

Western Australia

Dividing Fences Act 1961

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Dividing Fences Act 1961

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Western Australia

Dividing Fences Act 1961

**An Act relating to the construction and repair of dividing fences
between certain lands and for incidental and other purposes.**

Part I — Preliminary

1. Short title and commencement

- (1) This Act may be cited as the *Dividing Fences Act 1961*¹.
- (2) This Act shall come into operation on a day to be fixed by proclamation¹.

[Section 1 amended by No. 5 of 1969 s. 1; No. 10 of 1998 s. 76.]

[2. Omitted under the Reprints Act 1984 s. 7(4)(f).]

3. Savings as to certain Acts

Nothing in this Act affects the provisions of the *Land Administration Act 1997*, the *Local Government Act 1995*, the *Vermin Act 1918*², or the *Bush Fires Act 1954*, and where any provision of those Acts is inconsistent with any provision of this Act the former provision, to the extent of the inconsistency, prevails.

[Section 3 amended by No. 14 of 1996 s. 4; No. 31 of 1997 s. 141.]

4. Crown not bound by Act

This Act does not bind the Crown.

5. Interpretation

In this Act, unless the contrary intention appears, —

court means the Magistrates Court;

dividing fence means a 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;

lease includes an original or derivative lease or an under-lease or an agreement for a lease;

owner, in relation to land, includes every person who —

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

- (i) is entitled to land for any estate of freehold in possession; or
- (ii) is entitled to receive or is in receipt of or if the land were let to a tenant would be entitled to receive the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession, or otherwise;

or

- (b) is the holder of a lease of land the unexpired term of which is not less than 5 years at the time —
 - (i) notice to fence is given by or to him pursuant to section 8;
 - (ii) he makes application to the court under section 11(1);
 - (iii) a copy of an order made pursuant to section 11(2) is given to him;
 - (iv) notice is given by or to him pursuant to section 15,

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

repair includes re-erect and re-align and inflexions of the word *repair* include corresponding meanings;

section means section of this Act;

sufficient fence, in relation to a dividing fence or a boundary fence referred to in section 16, means —

- (a) any fence prescribed by a local law as a sufficient fence for the part of the local government district in which the dividing fence or boundary fence is, or is to be, erected;
- or

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(b) any fence of the description and quality agreed upon by the parties concerned which does not fail to comply with any local law referred to in paragraph (a),

or where no such local law or agreement is made, means —

(c) any substantial fence that is ordinarily capable of resisting the trespass of cattle and sheep; or

(d) any fence determined to be a sufficient fence by the court pursuant to this Act;

surveyor means a surveyor licensed under the *Licensed Surveyors Act 1909*.

[Section 5 amended by No. 5 of 1969 s. 2; No. 14 of 1996 s. 4; No. 79 of 1996 s. 28; No. 59 of 2004 s. 141.]

6. Act not to interfere with agreements

Nothing in this Act affects any covenant, contract or agreement made between landlord and tenant or between the owners of adjoining lands, or between any other persons relative to the cost of erecting or repairing dividing fences.

Part II — Construction of dividing fences**7. Liability of owners of adjoining lands to fence**

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

8. Notice to fence to be given

An owner of land desiring to compel the owner of adjoining land to join in or contribute to the construction of a dividing fence under this Act may give him a notice which shall —

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

9. Proceedings in default of agreement

- (1) If within 21 days after the giving of a notice referred to in section 8, the owner giving and the owner receiving the notice do not agree as to all or any of the following matters —
 - (a) as to the need for the construction of the dividing fence;
 - (b) the boundary or line upon which it is proposed to construct the fence; or
 - (c) the kind of dividing fence that is to be constructed,

the court at the place nearest to the place where it is proposed to erect the fence, on an application by either of those owners may make an order determining all or any of the following matters on which the owners are not in agreement —

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- (d) as to the need for and the kind of fence to be constructed;
- (e) what portion of the fence shall be constructed by each owner; and
- (f) the time within which the fence shall be constructed,

and if the court thinks it is necessary, the court may determine —

- (g) the boundary or line upon which the dividing fence is to be constructed; and
 - (h) the compensation in the form of an annual payment to be paid by the one owner to the other owner in consideration of loss of occupation of any land.
- (2) Where an order made under subsection (1) determines that the dividing fence is to be constructed otherwise than on the common boundary of adjoining lands, the occupation of land on either side of that fence in pursuance of or as a result of the order is not and shall not be deemed adverse possession as against the owner of the land or affect the title to or possession of the land except for the purposes of this Act.
- (3) When making an order under this section, the court shall be guided as to the type of sufficient fence the court orders to be constructed by the kind of fence usually constructed in the locality where it is proposed to construct the fence, the purpose for which the lands that will be separated by the fence are used and the type of sufficient fence (if any) prescribed under a local law made by the local government for that locality.
- (4) An order of the court made under this section is final.

