence,

but does not include a retaining wall or a wall which is part of a house, garage or other building;

“**fencing work**” means:

- (a) the design, construction, replacement, repair or maintenance of the whole or part of a dividing fence; and
- (b) the surveying or preparation of land along or on either side of the common boundary of adjoining lands for such a purpose,

and includes:

- (c) the planting, replanting and maintenance of a hedge or similar vegetative barrier; and

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- (d) the cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as a dividing fence;

**"lease"** includes a sublease and an agreement for a lease;

**"local land board"** means a local land board constituted under the Crown Lands Act 1989 or under the Western Lands Act 1901 for the district in which the dividing fence concerned is or is proposed to be located or, if the dividing fence is or is proposed to be located on the boundary of or within 2 such districts, the local land board of either of those districts;

**"owner"** includes:

- (a) any person who jointly or severally (whether at law or in equity) is entitled to land for any estate of freehold in possession or who receives or is entitled to receive any rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise; and
- (b) any person who is the holder of a lease (the unexpired term of which is not less than 5 years) when a notice to carry out fencing work in accordance with this Act is given by, or served on, that person.

**Determination as to "sufficient dividing fence"**

4. In any proceedings under this Act, a Local Court or local land board is to consider all the circumstances of the case when determining the standard for a sufficient dividing fence for the purposes of this Act, including the following:

- (a) the existing dividing fence (if any);
- (b) the purposes for which the adjoining lands are used or intended to be used;
- (c) the privacy or other concerns of the adjoining land owners;
- (d) the kind of dividing fence usual in the locality;
- (e) any policy or code relating to dividing fences adopted by the council of the local government area in which the adjoining lands are situated;
- (f) any relevant environmental planning instrument relating to the adjoining lands or to the locality in which they are situated.

**Adjoining owners—land separated by road or watercourse**

5. (1) The intervention of a road or watercourse between 2 parcels of land does not prevent:

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- (a) the owners of those parcels of land from being taken to be adjoining owners for the purposes of this Act; or
  - (b) a claim for contribution for fencing work being brought in respect of a fence on either side of the road or watercourse.
- (2) This section applies only if the fence has been used or, in the opinion of a Local Court or local land board could reasonably be used, as a dividing fence by the owners of the land on either side of it.

**PART 2—LIABILITY FOR FENCING WORK****General principle—liability for fencing work**

6. (1) An adjoining owner is liable, in respect of adjoining lands where there is no sufficient dividing fence, to contribute to the carrying out of fencing work that results or would result in the provision of a dividing fence of a standard not greater than the standard for a sufficient dividing fence.

(2) This section applies whether or not a dividing fence already separates the adjoining lands.

**Contribution as between adjoining owners—generally**

7. (1) Adjoining owners are liable to contribute in equal proportions to the carrying out of fencing work in respect of a dividing fence of a standard not greater than the standard for a sufficient dividing fence.

(2) An adjoining owner who desires to carry out fencing work involving a dividing fence of a standard greater than the standard for a sufficient dividing fence is liable for the fencing work to the extent to which it exceeds the standard for a sufficient dividing fence.

**Contribution where negligent or deliberate act**

8. (1) Despite section 7, an adjoining owner is liable for up to the whole cost of the fencing work required to restore a dividing fence that has been damaged or destroyed by a negligent or deliberate act of the owner or of a person who has entered the land concerned with the express or implied consent of the owner.

(2) Any such dividing fence is to be restored to a reasonable standard, having regard to its state before the damage or destruction.

(3) In determining an adjoining owner's liability under this section, it does not matter if the negligent or deliberate act concerned took place before the commencement of this section.

**Contribution when urgent fencing work is required**

9. (1) This section applies to a dividing fence that has been damaged or destroyed (in whole or in part) and in the circumstances requires urgent fencing work.

(2) If it is impracticable to serve a notice under section 11 in respect of a dividing fence to which this section applies, an adjoining owner may, without serving such a notice, carry out the urgent fencing work required to restore the dividing fence.

(3) The other adjoining owner is liable for half the cost (or a greater proportion if section 8 applies) of the urgent fencing work.

(4) Any such liability may be reviewed by a Local Court or local land board on the application by that owner to the Court or board within 1 month after the work has been completed (or within such later period as the Court or board may allow).

