

ATTACHMENT 1

CITY OF JOONDALUP – REPORT FOR 14 NOVEMBER 2000

REVIEW OF DIVIDING FENCES ACT 1961
01185

The following are our recommendation to the specific questions raised by the Department of Local Government in the Issues Paper. Our recommendations are listed below each question, which is in bold.

It would be advisable to read the complete report before carrying out and research for more information as you may found the answer further in the report.

4.0 Definitions

Q4.1 How should a “dividing fence” be defined?

“dividing fence” should be defined as follows:

Fence that separates the lands of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary and includes any foundation or support necessary for the support and maintenance of the fence, and may include a retaining wall, but does not include a wall which is part of a house, building or other structure.

Q4.2 How should an “owner” be defined?

The current definition should be amended to make it clear that it applies to owners of land on a strata plan including the Strata Company.

Q4.3 How should a “sufficient fence” be defined?

Sufficient fence should be comprehensively defined in the proposed Act to encompass the whole State with appropriate standards set for specific land uses, topography and geographical locations eg cylconic, hill sides, residential etc. This will eliminate confusion and enable simple interpretation of a sufficient fence.

Q4.4 Should the legislation contain definitions or guidance on how “cost” and “value” might be determined? If so, how should these concepts be defined or determined?

As there are so many variables, the best way would be for both parties to obtain quotes for the proposed work and decide what is a reasonable cost. The quotes should not be more than 90 days old.

Q4.5 Should local governments be required to have local laws setting out what is a “sufficient fence” for specified circumstances?

Local government control should be limited to the planning issues involved, which can be referred to in this legislation. For example, a dividing fence height could be limited in the Act to 1.8 metres with any variation to be referred to the Local Government for determination.

Q4.6 Should local governments be required to have specific provisions in their Town Planning Scheme; in keeping with the “Residential Planning Code”; and/or in planning policies regarding matters such as materials, height, privacy and access to light?

Many local governments already have matters such as materials, height and privacy for fences specified in their TPS and policies, we currently have a number off policies and structure plans which incorporate requirements for fencing both dividing and front fencing.

Q4.7 Would it be helpful if dividing fences legislation set out broad criteria to assist in the determination of what might be considered to be a sufficient fence in any one circumstance?

There are many benefits to having a common benchmark throughout the State, as the more people who understand and provide similar advice the less misunderstanding there is between the neighbours and subsequently less disputes.

Q4.8 Should there be provisions in the legislation relating to “fencing works” rather than to construction and repair?

Yes, this would simplify the reading of the Act and prevent some confusion between the requirements of construction and repair.

Q4.9 Should there be a specific provision about the removal of a fence or should this be captured by a new concept such as “fencing works”?

This should be covered in a new concept such as “fencing works”

5.0 Procedures

Q5.1 Should future dividing fence legislation facilitate more private agreements to occur? For example, should it include :

- **criteria for matters which should be covered in a private agreement; and**
- **proformas that could be used by adjoining owners when negotiating and formalising an agreement ?**

Yes this would help to formalise an agreement between the parties involved and help prevent disagreements in both the present and future.

Q5.2 Should private agreements be supported by non-legislative guidelines rather than legislative provisions?

There should be a legislative requirement and specific forms used, as this will prevent disputes arising later.

Q5.3 Should private arrangements be in written form, rather than just verbal?

All arrangements should be in written form.

Q5.4 Are the current requirements for the content of a notice to compel construction of a fence sufficient?

No, however by incorporating the following information proposed in the Victorian legislation would improve the current requirements.

- details of at least three competitive quotations, copies of which should be attached to the notice;
- a statement as to the legal effect of the document and the consequence of a failure to respond; and
- sections headed “Notice of Assent” and “Notice of Dispute” in which the recipient must give written notification of his or her intentions in the matter to the owner serving the notice.

Q5.5 Are the current requirements for the content of a notice to compel repair of a fence sufficient?

No see Q5.4 above for more detailed requirements.

Q5.6 Should the Act contain more detailed requirements about the notice?

Yes see Q5.4 above for more detailed requirements.

Q5.7 Should a proforma notice be included in the legislation?

Yes, as a most people would not have the expertise to write a notice and the other party involved would accept the notice more readily knowing that it has been written by a independent third party.

Q5.8 What, if any, notice provisions should be given when fences are damaged by natural events, such as floods, or man made problems, such as burning off or a tree falling?

No notice should be required as per the current Act due to the safety and security issues involved. However specific records should be kept of events and responses, actions including details of costs involved.

