NSW Law Reform Commission REPORT 59 (1988) - COMMUNITY LAW REFORM PROGRAM: DIVIDING FENCES

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Community Law Reform Program

The Community Law Reform Program was established on 24 May 1982 by the then Attorney General, the Honourable F J Walker, QC, MP, by letter addressed to the Chairman of the Commission. The letter included the following statement:

This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act, 1967.

The background to the Community Law Reform Program and its progress since 1982 are described in detail in the Commission's Annual Reports.

This is the fifteenth Report in the Program.

Terms of Reference and Participants

New South Wales Reform Commission

To the Honourable J R A Dowd, LLB, MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

DIVIDING FENCES

Dear Attorney General,

We make this Report pursuant to the reference from the Honourable T W Sheahan, BA, LLB, MP, then Attorney General for New South Wales to this Commission dated 4 November 1986.

Helen Gamble

(Chairman)

Paul Byrne

(Commissioner)

Ronald Sackville

(Commissioner)

December 1988

Terms of Reference

On 4 November 1986 the then Attorney General of New South Wales, the Honourable T W Sheahan, BA, LLB, NIP, made the following reference to the Commission:

To inquire into and report on:

1. the law governing the rights and liabilities of owners or occupiers of adjoining land with regard to the construction and maintenance of dividing fences, including but not limited to the application of

    (a) the Dividing Fences Act, 1951;

    (b) relevant parts of the Crown Lands Consolidation Act 1913, Western Lands Act 1901, Closer Settlement Act 1904, and Pastures Protection Act 1934.

2. Any incidental matter.

Participants

Commissioners

For the purpose of this reference a Division was created by the Chairman, in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

Ms Helen Gamble (Chairman)

Paul Byrne

Ronald Sackville

Honorary Consultant to the Division

Howard Insall

Research Director

William J Tearle

Research and Writing

Andrew Frazer

Ross Ramsay

Secretary

John McMillan (to 31 August 1988)

Word Processing and Typing

Miss Annette Boseley

Mrs Margaret Edenborough

Miss Judith Grieves

Mrs Nozveen Khan

Miss Doris Sclosa

Librarian

Ms Beverley Caska

Administrative Assistance

Ms Zoya Howes

Jennifer McMahon

Summary of Principle Recommendations

General Principles

The Commission believes that disputes over fencing costs should be, settled by agreement rather than by litigation. Neighbouring owners should be encouraged to settle their disputes by negotiation, if necessary with the aid of a mediator. Judicial determination should be seen as a last resort, but where it becomes necessary adjudication should be simple, inexpensive and readily accessible to both parties. The Commission has also been guided by the principle that the basis of liability for contribution should be use of or benefit from the fence.

(paras 3.1-3.2)

Consolidation and Rationalisation of Acts

1. The notice requirements in the Dividing Fences Act should be modified so that where the court or land board considers it to be just and equitable in the circumstances, notice demanding contribution can be served on the party from whom contribution is sought up to 12 months after the fencing work has been performed.

(paras 3.3-3.12)

Construction and Repair of Fences

2. The Dividing Fences Act should incorporate a single concept of “fencing work”, including the construction, replacement and repair of fences.

(paras 3.13-3.15)

Determination of Disputes

3. Disputes under the Dividing Fences Act should be capable of being brought before either a Local Court or a local land board. Disputes which are pending in either type of tribunal should be capable of being transferred to the other by a system of cross-vesting if appears to the tribunal before which the dispute is pending that it is more appropriate that the other tribunal hear the application. In making this decision the first tribunal should have regard to the subject-matter of the application and the nature and composition of the tribunal to which the application is to be transferred. Such a transfer should be final and not subject to appeal or review in any way.

(paras 3.16-3.23)

4. Where a court or land board has to determine what is a sufficient fence for the purposes of the Dividing Fences Act, it should have regard to all the circumstances of the case including:

(a) the kind of fence usual in the locality;

(b) the purposes for which both adjoining lands are used;

(c) a policy or code relating to fences which has been adopted by the local council in which the adjoining lands are situated;

(d) the privacy of the occupiers of the adjoining lands; and

(e) any relevant rule, regulation, by-law, order or environmental planning instrument.

(paras 3.24-3.26)

5. A party to proceedings under the Dividing Fences Act should be able to appeal to the Supreme Court where the decision of a court or land board is erroneous in point of law, on terms similar to those available for appeals from Local Courts in normal civil cases.

(paras 3.34-3.37)

Alternative Dispute Resolution

6. The recommended forms of fencing notice and fencing agreement contained in Appendix B should be included in regulations made under the Dividing Fences Act, as well as being incorporated into an informative pamphlet on the Act which should be made widely available.

(paras 3.27-3.28)

7. Where parties to a dividing fence dispute have attended a community justice centre and entered into an agreement at a mediation session, that agreement should be admissible and binding in court.

(paras 3.29-3.32)

8. Magistrates should be able to refer matters under the Dividing Fences Act to arbitrators under the Arbitration (Civil Actions) Act 1983.

(para 3.33)

Apportionment of Costs

9. The liability of owners under the Dividing Fences Act should be limited to half the expense of fencing work which would result in a sufficient fence dividing their properties. In the absence of an agreement, the cost of any further fencing work involving the creation of a fence of a higher standard than a sufficient fence should be borne by the owner desiring that higher standard.

(paras 3.38-3.43).

Planning and Local Government Issues

10. To allow the development of “no fence” areas a Local Court or land board should be able to order that, in the circumstances, no fence shall be built.

(para 3.50)

Liability of the Crown and Other Public Bodies

11. The Dividing Fences Act should bind the Crown and public authorities (including local councils) where land owned by them is either:

(a) situated in a city, a municipality, or the whole or part of a shire in which the shire council may regulate the erection of buildings under Part 11 of the Local Government Act 1919; or

(b) less than one hectare in area; or

(c) prescribed by regulation as subject to the Act.

(paras 3.54-3.63)

1. The Reference

I. BACKGROUND TO THE REFERENCE

1.1 Disagreements between neighbours over fences are a common source of conflict in the community. Because fences are the physical boundaries between neighbouring properties for everyday purposes, and are also controlled by both adjoining owners, they are subject to conflicts between the different uses, needs and tastes of the neighbours. Statistics of disputes handled by the Community Justice Centres show that fences were the most frequently mentioned complaint in 10.5% of new cases during 1985-86 and 8.8% of new cases during 1986-87.[1] Although the number of disputes concerning dividing fences which find their way into the judicial system is much lower, the rights and duties involved constitute a significant and often vexing area of contact with the law by ordinary citizens.

1.2 Deficiencies in New South Wales' dividing fences legislation have been revealed in a number of judicial decisions. In 1957 the Full Court of the Supreme Court in *Ex parte Carmichael; Re Newman*[2] criticised the confused drafting of s9 of the Dividing Fences Act, which gives often competing jurisdiction for the resolution of disputes to both the courts of petty sessions (now Local Courts) and the local land boards:

> The difficulties of construing s9 - which are very real - arise from the fact that s9(1) is based upon provisions in very similar terms in the Victorian Fences Act 1928 and in the South Australian Fences Act 1924. Under each of those Acts, however, a court of summary jurisdiction or an arbitrator appointed for that purpose by that court is the sole tribunal. The draftsman of s9(1) of the New South Wales Act seems not to have given sufficient attention to the fact that the scheme of the New South Wales Act was somewhat different and that by s9(3)(a) and (b) and by s11(1) jurisdiction to make orders was divided between the court of petty sessions on the one hand and the local land board on the other.

This criticism was echoed by NIcLelland J in *Flapan v Land Board for Metropolitan District*[3] which provided a further illustration of the problems associated with the demarcation of jurisdictions.

1.3 Judicial criticism has also been directed at the fact that several statutes govern dividing fences in particular circumstances. In *Worthington v Cosgrove*, Hardy J referred to the passage of the Dividing Fences Act 1951 and said:

> Unfortunately, Parliament did not deal with the whole subject matter, leaving untouched and on foot ... the variety of provisions on the same subject matter contained in other legislation, including the obscure sections of the Crown Lands Act already dealt with. The State and the community thus lacks one modern workable Act of Parliament on this important branch of the law, which has always been the cause of litigation and of much ill feeling and distrust among neighbours.[4]

Mr Justice Cripps of the Land and Environment Court wrote to the Commission on 26 May 1983 enclosing a copy of his judgment in *Pacific Plantations (No 4) Pty Ltd v Burvill*.[5] He said that the system comprised by the Crown Lands Consolidation Act, the Pastures Protection Act and the Dividing Fences Act was hopelessly clumsy and that in his opinion there ought to be one Act dealing comprehensively with the whole subject matter of fences.

1.4 In 1983 the Commission, within its Community Law Reform Program, gave preliminary consideration to the subject-matter of this Report. Information was sought from the Legal Aid Commission and the Community Justice Centres. This information revealed in general terms the existence of a large volume of disputes within the community over dividing fences and a wide variety of deficiencies in the legislation. On the basis of its preliminary consideration of dividing fences legislation, the Commission decided that a reference should be sought under the Community Law Reform Program.

II. CONSULTATION

1.5 Given the community-based character of dividing fence issues and the diverse nature of the problems which may arise, the Commission embarked on an extensive program of consultation. The goal was to ascertain the

degree of concern within the community over the legislation, to identify the problems which existed and to obtain suggestions for reform.

1.6 The Commission greatly appreciates the assistance it received from the Law Society of New South Wales and the Local Government and Shires Associations of New South Wales in tapping the expertise of their members. Circulars seeking information both at a general level and on specific issues were distributed to local councils and regional law societies. The Commission also consulted a number of bodies including the Community Justice Centres and the Conference of Chamber Magistrates. Comments were sought from a wide variety of government bodies, including those with substantial land holdings or responsibilities for fencing work.

1.7 In January 1987 the Commission sent letters to a large number of government bodies and private organisations seeking information on problems being encountered in the operation of the legislation. A tentative list of reform issues was enclosed and views were solicited on how the law should be changed. At the same time, the Commission placed articles in the Law Society Journal and the Local Government Bulletin and sent press releases to 213 newspapers and magazines. The press release was published in many suburban and country newspapers as well as in trade and special interest newspapers such as The Land. As a result of these steps, the Commission received a large number of submissions outlining both problems with the legislation and suggestions for reform. A complete list of the government bodies, private organisations and individuals who made submissions is set out in Appendix C.

III. ACKNOWLEDGEMENTS

1.8 The Commission wishes to thank the members of the Conference of Chamber Magistrates, especially Mr Bob Stewart and Mr Paul Ruse, for sharing their practical experience and making many useful suggestions. Also of great assistance were the Local Government and Shires Associations, which enabled the views of their member councils to be ascertained. Mr Howard Insall, Barrister-at-law, acted as honorary consultant to the Division and provided invaluable advice. The Commission also records its appreciation to Mr C M Orpwood, QC and Mr Nigel Hill of Parliamentary Counsel who prepared the draft legislation appearing as Appendix A. Professor Robert Eagleson of the English Department at the University of Sydney provided useful comments on a draft of the fencing agreement in Appendix B during a seminar on Plain Language which he conducted at the Commission in October 1988.

FOOTNOTES

1. Community Justice Centres *Annual Report 1986-87* (1987), table 8.

2. (1957) 74 WN 189 at 191.

3. (Unreported) No 2235 of 1981, 23 June 1981, Equity Division, Supreme Court of New South Wales.

4. [1961] NSWR 1071 at 1076; (1961) 78 WN 598 at 602.

5. (Unreported) No 30383 of 1982, 27 April 1983, Land and Environment Court.