[Section 9 amended by No. 14 of 1996 s. 4; No. 59 of 2004 s. 141.]

10. Proceedings on failure to carry out agreement or order

- (1) Where the owner giving and the owner receiving a notice given pursuant to section 8 agree as to the construction of the fence to

which or the notice relates, or where, in default of such agreement, an order of the court is made pursuant to section 9, and in either case either of those owners fails within the time named in the agreement or order, or, if no time is named, within 3 months after the date of the agreement or order, to perform his part of the agreement or to comply with the order, then the other of those owners may construct the whole fence as agreed upon or determined by the order.

- (2) The owner who constructs the fence pursuant to subsection (1) may recover from the owner in default half the cost thereof.

[Section 10 amended by No. 59 of 2004 s. 141.]

11. Cases where owner of adjoining land cannot be found

- (1) Where the owner of land satisfies the court at the place nearest to the place where he proposes to construct a dividing fence, that he has made reasonable inquiries and has been unable to ascertain the whereabouts of the owner of the adjoining land for the purpose of giving a notice as required by section 8, the court may, upon application in the prescribed form by the first-mentioned owner for an order authorising the construction of a dividing fence as set out in the application, proceed *ex parte* to make an order authorising the applicant to construct a fence of the kind specified in the order upon the boundary or line specified therein.
- (2) Where a person constructs a dividing fence in compliance with an order made under subsection (1), if afterwards during the continuance of that fence, the person ascertains the whereabouts of the owner of the adjoining land, whether or not such owner was the owner of the land at the time of the construction of the fence, the person may give to such owner a copy of the order.
- (3) The owner to whom the copy of the order is given shall, after the expiration of one month from the date the notice is given to him, be liable to pay to the person who constructed the fence half the value of the fence at the date of the giving of the copy of the order.

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- (4) If the owner to whom the copy of the order is given considers the order inequitable, the court may, on an application by that owner made within one month after the giving to him of the copy of the order —
 - (a) relieve the applicant from a portion of the sum claimed as the value of the fence; and
 - (b) order that the position of the fence be altered on such terms as the court may think fit.
- (5) The value of the fence shall be ascertained as soon as practicable after the giving of the copy of the order, pursuant to subsection (3), and, in default of agreement between the owners, the value may, on an application by either of them, be determined by the court.
- (6) Where an owner has obtained an *ex parte* order under subsection (1) he shall, within 21 days, give or cause to be given to the chief executive officer of the local government of the district in which the fence referred to in that order is to be constructed, a copy of that order, and if the owner fails to comply with this subsection he is not entitled to recover any portion of the cost of constructing the fence from the owner to whom the copy of the order is given under this section.

[Section 11 amended by No. 14 of 1996 s. 4; No. 59 of 2004 s. 141.]

12. Proceedings for defining boundary line by surveyor

- (1) When the owners of adjoining lands do not agree as to the accurate position of the common boundary line between those lands upon which either of the owners desires a dividing fence to be constructed pursuant to this Act, either one may give notice to the other of his intention to have that line defined by a surveyor.
- (2) The owner to whom a notice under subsection (1) is given shall, within 7 days after the giving of the notice —

- (a) if satisfied of the accurate position of the common boundary line, define the line by pegs; or
- (b) employ a surveyor to define the common boundary line,

and where that owner has taken action under either paragraph (a) or paragraph (b), he shall as soon as practicable thereafter give the owner of the adjoining land notice of the action he has taken.

- (3) If within one month from the giving of a notice pursuant to subsection (1), the owner to whom the notice was given —
 - (a) has defined the common boundary line by pegs; or
 - (b) has failed to have the common boundary line defined by a surveyor,

then the owner who gave the notice may have that line defined by a surveyor.

- (4) If the common boundary line when defined by a surveyor is found to be in the same position as defined by any pegs placed there by the owner receiving the notice given pursuant to subsection (1), that owner is entitled to recover any costs of the survey, if any, incurred by him from the owner giving the notice, but in all other cases where a surveyor has been employed for the purposes of this section all reasonable expenses incurred shall be paid in equal shares by the owners of the adjoining lands.