Q5.9 Should the Act contain notice provisions for construction and repair separately; or should the provisions be identical for both?

The provisions should be the same for both to simplify the process.

Q5.10 Is it more appropriate for direction on these matters to be provided in guidelines?

Yes. It would be helpful in reducing disputes providing the parties involved followed recommended guidelines.

Q5.11 How should the owner's address be defined?

The owner's address contained in the rate records of the local government within whose district the land is situated.

Q5.12 Should the ability to serve notices on occupiers be possible?

Yes, as recommended by the Victorian Law Reform.

Q5.13 How should a notice be served?

As required by Section 22 of the current Act which is inkeeping with other current legislation for serving of a notice.

Q5.14 Is there a need to have separate provisions for the serving of a notice for both construction and repair works?

No, the one process would be appropriate for both.

Q5.15 Where an owner receives a notice, are the existing timeframes for response by that owner appropriate?

Yes

Q5.16 Should there be specific provision to enable an owner who receives a notice for the repair of a dividing fence from an adjoining owner to respond with a counter proposal which was not included in the notice? If so, should there then be a requirement for the owner who initially served the notice to respond to the counter proposal from that adjoining owner?

Yes to both questions as this would provide a fairer system as both parties would feel they were able to have their say and more likely to come to a common agreement.

Q5.17 Should an owner who has been served a notice be required to respond to the giver of the notice in writing?

Yes, a proforma response form should be attached to the notice for ease of response, for both agreeing or not.

Q5.18 An owner giving a notice on an adjoining owner to compel repair work, can carry out that repair work if the adjoining owner does not respond within 14 days. Is 14 days sufficient time before repair work is carried out? If not, should there be a further period of time, for example, to allow for consideration of counter proposals. If further time should be allowed, how many days should this be?

14 days is sufficient time to respond and this may take the form of a counter proposal in which the original person serving the notice would have 14 days in which to respond.

Q5.19 Following the serving of a notice for construction works, either owner can apply to the court for it to determine the matter. For repair work only the owner serving the notice can make application to the court. Is this inconsistency appropriate?

No, there is no need for this inconsistency it will only make one party feel they have been disadvantaged.

Q5.20 To assist owners who are in disagreement about proposed fencing works, should the Act include a section which suggests that such owners consider or utilise non-judicial methods of mediation?

Yes, there is sufficient evidence to show that mediation can provide a much quicker and mutually agreeable outcome. You should not be able to approach the court until you have tried mediation.

Q5.21 Should there be a provision that specifically states that a person shall not be liable for contributing to the cost of fencing works: before a notice is served on them; after the service of the notice but before agreement is reached by the owners concerning the fencing work; or before the matter has been determined by the court?

A person should be liable after the notice is served.

Q5.22 Should the construction and repair provisions be the same?

Yes, there is no reason for them to differ.

Q5.23 Is three months an appropriate period of time before an owner can act?

If one party fails to carry out their part of the agreement after three months then the other party should be allowed to have the works done and recover the cost from the owner in default.

Q5.24 Should there be a provision that, after a certain period of time, the agreement or order lapses? If so, after what period should this occur?

A 4-month period as define in the South Australian Act would be reasonable, after that time a new agreement would be required. Providing no works were commenced or resources expanded by either party in relation to the original agreement.

Q5.25 Are the requirements for notifying absent owners adequate?

Yes they are.

Q5.26 When an adjoining owner complains to the court about an order given to him by the owner who constructed the fence, are the matters that a court can make a determination on sufficient?

Yes they are.

Q5.27 Should the same provisions apply to both construction and repair work?

Yes they should.

Q5.28 Are the current provisions adequate?

No, the current procedures for the recovery of money payable are not adequate.

Q5.29 Should there be additional provision to enable a person claiming outstanding money for a dividing fence to register a notification or charge against the adjoining owner's property?

Yes, providing it is ratified by a court.

6.0 Liability and Contribution

Q6.1 Should adjoining owners be liable to contribute in equal proportions or on some other basis?

As recommended by the Western Australian Law Reform Commission, section 7 of the Act should be amended to give the courts the power to decide on the extent of contribution payable where an imbalance in respective needs from a fence could be proved. For example, proportional regarding any retaining required depending on the level of variations changed by the individual owners to the natural ground level.

Q6.2 After a fence is erected, what should be the rights and liabilities for the owner who constructed the fence (and his or her successors) and the adjoining owner (and successors)?

After a fence is erected it should be should be treated as common property and all rights and liabilities shared.