2. Law of Dividing Fences: History and Current Law

I. HISTORICAL DEVELOPMENT OF DIVIDING FENCES LEGISLATION

2.1 At common law the general rule is that a landowner is under no obligation to construct or maintain boundary fences.[1] This rule applies even where land adjoins a public road.[2] Common law exceptions to this rule occur where fencing is required to satisfy the duty of care owed by an occupier to visitors, or where there is an artificial structure or excavation on land adjoining or near a road which, if left unfenced, would amount to a public nuisance.[3] Although landowners are under a common law duty to prevent their stock from trespassing on another's land, and this will usually involve the fencing of boundaries, there is no obligation at common law to do so.[4]

2.2 In England, the common law with some statutory modifications largely determines the duties which arise concerning fences. In Australia, however, all states have enacted comprehensive legislation governing the obligations of adjoining landowners with respect to boundary fences. The first attempt to regulate the fencing of lands in New South Wales came in 1806 with a proclamation laying down complex rules requiring the holder of each allotment to fence part of their property, owing to complaints of trespass by livestock.[5] In 1824 the Surveyor General, John Oxley, gave notice that allotments in Sydney that remained unfenced would be forfeited.[6] The need for legislation dealing with fences became more pressing with the rapid expansion of the pastoral industry, especially after new land grant instructions were issued in 1825 to encourage grazing. In 1828 the Legislative Council passed "An Act to regulate the Dividing Fences of Adjoining Lands" (9 Geo IV, No 12) which created the right of landowners to claim equal contribution towards the construction or repair of boundary fences from the owners of adjoining lands and provided that all disputed claims should be referred to arbitration. This statute formed the basis of legislation passed in the other Australian colonies. Fencing statutes were first enacted by Western Australia in 1834, Tasmania in 1853, Queensland in 1861, Victoria in 1865 and South Australia in 1892.[7] Similar legislation was enacted in New Zealand, the United States and Canada.[8]

2.3 The original New South Wales Act of 1828 was consolidated without amendment in the Dividing Fences Act 1902. This legislation generated a great deal of dissatisfaction in the first half of this century because of the lengthy delays, often up to 18 months, which were involved in any attempt to enforce a claim at law. As one commentator writing in 1933 noted:

> It is true that there have been very few decisions given under the Act, but this is probably because a person, who wishes to fence his land from his neighbour's, realizes that there must be such a waste of time before he could assert his rights that it is no doubt better to suffer injustice than incur the delay.[9]

The legislation was also quite unsuited to urban areas and modern forms of land use, having been enacted at a time when less than 2% of the area of New South Wales had been alienated from the Crown.[10] Accordingly, it made provision for such acts as the cutting of timber from adjoining land for the construction of a fence.

2.4 Dissatisfaction with this state of affairs ultimately led to the introduction of a new Dividing Fences Act in 1951. In framing the new legislation the then government drew extensively on the South Australian Fences Act of 1924 and the Victorian Fences Act of 1928.[11] Both of these statutes have since been the subject of reports by law reform bodies and have subsequently been replaced. The Dividing Fences Act has not been amended substantially since its enactment.

2.5 In New South Wales there are three main branches of legislation dealing with boundary fences. Apart from the Dividing Fences Act, there are Crown lands legislation and the Pastures Protection Act. Fencing provisions regarding pastures protection had their origin in the Rabbit Act of 1890 which provided for contribution toward the cost of erecting and maintaining rabbit-proof fences. The present Act is the Pastures Protection Act 1934 which covers dog-proof and marsupial-proof fences as well as rabbit-proof fences. The Crown lands legislation concerning fences originated in 1884[12] and is now contained in the Crown Lands Consolidation Act 1913.

II. CURRENT NEW SOUTH WALES LEGISLATION

2.6 The Dividing Fences Act 1951 is the principal enactment governing the construction and repair of dividing fences in New South Wales. Other Acts which have a significant role in this area of law are the Crown Lands Consolidation Act 1913, the Western Lands Act 1901 and the Pastures Protection Act 1934. In addition, a number of other statutes contain provisions dealing with dividing fences. These are the Closer Settlement Act 1904, the Returned Soldiers Settlement Act 1916, the Mining Act 1973, the Public Works Act 1912 and the Bush Fires Act 1949.

2.7 Responsibility for the adjudication of disputes under these Acts is divided between Local Courts and local land boards. Every land district in New South Wales has a local land board, constituted under the Crown Lands Consolidation Act or the Western Lands Act. They generally consist of an officer of the Department of Lands as chairman and two members who are appointed by the Minister for Lands and are usually well-respected residents of the district. The composition of these boards thus ensures that they possess wide knowledge of local conditions and expertise in rural matters. For this reason their original jurisdiction over fencing disputes between occupiers of Crown lands was extended by the Dividing Fences Act 1951 to disputes on private land where the fence was not erected on the common boundary. Such situations, it was supposed, arose only in the erection of "give and take" fences between large country properties where local topography prevented the boundary line being fenced exactly.[13]

A. Dividing Fences Act 1951

1. The Scope of the Act

2.8 The Dividing Fences Act operates as a code regulating obligations between neighbouring landowners in relation to fences separating their lands. The Act only sets down circumstances in which one owner nay obtain contribution from the other for the cost of construction or repair of a fence. It does not control other aspects of dividing fences, such as their height, type and materials or the state in which they should be kept, unless a contribution is sought. These aspects are within the responsibility of local councils (see para 3.45 below). The Act does not determine ownership of fences. This is decided under the normal principles of property law, which attaches ownership of structures to the ownership of the land on which they stand.[14] The basic principle of the Act is that where adjoining lands are not divided by a sufficient fence, or are divided by a fence which is out of repair, the respective owners of the land are liable to contribute equally to the construction or repair of the dividing fence.[15]

2.9 The Act exempts from this principle any covenant, contract or agreement in relation to fencing entered into by adjoining landowners.[16] In addition, the Crown does not come within the definition of "owner" in the Act and so the provisions of the Act cannot render the Crown liable.[17] A further qualification on the scope of the Act is provided in s4 which states:

> Nothing in this Act shall affect any of the provisions of the Crown Lands Consolidation Act, 1913, the Pastures Protection Act, 1934, the Western Lands Act of 1901, the Closer Settlement Acts, the Mining Act, 1906, the Public Works Act, 1912, the Bush Fires Act, 1949, or any Act amending any of the said Acts, or repealing and replacing any of the said Acts with or without amendment.

2. Construction of Dividing Fences

2.10 The Act provides separate procedures for the construction and repair of dividing fences. The procedure dealing with construction of fences in Part II of the Act requires a landowner who wishes an adjoining owner to contribute to the cost of a fence, to serve on that owner a notice which specifies the planned location of the fence, contains a proposal for fencing, and specifies the kind of fence proposed to be constructed.[18]

2.11 If the parties are unable to reach agreement after a notice has been served, either party may bring proceedings before the local land board or Local Court for an order determining the matter.[19] The Local Court has jurisdiction where the proposed fence is to be constructed on the common boundary of the adjoining properties while the local land board has jurisdiction where it is not.

2.12 If either party fails to carry out their obligations under an agreement or order, the other party may construct the whole of the fence and recover half the cost of construction as an ordinary debt.[20] Provision is made for

supplementary matters such as a procedure for settling disputes as to the location of boundary lines[21] and a procedure for construction where an adjoining owner cannot be located.[22]

3. Repair of Dividing Fences

2.13 The provisions set out in Part III of the Act for the repair of fences are similar to those for the construction of fences. There is a notice requirement[23] and adjoining landowners are each liable to contribute half of the cost of repair.[24] Unlike the provision for construction of fences, a party who has served notice may, after one month, simply proceed to have the fence repaired without taking the matter before a court or land board. One-half of the cost of repair is then recoverable as an ordinary debt. If damage to a fence has resulted from accident, either owner may repair the fence without notice and recover half the cost of repair.[25] However, if the damage is caused by fire or falling trees due to the neglect of one landowner, that landowner alone must bear the cost of repair. It is also provided that if a fence on one side of a road is used by the owner of land on the other side of the road, that owner must contribute one half of the cost of any repairs to that fence.[26]

4. General Provisions

2.14 Part IV of the Act contains a number of general provisions. Where there is no agreement to the contrary, provision is made for fencing costs to be apportioned between owners and lessees. If the unexpired term of the lessee's interest is greater than five years, the tenant will be liable to make a contribution.[27] Section 19 requires persons exercising an option to purchase to reimburse the vendor if contributions towards fencing were made during the term of the option. Finally, s20 gives someone constructing or repairing a fence under the Act power to enter adjoining land for the purpose of carrying out the work.

B. Crown Lands Legislation

2.15 There are a number of enactments which together regulate the alienation and occupation of Crown lands. Over 40% of the land area of New South Wales is held under Crown lands legislation.[28] While the forms of tenures relating to Crown lands are numerous, amounting to more than 50 different types, four broad categories of tenure exist. These are purchase, perpetual lease, term lease and permissive occupancy. The most significant Acts relating to Crown Lands are the Crown Lands Consolidation Act 1913, the Western Lands Act 1901, the Closer Settlement Act 1908 and the Returned Soldiers Settlement Act 1916.

1. Crown Lands Consolidation Act 1913

2.16 The Crown Lands Consolidation Act is the major enactment regulating interests in Crown land. It was passed in 1913 to consolidate a number of Acts then in force. Division 6 of the Act, comprising ss199-203, contains provisions dealing with fencing.[29] Section 199 is the most significant provision and deals with contribution to the cost of fencing work. The party seeking contribution under s199 must be the holder of one of the types of land specified as grounding a claim for contribution. These are "a conditional or other purchase, homestead selection not subject to the provisions of the Real Property Act, 1900, holding within an irrigation area or any lease other than an annual lease". While the person seeking contribution must hold the relevant land pursuant to the Crown Lands Consolidation Act, the adjoining landowner from whom a contribution is sought may hold a freehold title.[30]

2.17 A claim for contribution under s199 can only be made after the fencing work has been completed[31] and there is no requirement that the demand for contribution be served in writing.[32] The contribution which may be sought where a fence is constructed is " .. to the extent of one-half of the value thereof as determined by the local land board - but so far only as such fencing marks a common boundary line or forms a common boundary fence". Provision is also made in s199 for liability to contribute one-half of the cost of repair of a fence.[33]

2.18 Section 119 provides that the "local land board shall have power to hear and determine all disputes and claims under this section". This is reiterated in s200 which deals with jurisdiction, it being stated that the local land board is to "determine all questions in dispute and make any order necessary or incident to the settlement thereof". Section 19 of the Crown Lands Consolidation Act specifies that appeals from decisions of the local land boards may be taken to the Land and Environment Court.

2.19 Where properties are subject to a fencing condition under the Act, s201 allows the local land board to order the erection of a give-and-take fence.[34] Section 202 is a long section dealing with the capacity of a landholder pursuant to the Crown Lands Acts or any freehold owner to seek permission from the local land board to "enclose, wholly or in part, any road or watercourse traversing or bounding such holding subject to payment of such annual rent as may be determined" and s203 provides that a local land board shall not prescribe a class of fencing likely to be a harbour or shelter for rabbits or other vermin.

2. Closer Settlement Act 1904

2.20 The Closer Settlement Act 1904 was introduced in order to promote land acquisitions by the Crown and subsequent sale or lease in smaller parcels for the purpose of effecting closer settlement of land. The major fencing provisions are contained in ss46-51 which are similar to ss199-203 of the Crown Lands Consolidation Act. Section 49 allows a party who holds land pursuant to the Closer Settlement Act and who undertakes fencing work to subsequently demand half the cost from an adjoining landholder. Section 51 empowers the local land board to hear and determine all disputes, with the Land and Environment Court having appellate jurisdiction.

3. Returned Soldiers Settlement Act 1916

2.21 This Act was passed to assist former members of the armed forces in obtaining land tenures. Certain provisions of the Crown Lands Consolidation Act, including ss199-203 which relate to fencing, apply to the holders of land under the Returned Soldiers Settlement Act.

4. Western Lands Act 1901

2.22 Section 7 of the Crown Lands Consolidation Act divides New South Wales into three divisions: namely the eastern, central and western divisions. The Western Lands Act deals with Crown lands in the western division and creates a Western Lands Commission for that purpose. The western division of New South Wales comprises approximately 42% of the State's land and approximately 98.5% of this area is held in leasehold tenure. All such tenures are held under the Western Lands Commissioner, who acts as a statutory landlord and has sweeping powers of control over land uses by occupiers.

2.23 Provisions relating to fencing are contained in ss17A, 18A, 18B and s18C of the Western Lands Act.

> s17A empowers the Minister to withdraw from lease without compensation any land required for specific purposes. The Commissioner may make such order as he thinks proper against the incoming tenant as to fencing the area withdrawn.
>
> s18A subjects all leases to a condition that the boundaries of the lands leased are to be fenced within such a period and with such class of fencing as may be determined by the Commissioner. There is a proviso that the Commissioner may exempt any boundary or part thereof from fencing and make various other exemptions.
>
> s18B gives a lessee the right to claim half the value of a dividing fence from a neighbour, including the owner of a freehold estate. The right does not extend to claims against persons with licenses or leases with less than five years to run.
>
> s18C empowers the local land board to determine all disputes and claims whatsoever as to fencing and provision is made for a right of appeal to the Land and Environment Court.

C. Pastures Protection Legislation

2.24 Part VII of the Pastures Protection Act deals generally with rabbit, marsupial and dog-proof fences. There are five divisions in Part VII, the first of which relates to the supply of materials for the erection and maintenance of rabbit, marsupial and dog-proof fences. The provisions in Division 1 arose out of a scheme operated by the government a number of years ago to provide low-interest rate loans for such work. This scheme has not operated for some years.