**Fencing easements etc. extinguished**

10. No obligation to perform fencing work arises or is taken to arise by prescription or implication under the common law.

**PART 3—PROCEDURE AND IMPLEMENTATION****Notice to carry out fencing work**

11. (1) An adjoining owner may require the other adjoining owner to contribute, under this Act, to the carrying out of fencing work by serving a notice in writing to that effect on the other owner.

(2) The notice is to specify the following:

- (a) the boundary line on which the fencing work is proposed to be carried out or, if it is impracticable to carry out fencing work on the common boundary of the adjoining lands, the line on which it is proposed to carry out the work;
- (b) the type of fencing work proposed to be carried out;
- (c) the estimated cost of the fencing work.

(3) The owner serving the notice may propose that the cost of the fencing work is to be borne otherwise than in equal proportions. In such a case, the notice is to state the proposed proportions.

(4) The description of land in a notice need not particularly define the land if it allows no reasonable doubt as to what land is referred to in the notice.

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(5) An adjoining owner is not liable to contribute to the cost of any fencing work in respect of a dividing fence:

- (a) carried out before a notice under this section is served on the adjoining owner (unless section 9 applies or the notice is served in accordance with section 22); or
- (b) carried out after the service of the notice on the adjoining owner and before agreement is reached by the adjoining owners concerning the fencing work (including the contributions to be made in respect of the work) or before the matter has been determined by a Local Court or local land board.

**Procedure when agreement not reached**

12. (1) Adjoining owners may attend a Community Justice Centre in an attempt to reach an agreement concerning the carrying out of fencing work (including the contributions to be made in respect of the work).

(2) If adjoining owners do not agree (within 1 month after one of them has served a notice under section 11) as to the fencing work to be carried out, either owner may apply to a Local Court or a local land board for an order determining the manner in which the fencing work (if any) is to be carried out.

**Jurisdiction of Local Court or local land board**

13. (1) A Local Court or local land board has jurisdiction to hear and determine any matter arising under this Act.

(2) An application under this Act that is pending in a Local Court or in a local land board may be transferred from the Court to a board, or from the board to a Court, if it appears to the tribunal to which the application was made that, having regard to the subject-matter of the application and the composition and nature of the other tribunal, it is more appropriate for the application to be determined by that other tribunal.

(3) A Local Court or local land board which has an application transferred to it under subsection (2) is to determine the application.

(4) A decision of a Local Court or local land board under subsection (2) is final and no proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, are to lie in respect of the decision.

(5) A Local Court may refer the parties to proceedings under this Act to an arbitrator within the meaning of the Arbitration (Civil Actions) Act 1983.

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**Orders as to fencing work**

14. (1) A Local Court or local land board may, in respect of an application under this Act, make an order determining any one or more of the following:

- (a) the boundary or line on which the fencing work is to be carried out, whether or not that boundary or line is on the common boundary of the adjoining lands;
- (b) the fencing work to be carried out (including the kind of dividing fence involved);
- (c) the manner in which contributions for the fencing work are to be apportioned or re-apportioned;
- (d) which portion of the dividing fence is to be constructed or repaired by either owner;
- (e) the time within which the fencing work is to be carried out;
- (f) the amount of any compensation (in the form of an annual payment to either of the adjoining owners) in consideration of loss of occupation of any land;
- (g) that, in the circumstances, no dividing fence is required in respect of all or part of the boundary of the adjoining lands.

(2) The occupation of land on either side of a dividing fence, as a result of an order determining that fencing work is to be carried out otherwise than on the common boundary of the adjoining lands, is not taken to be adverse possession as against the owner or to affect the title to or possession of the land, except for the purposes of this Act.

**Enforcement of agreements and orders**

15. (1) If an agreement is reached by adjoining owners or an order is made by a Local Court or local land board and an adjoining owner bound by the agreement or order fails within the required time to perform his or her part of the agreement or to comply with the order, the other adjoining owner:

- (a) may carry out the fencing work as agreed on or as determined by the order; and
- (b) may recover from the defaulting adjoining owner the amount agreed or ordered to be paid by that adjoining owner or (if the agreement or order does not specify the amount to be paid) half the cost of the fencing work carried out.

(2) The "required time" is the time specified in the agreement or order or, if no time is specified, within 3 months after the making of the agreement or order.

**Substantial compliance sufficient**

16. (1) Substantial compliance with the terms of any agreement or order referred to in section 15 is sufficient for the purposes of this Act.