Q6.3 Should an adjoining owner be liable to contribute if the adjoining owner was not the owner when the fence was constructed?

Yes, all liabilities should be bound to the property.

Q6.4 Should contributions to fencing be based on ownership or use?

Contributions should be based on ownership, but limited to a sufficient fence unless otherwise agreed.

Q6.5 In relation to a situation where a person uses a fence located on the other side of a road or a watercourse,

- **should the contribution to repair works be divided equally between owners? If not, how should it be apportioned?**
- **should owners making use of fences in these circumstances be required to contribute to all forms of fencing works, including repair and removal?**
- **if applicable, what method of payment of the contribution is appropriate – lump sum, annual payment at a nominated rate of interest or some other method?**
- **if a contribution to construction is appropriate, should the liability only apply to the person who was the neighbouring owner when the fence was constructed, or should it apply to future owners?**

All the above scenarios raised in Q6.5 should be determined on ownership.

7.0 Right of Appeal

Q7.1 Should there be any right of appeal against court orders?

Yes, but limited by specific criteria to prevent resource rich owners using the legal professionals to defer their liabilities.

Q7.2 Should the right of appeal be limited to certain circumstances and/or be available for only some of the matters that a court can make orders about? If not, should all orders made by a court be appealable?

All appeals should be limited refer Q7.1 above.

Q7.3 Should the District Court be the appellate court?

Yes the District Court should be the appellate court.

Q7.4 Should consideration be given to an “expert panel” approach? Should such a panel be advisory in nature or should it have authority under the legislation to make final determinations?

An “expert panel” would be a better approach and they should have the authority to make the final decision. However, the panel may refer it to a court.

8.0 Dispute Resolution

Q8.1 Should there be specific legislative provision for mediation or other dispute resolution processes?

Yes, this will save time, money and encourage better relations between neighbours.

Q8.2 Should dividing fence matters be dealt with through an arbitration process or tribunal?

Yes, dividing fence matters should be dealt with through Tribunal (expert panel), however members should have training or experience in dealing with persons with limited expertise, knowledge and resources.

Q8.3 Should local governments have a legislated role in dispute resolution regarding dividing fences?

No, as you would require professional mediators and not all Councils would be able to afford to provide that service. It should be funded by the State and come under the Minister for Fair Trading jurisdiction, for example.

9.0 Application

Q9.1 Should the Crown and State instrumentalities be fully bound by new legislation?

No they should not.

Q9.2 Should the Crown be liable to contribute in some way? If so, under what circumstances and to what extent?

No they should not.

Q9.3 Should any Crown land remain exempt?

Yes all of it.

Q9.4 Are there other alternatives or options, which might be considered? If so, what might these be?

Where a landowner is sufficiently aggrieved by the Crown being exempt (subject to criteria) the matter could be put to the expert panel for determination.

Q9.5 To what extent should local governments be bound by new legislation?

Local Governments should bound as required by Section 4 of the current *Dividing Fences Act 1961*.

Q9.6 Should land in the metropolitan area or townsites be treated differently from rural land in relation to fencing matters?

No, however, this should be reflected in the definition of a sufficient fence.

10.0 Miscellaneous Act Matters

Q10.1 Are the current powers of entry provisions appropriate/sufficient?

No as no notice has to be given.

Q10.2 Alternatively, should there be a requirement for notice to be given of the intended entry? If so, should this be in writing; how much notice should be given; and how should the notice be given?

Two days written notice as stated by the South Australian Act would improve the current provisions.

Q10.3 Should substantial compliance with an agreement or order be acceptable?

Yes it should be acceptable.

Q10.4 Should the matters on which a court makes determinations for inclusion in an order be the same for all circumstances?

Yes, they should be the same for all circumstances.

Q10.5 Should there be consistency about which owner can apply to the court for an order?

Yes, there should be consistency about which owner can apply for a court order.

Q10.6 Should jurisdiction of fencing related matters rest with another body and, if so, which body?

Yes, the jurisdiction of fencing related matters should rest with another body e.g. an “expert panel” would be a better approach and they should have the authority to make the final decision. The body should form part of the Minister of Fair Trading portfolio.

Q10.7 Are there current provisions in other legislation and/or arrangements, which need to be considered in the review of the Act? If so, what are they?

Yes, for e.g. Local government (Miscellaneous Provisions) Act, section 391 as a retaining wall may form part of the fence and affect a building within 3m on the adjoining property, section 374 requirement for a building licence, some town Planning Schemes.