13. Liability to contribute to cost of dividing fence

- (1) When an owner of land has constructed a dividing fence that separates his land from adjoining land if the fence is a sufficient fence, the owner of the adjoining land is liable to pay in accordance with the provisions of this section half of the amount of the value of the fence.
- (2) When an owner of land has, whether before or after the coming into operation of this Act, without giving a notice pursuant to section 8 or pursuant to any corresponding provision of any Act

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repealed by this Act, constructed such a dividing fence and has not received from the owner of the adjoining land or any previous owner of it one-half of the amount of the value of the fence, then if the adjoining owner —

- (a) has completed or completes, or has caused or causes to be completed the construction of any substantial building or structure on his adjoining land; or
- (b) has occupied or occupies a building or structure constructed on the adjoining land; or
- (c) has permitted or permits the lawful occupation by a person of a building or structure erected on the adjoining land,

the owner who constructed the fence may give to the owner of the adjoining land a notice claiming the payment of half of the amount of the value of the fence as estimated at the date of the claim.

- (3) Where the owner of the adjoining land —
 - (a) disputes the need for the dividing fence;
 - (b) claims that the dividing fence is not desirable;
 - (c) disputes the need for a dividing fence of the particular type that has been constructed;
 - (d) disputes the amount of the value of the dividing fence shown in the claim,

he may, within one month of the receipt of the claim, give notice to the claimant owner that he disputes the claim.

- (4) The owner who constructed the fence may, in default of agreement between the owners upon all or any of the matters referred to in subsection (3), apply to the court at the place nearest to the place where the fence was constructed claiming that the owner of the adjoining land has failed to pay half of the amount of the value of the fence in accordance with subsection (1).

- (5) The court on an application made pursuant to subsection (4) may, by order, determine —
- (a) the need for the dividing fence;
 - (b) whether the fence is desirable;
 - (c) the value of the fence as at the date of the claim made under subsection (2); and
 - (d) the amount, if any, to be paid, and the period within which that amount is to be paid, by the owner of the adjoining land to the owner who constructed the fence.
- (6) An order of the court made pursuant to subsection (5) is final.
- (7) If the owner of adjoining land on whom a notice of claim has been made pursuant to subsection (2) does not —
- (a) pay the amount of the claim within one month of the receipt by him thereof; or
 - (b) within that period give notice to the claimant owner that he disputes the claim in accordance with subsection (3),

he is liable to pay to the owner who constructed the dividing fence referred to in subsection (1), the amount of the claim.

[(8) deleted]

[Section 13 amended by No. 5 of 1969 s. 3; No. 59 of 2004 s. 141.]

Part III — Repair of dividing fences

14. Liability of adjoining owners to repair dividing fence

When a dividing fence is in need of repair the owners of land on either side of the fence are liable, subject to the provisions of section 15, to join in or contribute in equal proportions to the repair of the fence.

[Section 14 amended by No. 5 of 1969 s. 4.]

15. Procedure to compel contribution to repair dividing fence

- (1) The owner of land separated from adjoining land by a dividing fence may give a notice to the owner of the adjoining land requiring him to assist in repairing the fence.
- (2) A notice given pursuant to subsection (1) may state that the owner giving the notice —
 - (a) is prepared to repair the fence at his cost and the cost of the owner to whom the notice is given, in equal shares;
 - (b) is prepared to permit the owner to whom the notice is given to repair the fence at the cost of both the owners, in equal shares; or
 - (c) is prepared to bear half of the cost of having the fence repaired by a third party,

and shall contain a proposal for repairing the fence upon the previous or other line, specifying the kind and extent of repairs and the line upon which they are to be effected.

- (3) An owner who has been given a notice pursuant to subsection (1) shall, within 14 days of the receipt by him of the notice, advise in writing the owner giving the notice that —
 - (a) he is prepared to join in the repairing of the fence in such one of the alternative manners set out in the notice as he specifies in the advice;

- (b) he disputes the need for repairing the fence and is not prepared to bear any portion of the cost of repairing the fence; or
 - (c) he objects to the kind and extent of repairs or the line upon which the repairs are to be effected.
- (4) Where an owner who has been given a notice pursuant to subsection (1) advises, in writing, the owner giving the notice that he disputes the need for repairing the fence and is not prepared to bear any part of the cost of repairing it or objects to the kind and extent of repairs or the line upon which the repairs are to be effected as provided in subsection (3), the owner who gave the notice may apply to the court at the place nearest to the place where the fence is situated claiming that the owner of the adjoining land has failed to assist in repairing the fence in accordance with this section.
- (5) The court on an application made pursuant to subsection (4) may by order determine —
- (a) whether the fence is in need of repair;
 - (b) if so, the kind and extent of repairs and by whom the repairs are to be effected and the period within which they are to be carried out,
- and if the court thinks it is necessary, the court may determine —
- (c) the line upon which the repairs are to be effected;
 - (d) the compensation to be paid by one owner to the other owner in consideration of any extra expense involved in the provision of additional fencing because of re-alignment; and
 - (e) the compensation in the form of an annual payment to be paid by one owner to the other owner in consideration of loss of occupation of any of his land.
- (5a) Where an order made under subsection (5) determines that the repairs to a fence are to be effected otherwise than on the

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common boundary of adjoining lands, the occupation of land on either side of that repaired fence in pursuance of or as a result of that order is not and shall not be deemed adverse possession as against the owner of the land or affect the title to or possession of the land except for the purposes of this Act.