(2) However, the adjoining owner who carries out the fencing work is liable to the other adjoining owner for any defect or omission in the fencing work.

**Application for order in absence of an adjoining owner**

17. (1) An adjoining owner may apply to a Local Court or local land board for an order, in the absence of the other adjoining owner, authorising the carrying out of such fencing work as is specified in the order (including the manner in which contributions for the work are to be apportioned).

(2) Such an order may only be made if the Court or board is satisfied that the adjoining owner making the application has made reasonable inquiries but has been unable to ascertain the whereabouts of the other adjoining owner for the purposes of serving a notice under section 11.

(3) An adjoining owner who carries out the fencing work authorised by the order and who later ascertains the whereabouts of the other adjoining owner:

- (a) may serve a copy of the order on the other owner; and
- (b) is entitled, after 1 month from the date of service, to recover from the other owner the proportion of that owner's contribution as specified in the order.

(4) The adjoining owner served with a copy of an order under subsection (3) may, within 1 month after being served, apply to a Local Court or local land board for a variation of the order and the Court or board may vary the order in such manner as it thinks fit.

**Procedure for defining boundary line**

18. (1) An adjoining owner may give notice in writing to the other adjoining owner of his or her intention to have the common boundary line defined by a registered surveyor if the owners do not agree on the position of the common boundary line for the purposes of carrying out fencing work.

(2) The owner receiving the notice may, within 7 days after service of the notice:

- (a) define the position of the common boundary line by pegs if satisfied as to its position; or

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(b) employ a registered surveyor to define the common boundary line, and in either case is to inform the other adjoining owner in writing of what has been done.

(3) The owner giving the notice may have the common boundary line defined by a registered surveyor if the owner to whom the notice is given has, within 1 month after service of the notice, defined the common boundary line by pegs or failed to have the common boundary defined by a registered surveyor.

(4) If the common boundary line as defined by a registered surveyor is ascertained to be in the same position defined by pegs placed there by the owner receiving the notice, that owner is entitled to recover from the owner giving the notice any costs incurred.

(5) In any other case when a registered surveyor has been employed, all reasonable expenses are to be paid in equal shares by the adjoining owners.

(6) In this section, "**registered surveyor**" means a person registered under the Surveyors Act 1929 as a surveyor.

**Appeals etc.**

19. (1) Any order made by a Local Court or local land board under this Act is final.

(2) However, a party to proceedings under this Act who is dissatisfied with the order of a Local Court or local land board as being erroneous in point of law, may appeal to the Supreme Court.

(3) Any person may apply to the Supreme Court for an order directing a Magistrate of a Local Court or a local land board to perform any of the functions of the Court or board under this Act (other than under section 13 (2)).

**PART 4—MISCELLANEOUS****Right to enter adjoining land**

20. An adjoining owner who carries out fencing work under this Act (including the owner's employees or agents) may, at any reasonable time, enter on the land adjoining the dividing fence for the purpose of carrying out the work.

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**Service of notices**

21. A notice under this Act is to be served on an adjoining owner by delivering it personally or sending it by post to the owner's usual or last known residential or business address.

**Time for service of notices—special provision**

22. (1) A Local Court or local land board may grant leave to serve a notice demanding contribution under this Act on an adjoining owner from whom contribution is sought up to 12 months after the fencing work concerned has been carried out.

(2) Leave may be granted only if:

- (a) the Court or board is satisfied that the owner seeking to serve notice has mistakenly taken action in respect of the dividing fence under some other Act; or
- (b) the Court or board considers it to be just or equitable in the circumstances for leave to be granted.

**Costs**

23. In any proceedings under this Act, a Local Court or local land board may award costs against either party.

**Recovery of money payable**

24. (1) Any money which an adjoining owner is required or liable to pay under this Act may be recovered as a debt in a court of competent jurisdiction.

(2) In any proceedings for the recovery of money, the certificate of the Local Court or local land board as to the making and contents of any order under section 14 or 17 is evidence of the matters set out in the certificate.

**Application of Act to Crown and local authorities etc.**

25. (1) This Act does not operate to impose any liability, or to confer any rights, with respect to dividing fences on:

- (a) the Crown; or
- (b) a council of a local government area, or any trustee or other person or body, in respect of land vested in (or under the care, control and management of) the council, trustee, person or body for the purposes of a public reserve, public park or such other public purposes as may be prescribed; or

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(c) a council of a local government area in respect of a public road where the fee simple is vested in the council.