2.25 Division 2 of Part VII is titled “Fences” and contains provisions for contribution by parties to the cost of fencing work. Section 123 provides that where a boundary fence has been made rabbit, dog, or marsupial proof at the expense of an owner or occupier, a contribution towards the cost of the work is payable by the owner of any land adjoining the fence. The contribution as determined by the local land board may be up to one-half of the cost of construction (s123(2),(5)). Further provision is made in s124 for an annual contribution towards the maintenance of the fence. Under s123(5) the right to receive a contribution only arises after the prescribed notice of demand is served; however, notice may be served up to 12 months after the fencing work has been performed. Liability under the Act is made additional to liability under other fencing statutes by s123(7) which specifies that:

> Nothing in the Crown Lands Acts, the Western Lands Acts, or any Act relating to dividing fences shall relieve any person from liability to make any payment under this Act.

2.26 Division 3 of Part VII is titled “Barrier Fences” and deals with substantial fences strategically placed so as to protect certain areas from rabbits, dogs and marsupials. Division 4 sets out a number of legal procedures. The local land boards are given jurisdiction to hear disputes with a right of appeal lying to the Land and Environment Court. Division 5 consists of one section which makes it an offence for any person to wilfully or negligently cause injury to, or interfere with, a rabbit, dog or marsupial proof fence.

D. Other Fencing Legislation

1. Bush Fires Act 1949

2.27 Section 15 of the Bush Fires Act provides that where an owner or occupier of land clears a space of not less than six metres from a dividing fence of all inflammable matter and the adjoining owner or occupier does not similarly clear their land then, if the fence is damaged by fire as a result of that adjoining owner’s failure to clear the land, that owner or occupier shall repair or re-erect the fence at their own expense within one month of the damage occurring or within an extended period which may be allowed by a magistrate upon application. Section 15 further provides that where the owner or occupier who is obliged to repair or re-erect the fence refuses or omits to do so, the adjoining owner or occupier may do so and the sums of money expended “shall be deemed to be money paid to the use of the owner or occupier in default”.

2. Mining Act 1973

2.28 Section 90 of the Mining Act enables the registered holder of a mining lease to fence the whole or part of the surface of a mining area, subject to s93 of the Act. Section 93 provides that where land subject to an authority (meaning land held under an exploration licence, a prospecting licence, a mining lease or a mining purposes lease) includes the surface of any land, being private lands or Crown lands held under a pastoral lease, the owner or occupier of that surface shall have free and uninterrupted access to the water in any stream abutting or on that land for the purpose of stock watering and water drainage. Under s90(2) the registered holder of a mining lease must erect and maintain a fence around any shaft, machinery or other works on a mining area including the surface of any land if required to do so by an instrument in writing.

3. Public Works Act 1912

2.29 Sections 83 and 90 of the Public Works Act deal with fences which a constructing authority must erect in the course of carrying out public works. Under s83, if adjoining lands are used for any of a number of specified purposes, including the removal of soil or earth, the constructing authority may be required to provide a sufficient fence to separate the lands used from adjoining lands. Under s90, the constructing authority must make and maintain convenient approaches with handrails or other fences if a public work crosses any highway other than a public carriageway. Under s91, the constructing authority must make and maintain certain works for the accommodation of the owners and occupiers of land adjoining any public work. Those works include sufficient posts, rails, hedges, ditches, mounds or other fences for separating the land taken or used from the adjoining lands not taken and protecting such lands from trespass or straying stock.

FOOTNOTES

1. *Star v Rookesby* (1710) 1 Salk 335; 91 ER 295; *Hilton v Ankesson* (1872) 27 LT 519; [1861-73] All ER Rep 994; *Lawrence v Jenkins* (1873) LR 8 QB 274.

2. In addition, and as an exception to the general law of negligence, owners of land abutting a highway are under no duty to prevent their animals from straying on the road: *Searle v Wallbank* [1947] AC 341; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. This exception has been abrogated in NSW by the Animals Act 1977, s7(2).

3. *Barnes v Ward* (1850) 9 CB 392; 137 ER 945; *Halsbury's Laws of England*, 4th ed, Vol 4, para 880.

4. *Butcher v Smith and Cranwell* (1868) 5 WW & A'B (L) 223. The tort of cattle trespass was abolished in New South Wales by the Animals Act 1977. As to common law duties in relation to fencing, see below, paras 4.24-4.27.

5. *Sydney Gazette* 8 June 1806, p3.

6. *Sydney Gazette* 19 August 1824, p1.

7. (1834) 4 Will IV No 4 (WA); Boundary Fences Act 1853 (Tas); Fencing Act of 1861 (Qld); Fencing Act 1865 (SA), Fences Statute 1865 (Vic).

8. For example: Fencing Act 1881 (NZ); Fences and Water Courses Act 1834, c12 (Upper Canada); Line Fences and Water Courses Act 1845, c20 (Canada); Fences and Fence Viewers Act RSNS 1864, 3d, c48 (Nova Scotia); 36A *Corpus Juris Secundum* Fences ss8-14. Typically, statutes in North America establish fence viewers, who act as a limited judicial tribunal to apportion contribution between adjoining owners.

9. C M Collins "Dividing Fences" (1933) 7 *Australian Law Journal* 293 at 294.

10. *NSW Parliamentary Debates*, Legislative Assembly, 2nd ser vol 195, 15 May 1951 at 1973.

11. See *NSW Parliamentary Debates*, Legislative Assembly, 2nd ser vol 195, 15 May 1951 at 1974.

12. An Act to regulate the Alteration, Occupation and Management of Crown Lands and for other purposes 1884, 48 Vic No 18.

13. *NSW Parliamentary Debates*, Legislative Council, 2nd ser vol 195, 16 May 1951 at 2032.

14. See R A Woodman *The Law of Real Property in New South Wales* vol 1 (Law Book Co 1980) at 13. Thus if a fence straddles the boundary line exactly, one-half is owned by each adjoining owner.

15. Dividing Fences Act 1951 ss7, 13.

16. s6.

17. s5.

18. s8.

19. s9.

20. s10.

21. s12.

22. s11.

23. s14.

24. s13.

25. s14(2).

26. s15.

27. s18.

28. A G Lang *Crown Land in New South Wales* (Butterworths 1973) at ix.

29. Other provisions dealing with fencing are contained in ss54, 101(1), 174(1), 178(1), 250, 252.

30. *Higgins v Berry* (1908) 6 CLR 618.

31. *Dalgety & Co v Nixon* (1893) 3 LCC 106.

32. *Mitchell v Pedley* (1900) 10 LCC 143.

33. In *Fallon v Richards* [1965] NSWR 1494, Hardie J held that the provisions relating to repair in s199 included the reconstruction or replacement of a fence.

34. The only forms of tenure currently subject to a fencing condition are settlement leases. See I Wallace “The Law of Dividing Fences” (1981) 19 *Law Society Journal* 539 at 543.

3. Principal Recommendations for Reform

I. GUIDELINES FOR REFORM

3.1 The existing Dividing Fences Act 1951 was enacted to encourage the settlement of disputes over fencing costs between neighbours by agreement rather than by litigation.[1] The Commission believes that this should still be the overriding objective for any proposed reforms. The basic purpose of dividing fences legislation is to provide a framework which will facilitate and encourage agreement between adjoining owners. Disputes over dividing fences often become the focus of more personal and general discontent between neighbours which can be exacerbated by litigation. Where possible, therefore, the parties should be encouraged to settle the matter by private negotiation, if necessary with the aid of an independent mediator. Judicial determination should be seen as a last resort after attempts by the parties to achieve an agreement have failed. In such cases the remedy and procedure for setting the dispute by adjudication should be simple, inexpensive and readily accessible to both parties.

3.2 The Commission has also been guided in its deliberations by the principle that the basis of liability for contribution towards the cost of fences should be use of or benefit from the fence.

II. CONSOLIDATION AND RATIONALISATION OF DIVIDING FENCES LEGISLATION

3.3 A source of confusion surrounding fences legislation in New South Wales arises from the fact that provisions dealing with fences are contained in a number of different enactments. In addition to the Dividing Fences Act, there are the Pastures Protection Act and four Acts dealing with Crown lands: the Crown Lands Consolidation Act, the Western Lands Act, the Closer Settlement Act and the Returned Soldiers Settlement Act. There are also provisions dealing with fences in the Bush Fires Act, the Mining Act and the Public Works Act. The nature of the provisions relating to fences contained in these enactments was outlined in the previous chapter.

3.4 The Commission received a number of submissions arguing that this myriad of legislation was the cause of confusion. It has also been the subject of judicial criticism. In May 1983 Mr Justice Cripps, Chief Judge of the Land and Environment Court, wrote to the Commission to discuss problems illustrated by the decision in *Pacific Plantations (No 4) Pty Ltd v Burvill.*[2] Justice Cripps' letter stated in part:

> The *Crown Lands Consolidation Act*, the *Pastures Protection Act* and the *Dividing Fences Act* all contain provisions dealing with the rights of people to claim contribution in respect of the erection and maintenance of boundary fences. In some cases the dispute goes to the Court of Petty Sessions with an appeal to the District Court and in others the dispute goes to a local land board with an appeal to the Land and Environment Court. Under the *Crown Lands Consolidation Act* a person having a certain tenure may claim but another person having the same tenure may not be required to contribute. In short, the system is hopelessly clumsy. People cannot be sure whether they are proceeding under the right Act or going to the right court.

3.5 In the *Pacific Plantations* case, the properties of the plaintiffs (Burvills) and defendant (Pacific Plantations) were separated by an unsealed Crown road which was enclosed pursuant to s202 of the Crown Lands Consolidation Act. The fence dispute arose with respect to the boundary along that part of the road which the plaintiffs occupied by virtue of a road permit they held. The defendant appealed to the Land and Environment Court from a decision by the local land board made under the Crown Lands Consolidation Act that a cattle-proof fence be constructed to which the defendant would contribute two-thirds of the cost. It was held on appeal that while the boundary had been fenced previously by the plaintiffs (Burvills) pursuant to permission obtained under s202 of the Crown Lands Consolidation Act, the road permit was not one of those categories of interest in land which could ground a claim for contribution under that Act. It is clear then, that the Crown Lands Consolidation Act does not adequately cater for all possible claims for contribution to the cost of fencing arising from land held under its provisions. The Burvills were unable to rely upon the Dividing Fences Act in the appeal since His Honour held that it was not open to the court to entertain on appeal what amounted to a deemed application to the local land board under the Dividing Fences Act.

3.6 The *Pacific Plantations* case exemplifies the types of technicalities under the Crown lands legislation and the Pastures Protection Act which can prevent people with just claims for contribution in respect of fencing work from claiming against the adjoining landowner. It is clear that there has been considerable confusion as to which provisions in which Act should be followed in order to claim a contribution for half the cost of a fence. Procedural and technical difficulties have frequently intruded upon the determination of fencing claims. This situation was criticised judicially in *Worthington v Cosgrove*,[3] where Hardy J stated:

> This case indicates the difficulties confronting owners of country properties and their legal advisers, faced as they are with the problem of deciding what is the appropriate legislation to examine in order to ascertain the nature and extent of their rights and remedies in relation to the erection and maintenance of dividing fences. There are three streams of legislation on this topic ... . The Dividing Fences Act, 1902 followed the archaic lines of the original Act of 1828. Dissatisfaction with that legislation was expressed from time to time . .ultimately in 1951 a modern Dividing Fences Act was passed .... Unfortunately, Parliament did not deal with the whole subject matter, leaving untouched and on foot ... the variety of provisions on the same subject matter contained in other legislation, including the obscure sections of the Crown Lands Consolidation Act, 1913 already dealt with. The State and the community thus lacks one modern workable Act of Parliament on this important branch of the law, which has always been the cause of litigation and of much ill feeling and distrust among neighbours.

3.7 The present array of statutes makes it possible to proceed under an inappropriate Act for, as *Pacific Plantations* demonstrates, the line of demarcation between Crown lands legislation and the Dividing Fences Act can be uncertain. Similarly, there can sometimes be doubt as to whether a fence is a rabbit, marsupial or dog-proof fence to which the provisions of the Pastures Protection Act apply, or an ordinary fence to which the provisions of the Dividing Fences Act apply. Where parties proceed under the incorrect Act injustice can occur since they may bar themselves from recovering a contribution by commencing proceedings before the wrong tribunal or by failing to adhere to notice requirements which are necessary under the correct Act. For example, disputes under the Dividing Fences Act are heard by the Local Court where a fence is on the common boundary between properties and by the local land board where it is not. Under the Crown lands legislation and pastures protection legislation, all disputes are determined by the local land board.

3.8 Further, the Dividing Fences Act provides that if notice is not served on the party from whom a contribution is sought prior to the commencement of the relevant fencing work, no contribution can be claimed. However, under the Pastures Protection Act, the required notice may be served up to 12 months after the fencing work is performed and under the Crown lands legislation there is no requirement for written notice at all. It is apparent that persons with just claims for contribution may be barred from recovering if they proceed under the wrong Act.

3.9 This Commission understands that legislation is currently being prepared which, if implemented, will repeal the Crown Lands Consolidation Act and replace it with a new Act which would contain no fencing provisions. It is also understood that under these proposals the Closer Settlement Act and the Returned Soldiers Settlement Act will be repealed. With respect to the field of dividing fences, this is a desirable step and will remove much confusion in the area.

