

# Dividing Fences Act 1991 No 72

[1991-72]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**
  - [Crown Land Legislation Amendment Act 2017 No 17](#) (not commenced — to commence on 1.7.2018)
  - [Statute Law \(Miscellaneous Provisions\) Act 2018 No 25](#) (not commenced — to commence on 29.6.2018)

### Authorisation

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New South Wales

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# Dividing Fences Act 1991 No 72



New South Wales

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.

## Part 1 Preliminary

### 1 Name of Act

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

### 2 Commencement

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

### 3 Definitions

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 (except as provided by paragraph (c)) 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 (including the trimming, lopping or removal of vegetation) 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
- (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.

**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.

#### **4 Determination as to “sufficient dividing fence”**

In any proceedings under this Act, the Local Court or the Civil and Administrative Tribunal 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,
- (g) in the case of a dividing fence affecting land the subject of a lease under the [Western Lands Act 1901](#), any order in force under section 18A of that Act.

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

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

- (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 the Local Court or the Civil and Administrative Tribunal 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**

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

- (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.

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

- (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.
- (3) An adjoining owner who desires to carry out the trimming, lopping or removal of vegetation (as referred to in paragraph (b) of the definition of **fencing work** in section 3) for a purpose other than the provision of a sufficient dividing fence is liable for the expenses of carrying out the work to the extent to which those expenses are attributable to work done for that other purpose.

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

- (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.

### **9 Contribution when urgent fencing work is required**

- (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 the Local Court or the Civil and Administrative Tribunal on the application by that owner to the Court or the Tribunal within 1 month after the work has been completed (or within such later period as the Court or the Tribunal may allow).

### **10 Fencing easements etc extinguished**

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**

### **11 Notice to carry out fencing work**

- (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.

- (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 the Local Court or the Civil and Administrative Tribunal.

## **12 Procedure when agreement not reached**

- (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 the Local Court or the Civil and Administrative Tribunal for an order determining the manner in which the fencing work (if any) is to be carried out.

## **13 Jurisdiction of Local Court or Civil and Administrative Tribunal**

- (1) The Local Court or the Civil and Administrative Tribunal has jurisdiction to hear and determine any matter arising under this Act.
- (1A) Despite subsection (1), only the Civil and Administrative Tribunal has jurisdiction to hear and determine matters affecting land the subject of a lease under the [Western Lands Act 1901](#).
- (2) An application under this Act that is pending in the Local Court or in the Civil and Administrative Tribunal may be transferred from the Court to the Tribunal, or from the Tribunal 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) The Local Court or the Civil and Administrative Tribunal which has an application transferred to it under subsection (2) is to determine the application.
- (4) (Repealed)
- (5) The Local Court may refer the parties to proceedings under this Act to an arbitrator within the meaning of Part 5 of the [Civil Procedure Act 2005](#), but only to the extent to



which that Act provides for such proceedings to be so referred.

### **13A Jurisdiction of Land and Environment Court**

- (1) The Land and Environment Court has jurisdiction to hear and determine matters arising under this Act in proceedings to which this section applies.
- (2) This section only applies if:
  - (a) application for the exercise of the jurisdiction is made in relation to proceedings under section 7 of the *Trees (Disputes Between Neighbours) Act 2006* that have been commenced but not determined, and
  - (b) the tree that is the subject of those proceedings:
    - (i) has caused, is causing, or is likely in the near future to cause damage to a dividing fence, or
    - (ii) is part of a dividing fence and has caused, is causing, or is likely in the near future to cause damage to the applicant's property or is likely to cause injury to any person.
- (3) The Land and Environment Court may, of its own motion or on an application by a party to an application under this Act that is before the Local Court or the Civil and Administrative Tribunal, transfer the application that is pending in the Local Court or in the Civil and Administrative Tribunal to the Land and Environment Court if:
  - (a) the application is relevant to proceedings under section 7 of the *Trees (Disputes Between Neighbours) Act 2006* that have been commenced in the Land and Environment Court but have not been determined, and
  - (b) the tree that is the subject of those proceedings:
    - (i) has caused, is causing, or is likely in the near future to cause damage to a dividing fence, or
    - (ii) is part of a dividing fence and has caused, is causing, or is likely in the near future to cause damage to the applicant's property or is likely to cause injury to any person, and
  - (c) the Land and Environment Court is satisfied that there is sufficient reason for the application under this Act to be heard and determined by the Land and Environment Court.
- (4) An application that is transferred to the Land and Environment Court under subsection (3) is to be continued in the Land and Environment Court and determined by the Land and Environment Court as part of the related proceedings under section 7 of the *Trees (Disputes Between Neighbours) Act 2006*.