11.0 Other Matters Impacting on Dividing Fences

Q11.1 Should “adverse possession” apply in all cases where fences do not lie on a common boundary? If not, when should it apply?

Fence alignment in isolation should not determine a claim for adverse possession.

Q11.2 Should there be provision to deal with an encroachment, where adjoining landowners consent and apply, and for the titles of their land to be amended accordingly following a survey?

No this can be achieved in any case without referral to this Act.

Q11.3 How should the positioning of fences on boundaries, including the inner and outer faces, be undertaken? What principles could apply?

The following principle as suggested, could apply:

- where walls and fences are used to divide private properties (as a fence only), then the centre of the structure is taken to be the line of demarcation or occupation;
- if a fence is uniform on both sides, then it should be built half on the land of each of the adjoining owners;
- where a private residential property adjoins an area to which there is general public access, such as commercial or municipal premises or a right of way, the rails or framing should be placed on the side of the fence facing into the residential property;
- in all other cases where a fence is being replaced, the rails or framing should be placed on the same side as they were located on the previous fence;
- the decisions should be based upon agreement between property owners and defined in the necessary notice to an adjoining owner by the proponent; and
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- As a general principle, the Committee indicated that a fence is generally placed on the actual or perceived boundary line between two properties by agreement.

Q11.4 How can problems associated with alteration of ground level best be addressed?

There must be a clear requirement under the Local Government (Miscellaneous Provisions) Act to require a building licence when altering ground levels. The retaining wall in some situations should form part of the fence and be included in the Fencing Act.

The Act should contain requirements for property owners who cut or fill within specific distances (relative to a number of factors) from a boundary line to install a durable and suitably designed retaining wall. The design and

management of the site during installation would need to be compatible with the particular circumstances encountered. For example:

- Where proposed retaining walls exceed a certain height, eg 300 mm or they are supporting soil under a driveway, or they are required for a building within structural proximity of the boundary, then certification from a practicing structural engineer should be required and an application submitted for a building licence to the local authority.
- Where a retaining wall is constructed along a fence alignment then this fence should be erected on the higher level.

(There are many other issues that need to be addressed which will require careful consideration if the principle proposal to control level variation is adopted).

Prior to any changes in levels occurring on (or within a distance that the proposed work will affect the level) of the boundary, the adjoining property owners should reach agreement on:

- the original levels on the boundary prior to any development;
- the existing levels on the boundary;
- the proposed finished levels on both sides of the boundary;
- the design, finish and position of any proposed retaining wall and fencing;
- the proportion of costs to be paid by each party;
- All level variations occurring near or on boundaries that need retaining shall require Council building (and where necessary) planning approval prior to the commencement of any work..
- Where necessary, professional persons such as a licensed land surveyor, practising structural engineer or an independent building surveyor shall be employed to provide certification of the circumstances and structural components.

GENERAL COMMENTS

Notwithstanding the above dividing fences have proven to be an issue that has been difficult for local authorities to deal with in relation to:

- ◆ authority to act
- ◆ maintenance of customer relations
- ◆ exposure to liability
- ◆ efficacy of intervention

It is not the provisions in the Dividing Fences Act which are the primary concern, but its inability to deal with the problem most commonly raised with Council Officers, ie variations in levels between properties.

It may be considered that this is a separate issue, but the two are inexorably combined in practice. Until legislation is introduced defining responsibilities of property owners in relation to both fencing and retention of cut and fill on or near boundaries, then any changes will have little or no effect on the problems facing property owners, Councils and the Courts.

The following suggested changes to the legislation are based on experience gained by local government officers during direct contact with aggrieved parties and viewing the results of improper practices on site as a result of ignorance or absence of reasonable controls.

DIFFICULTIES WITH CURRENT LEGISLATION

It should be noted that whilst there are controls in Planning and Building legislation that may address some of the issues described, it is generally not practical or possible to implement in an effective preemptive manner.

Understanding the Act

Council Officers are often called upon to provide advice specifically relating to dividing fences and the provisions of the Act.

As they have little or no training in relation to the intricacies of the legislation and are concerned about the liabilities of reliance on their advice, the customer is often referred to the Department of Local Government or the Citizens Advice Bureau, but usually to the pamphlet issued by the Department of Local Government. Understandably, this does not necessarily satisfy most enquiries, particularly if level variations are involved.

Co operation between Property Owners

From a Council point of view, this is the biggest problem arising from fencing disputes and can use large amounts of resources with a frustratingly low-resolution rate. Although the Dividing Fences Act in isolation has proven to be workable, it does not address specific associated issues and its contribution to dispute settlement is very limited in many cases.