3.10 These proposals, if implemented, will leave the Dividing Fences Act, the Western Lands Act and the Pastures Protection Act as the major enactments dealing with dividing fences. Both the Western Lands Commission and the Pastures Protection Boards' Association have urged the retention of the latter two enactments. This Commission accepts that the fencing provisions of both Acts serve useful purposes and appear to operate well in practice. Inquiries and consultation initiated by the Commission failed to reveal any dissatisfaction on the part of landowners. However, the Commission believes that certain measures are necessary in order to counteract any injustice which may arise because of the multiple statutes.

3.11 The Commission makes the following recommendation:

> The notice requirements in the Dividing Fences Act should be modified so that where the court or land board considers it just and equitable in the circumstances, notice demanding contribution may be served on the party from whom contribution is sought up to 12 months after the fencing work has been performed.

The implementation of such a provision would allow parties who make a reasonable mistake in initiating an action under the Western Lands Act or Pastures Protection Act, and who therefore fail to serve notice before the fencing

work is undertaken, to seek a contribution under the Dividing Fences Act. A discretion should exist on the part of the court or land board to allow late service of notice where they consider this to be justified by the circumstances.

3.12 Some mention must be made of the provisions dealing with fences in the Bush Fires Act, the Public Works Act and the Mining Act. The relevant parts of these enactments were outlined above at paras 2.27-2.29. The fencing provisions in these Acts are brief and apply to quite specific situations. For this reason, the Commission considers them to be suitably placed at present and wishes to make no recommendation with respect to them.

III. CONSTRUCTION AND REPAIR OF FENCES

3.13 Currently, the Dividing Fences Act establishes separate procedures for the construction and repair of fences. Under s9, recovery of contribution for constructing a fence involves service of a notice demanding contribution and, where agreement is not reached, a subsequent determination by the Local Court or local land board. The repair provision in s14 differs in that there is no provision for an application to be made to the court or board; it merely provides that if an owner who has been served with notice to repair does not assist in repairing the fence within one month, the person serving the notice may recover half the cost of repairing the fence as an ordinary debt. The basis for allowing an application to court in the case of disputes over the construction of a fence but not in the case of repair is uncertain. The disparity may have arisen from a concern to prevent litigation over trivial matters. However, issues concerning the repair of fences can be just as contentious as those involved in their construction. The sums involved can also be large, particularly when agricultural, ornamental or special purpose fences are concerned. For taxation purposes, farmers often repair fences instead of replacing them completely. The different procedures for recovery which currently exist naturally give rise to confusion and dispute over the distinction between construction and repair. An owner may serve the wrong notice, jeopardizing his or her ability to recover contribution under the Act. Legal practitioners commonly proceed under the simpler repair provisions unless no fence previously existed, thus avoiding the possibility of a hearing on the merits of the case.

3.14 The courts have proved equivocal on the distinction between the construction and repair of fences, particularly when the replacement of an existing fence is involved. In some cases, repair has been held to include the replacement of a fence. In *Palmer v Lintott*[4] Wallace J of the Supreme Court of Western Australia held that the total replacement of a dilapidated fence constituted repair rather than construction. In other cases, the courts have decided that the replacement of an existing fence amounts to the construction of a new fence rather than repair.[5] In *Stacey v Meagher* Neasey J of the Tasmanian Supreme Court thought that “erection” included repair and replacement of an existing fence as well as construction of a new fence.[6] Although several cases have established that the difference between construction and repair depends upon whether the previously accepted fencing line has been adhered to and the degree to which a fence of substantially different character has been created,[7] the distinction is a fine one and may lead to injustice when owners are deprived of their rights to claim contribution because it later emerges that they proceeded under the wrong section. The Commission is of the view that these problems have arisen because the difference between construction and repair is largely artificial.

3.15 The Commission considers that the procedures for obtaining contribution should be the same for both construction and repair of fences. Parties to a dispute should in all cases be able to resort to a hearing before a tribunal where necessary. The Commission therefore makes the following recommendation:

> The Dividing Fences Act should incorporate a single concept of “fencing work”, which should be defined to include the design, construction, replacement, repair and maintenance of a fence in whole or in part, the surveying and preparation of land along or on either side of a boundary between adjoining owners for any such purpose, the trimming, replanting and care of a live fence, and the cleaning, deepening, alteration or enlargement of a watercourse, ditch or embankment that serves as a fence.

In making this recommendation, the Commission endorses the approach taken in South Australia’s Fences Act 1975 and the New Zealand Fencing Act 1978, as well as the Report on the Boundary Fences Act 1908 by the Law Reform Commission of Tasmania, where it was proposed that a single definition of “fencing work” should “form the basis of a simple, all-encompassing procedure for determining disputes”.[8]

IV. DETERMINATION OF DISPUTES

A. The Local Court and the Local Land Boards

3.16 Disputes under the Dividing Fences Act are heard by either the Local Court or the local land boards. Subsection 9(3) of the Act provides that disputes relating to fences upon the "common boundary" are to be heard by the Local Court while disputes relating to fences other than on the common boundary are to be heard by the local land board for that district.

3.17 The confusion which can be generated by the shared jurisdiction of the Local Court and local land boards was demonstrated in *Ex parte Carmichael: Re Newman*.[9] In that case, the applicant Carmichael appealed against an order by a magistrate in the Court of Petty Sessions[10] that a dividing fence be constructed other than on the common boundary. The applicant claimed that because of subsection 9(3), the magistrate did not have the jurisdiction to make the order which he did. The Supreme Court resorted to fairly technical reasoning in holding that the Court of Petty Sessions did have jurisdiction. It reasoned that because the proposal in the notice to fence was to construct a fence, the Court was properly empowered to deal with the application under s9(1) of the Act to determine the boundary or line upon which the fence was to be constructed and that the Court of Petty Sessions was not confined to ordering the construction of a fence upon the common boundary. The Court relied upon the word "proposed" in sub-ss9(1) and (3) to determine where jurisdiction lay. That is, where it was proposed to put the fence upon the common boundary then it was appropriate to apply to the Local Court even if ultimately the Local Court ordered a fence which was not upon the common boundary. The Full Court then went on to criticise the drafting of s9 of the Act, stating that

> The draftsman of s9(l) of the New South Wales Act seems not to have given sufficient attention to the fact that the scheme of the New South Wales Act was somewhat different [from the Victorian and South Australian Act] and that by s9(3)(a) and (b) and by s11(1) jurisdiction to make orders was divided between the Court of Petty Sessions on the one hand and the local land board on the other. It may be that it was intended that a Court of Petty Sessions should only have jurisdiction to make orders providing for the construction of a common boundary fence and to have that jurisdiction only where the applicant's notice given under s8 specified a proposal to erect such a fence, and that the local land board's jurisdiction was intended to be limited in a similar way to orders relating to "give and take" fences. But whether this be so or not, s9(l), which sets out in plain words the powers conferred on both kinds of tribunal, confers on each a jurisdiction to make either type of order.[11]

3.18 In *Flapan v Land Board for District*,[12] McLelland J noted the decision in *Ex parte Carmichael* and stated in relation to it:

> The deficiencies of s9 of the Act were pointed out in 1957 by the Full court in the case already cited and the present case provides a further illustration thereof.

The facts of the case were that the local land board declined jurisdiction on the ground that the proposed fence was "substantially on line". The proposed fence was approximately 14 metres long and deviated a maximum distance of nine centimetres from the boundary. The defendant land board's counsel submitted that s9(3)(a) of the Act relates only to a "give and take" fence, namely one substantially off the line of the common boundary as frequently occurs in rural areas. His Honour dismissed that submission. He held that the proposed fence was otherwise than on the common boundary of the adjoining land and that jurisdiction therefore lay with the local land board.

3.19 These cases illustrate the uncertainty which exists as to the respective roles of the Local Court and local land boards in resolving disputes under the Dividing Fences Act. Their dual jurisdiction under the Act was created because of the special demands of resolving fence disputes in country areas. The above cases demonstrate that the legislation is not operating as planned. The intent of the legislation was that land boards would resolve fence disputes involving country properties, hut the mechanism set up to achieve this in terms of whether fences are on the common boundary has not proved effective. As was decided in *Flapan's* case, a fence within the metropolitan area which was only 14 metres long and nine centimetres off the common boundary falls within the jurisdiction of the land board rather than the Local Court.

3.20 This state of affairs prompted a number of submissions to the Commission which advocated that all disputes be dealt with by the Local Court and that the jurisdiction of the local land boards should be discontinued. While

this would make for procedural simplicity, the Commission is concerned that the expertise of the land boards would be missed in certain types of disputes. The Commission received submissions from people in country areas who spoke highly of the practical knowledge of the land boards in resolving fence disputes. It was argued that the experience of the boards' members allowed them to make informed and prompt decisions in rural fencing disputes which, if heard in the Local Court, might require the calling of expert evidence.

3.21 It is also the case that the problems currently being encountered arise not from the role or performance of the land boards, but rather from the inadequate procedure by which the respective domains of the Local Court and local land boards in resolving disputes under the Dividing Fences Act are determined. The Commission is of the opinion that the use of both the Local Court and the local land boards optimises expertise in the resolution of disputes over fences and that their sharing of jurisdiction can operate successfully where their respective roles are properly defined.

3.22 As the problems encountered with the present Act indicate, any statutory provision which attempts to define the demarcation between Local Courts and local land boards must be precise and readily ascertainable. Any uncertainty in such an approach will only prevent the speedy resolution of disputes. The Commission has considered a number of ways of defining a division of jurisdictions using an appropriate criterion such as geographical location or land use. After examining the various statutory means of distinguishing between urban and rural land in local government and environmental planning law, we have decided that they are not sufficiently precise for jurisdictional purposes. Instead, we have preferred a system which avoids the need for precise definition in the statute by allowing one tribunal to transfer proceedings to another - from a Local Court to a local board or *vice versa* - if it is satisfied that such a transfer is appropriate according to specified considerations. This approach follows that recently adopted in all Australian jurisdictions to resolve problems where State and Federal courts have parallel or dual jurisdiction.[13]

3.23 The Commission recommends that:

> Disputes under the Dividing Fences Act should be capable of being brought before either a Local Court or a local land board; but where an application is pending in one type of tribunal it may be transferred to the other. A tribunal should be able to transfer a pending application where it appears to that tribunal that it is more appropriate that the other tribunal should hear the application, considering both the subject-matter of the application and the nature and composition of the tribunal to which the application is proposed to be transferred. A tribunal which has a pending application transferred to it under this provision should not be able to transfer it to another tribunal. The transfer should be final and not subject to appeal or review in any way.

This approach has the advantage of providing a unified though flexible system which allows either tribunal to finally determine a dispute according to the particular circumstances and requirements of the case. In most circumstances, the effect of this provision would be to give the applicant the choice of forum. However, both the respondent and the tribunal first approached would be able to initiate a preliminary inquiry into whether it is better for the other tribunal to hear the matter. This inquiry would be brief and conclusive; it would not require an examination of the merits of the case. It would be open to the tribunal hearing an application for transfer to refuse to do so on the ground that it was an equally appropriate tribunal to hear the matter.

B. Factors for Judicial Consideration: Definition of "Sufficient Fence"

3.24 The operation of s7 of the Dividing Fences Act depends on whether the adjoining lands in question are divided by a "sufficient fence". What constitutes a sufficient fence for the purposes of the Act is nowhere defined, and the Commission received several submissions suggesting that a definition be included in the Act. One solicitor said that without such a definition, it is difficult for owners and practitioners to determine whether an existing fence is sufficient and therefore whether action under the Dividing Fences Act is likely to succeed. The greatest problems in this respect occur when the adjoining owners use the lands for different purposes, for instance where residential land abuts land used for grazing livestock. In these circumstances the existing fence may be sufficient for the purposes of one owner, but not for the purposes of the other.

3.25 Various attempts have been made to define a "sufficient" or "adequate" fence for the purpose of dividing fences legislation in other jurisdictions, either by a list of acceptable types of fence or by some general standard,

such as whether it can resist the trespass of cattle or is sufficient for the purposes of the adjoining owners.[14] The result has been either too restrictive or too vague to provide any real guidance. The Commission regards the approach taken in the Northern Territory's Fences Act 1972 as preferable. It provides that where a court has to determine what is a sufficient fence under the Act, it shall take a list of specified items into account. As the fencing needs and uses of adjoining owners vary considerably, this approach has the benefit of allowing magistrates and land boards a degree of flexibility while directing them to take into account a number of factors. The differential weight to be attached to each factor will vary in each case and may be adjusted by the adjudicator. While this approach will not give an exact answer when a party wishes to determine whether a particular fence is sufficient, it should allow them to come to a reasonably informed conclusion.