(2) However, nothing in this Act prevents the Crown or any such council, trustee, person or body from entering into arrangements (other than those arising under this Act) to contribute to fencing work in respect of dividing fences.

(3) In this section, "Crown" includes a statutory body representing the Crown.

**Act not to affect agreements etc., retaining walls or other Acts**

26. Nothing in this Act affects:

- (a) any covenant or any contract or agreement (other than an agreement arising under this Act) made between adjoining owners in respect of a dividing fence before or after the commencement of this Act; or
- (b) any law relating to retaining walls, easements of support or other rights of support in relation to land; or
- (c) provisions relating to fences made by or under any other Act.

**Regulations**

27. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**Repeal of Dividing Fences Act 1951 No. 8 etc.**

28. (1) The Dividing Fences Act 1951 is repealed.

(2) The Dividing Fences Regulations 1957 (and any other regulations under that Act) are repealed.

**Savings, transitional and other provisions**

29. Schedule 1 has effect.

**Amendment of other Acts**

30. The Acts specified in Schedule 2 are amended as set out in that Schedule.

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**SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS**

(Sec. 29)

**Savings as to proceedings etc.**

1. (1) The Dividing Fences Act 1951 continues to operate in respect of any matter pending as a result of a notice served under that Act, an order made under section 11 of that Act or work completed under section 14 (2) (b) of that Act as if that Act had not been repealed by this Act.

(2) Otherwise, this Act applies to and in respect of fencing work whether carried out before or after the commencement of section 28.

**Construction of references**

2. A reference in any other Act or in an instrument made under an Act or in any document to the Dividing Fences Act 1951 is to be read as a reference to this Act, except as provided by clause 1 (1).

**SCHEDULE 2—AMENDMENT OF OTHER ACTS**

(Sec. 30)

**Local Government Act 1919 No. 41****Section 232 (Fee-simple):**

From section 232 (3) (e), omit "or in respect of any dividing fence under the Dividing Fences Act 1951".

**Maritime Services Act 1935 No. 47****Section 13TC (Exclusion of Dividing Fences Act 1991):**

Omit "1951", insert instead "1991".

**Stock Diseases Act 1923 No. 34****Section 13 (Power to order fencing):**

From section 13 (4), omit "1951", insert instead "1991".

**Strata Titles Act 1973 No. 68****Section 149 (Dividing fences):**

Omit "1951", insert instead "1991".

**Strata Titles (Leasehold) Act 1986 No. 219****Section 187 (Dividing fences):**

Omit "1951", insert instead "1991".

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# **DIVIDING FENCES ACT 1991 No. 72**

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- 28. Repeal of Dividing Fences Act 1951 No. 8 etc.
- 29. Savings, transitional and other provisions
- 30. Amendment of other Acts

SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS  
SCHEDULE 2—AMENDMENT OF OTHER ACTS

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**DIVIDING FENCES ACT 1991 No. 72**

*Date of last reprint: not yet reprinted*

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**Amendments not included in current print**

<b>Made by</b>	<b>Provisions affected</b>
Roads Act 1993 No. 33	s. 25
Statute Law (Miscellaneous Provisions) Act 1994 No. 32	s. 13
Irrigation Corporations Act 1994 No. 41	s. 25

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AMENDMENTS ARE SHOWN IRRESPECTIVE OF WHETHER THEY ARE IN FORCE AT THE DATE OF ISSUE OF THIS SHEET. FOR FURTHER INFORMATION ABOUT THE EXACT STATUS OF LEGISLATION ETC. PLEASE CONSULT THE MONTHLY ACTS TABLES OR CONTACT THE LEGISLATION INFORMATION SERVICE AT THE PARLIAMENTARY COUNSEL'S OFFICE ON (02) 228 7139.



**DIVIDING FENCES ACT 1991 No. 72**

*Date of last reprint: 1 November 1994*

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**Amendments not included in current print**

<b>Made by</b>	<b>Provisions affected</b>
Threatened Species Conservation Act 1995 No. 101	s. 14

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AMENDMENTS ARE SHOWN IRRESPECTIVE OF WHETHER THEY ARE IN FORCE AT THE DATE OF ISSUE OF THIS SHEET. FOR FURTHER INFORMATION ABOUT THE EXACT STATUS OF LEGISLATION ETC. PLEASE CONSULT THE MONTHLY ACTS TABLES OR CONTACT THE LEGISLATION INFORMATION SERVICE AT THE PARLIAMENTARY COUNSEL'S OFFICE ON (02) 228 7139.