- (5b) When making an order under this section, the court shall be guided as to the kind and extent of repairs the court orders by the kind of fence in use in the locality where it is proposed to repair the fence, the purpose for which the lands that are or will be separated by the fence are used, and the type of sufficient fence (if any) prescribed under a local law made by a local government for that locality.
- (6) An order of the court made pursuant to subsection (5) is final.
- (7) Where an owner, who has been given a notice pursuant to subsection (1), fails to advise the owner giving the notice as provided in subsection (3) within 14 days after the receipt by him of the notice, the owner giving the notice may repair the fence and demand and recover from the owner to whom the notice was given, one-half of the cost of repairing the fence, but if —
 - (a) any dividing fence has been constructed partly by one owner and partly by another owner each shall bear the cost of repairing the part so constructed by him;
 - (b) any dividing fence or any portion thereof is damaged or destroyed by flood, fire, lightning, storm, tempest or accident the owner of the land on either side of the fence may immediately repair it without any notice to the other owner and is entitled to recover half of the expenses of so doing from the owner of the adjoining land;
 - (c) any dividing fence is damaged or destroyed in whole or in part by fire or by the falling of any tree or portion thereof the owner of the land through whose neglect the fire originated or caused damage or destruction to the

fence, or the tree or part thereof fell, is bound to repair or renew as soon as practicable after the damage or destruction occurs the fence so damaged or destroyed.

- (8) If an owner of land who is liable under subsection (7)(c) to repair or renew a dividing fence fails to do so, the owner of the adjoining land may repair or renew the fence and recover from the owner so liable and in default the whole of the cost of the repair or renewal.

[Section 15 amended by No. 5 of 1969 s. 5; No. 14 of 1996 s. 4; No. 59 of 2004 s. 141.]

16. Liability of person using fence on further side of road

- (1) Where the owner of land bounded by a road constructs a sufficient fence on the boundary of the land and the road and another owner of land afterwards adopts any means whereby his land is in any way enclosed by that fence, or afterwards avails himself of that fence or renders it of beneficial use to himself, the last-mentioned owner is liable, so long as his land is so enclosed or he avails himself of the fence or makes beneficial use of it, to join in or contribute in equal proportions to the repair of so much of the fence as encloses his land or is availed or made beneficial use of by him.
- (2) In this section *owner* includes any person who, at the time —
- (a) of the construction of the fence referred to in subsection (1);
 - (b) of adopting any means whereby his land is in any way enclosed by the fence;
 - (c) of availing himself of the fence; or
 - (d) of rendering the fence of beneficial use to himself,

is the holder of a lease the unexpired portion of the term of which is not less than 5 years.

Part IV — Miscellaneous

17. Costs

In any proceedings under this Act the court may award costs against either party to the proceedings.

[Section 17 amended by No. 59 of 2004 s. 141.]

18. Method of recovering money payable under this Act

- (1) Moneys that a person is, in pursuance of this Act, required or liable to pay may be sued for and recovered in any court of competent jurisdiction.
- (2) In proceedings for the recovery of moneys referred to in subsection (1), a certificate of the court as to the making and contents of an order made by it under section 9 or section 11 or section 15 is evidence of the matters set forth therein.
- (3) Despite subsection (1), an order of the court made under section 9(1)(h), 13(5)(d) or 15(5)(d) or (e) is a judgment of the court and may be enforced accordingly.

[Section 18 amended by No. 5 of 1969 s. 6; No. 59 of 2004 s. 141.]