3.26 The Commission recommends that:

The Dividing Fences Act should be amended so that where a court or local land board has to determine what is a sufficient fence for the purposes of the Act, the court or board should have regard to all the circumstances of the case, including:

(a) the kind of fence usual in the locality;

(b) the purposes for which both adjoining lands are used or intended to be used;

(c) any policy or code relating to fences which has been adopted by the local council in which the adjoining lands are situated;

(d) the privacy of the occupiers of the adjoining lands;

(e) any relevant rule, regulation, by-law, order or environmental planning instrument relating to the adjoining lands or the locality in which they are situated.

In making these recommendations, the Commission has taken into account the major complaints received from individuals and practitioners. The first two factors already exist in s9(4) of the Act. The third and fifth are included because both individuals and local councils indicated uncertainty at the relationship between the Dividing Fences Act and codes or policies of local councils (see para 3.48 below). The fourth factor, privacy, has been included because a number of cases have been brought to the attention of the Commission which suggest that decisions are sometimes made by magistrates in residential areas which fail to take account of the privacy needs of owners. In one case, a magistrate ordered that a 1.2m-high "cyclone" wire mesh fence be built along the side boundary of two properties, against the preferences of both parties, when the main reason for the plaintiff desiring a fence was the protection of his privacy. The Commission considers that privacy is one of the main purposes of fencing in urban areas, and that the law should reflect the interests of owners in this respect.

C. Non-Judicial Methods of Dispute Resolution

1. Agreement

3.27 The Dividing Fences Act requires that, where an owner wants the adjoining owner to contribute towards the cost of the construction of a fence, they should serve that owner with a notice to fence. Where the adjoining owners have agreed to the construction of a fence and one party has reneged on the obligations under the agreement, s10 provides a simple form of redress. However, there is no established form for either the notice or an agreement. The Commission believes that the absence of such forms is an impediment to the settlement of fencing disputes. Drafting such documents in terms which comply with the requirements of the Act and fulfill the needs of the parties often requires the assistance of a solicitor, thus incurring additional trouble and expense. The language in which such documents are phrased can be excessively legalistic and impersonal, while the intervention of a legal advisor during the early stages of negotiation may hamper the prospects of arriving at an amicable agreement.

3.28 In the view of the Commission, these problems can best be met by standard forms for both the notice to fence and a fencing agreement. While the exact wording of these forms should not be compulsory, since the diversity of situations in which fencing work is undertaken is great, the Commission considers it appropriate to include recommended versions in regulations under the Act. To this end, a draft form of fencing notice and a draft

fencing agreement have been devised and are contained in Appendix B. They should be included in a pamphlet which contains information on the Dividing Fences Act and can be completed by an owner and sent to the adjoining owner without the need for legal advice. Pamphlets could be made available at the offices of chamber magistrates, legal centres, local councils and community justice centres. The agreement is also designed so that it can be completed by a fencing contractor or used to frame the outcome of a mediation at a community justice centre. The Commission therefore recommends:

> That the recommended form of fencing notice and fencing agreement contained in Appendix B should be included in regulations made under the Dividing Fences Act and should be sufficient for the purposes of the Act. They should also be incorporated into an informative pamphlet on the Act and be made widely available.

2. Mediation

3.29 The Commission recognises that non-judicial methods of dispute resolution have an important contribution to make in the area of fencing disputes. There will often he a personal element in disputes between neighbours and therefore a dispute which ends up in court is not infrequently a by-product or symptom of a more wide-reaching problem in the neighbours' relationship. Thus the New South Wales Community Justice Centres, in a letter to the Commission on their experience with disputes over fences, noted that "in many of the 'fence' disputes, the fence was a convenient way of punishing the other party for earlier real or imagined wrongs".[15]

3.30 Where disputes are of a personal nature, the conventional court system will often be unable to provide a lasting resolution. A court can only concern itself with the specific dispute before it and must ignore any background conflict of which the litigated dispute is a symptom. In these cases, non-judicial methods of dispute resolution such as mediation can often prove to be beneficial. Community justice centres provide for the mediation of disputes in New South Wales and their workload includes a large number of disputes over fences (see para 1.1). Parties to a fence dispute either approach the centres directly or come at the suggestion of solicitors, legal centres or Local Courts. The community justice centres by most accounts work very successfully, and the Commission considers that any changes in this area should be directed to assisting the centres in carrying out their work.

3.31 It was suggested to the Commission that magistrates should be given the power to compulsorily refer disputes over dividing fences to the community justice centres. At present, magistrates can only adjourn matters and suggest to the parties that they attend a mediation session. Compulsory mediation would certainly be of practical advantage in getting parties to a dispute to attend a mediation session. However, the issue of compulsory mediation raises jurisprudential and practical issues and the Commission believes that it would not be appropriate to consider the matter on an *ad hoc* basis in the area of dividing fences. Accordingly, the Commission declines to make any recommendations on that issue in this Report.

3.32 A further issue concerns a problem which can occur where disputes over dividing fences are mediated at a community justice centre. Agreements reached at community justice centres are not binding or admissible in court.[16] Therefore, where a party relies on a mediated agreement and carries out fencing work, that party cannot then recover a contribution if the other party reneges on the agreement. This has occurred in a number of cases and the Commission considers that this problem must be addressed in order that the confidence of parties in agreements reached at community justice centres is not undermined. The Commission therefore makes the following recommendation:

> Any agreement relating to fencing work under the Dividing Fences Act and reached at or pursuant to a mediation session at a community justice centre should be admissible and binding in court.

3. Arbitration

3.33 At present, magistrates cannot refer matters under the Dividing Fences Act to arbitrators constituted under the Arbitration (Civil Actions) Act 1983.[17] The Commission is aware that arbitration has proved successful in civil actions which would otherwise be determined in the Courts, and believes that this form of dispute resolution should also be an available option for magistrates hearing dividing fence matters which have failed to be resolved by conciliation or mediation. Civil arbitration has potential for the development of expert adjudication in a relatively informal manner away from the hectic confines of a court. The Commission therefore recommends that:

> Magistrates should be able to refer matters under the Dividing Fences Act to arbitrators under the Arbitration (Civil Actions) Act 1983.

The availability of this procedure for disputes over boundary fences may encourage the formation of a panel of solicitors with expertise in such areas as local government, town planning, surveying or building to determine such disputes.

D. Rights of Appeal

3.34 Normally, where the statute under which proceedings are taken allows, a party may appeal from decisions of the Local Court. Section 122 of the Justices Act 1902 provides that a person subject to the conviction or order of a magistrate may appeal to the District Court. Similarly, slY of the Crown Lands consolidation Act creates a right of appeal from decisions of local land boards to the Land and Environment Court. However, since s9(5) of the Dividing Fences Act states that "any order of the local land board or Local Court made under this section shall be final", these avenues of appeal are not available for orders concerning the construction of fences.

3.35 Competing factors bear on the issue of appeals. On the one hand, the sums involved in disputes over fences will often be quite small and may not justify a right of appeal. Further, a right of appeal may prolong conflict between neighbours and introduce substantial delays. Against this, however, must be weighed the potential for injustice which a lack of appeal rights gives rise to. In one case brought to the Commission's attention, a mail delay meant that a solicitor did not receive notice of the hearing date of a dividing fences matter and was not able to present his client's case. The matter was dealt with *ex parte* and there was no opportunity for relisting or appeal. The client was forced to seek an injunction from the Supreme Court to restrain enforcement of the magistrate's order, incurring considerable costs.

3.36 Despite the exclusion of appeals, there may still be modes of redress under the Justices Act. Sections 101-111 enable a dissatisfied party to proceedings to request a magistrate to refer a stated case to the Supreme Court when a difficult question of law is involved, and also allow the Supreme Court to intervene if a magistrate refuses to refer such a case. Section 112 creates a statutory form of prohibition, which allows the Supreme Court to restrain a magistrate from enforcing or proceeding with a court order. Where a magistrate has refused to exercise a duty, for example by dismissing a claim, the Supreme Court is given power under s134 to issue a statutory form of mandamus, which directs the magistrate to perform that duty. Such hearings are in the nature of an appeal, although they do not involve a full re-hearing of the matter.[18] These remedies are available only in limited circumstances. The Supreme Court may restrain or amend a magistrate's order where it was unsupported by evidence, based on findings of fact which reasonable persons could not conclude from the evidence, or affected by a fundamental error of law which prevents the relevant facts from determined.[19] Statutory prohibition may also be available where a magistrate has denied a party the right to a fair hearing. Although this power is uncertain, the Supreme Court can issue a similar prerogative remedy at common law where an application for statutory review has been made.

3.37 The Commission regards the provision of a full system of appeals, including re-hearing on questions of fact, as inappropriate for dividing fence matters. Such a system would allow many disputes to become protracted and costly, while removing the finality that is essential for those cases where resolution can only be obtained by judicial proceedings before the Local Court or land board. However, we see no reason why appeals limited to questions of law would derogate from the principle of simplicity in dividing fences cases. The existing forms of review made available by the Justices Act are adequate for this task. The inclusion of these forms of redress within the Dividing Fences Act would also have the benefit of bringing appeals in fencing matters into conformity with those provided for general civil litigation in the Local Courts. However, normal civil appeals do not specifically include statutory mandamus, which the Commission believes should be available for appeals under the Dividing Fences Act. The Commission therefore recommends that:

> There should be included in the Dividing Fences Act a provision explicitly allowing a party to appeal to the Supreme Court where the decision of a Local Court or local land board is erroneous in point of law. This remedy should be in similar terms to that provided by s69 of the Local Courts (Civil Claims) Act, but should also include statutory mandamus under s134 of the Justices Act.

V. APPORTIONMENT OF COSTS FOR FENCING WORK

3.38 Section 7 of the Dividing Fences Act states that:

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

Similarly, s13 states that:

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

Thus, the Dividing Fences Act provides that where fencing work is required, there is to be an equal apportionment of the cost between the adjoining property owners.

3.39 The Commission received a number of submissions concerning the apportionment of costs for fencing work. In these submissions the claim was often made that the mandatory 50-50 apportionment of costs can lead to injustice since it is inflexible and does not allow the courts or land boards to exercise discretion in tailoring their orders to the situations before them. For example, cases often arise where one neighbour desires to construct a "better quality" fence than the other neighbour who would be content with a paling fence. In such cases, since there can only be an equal contribution to the cost, the order of the court or land board will invariably be for the cheaper fence and the wishes of the party seeking a more elaborate fence will be thwarted. Similar problems arise where a landowner creates the need for a special, more expensive fence because of particular activities which take place on his or her land. An example of this is where a swimming pool fence is also the boundary fence. In these cases the adjoining landowner could avoid making any contribution even though some benefit was derived from the fence.

3.40 In other jurisdictions the solution to this problem has been to allow the Court to apportion liability for fencing costs between the adjoining owners. For example, the current South Australian Act does not make any general statement as to contribution but allows a local court to "determine the cost of fencing work and the persons by whom and the proportions in which the cost is to be borne".[20] This approach was adopted in New Zealand, following the Property Law and Equity Reform Committee's report on the Fencing Act.[21] The Committee thought that it would be fair for a court to depart from the principle of equal contribution where one occupier had completely changed the use of his or her land, so that the existing fence was no longer adequate. In such cases the Committee believed a court should have the power to order that the party who had changed their land use should pay the whole or the greater part of the cost of the new fence. In Victoria, contribution is determined in certain specific circumstances by the type of fence which is sufficient for each party's purposes, while in all other cases it is left to the court to determine in what proportions the cost is to be met by either party.[22]

3.41 A variant of this approach has been taken by the Law Reform Commissions of Western Australia and Tasmania. Both these bodies have recommended that the tribunal should determine the cost to be borne by each adjoining owner according to their respective needs and their benefit from the proposed fence; but that in the absence of proof to the contrary, it should be presumed that each owner has equal needs and will benefit equally.[23] Neither of these reports has yet been implemented by legislation. In brief, the solution taken in South Australia and Victoria involves giving the tribunal complete discretion in apportioning contribution. The modification recommended in Western Australia and Tasmania sets up a rebuttable presumption of equal need and benefit, and therefore of equal contribution.

3.42 The Commission is not convinced that either of these approaches is a useful improvement on the equal contribution rule. Strict equal apportionment at least has the advantages of simplicity and predictability. Relaxing this rule would increase the likelihood of litigation. It would also be difficult in practice to evaluate the existing need and expected benefit since both factors are highly subjective in content. Instead, to prevent injustice arising from the inflexibility of the present contribution rule, we propose limiting the contribution recoverable under the Act to half the cost of a sufficient fence. We have already recommended in para 3.26 that the concept of a sufficient fence be retained for the purpose of determining whether fencing work is required in particular cases. The Commission also believes that this concept should serve as a standard limiting the contribution which an adjoining owner is, in the absence of agreement, obliged to make under the Dividing Fences Act. We therefore recommend that:

> The liability of owners under the Dividing Fences Act should be limited to half the expense of fencing work which would result in a sufficient fence dividing their properties. In the absence of an agreement, the cost of any further fencing work involving the creation of a fence of a higher standard than a sufficient fence should be borne by the owner desiring that higher standard.