**DIVIDING FENCES ACT 1991 No. 72**

**NEW SOUTH WALES**



**Act No. 72, 1991**

An Act to provide for the apportionment of the cost of dividing fences; to repeal the Dividing Fences Act 1951; and to amend certain other Acts.  
[Assented to 17 December 1991]

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The Legislature of New South Wales enacts:

**PART 1—PRELIMINARY**

**Short title**

1. This Act may be cited as the Dividing Fences Act 1991.

**Commencement**

2. This Act commences on a day or days to be appointed by proclamation.

**Definitions**

3. In this Act:

“**adjoining owners**” means the owners of land on either side of a common boundary;

“**dividing fence**” means a fence separating the land of adjoining owners, whether on the common boundary of adjoining lands or on a line other than the common boundary;

“**fence**” means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners, and includes:

- (a) any gate, cattlegrid or apparatus necessary for the operation of the fence; and
- (b) any natural or artificial watercourse which separates the land of adjoining owners; and
- (c) any foundation or support necessary for the support and maintenance of the fence,

but does not include a retaining wall or a wall which is part of a house, garage or other building;

“**fencing work**” means:

- (a) the design, construction, replacement, repair or maintenance of the whole or part of a dividing fence; and
- (b) the surveying or preparation of land along or on either side of the common boundary of adjoining lands for such a purpose,

and includes:

- (c) the planting, replanting and maintenance of a hedge or similar vegetative barrier; and

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- (d) the cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as a dividing fence;

**"lease"** includes a sublease and an agreement for a lease;

**"local land board"** means a local land board constituted under the Crown Lands Act 1989 or under the Western Lands Act 1901 for the district in which the dividing fence concerned is or is proposed to be located or, if the dividing fence is or is proposed to be located on the boundary of or within 2 such districts, the local land board of either of those districts;

**"owner"** includes:

- (a) any person who jointly or severally (whether at law or in equity) is entitled to land for any estate of freehold in possession or who receives or is entitled to receive any rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise; and
- (b) any person who is the holder of a lease (the unexpired term of which is not less than 5 years) when a notice to carry out fencing work in accordance with this Act is given by, or served on, that person.

**Determination as to "sufficient dividing fence"**

4. In any proceedings under this Act, a Local Court or local land board is to consider all the circumstances of the case when determining the standard for a sufficient dividing fence for the purposes of this Act, including the following:

- (a) the existing dividing fence (if any);
- (b) the purposes for which the adjoining lands are used or intended to be used;
- (c) the privacy or other concerns of the adjoining land owners;
- (d) the kind of dividing fence usual in the locality;
- (e) any policy or code relating to dividing fences adopted by the council of the local government area in which the adjoining lands are situated;
- (f) any relevant environmental planning instrument relating to the adjoining lands or to the locality in which they are situated.

**Adjoining owners—land separated by road or watercourse**

5. (1) The intervention of a road or watercourse between 2 parcels of land does not prevent:

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- (a) the owners of those parcels of land from being taken to be adjoining owners for the purposes of this Act; or
- (b) a claim for contribution for fencing work being brought in respect of a fence on either side of the road or watercourse.

(2) This section applies only if the fence has been used or, in the opinion of a Local Court or local land board could reasonably be used, as a dividing fence by the owners of the land on either side of it.

## **PART 2—LIABILITY FOR FENCING WORK**

### **General principle—liability for fencing work**

6. (1) An adjoining owner is liable, in respect of adjoining lands where there is no sufficient dividing fence, to contribute to the carrying out of fencing work that results or would result in the provision of a dividing fence of a standard not greater than the standard for a sufficient dividing fence.

(2) This section applies whether or not a dividing fence already separates the adjoining lands.

### **Contribution as between adjoining owners—generally**

7. (1) Adjoining owners are liable to contribute in equal proportions to the carrying out of fencing work in respect of a dividing fence of a standard not greater than the standard for a sufficient dividing fence.