19. Apportionment of the costs of fencing as between landlord and tenant

- (1) Where, under the provisions of this Act, a fence is constructed or repaired, if the fence divides any land held by a person as tenant of any landlord from any adjoining lands, the contribution payable in respect of the cost of such construction or repair as between that landlord and tenant shall, unless otherwise agreed upon by the parties concerned, be payable in the proportions following: —
 - (a) if the interest of the tenant at the time of the construction or repair of the fence is less than for a term of 5 years, the landlord shall pay the whole of the cost;

- (b) if the interest of the tenant at such time is for a term of 5 years or more and less than for a term of 7 years, the landlord shall pay three-fourths of the cost and the tenant shall pay one-fourth of the cost;
- (c) if the interest of the tenant at such time is for a term of 7 years or more and less than a term of 12 years, the landlord and the tenant shall each pay one-half of the cost;
- (d) in case the interest of the tenant at such time is for a term of 12 years or more, the tenant shall pay the whole of the cost.

- (2) Where either the landlord or the tenant pays a greater proportion of the cost than he is required to pay under this section, he may recover, in manner referred to in section 18(1), the excess from his tenant or landlord, and any tenant may set off any sum recoverable by him under this section against any rent payable to his landlord.

20. Purchaser under option to purchase liable for amount of contribution for dividing fence paid by owner

Where land, in respect of which a contribution has been paid by the owner thereof towards the cost of the construction or repair of a dividing fence, is at the time of the making of the contribution subject to an option to purchase, if that option is exercised the purchaser under the option shall on completion of the purchase pay to the owner the amount of the contribution so paid by the owner.

21. Power to enter adjoining land

Every person engaged in constructing or repairing a fence under this Act and his agents and servants may, at all reasonable times during the construction or repairing, enter upon the lands adjoining the fence and do upon those lands such acts, matters and things as are necessary or reasonably required to carry into effect the construction or repairing of the fence.

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22. Notices to be in writing, method of giving notices, etc.

- (1) Any notice or demand to be given or made under this Act shall be in writing and signed by the person giving or making it, or by his attorney or agent.
- (2) Where a notice or demand is to be given or made under this Act to or on a person, not being a corporation, it shall be given or made —
 - (a) by delivering the notice or demand to him personally; or
 - (b) by sending the notice or demand by registered mail addressed to him at his usual or last known place of abode.
- (3) Where a notice or demand is to be given or made under this Act to or on a corporation it shall be given or made —
 - (a) by delivering or leaving the notice or demand to or at the principal office of the corporation in the State; or
 - (b) by sending the notice or demand by registered mail addressed to the corporation at that principal office.
- (4) The description of any land in a notice or demand given or made under this Act shall be regarded as a sufficient description of the land if the description allows no reasonable doubt as to what land is referred to in the notice or demand.

23. Regulations

- (1) The Governor may make regulations not inconsistent with this Act prescribing forms, fees and all matters that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) The regulations may impose a penalty not exceeding \$40 for breach thereof.

[Section 23 amended by No. 113 of 1965 s. 8.]

24. Local government may be required to prescribe “sufficient fence”

A local government shall, when required by the Minister so to do, make a local law prescribing what constitutes a sufficient fence for the purpose of the definition of *sufficient fence* in section 5.

[Section 24 inserted by No. 14 of 1996 s. 4.]

Notes

¹ This is a compilation of the *Dividing Fences Act 1961* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Dividing Fences Act 1961</i>	44 of 1961	23 Nov 1961	1 Jan 1962 (see s. 1(2) and <i>Gazette</i> 15 Dec 1961 p. 3704)
<i>Decimal Currency Act 1965</i>	113 of 1965	21 Dec 1965	s. 4-9: 14 Feb 1966 (see s. 2(2)); balance: 21 Dec 1965 (see s. 2(1))
<i>Dividing Fences Act Amendment Act 1969</i>	5 of 1969	21 Apr 1969	21 Apr 1969
Reprint of the <i>Dividing Fences Act 1961</i> approved 2 Feb 1972 (includes amendments listed above)			
<i>Local Government (Consequential Amendments) Act 1996</i> s. 4	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)
<i>Licensed Surveyors Amendment Act 1996</i> s. 28	79 of 1996	14 Nov 1996	5 Apr 1997 (see s. 2 and <i>Gazette</i> 4 Apr 1997 p. 1750)
<i>Acts Amendment (Land Administration) Act 1997</i> s. 141	31 of 1997	3 Oct 1997	30 Mar 1998 (see s. 2 and <i>Gazette</i> 27 Mar 1998 p. 1765)
<i>Statutes (Repeals and Minor Amendments) Act (No. 2) 1998</i> s. 76	10 of 1998	30 Apr 1998	30 Apr 1998 (see s. 2(1))
Reprint of the <i>Dividing Fences Act 1961</i> as at 18 Jan 2002 (includes amendments listed above)			
<i>Courts Legislation Amendment and Repeal Act 2004</i> s. 141	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)

² Repealed by the *Agricultural and Related Resources Protection Act 1976*.