This accords with the general principle stated in para 3.1 that the Dividing Fences Act should encourage agreement between adjoining owners. Thus an owner who wants a fence of better quality than a sufficient fence would be encouraged to seek an agreement with the adjoining owner to share the additional cost. The proportions in which this extra cost is borne would be left to the owners. If no agreement can be reached, perhaps after mediation, the owner proposing the better fence would either pay for the additional cost or accept a lower standard.

3.43 This recommendation also reflects the Commission's belief that the statutory liability to contribute towards fencing costs should be confined to a minimum standard. Itwould be unjust, in our opinion, to allow a court or land board to require a landowner to pay for improvements that are neither needed nor wanted. The standard of "sufficient fence" is still flexible enough to allow the minimum to be adjusted to suit the particular needs and obligations of the owners. In the majority of cases in built-up areas, the minimum standard would be satisfied by the normal wooden paling fence. In rural areas a sufficient fence would normally be one of the usual wire and steel star post configurations used to contain sheep or cattle, although this would vary with topography, soil type and land use. In practice, therefore, the recommendation would not affect the majority of landowners or radically change the current law.

VI. PLANNING AND LOCAL GOVERNMENT ISSUES

3.44 A common complaint with the Dividing Fences Act is that it makes no allowance for aesthetics and the development of alternatives to the usual five foot paling fence. A number of submissions also raised the problem that no express provision is made in the Act for token or no-fence options and that the Act fails to take into account local government requirements as to fences.

3.45 Local councils have the power to deal with planning aspects of fencing under Part XI of the Local Government Act. Under that Part, dealing with building regulation, councils nay control the erection of buildings in urban areas, while a building may not be erected or altered unless the approval of the council has been obtained beforehand.[24] Since "building" is defined widely in Part XI to include "any substantial structure or any part thereof", these general powers include control over the construction, alteration and repair of fences.[25] In addition, a local council is required, when considering a building application, to take into account the "height, materials, stability, design and position of fences to be erected".[26] Local authorities may enforce these powers by fine and have additional powers to order a dilapidated or dangerous fence to be demolished or repaired.[27]

3.46 In order to gauge the activities and problems of local councils in dividing fence matters, the Commission sought their views through the Local Government and Shires Associations.[28] The responses indicate that while most councils regulate front fences in residential areas for streetscape planning purposes, relatively few controls are placed on boundary fences behind the building line. However, councils are increasingly exercising their powers by the formulation of comprehensive codes covering the construction of fences in their localities. These generally state that council approval is required only if the proposed fence exceeds a specified height (usually 1.8m) or is of masonry construction or unusual design. Some councils have also established minimum standards for the type and materials of fences to be constructed in their areas.

3.47 Many councils expressed the view that they are not appropriate bodies for the resolution of fencing disputes between neighbouring landowners. A notable exception is Randwick Municipal Council which requires a building application in contentious cases and attempts to reconcile any differences. The Commission appreciates the reluctance of councils to become involved in neighbourhood disputes, since this task may require resources which they do not possess at present. However, the Commission believes that local councils can play a significant role in minimising disputes between neighbours over fences by formulating fencing policies which establish standards appropriate to the locality and require building approval where the proposed fence is of exceptional height or unusual design. In many cases the mere existence of ascertainable limits will discourage an owner from insisting upon an extravagant construction and promote agreement when there is doubt as to the standard appropriate to a locality. Ideally, a local council should also require evidence of the consent of the

adjoining owner before it grants a building application for a fence on or near the boundary. The Commission does not expect that fencing codes such as those described in para 3.46 will overburden local councils, since those councils most active in the regulation of backyard fences reported that disputed cases are rare.

3.48 The Commission regards as appropriate the present system whereby local councils are empowered to deal with the planning aspects of fences while the Dividing Fences Act is concerned with financial contribution. These planning powers are vested in councils because of their ability to establish local planning requirements and supervise their enforcement. There are appropriate procedures for consultation, deliberation and appeal to the Land and Environment Court under this system. The inclusion of planning requirements in the Dividing Fences Act would not accord with the scheme and purpose of the Act which is designed to establish procedures for determining and obtaining contribution to the cost of fencing work by adjoining owners. While most councils contacted did not believe that this current demarcation constrains their ability to set standards for fencing, there appears to be some confusion as to the scope of the Dividing Fences Act. Many people, among them officers of local councils, believe that it regulates all aspects of boundary fences, including those which have been reserved to local councils.

3.49 There is also the problem of conflict between the Act and council determinations or policies if, for example, a magistrate ordered the construction of a fence which was not in accordance with the local council's minimum standards. Although the council's policy would prevail in such circumstances since it operates as delegated legislation, the Commission thinks it is appropriate for the Dividing Fences Act to direct the attention of magistrates to local government requirements when making a determination under the Act. This is achieved in Western Australia's Dividing Fences Act by defining a sufficient fence in terms of any fence prescribed by a local government by-law as a sufficient fence.[29] However, similar powers are not vested in local councils in New South Wales, and the current practice by councils of issuing guidelines or minimum standards is preferable to strict requirements because it allows for flexibility and choice by adjoining owners. The Commission has recommended in para 3.26 that magistrates should take into account local government fencing policies when determining what is a sufficient fence" for the purposes of the Dividing Fences Act. That recommendation adquately resolves the problem.

3.50 A further possible conflict between the Dividing Fences Act and local government powers may arise when a council designates a "no fence" area. Such areas are sometimes established for reasons of streetscape aesthetics and prevent the construction of fences forward of the building line. The Commission believes that in such situations the Dividing Fences Act should unequivocally provide for a "no fence" order. Therefore it recommends that:

> The Dividing Fences Act should allow a Local Court or local land board to order that, in the circumstances, no fence shall be built as to all or part of the boundary of the adjoining lands in question.

VII. WHERE NO CONTRIBUTION IS SOUGHT

3.51 One of the original complaints which prompted the Commission to seek a reference on the law relating to dividing fences came From a resident of Lavington. The correspondent wrote that while she was away her neighbours built a 3m high brick wall, apparently on their own property but near the boundary between the two properties. As the neighbours did not seek contribution from her, she was unable to take any action under the Dividing Fences Act. She approached Albury City Council, which informed her that it did not require the submission of plans for approval of the erection of fences between adjoining properties. Apparently, the Council refrained from regulating the construction of boundary fences because it regarded the Dividing Fences Act as the most effective means of controlling such matters. In her letter to the Commission, the correspondent intimated that the Act should be changed so that adjoining owners must in all circumstances be informed of any intention to build a fence near the boundary line.

3.52 The Commission has received a number of submissions concerning the erection of fences in similar circumstances. Typically, the complainant returned home after a short absence to find that a fence, sometimes an unusually high brick one, had been constructed without prior notice and without council approval. Local councils have been unconcerned about the erection of such structures or have approved them after their construction. The Dividing Fences Act does not assist in these circumstances. It is silent about the ownership of fences and establishes rights between adjoining owners only when one of them wants the other to contribute towards the construction or repair of the dividing fence. Similarly, the common law does not prevent a landowner

doing anything on his or her own land which does not interfere with recognised common law rights of others. The common law also provides that a structure which is erected on a person's land becomes part of that land and therefore belongs to the landowner. Hence if a fence is constructed exactly on the boundary, half the fence will belong to each adjoining owner,[30] although on demolition the ownership of the materials of the fence will revert to the persons who had supplied them.[31] Therefore, in the absence of planning controls and such interference with their rights of enjoyment of their land as would constitute the tort of nuisance, a landowner has no remedy at law when a boundary fence is built on the neighbour's land. If the fence or wall partly intrudes on their land, the complaining neighbour may apply to the Supreme Court for an order under the Encroachment of Buildings Act 1922, which may include demolition of the structure.

3.53 The Commission believes that the type of problem mentioned in para 3.51 cannot be addressed adequately by amendment of the Dividing Fences Act. Apart from falling outside the scope of the Act, a general requirement to give notice to an adjoining owner before constructing a dividing fence would be difficult to enforce through an effective and appropriate remedy. Most jurisdictions in the United States have "spite fence" laws, established either by statute or by an extension of the tort of nuisance, which prohibit the erection of a fence by defendants on their own land with the dominant motive of annoying or injuring the adjoining owner and with no use or benefit to the defendant.[32] Under these laws a court may award monetary damages in compensation or issue an injunction ordering the offending fence to be removed. However, such laws would not remedy the problems which have been brought to the Commission's attention. The Commission regards these as essentially planning problems, since they arise when the local council fails to exercise its building regulation powers, which include approval for the construction of fences. The aggrieved adjoining owner may well have a remedy in taking proceedings against the council before the Land and Environment Court. Therefore, the Commission does not make any recommendations in this area.

VIII. LIABILITY OF THE CROWN AND OTHER PUBLIC BODIES

3.54 At present many government bodies are exempted from liability for contribution under the Dividing Fences Act. It is a general rule of statutory interpretation that the Crown is not included in the operation of a statute except by express words or necessary implication.[33] Where a statute is silent on the matter, it does not bind the Crown unless the apparent purpose of the statute would be wholly frustrated by excluding the Crown from liability.[34] A statutory authority may rely on the immunity of the Crown if this clearly appears to have been the intention of the legislature as shown in the statute constituting the body.[35] As the Dividing Fences Act does not expressly bind the Crown or depend on Crown liability for its operation, a private owner cannot compel a government department or a statutory authority to contribute towards the cost of constructing or repairing a fence which divides their adjoining properties. When the Act was originally debated in Parliament, the reason given for this exemption was that it would be improper to require the Crown to pay for the cost of fencing large areas of unoccupied Crown lands from which it derived no benefit.[36]

3.55 One exception to this general position is where work is authorised to be undertaken under the Public Works Act 1912. In such cases, the authority responsible for constructing the works is required to erect and maintain fences sufficient to separate the land taken or used for the public work from the adjoining lands.[37]

3.56 A further exemption of public bodies from liability under the Dividing Fences Act arises from the definition of "owner" in s5. The Act applies only to parties who come within this definition, which expressly states that it

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

Thus local councils and similar public bodies are liable under the Act unless the land involved is a public reserve or park.[38] No other purposes have been prescribed by regulation. In addition, while s232 of the Local Government Act 1919 vests ownership of public roads in local councils, it expressly excludes them from liability under the Dividing Fences Act. Hence local councils are not required to contribute towards the cost of fences which adjoin public roads. The Maritime Services Board is also exempt from liability under the Act in respect of sea retaining walls bounding property vested in the Board.[39] This includes the bed of Port Jackson, which is owned by the Board.

3.57 The Commission received several letters complaining that the exemption of public bodies from the Act imposed an unjust burden on adjoining private land owners. The most common complaints concerned fences between private houses and suburban parks owned or controlled by local councils. Submissions were also received from rural landholders who were concerned at the influx of animals from Crown lands, particularly national parks, on private grazing land in the absence of adequate vermin-proof fencing.

3.58 While they are not bound to contribute towards the cost of fencing boundaries with private landowners, some public bodies already do so. Apart from its obligations under the Public Works Act and the various railway construction Acts, the State Rail Authority makes *ex gratia* payments towards the cost of providing standard paling fences, particularly where railway lines run adjacent to residences. The Forestry Commission often bears the cost of fencing boundaries between state forests and private land where it considers the work to be in its interests, and may also allow adjoining landowners to cut timber from a state forest for fencing purposes. Since 1972 the National Parks and Wildlife Service has often provided the whole or part of the cost of materials for fencing the boundaries of national parks, including the erection of sophisticated fauna-proof fences, for wildlife management or ethical reasons. Of the local councils in the Sydney region which responded to the Commission's request for information, almost half reported that they made *ex gratia* payments to owners of land next to parks and reserves as a matter of policy.[40]

3.59 The major property-owning state government departments also do not rely on their legal exemption. The Department of Agriculture usually shares the cost of fencing its research stations and other properties with its neighbours in order to maintain good public relations. The Department of Education has advised that it is departmental policy to fence operating schools, and that it also relies upon the Dividing Fences Act to claim contribution from adjoining owners unless it is satisfied that the neighbour is unable to pay. The Department of Family and Community Services generally pays half the cost of boundary fences, sometimes meeting the total cost where the Department has special needs.

3.60 As most government bodies already contribute towards fencing costs as a matter of policy, the Commission sees no reason why the existing practices should not be the subject of a positive legal obligation. If the private landowner is entitled as a matter of fairness to have the public landowner share the cost of fencing, then his or her entitlement should be protected by legislation, rather than being dependent upon the discretion of the Crown. There is always the possibility that a system of *ex gratia* payments will be administered arbitrarily or inconsistently.