(2) An adjoining owner who desires to carry out fencing work involving a dividing fence of a standard greater than the standard for a sufficient dividing fence is liable for the fencing work to the extent to which it exceeds the standard for a sufficient dividing fence.

### **Contribution where negligent or deliberate act**

8. (1) Despite section 7, an adjoining owner is liable for up to the whole cost of the fencing work required to restore a dividing fence that has been damaged or destroyed by a negligent or deliberate act of the owner or of a person who has entered the land concerned with the express or implied consent of the owner.

(2) Any such dividing fence is to be restored to a reasonable standard, having regard to its state before the damage or destruction.

(3) In determining an adjoining owner's liability under this section, it does not matter if the negligent or deliberate act concerned took place before the commencement of this section.

**Contribution when urgent fencing work is required**

9. (1) This section applies to a dividing fence that has been damaged or destroyed (in whole or in part) and in the circumstances requires urgent fencing work.

(2) If it is impracticable to serve a notice under section 11 in respect of a dividing fence to which this section applies, an adjoining owner may, without serving such a notice, carry out the urgent fencing work required to restore the dividing fence.

(3) The other adjoining owner is liable for half the cost (or a greater proportion if section 8 applies) of the urgent fencing work.

(4) Any such liability may be reviewed by a Local Court or local land board on the application by that owner to the Court or board within 1 month after the work has been completed (or within such later period as the Court or board may allow).

**Fencing easements etc. extinguished**

10. No obligation to perform fencing work arises or is taken to arise by prescription or implication under the common law.

**PART 3—PROCEDURE AND IMPLEMENTATION****Notice to carry out fencing work**

11. (1) An adjoining owner may require the other adjoining owner to contribute, under this Act, to the carrying out of fencing work by serving a notice in writing to that effect on the other owner.

(2) The notice is to specify the following:

- (a) the boundary line on which the fencing work is proposed to be carried out or, if it is impracticable to carry out fencing work on the common boundary of the adjoining lands, the line on which it is proposed to carry out the work;
- (b) the type of fencing work proposed to be carried out;
- (c) the estimated cost of the fencing work.

(3) The owner serving the notice may propose that the cost of the fencing work is to be borne otherwise than in equal proportions. In such a case, the notice is to state the proposed proportions.

(4) The description of land in a notice need not particularly define the land if it allows no reasonable doubt as to what land is referred to in the notice.

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(5) An adjoining owner is not liable to contribute to the cost of any fencing work in respect of a dividing fence:

- (a) carried out before a notice under this section is served on the adjoining owner (unless section 9 applies or the notice is served in accordance with section 22); or
- (b) carried out after the service of the notice on the adjoining owner and before agreement is reached by the adjoining owners concerning the fencing work (including the contributions to be made in respect of the work) or before the matter has been determined by a Local Court or local land board.

**Procedure when agreement not reached**

12. (1) Adjoining owners may attend a Community Justice Centre in an attempt to reach an agreement concerning the carrying out of fencing work (including the contributions to be made in respect of the work).

(2) If adjoining owners do not agree (within 1 month after one of them has served a notice under section 11) as to the fencing work to be carried out, either owner may apply to a Local Court or a local land board for an order determining the manner in which the fencing work (if any) is to be carried out.

**Jurisdiction of Local Court or local land board**

13. (1) A Local Court or local land board has jurisdiction to hear and determine any matter arising under this Act.

(2) An application under this Act that is pending in a Local Court or in a local land board may be transferred from the Court to a board, or from the board to a Court, if it appears to the tribunal to which the application was made that, having regard to the subject-matter of the application and the composition and nature of the other tribunal, it is more appropriate for the application to be determined by that other tribunal.

(3) A Local Court or local land board which has an application transferred to it under subsection (2) is to determine the application.

(4) A decision of a Local Court or local land board under subsection (2) is final and no proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, are to lie in respect of the decision.

(5) A Local Court may refer the parties to proceedings under this Act to an arbitrator within the meaning of the Arbitration (Civil Actions) Act 1983.