- (5) For the purposes of any proceedings to which this section applies, a reference to the Local Court in this Act (except sections 13 (2), (3) and (4) and 19 (2) and (3)) is taken to include a reference to the Land and Environment Court.

#### **14 Orders as to fencing work**

- (1) The Local Court or the Civil and Administrative Tribunal 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 or the amount that each adjoining owner is liable to pay for that work,
  - (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.
- (1A) Despite subsection (1), no order may be made for the carrying out of fencing work on critical habitat within the meaning of the *Threatened Species Conservation Act 1995* without the consent of the Director-General of National Parks and Wildlife.
- (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.

#### **15 Enforcement of agreements and orders**

- (1) If an agreement is reached by adjoining owners or an order is made by the Local Court or the Civil and Administrative Tribunal 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.

#### **16 Substantial compliance sufficient**

(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.

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

(1) An adjoining owner may apply to the Local Court or the Civil and Administrative Tribunal 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 the Tribunal 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 the Local Court or the Civil and Administrative Tribunal for a variation of the order and the Court or the Tribunal may vary the order in such manner as it thinks fit.

#### **18 Procedure for defining boundary line**

(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

(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 [Surveying and Spatial Information Act 2002](#) as a surveyor.

## **19 (Repealed)**

## **Part 4 Miscellaneous**

### **20 Right to enter adjoining land**

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.

### **21 Service of notices**

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.

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

- (1) The Local Court or the Civil and Administrative Tribunal 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 the Tribunal 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 the Tribunal considers it to be just or equitable in the circumstances for leave to be granted.

### **23 Costs**

In any proceedings under this Act, the Local Court or the Civil and Administrative Tribunal may award costs against either party.

### **24 Recovery of money payable**

- (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 the Civil and Administrative Tribunal as to the making and contents of any order under section 14 or 17 is evidence of the matters set out in the certificate.
- (3) The Tribunal may, on the application of an adjoining owner, make an order determining an amount that the other adjoining owner is required or liable to pay under this Act (other than an amount the subject of an order by the Local Court under this Act).
- (4) The amount (including any costs awarded against the other adjoining owner under section 23) may be certified by the principal registrar of the Civil and Administrative Tribunal.
- (5) A certificate given under subsection (4) must identify the person liable to pay the certified amount.
- (6) If a certificate given under subsection (4) is filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate, the certificate operates as such a judgment.

### **25 Application of Act to Crown and local authorities etc**

- (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
  - (c) a roads authority (within the meaning of the [Roads Act 1993](#)) with respect to any public road, or
  - (d) an irrigation corporation within the meaning of the [Water Management Act 2000](#),

or

(e) an Aboriginal Land Council with respect to land reserved under Part 4A of the *National Parks and Wildlife Act 1974*, or

(f) Water NSW, but only with respect to the exercise of its functions in the Sydney catchment area (within the meaning of the *Water NSW Act 2014*).

(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.

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

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 or fencing work made by or under any other Act.

## **27 Regulations**

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.

## **28 Repeal of *Dividing Fences Act 1951 No 8* etc**

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

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

## **29 Savings, transitional and other provisions**

Schedule 1 has effect.

## **30 (Repealed)**

## Schedule 1 Savings, transitional and other provisions

(Section 29)

### Part 1 Preliminary

#### 1A Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

*Dividing Fences and Other Legislation Amendment Act 2008*

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Part 2 Provisions consequent on enactment of this Act

#### 1 Savings as to proceedings etc

- (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.

#### 2 Construction of references

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).

### Part 3 Provision consequent on enactment of *Dividing Fences and*

## **Other Legislation Amendment Act 2008**

### **3 Order under section 14 specifying amount to be paid**

The amendment made to section 14 (1) (c) by the *Dividing Fences and Other Legislation Amendment Act 2008* extends to proceedings begun before the commencement of that amendment, but not so as to affect any determination of a Local Court or local land board before that commencement.

### **Schedule 2 (Repealed)**