3.61 Several public bodies, including local councils, the Crown Lands Office of the Department of Lands, the National Parks and Wildlife Service and the Forestry Commission, made submissions which indicated that any amendment requiring them to contribute towards the fencing of land owned by them would result in enormous costs that they would be unable to meet from their present budgets. The Commission accepts that the cost of fencing all public lands throughout the state would be an onerous and unnecessary financial burden, considering that a large proportion of the state consists of vacant and unalienated crown land. However, the Commission considers it inequitable to impose the whole cost of fencing on the private owner adjoining publicly-owned land in all circumstances.

3.62 Problems arise when attempting to define reasonable and practicable limits to the liability of public bodies. In the case of fencing legislation, three approaches have been implemented or recommended in Australasian jurisdictions.

> In South Australia, s20 of the Fences Act 1975 expressly binds the Crown in respect of liability under the Act but effectively limits this liability to parcels of land of one hectare or less in area.
>
> The New Zealand approach is to bind the Crown with the exception of roads, national parks, land for railway purposes and land reserved by the sea, lakes, rivers and streams. Local authorities are not exempt from liability, and bodies vested with control of public reserves are specifically included in the definition of "occupier", thus imposing general liability.[41]
>
> In its Report on Dividing Fences, the Law Reform Commission of Western Australia recommended that local authorities, the Crown and statutory bodies entitled to the immunity of the Crown should only be liable for contribution to the cost of construction and repair of fences adjoining "land in a residential locality on which a

private dwelling house is erected or being constructed." However, the Western Australian Commission further recommended that this liability be limited to fences constructed in the future.[43]

3.63 Given that most complaints have come from residential areas and that the cost of fencing large tracts of waste Crown land would be prohibitive, the Commission regards an approach similar to that recommended for Western Australia as most appropriate for this State. There are, however, considerable difficulties in adequately defining a "residential locality" or in leaving the question of liability to the discretion of a Local Court or local land board. Instead, the means by which local councils are assigned the power to control and regulate the erection of buildings, under Part XI of the Local Government Act 1919, has been adopted. Part XI limits this power in relation to cities and municipalities as well as parts of shires which have been proclaimed for that purpose, including areas proclaimed as towns, villages and urban areas. In practice this will include most built-up areas and exclude lands for which the public body could derive no conceivable benefit from fencing. Since this solution is capable of arbitrariness and discrimination against rural landholders, the Commission also believes that there should be additional means for defining public land to which the Dividing Fences Act applies. To allow other areas to be included within this regime, there should be power within the Act to prescribe further regions by regulation. Liability should also extend in relation to small parcels of land, which may not be included in proclamations under the Local Government Act. Hence the Commission recommends that:

The Dividing Fences Act should bind the Crown and public authorities (including local councils) where land owned by the is:

(a) situated in a city, a municipality, or the whole of part of a shire in which the shire council may regulate the erection of buildings under Part XI of the Local Government Act 1919; or

(b) less than one hectare in area; or

(c) prescribed by regulation as subject to the Act.

However, the Commission believes that the present exemptions of local councils in respect of public roads and the Maritime Services Board in respect of sea retaining walls (mentioned in para 3.56) should be retained since they legitimately exclude structures which are not true dividing fences, and recommends that the Dividing Fences Act should not affect s232 of the Local Government Act 1919 or s13TC of the Maritime Services Act 1935.

FOOTNOTES

1. New South Wales Parliamentary Debates, Legislative Assembly, 2nd ser vol 195, 15 May 1951 at 1972-1973.

2. (Unreported) No 30383 of 1982, 27 April 1983, Land and Environment Court, Cripps J.

3. [1961] NSWR 1071 at 1076; (1961) 78 WN 598 at 602.

4. [1981] WAR 157; see also *Hennessey v Petrie* (1977) 4 Queensland Lawyer 242.

5. *Lengyel v Francis* (1983) 6 Petty Sessions Review 2833 (case stated to Supreme Court of New South Wales).

6. [1978] Tas SR 56.

7. At least this is the test adopted by the New Zealand courts: *Tibbits v Gerrand* (1896) 14 NZLR 678; *McSaveny v Smith* (1905) 24 NZLR 245; an v Nelson [1959] NZLA 733. This approach was in *Storey v Lockhart* (1915) 11 Tas LR 163.

8. Report No 37 (1984) at 10.

9. (1957) 74 WN 189.

10. As the Local Court was then titled.

11. (1957) 74 WN 189 at 191.

12. (Unreported) No 2235 of 1981, 3 July 1981, Equity Division, Supreme Court of New South Wales, transcript at 3.

13. Jurisdiction of Courts (Cross-vesting) Act 1987; see Keith Mason and James Crawford "The Cross-vesting Scheme" (1988) 62 *Australian Law Journal* 328.

14. See Boundary Fences Act 1908 (Tas) s4; Fences Act 1924 (SA) s5 (repealed by Fences Act 1975); Dividing Fences Act 1961 (WA) s5; Fences Act 1968 (Vic) s4(1); Fencing Act 1978 (NZ) s2.

15. Letter dated 22 April 1983 from Wendy Faulkes, Director, New South Wales Community Justice Centres.

16. Community Justice Centres Act 1983 ss23(3), 28(5).

17. This is because magistrates' powers to refer matters under the Arbitration (Civil Actions) Act 1983 are contained in the Local Courts (Civil Claims) Act 1970 s21H, and dividing fence matters are not initially brought under that Act.

18. *Peck v Adelaide Steamship Co Ltd* (1914) 18 CLR 167 at 181, 186.

19. *Dunn v Shapowloff* [1978] 2 NSWLR 235 at 237; affirmed (1981) 148 CLR 72; *Hooper v Gorman* [1976] 2 NSWLR 431.

20. Fences Act 1975 (SA) s12(2)(i).

21. Fencing Act 1978 (NZ) s24(l)(e); New Zealand Property Law and Equity Reform Committee *The Fencing Act* 1908 (1972) at 13.

22. Fences Act 1968 (Vic) s4.

23. Law Reform Commission of Western Australia Re ort on Fences (Project No 33, 1975) at 8-9, 39; Law Reform Commission of Tasmania *Report on the Boundary Fences Act 1908* (Report No 37, 1984) at 9.

24. Local Government Act 1919 ss305, 311(1).

25. *Williamson v Waterloo Municipal Council* (1933) 11 LGR 73; *R v Lowe* (1954) 19 LGR 348, noted in (1955) 29 ALJ 16; *Mills and Rockleys Ltd v Leicester City Council* [19461 KB 315.

26. Local Government Act 1919 s313(l)(j). Section 318 of the Act also empowers the Governor to make ordinances regulating the construction, demolition and alteration of boundary fences and defining the rights of owners of adjoining lands in relation to such fences, although no such ordinances have been proclaimed.

27. Local Government Act 1919 ss317, 249(g)-(h), 317B; Public Health Act 1902, ss64-65.

28. A notice was published in the Local Government Association's Circular No 15, November 1987. This requested copies of fencing policies and asked for comments on possible constraints on councils caused by dividing fences legislation, the relationship between local government planning powers and the Dividing Fences Act, councils' attitudes towards the regulation of backyard fences, and policies on the apportionment of fencing costs when council properly adjoins private property. In all, 31 replies were received, 15 from Sydney metropolitan councils, ten from regional areas (containing a population centre of more than 8,000 inhabitants), and six from country areas.

29. Dividing Fences Act 1961 (WA) s5. This definition refers to by-laws made by councils under s210(e) of the Local Government Act 1960, which in turn allows councils to define what shall constitute a sufficient fence under dividing fences legislation.

30. *Minister for Lands v Australian Joint Stock Bank* (1900) 21 NSWLR 209; *Walsh v Elson* (1955) VLR 276; *Botta v Pene* (1910) 15 WLR 508. It is sometimes said that there are certain common law presumptions as to ownership of fences, such as that the owner is the one on whose side the posts and rails are placed. However,

these are no more than inferences which would need to be established: see *Halsbury's Laws of England*, 4th ed vol 4 at para 849.

31. *Ex p Denney* (1925) 42 WN (NSW) 12.

32. *Hornsby v Smith* (1941) 133 ALR 684 and annotations at a 691-720; *Rapuano v Ames* (1958) 145 A 2d 384; *Sundowner v King* (1973) 509 P 2d 785.

33. *Commonwealth v Rhind* (1966) 119 CLR 584 at 598, per Barwick CJ.

34. *Province of Bombay v Municipal Corporation of the City of Bombay* [19471 AC 58; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 200, per Gibbs J.

35. *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 289, 291.

36. New South Wales Parliamentary Debates, Legislative Assembly, 2nd Ser vol 195 at 1988.

37. Public Works Act 1912 s91(b); see above, para 2.29.

38. See also *District Council of Noarlunga v Coventry* [1967] SASR 71 where Walters J thought that the history and policy of the Fences Act 1924 (SA) indicated that Parliament had not intended bodies entrusted with the maintenance of public lands to be liable to contribute towards fencing costs. The South Australian Law Reform Committee subsequently recommended that the Act be amended in this respect.

39. Maritime Services Act 1935 s13TC.

40. See above, note 28.

41. Fencing Act 1978 (NZ) s3.

42. Law Reform Commission of Western Australia *Report on Dividing Fences* (Project No 33, 1975) at 21.

4. Further Recommendations For Reform

I. DEFINITION OF "FENCE"

A. General

4.1 The present definition of "fence" in s5 of the Dividing Fences Act is in terms of a structure or a wall, ditch or embankment which encloses or bounds land. "Structure" is qualified by a list of materials from which the fence may be constructed (boards, palings, rails, galvanised iron, metal, or wire). As the definition is an exclusive one, this list would preclude the use of other materials or live fences such as hedges. Concern was expressed by members of the fencing industry that some new types of fence, such as brushwood fences or fences made of pre-cast panels, would not satisfy the definition. The Commission believes that the present definition of "fence" places unnecessary constraints on the sorts of fences which are covered by the Act and should be replaced with a more general provision. In this respect, the Commission considers the comprehensive definition of "fence" in s2 of New Zealand's Fencing Act 1978 to be useful.

4.2 The New Zealand Act takes into account situations where streams are used as a fence, and also allows for fences which do not completely bound the land. However, it does not specifically exclude party walls or include foundations and supports for a fence, as the current Dividing Fences Act does. The Commission considers that walls which form part of a house, garage or other building should not attract the regime of contribution under the Dividing Fences Act. The purposes for which such walls are built are different from the function of separating lands, so it would be unjust to require a neighbouring owner to contribute towards the cost of their construction and maintenance. Neither the present Act nor the New Zealand Act includes in its definition the apparatus required for an electric fence. Both this and any construction work required for the proper working of a fence should be included within the definition of "fence" under the Act.

4.3 The Commission therefore recommends that:

> The definition of "fence" in s5 of the Dividing Fences Act should be replaced by a definition which States that "fence" means a structure, ditch, embankment or live fence enclosing or bounding land, whether or not continuous or extending along the whole boundary, and includes any gate, cattlegrid or apparatus reasonably necessary for the operation of the fence, and also includes any natural or artificial watercourse which serves as a dividing fence) or any foundation, foundation wall, or support reasonably necessary for the support and maintenance of the fence, but does not include a wall which is part of a house, garage or other building.