Complexity of Concerns

Confusion arises with the various pieces of legislation influencing the structure, style, size and position of fencing and its incorporation in other building structures, such as retaining and walls on boundaries.

This is exacerbated by Local Laws and Policies introduced by Councils for fencing.

Dependency on a Third Party for Resolution

The Act does outline basic consultative requirements for adjoining neighbours in relation to fences, but because the disagreement often involves other issues (usually variations in levels), the matter is referred to third parties such as the

Local Council, Department of Local Government, Legal Aid and the Local Court, often without any real attempt by either neighbour to find a resolution themselves.

This obviously uses resources in many cases in a less than effective manner when viewed from a community need perspective.

There seems to be a perception that an authority will immediately act against a neighbour who is alleged to be offending. At the very least, it is usually expected that accurate, useable (in Court) advice in the complainant's favour is forthcoming. When it is pointed out that this cannot occur without an assessment of the situation, then the customer feels aggrieved.

SOLUTIONS

It is never easy to introduce change and even harder to implement it. However, in this particular case, rather than changing the status quo, if it is formulated skillfully, any revised legislation will only reflect and rationalise the current activities in the community whilst allowing existing resources to be used for more worthwhile matters.

1.1 Understanding the Act

Obviously it is often impossible to write legislation that is legally defensible in a simplistic manner, but incorporated in the legislation should be an explanatory attachment that gives the intended meaning and causal effect of each part. This can be further distilled into a document that comprehensively and clearly gives a sufficient understanding of the Act to any person reading it.

No matter how well the Act may be documented, questions will inevitably arise and it is suggested that the most effective and efficient method to deal with enquiries is to establish a centralised telephone advice service.

This 'hotline' could be operated by a small number of highly skilled and knowledgeable personnel giving expert help to enable property owners to understand their rights and responsibilities in relation to common boundary issues.

As a referral service it would release the resources of local authorities and the Department of Local Government to be used in a more efficient manner.

1.2 Non Co operation between Property Owners

In order to ensure that reasonable attempts have been made at conciliation, the legislation could contain provisions requiring documentary proof of contact (in a fair and reasonable manner) with adjoining property owners on a number of occasions before the matter is referred to a third party.

If the revised Act contains clear direction of responsibility particularly in relation to the provision of retaining walls, adequate screening and permissible heights, then it should significantly reduce the room for dispute.

1.3 Complexity of Controls

Providing specific requirements are incorporated into a revised Act, such as:

- ◆ Permissible heights relative particular locations – eg side and rear boundary fencing to the rear of a building setback line or adjacent to a driveway at a front boundary.
- ◆ Types of sufficient acceptable fencing relative to the use of the properties concerned.
- ◆ Where the responsibility for the provision of retaining walls lies.

Then there would be no need for Councils to have fencing local laws.

Councils can still control fencing through the planning and building processes and, where necessary, by referral to this Act. In the same way the Act can be referred to in a Council's Town Planning Scheme.

1.4 Dependency on a Third Party for Resolution

If other measures are incorporated into the revised Act – making the Act easily read and understandable, making adjoining property owners directly responsible (in actions) for conciliation, simplifying the complexity of control by centralising the basic requirements for fencing in the revised Act and addressing the problem of variations in levels between properties, then it should result in more resolutions occurring without reference to third parties.

SUMMARY

The key to successfully implementing any legislation or control is to have it clearly understood and accepted by the parties concerned.

To do this it has to address the interests of all, including the enforcing authorities. Although the Dividing Fences Act 1961 has worked well in its own right, unless it is changed to address the most common elements of disputes between property owners and difficulties experienced by authorities, it will not serve the community as it should.

The implications, legally, for incorporating controls of property levels in this Act make it essential to ensure that it is compatible with existing and proposed legislation.

Elements of a new Building Act could contain similar clauses for controlling:

- ◆ when building approvals are required (defining exemptions)
- ◆ protection of adjoining property
- ◆ access to adjoining properties for construction purposes
- ◆ stop work orders
- ◆ enforcement of standards, orders, etc

which could be used (by referral to “expert panel” to be set up by the State, private Building Surveyor or Local Government under specific conditions) instead of the courts on a user pay basis.

However, it is important to retain the autonomy of the Act by keeping it as common law, able to be economically used by people who do not have access to high priced legal remedies.

The ideas contained in this submission represent a major change to the current Act and it could be a good opportunity to change the name of the Act as a signal of the changes to the community, eg Adjoining Properties Act.