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**Orders as to fencing work**

14. (1) A Local Court or local land board may, in respect of an application under this Act, make an order determining any one or more of the following:

- (a) the boundary or line on which the fencing work is to be carried out, whether or not that boundary or line is on the common boundary of the adjoining lands;
- (b) the fencing work to be carried out (including the kind of dividing fence involved);
- (c) the manner in which contributions for the fencing work are to be apportioned or re-apportioned;
- (d) which portion of the dividing fence is to be constructed or repaired by either owner;
- (e) the time within which the fencing work is to be carried out;
- (f) the amount of any compensation (in the form of an annual payment to either of the adjoining owners) in consideration of loss of occupation of any land;
- (g) that, in the circumstances, no dividing fence is required in respect of all or part of the boundary of the adjoining lands.

(2) The occupation of land on either side of a dividing fence, as a result of an order determining that fencing work is to be carried out otherwise than on the common boundary of the adjoining lands, is not taken to be adverse possession as against the owner or to affect the title to or possession of the land, except for the purposes of this Act.

**Enforcement of agreements and orders**

15. (1) If an agreement is reached by adjoining owners or an order is made by a Local Court or local land board and an adjoining owner bound by the agreement or order fails within the required time to perform his or her part of the agreement or to comply with the order, the other adjoining owner:

- (a) may carry out the fencing work as agreed on or as determined by the order; and
- (b) may recover from the defaulting adjoining owner the amount agreed or ordered to be paid by that adjoining owner or (if the agreement or order does not specify the amount to be paid) half the cost of the fencing work carried out.

(2) The “**required time**” is the time specified in the agreement or order or, if no time is specified, within 3 months after the making of the agreement or order.

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**Substantial compliance sufficient**

16. (1) Substantial compliance with the terms of any agreement or order referred to in section 15 is sufficient for the purposes of this Act.

(2) However, the adjoining owner who carries out the fencing work is liable to the other adjoining owner for any defect or omission in the fencing work.

**Application for order in absence of an adjoining owner**

17. (1) An adjoining owner may apply to a Local Court or local land board for an order, in the absence of the other adjoining owner, authorising the carrying out of such fencing work as is specified in the order (including the manner in which contributions for the work are to be apportioned).

(2) Such an order may only be made if the Court or board is satisfied that the adjoining owner making the application has made reasonable inquiries but has been unable to ascertain the whereabouts of the other adjoining owner for the purposes of serving a notice under section 11.

(3) An adjoining owner who carries out the fencing work authorised by the order and who later ascertains the whereabouts of the other adjoining owner:

(a) may serve a copy of the order on the other owner; and

(b) is entitled, after 1 month from the date of service, to recover from the other owner the proportion of that owner's contribution as specified in the order.

(4) The adjoining owner served with a copy of an order under subsection (3) may, within 1 month after being served, apply to a Local Court or local land board for a variation of the order and the Court or board may vary the order in such manner as it thinks fit.

**Procedure for defining boundary line**

18. (1) An adjoining owner may give notice in writing to the other adjoining owner of his or her intention to have the common boundary line defined by a registered surveyor if the owners do not agree on the position of the common boundary line for the purposes of carrying out fencing work.

(2) The owner receiving the notice may, within 7 days after service of the notice:

(a) define the position of the common boundary line by pegs if satisfied as to its position; or

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(b) employ a registered surveyor to define the common boundary line, and in either case is to inform the other adjoining owner in writing of what has been done.

(3) The owner giving the notice may have the common boundary line defined by a registered surveyor if the owner to whom the notice is given has, within 1 month after service of the notice, defined the common boundary line by pegs or failed to have the common boundary defined by a registered surveyor.

(4) If the common boundary line as defined by a registered surveyor is ascertained to be in the same position defined by pegs placed there by the owner receiving the notice, that owner is entitled to recover from the owner giving the notice any costs incurred.

(5) In any other case when a registered surveyor has been employed, all reasonable expenses are to be paid in equal shares by the adjoining owners.

(6) In this section, "**registered surveyor**" means a person registered under the Surveyors Act 1929 as a surveyor.

**Appeals etc.**

19. (1) Any order made by a Local Court or local land board under this Act is final.

(2) However, a party to proceedings under this Act who is dissatisfied with the order of a Local Court or local land board as being erroneous in point of law, may appeal to the Supreme Court.

(3) Any person may apply to the Supreme Court for an order directing a Magistrate of a Local Court or a local land board to perform any of the functions of the Court or board under this Act (other than under section 13 (2)).

**PART 4—MISCELLANEOUS****Right to enter adjoining land**

20. An adjoining owner who carries out fencing work under this Act (including the owner's employees or agents) may, at any reasonable time, enter on the land adjoining the dividing fence for the purpose of carrying out the work.

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**Service of notices**

21. A notice under this Act is to be served on an adjoining owner by delivering it personally or sending it by post to the owner's usual or last known residential or business address.

**Time for service of notices—special provision**

22. (1) A Local Court or local land board may grant leave to serve a notice demanding contribution under this Act on an adjoining owner from whom contribution is sought up to 12 months after the fencing work concerned has been carried out.

(2) Leave may be granted only if:

- (a) the Court or board is satisfied that the owner seeking to serve notice has mistakenly taken action in respect of the dividing fence under some other Act; or
- (b) the Court or board considers it to be just or equitable in the circumstances for leave to be granted.

**Costs**

23. In any proceedings under this Act, a Local Court or local land board may award costs against either party.

**Recovery of money payable**

24. (1) Any money which an adjoining owner is required or liable to pay under this Act may be recovered as a debt in a court of competent jurisdiction.

(2) In any proceedings for the recovery of money, the certificate of the Local Court or local land board as to the making and contents of any order under section 14 or 17 is evidence of the matters set out in the certificate.

**Application of Act to Crown and local authorities etc.**

25. (1) This Act does not operate to impose any liability, or to confer any rights, with respect to dividing fences on:

- (a) the Crown; or
- (b) a council of a local government area, or any trustee or other person or body, in respect of land vested in (or under the care, control and management of) the council, trustee, person or body for the purposes of a public reserve, public park or such other public purposes as may be prescribed; or

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- (c) a council of a local government area in respect of a public road where the fee simple is vested in the council.
- (2) However, nothing in this Act prevents the Crown or any such council, trustee, person or body from entering into arrangements (other than those arising under this Act) to contribute to fencing work in respect of dividing fences.
- (3) In this section, "Crown" includes a statutory body representing the Crown.

**Act not to affect agreements etc., retaining walls or other Acts**

26. Nothing in this Act affects:

- (a) any covenant or any contract or agreement (other than an agreement arising under this Act) made between adjoining owners in respect of a dividing fence before or after the commencement of this Act; or
- (b) any law relating to retaining walls, easements of support or other rights of support in relation to land; or
- (c) provisions relating to fences made by or under any other Act.

**Regulations**

27. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**Repeal of Dividing Fences Act 1951 No. 8 etc.**

28. (1) The Dividing Fences Act 1951 is repealed.

(2) The Dividing Fences Regulations 1957 (and any other regulations under that Act) are repealed.

**Savings, transitional and other provisions**

29. Schedule 1 has effect.

**Amendment of other Acts**

30. The Acts specified in Schedule 2 are amended as set out in that Schedule.

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**SCHEDULE 1—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS**

(Sec. 29)

**Savings as to proceedings etc.**

1. (1) The Dividing Fences Act 1951 continues to operate in respect of any matter pending as a result of a notice served under that Act, an order made under section 11 of that Act or work completed under section 14 (2) (b) of that Act as if that Act had not been repealed by this Act.

(2) Otherwise, this Act applies to and in respect of fencing work whether carried out before or after the commencement of section 28.

**Construction of references**

2. A reference in any other Act or in an instrument made under an Act or in any document to the Dividing Fences Act 1951 is to be read as a reference to this Act, except as provided by clause 1 (1).

**SCHEDULE 2—AMENDMENT OF OTHER ACTS**

(Sec. 30)

**Local Government Act 1919 No. 41****Section 232 (Fee-simple):**

From section 232 (3) (e), omit "or in respect of any dividing fence under the Dividing Fences Act 1951".

**Maritime Services Act 1935 No. 47****Section 13TC (Exclusion of Dividing Fences Act 1991):**

Omit "1951", insert instead "1991".

**Stock Diseases Act 1923 No. 34****Section 13 (Power to order fencing):**

From section 13 (4), omit "1951", insert instead "1991".

**Strata Titles Act 1973 No. 68****Section 149 (Dividing fences):**

Omit "1951", insert instead "1991".

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SCHEDULE 2—AMENDMENT OF OTHER ACTS—*continued*

Strata Titles (Leasehold) Act 1986 No. 219

Section 187 (Dividing fences):

Omit "1951", insert instead "1991".

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[Minister's second reading speech made in—  
Legislative Assembly on 13 November 1991  
Legislative Council on 11 December 1991]