B. Retaining Walls

4.4 A number of individuals and organisations expressed concern to the Commission over the confusion which currently surrounds retaining walls. Problems arise because, in addition to separating land, retaining walls serve to retain earth and other matter on one property. After some vacillation it appears that the courts in New South Wales have settled on the view that a retaining wall is not a fence for the purposes of the Dividing Fences Act. In *Sheridan Court Pty Ltd v McFadden* [1] Myers J held that whether a wall bounded land was a matter of degree and found that a retaining wall was a fence within the meaning of the Act. This approach was rejected in *Carter v Murray* where McLelland J said:

> In my opinion the word "separating" in the definition of "dividing fence" has a functional connotation, which renders it necessary to examine the physical characteristics and function of the fence in question in relation to the physical characteristics of the rest of the land on either side thereof in order to determine whether the statutory criterion is satisfied. The concluding words of the definition of "dividing fence" which contemplate a dividing fence otherwise than on the common boundary seem to me to support such a connotation in the present case. The retaining wall provides structural support for other material on and below the surface of No 30 and thus assists to maintain the surface of No 30 at its present level, but it seems to me that it does not ''separate" the two parcels of land in what I consider to be the relevant sense of impeding egress or ingress to or from either property.[2]

The retaining wall was held to be part of the sub-surface of the land rather than a dividing fence since it was the vertical drop between the lands in question, rather than the wall, which separated the properties. Cohen J followed this decision in *Gollan v Cranfield*, finding that the wall in dispute "exists for the purpose of stabilising the face of the land of the defendant and not for the purpose of separating that land from that of the plaintiffs'.[3]

4.5 The rights and obligations of neighbouring landowners concerning the erection and maintenance of retaining walls are governed by the common law doctrine of support to land. Landowners have the right to the support of neighbouring land so that if excavation or other work on adjacent property results in damage to their land, they are entitled to monetary compensation or an injunction against the person causing the damage.[4] This right, best described as a natural right not to have the support of one's land removed, is founded in the tort of private nuisance, which protects landowners from invasions of the use and enjoyment of their land. However, this right applies to land in its natural state and does not automatically extend to buildings on the land; although if the withdrawal of support would have resulted in damage (such as subsidence or erosion) to the land in its unaltered state, the amount recoverable may include damage to buildings.[5] Liability for the withdrawal of support is strict and does not depend on proof of negligence. Indeed, it has been established that an owner has no duty to take care that damage to neighbouring land does not indirectly result when making excavations, and is not liable for resulting damage in the absence of a right to support.[6]

4.6 Several consequences flow from the fact that the right to support is founded in tort. Firstly, a landowner is not liable for the withdrawal of support unless and until actual damage occurs to the neighbouring land.[7] Secondly, liability falls upon the person responsible for causing the damage rather than the owner for the time being of the land upon which the work was done that resulted in damage. Thus landowners are not liable for subsidence caused by actions of their predecessors in title, even though that damage occurs when the subsequent owner is in possession. A third consequence of the foundation of the right of support in tort is that it does not impose a positive duty upon a neighbour to maintain this support. An owner is under no duty to prevent subsidence of neighbouring land caused by previous owners of their land, or to maintain such structures as retaining walls which were erected to provide support withdrawn by the excavations of previous owners.[8] In *Byrne v Judd*,[9] the defendant owned land on which the previous owner had made excavations which removed the lateral support of his neighbour's land, replacing the natural support with a wooden retaining structure. The defendant failed to maintain this structure, with the result that the plaintiff's land suffered a slip which required the construction of a concrete retaining wall. The defendant was held not liable for the cost of the new wall, as he was not responsible for the withdrawal of natural support by the previous owner. On the other hand, an action for loss of support will lie against one who withdraws lateral support to land even though they no longer own the land on which the excavation was made.[10]

4.7 The right to have land and buildings supported by neighbouring land can also be created by easement, either expressly, impliedly or by prescription after 20 years continual use. Where such a right exists, the owner of the land benefiting from it may enter upon the neighbouring land to execute repairs although, since an easement cannot require a positive obligation, the neighbour is under no obligation to keep the supporting land or building in repair.[11]

4.8 The law of rights to support of land has come under much judicial criticism, particularly the unavailability of actions in negligence and the fact that the natural right to support does not extend to buildings.[12] The traditional position has been reasserted recently by the New South Wales Court of Appeal in *Kebewar Pty Ltd v Harkin*.[13] The Commission does not believe that it is appropriate to address these problems by the imposition of liability for construction and repair of retaining walls under dividing fences legislation. Retaining walls serve quite different purposes from fences. They are usually substantial and expensive structures which repose within the subsurface of the land of one adjoining owner, and are therefore required to withstand considerable lateral stress. They also interfere with the cross-flow of subterranean water and so must normally include weep holes and other drainage works. The foundations or footings often encroach substantially upon the downward adjoining land. Retaining walls are usually erected solely for the benefit of the owner who undertakes excavation work: this may be imposed by local councils when considering building applications.[14] The Commission does not wish to make any recommendation with respect to them under this reference. A similar approach was taken by the Law Reform Commission of Western Australia, which deferred consideration to its report on the alteration of ground levels. The later report recommended substantial changes to the law of support to land.[15]

II. DAMAGE TO FENCES

4.9 Section 14 of the Dividing Fences Act provides three exceptions to the general rule that owners must contribute equally to the cost of repairing a fence after being served with notice. Each applies in specific circumstances when a fence has been damaged.

A. Part Construction by Each Owner

4.10 At present, where parts of a fence have been constructed separately by the adjoining owners, each owner bears the cost of repairing the part they have constructed (s14(2)(a)). This proviso apportions contribution towards repairs in a non-monetary form and also functions indirectly as a means of setting liability for faulty construction by an owner. The strict liability which it imposes may lead to injustice, for example where an owner has voluntarily constructed most of a fence, or where damage is not the result of defective construction. The Commission believes that this rule is inflexible and unnecessary. If each adjoining owner were to construct part of a fence, it would be more equitable if contribution for subsequent repairs were apportioned by a court or land board in accordance with the general reforms proposed. Liability for repairs should be independent of prior contribution towards fencing work since, in the absence of evidence to the contrary, it must be presumed that both owners derive equal benefit from the fence. It is not practicable to take previous work into account because ownership of the adjoining lands may always change hands, and liability for fencing work does not pass to successors in title. Accordingly the Commission recommends that paragraph 14(2)(a) of the Dividing Fences Act should be repealed.

B. Urgent Repairs

4.11 When a fence is damaged or destroyed by natural forces or accident, either adjoining owner may currently repair the fence immediately, without giving notice to the other owner, and recover half the cost of repairs.[16] The Commission accepts that there are circumstances in which immediate repair is necessary to prevent the escape of livestock or for similar reasons. However, it considers that recovery under this provision should be limited to cases in which the need to repair the fence is urgent. Also, while it may be appropriate to relax the requirement that the notice period of one month must have expired before repairs can be carried out, the Commission believes that notice of the repairs should still be given to adjoining owners whenever it is practicable to do so. The Commission recommends that:

> If a dividing fence is damaged or destroyed and requires urgent or immediate work to restore the fence, either adjoining owner should be able to carry out the requisite fencing work after giving notice to the other adjoining owner where practicable and recover half the cost of the fencing work from the other adjoining owner.

C. Negligent or Deliberate Act

4.12 Where a fence has been damaged or destroyed by fire or the falling of any tree which is attributable to the neglect of an owner, that owner is liable to repair the fence and pay the whole cost of repairs (s14(2)(c)). The Commission found the limited extent of this provision to be a significant cause of complaint in the submissions it received. Submissions told of neighbours who built up soil against fences causing them to rot, who affixed structures to fences thereby damaging them because of the added strain, and even of those who demolished fences intentionally. The present Dividing Fences Act does not deal adequately with such situations. It is inappropriate to limit the relevant negligent acts to those causing fire or falling trees. The intentional or deliberate acts of a landowner, or someone entering the land with the express or implied permission of the owner, should also be taken into account.

4.13 The scope of liability for damage to fences has been widened in South Australia by the Fences Act 1975 which provides that where a dividing fence has been damaged or destroyed by a wrongful act or default on the part of any person, that person is liable to an owner who incurs expense in repairing or restoring the fence. That Act also provides that an owner may not recover contribution from an adjoining owner for any fencing work which results from his or her own wrongful act or default.[17] Thus a stranger who negligently or deliberately damages a fence may be proceeded against under the South Australian legislation independently of any liability under the common law torts of trespass and negligence. The Commission regards this latter provision as an unnecessary

duplication of the existing law of torts which may well lead to confusion. It is sufficient to introduce a general form of liability for acts or omissions which result in damage to fences but, in line with the rest of the Dividing Fences Act, to make this liability actionable only between adjoining owners. The responsibility of owners for the consequences of their deliberate acts or neglect would then be clearly stated in the Act, which would allow a relatively simple form of redress to adjoining owners.

4.14 The Commission recommends that:

> If any damage to a dividing fence is caused by negligent or deliberate act of an owner or a person who has entered the land with the owner's permission, that owner should be liable to pay for the whole cost of the fencing work required to restore the fence to a reasonable standard having regard to its state prior to the damage. In default of such restoration the adjoining owner should be able to repair the fence and recover the cost from the owner at fault.

III. NOTICE REQUIREMENTS

4.15 The Dividing Fences Act currently provides that a contribution to the cost of constructing or repairing a fence may only be obtained if notice is served on the adjoining landowner prior to the work being carried out. However, in para 3.11 above, the Commission recommended that service of such notice up to 12 months after the completion of fencing work should be allowable by the court or land board where it considers this to be reasonable in the circumstances. This recommendation was initially made to alleviate the hardship which may arise where parties mistakenly seek a contribution to the cost of fencing work under an inappropriate Act. The Commission is of the view, however, that this recommendation with respect to late service of notice should have general application since other circumstances may arise where a failure to give advance notice should be excused.

4.16 Problems have also emerged with the formal requirements for the service of notices under the Dividing Fences Act. Under s21(1)(c) of that Act, one of the alternative methods of service is "by registered letter". This has caused uncertainty as Australia Post has replaced the registered letter service with certified mail, and the Commission is aware of one case where a magistrate refused to accept that service by certified mail satisfied the requirements of service in the Dividing Fences Act. In relation to this and other statutes passed before 24 April 1969 the matter is covered by s77(1) of the Interpretation Act 1987 which continues a provision introduced in 1969 and states that

> Any Act or statutory rule under which a document (other than a summons) may be or is required to be served on a person by registered mail, registered post, certified mail or certified post (whether the word "serve", "give" or "send" or any other word is used) shall be taken to authorise the service of the document by post (other than registered mail, registered post, certified mail or certified post) in addition to any other means by which the Act or statutory rule authorises the document to be served.

In *Freeman v Jacobs* Kearney J considered the effect of the 1969 predecessor of this section on s170 of the Conveyancing Act, which requires service by registered letter, and said that the provisions of the Interpretation Act "appear to eliminate the necessity for registered post".[18] A statute may be exempted from these provisions by an order published in the Government Gazette. However, since many other forms of notice are no longer required to be served by special postal service, the Commission believes that service by ordinary post is sufficient for the purposes of the Dividing Fences Act. Therefore, to remove any possible doubt or oversight, the Commission recommends that

> s21(1) of the Dividing Fences Act should be amended to refer to service of notice by ordinary post.

IV. SUBSTANTIAL COMPLIANCE

4.17 Some doubt has arisen as to whether failure to comply strictly with the terms of an agreement or order allows an owner to recover contribution under the Dividing Fences Act. In *O'Sullivan v O'Leary*[19] Gavan Duffy J held that, in proceedings under a provision similar to s10 of the Dividing Fences Act, strict compliance was necessary before a party could recover any contribution from the party in default of an agreement or order. This was because the legislation provided a special remedy, and also because to allow recovery for mere substantial

compliance would force the other party to pay half the cost of a fence that was less than the standard bargained for or determined by the Court.[20]

4.18 The Law Reform Commission of Western Australia in its Report on Dividing Fences recommended that the State's fencing legislation should be amended to ensure that substantial, even though not strict compliance, with an agreement or court order as to fencing was acceptable. The Western Australian Commission was of the view that

> To require strict compliance could in some cases lead to unjust results if a claim for contribution was defeated by some minor variation in the fencing work from that agreed upon or ordered by the court.[21]

This view must be tempered by the consideration that where an agreement has been made the fence built should conform to the conditions bargained for. The following recommendation is therefore made:

> The Dividing Fences Act should specify that substantial compliance with the terms of agreements or orders under the Act shall be deemed sufficient, subject to compensation to the non-constructing owner for any defect or omission in the fencing work.

V. LANDS SEPARATED BY A ROAD OR WATERCOURSE

4.19 Unlike the general liability for construction and repair, s15 of the Dividing Fences Act provides a form of contigent liability for fencing work. Thus an owner who makes use of a fence constructed on the further side of a road which bounds the land is liable for half the cost of repairing the fence for the time it is so used. Such provision is necessary because the Act otherwise relates to "adjoining" lands: lands which actually touch each other.[21] Since the land on which public roads are laid is owned by either the Crown or local councils, lands separated by a public road do not actually adjoin and so no contribution for fencing work can be claimed apart from s15.[22] Also, the present s15 allows an owner whose fence is used by a neighbour on the other side of a road to recover half the cost of repairs to the fence, but does not allow for any contribution towards the cost of construction.

4.20 The Commission received a number of submissions concerning lands separated by a public road. In one case, a farmer complained that cattle constantly trespassed on his crops from a neighbour's pastures, which were separated from the complainant's land by an unfenced, unmade and little-used Crown road. The neighbour refused to erect a fence and the complainant was unable to recover anything for the cost of constructing a fence under the terms of the Dividing Fences Act. This is likely to be a common problem, since there are many Crown roads in the state which were originally reserved in Crown grants to allow access to subdivisions. Most are boundary roads and many are disused or virtually nonexistent. The Commission considers it unjust that such roads should defeat rights normally available under dividing fences legislation.

4.21 A similar problem may occur when two properties are divided by a river, stream or lake, the bed of which is owned by the Crown. At common law the *ad medium filum* rule states that the boundary of lands divided by a stream lies along the centre line of the stream. However, the beds of all watercourses on lands sold by the Crown at least since 3 May 1918 have remained Crown property.[23] In the case of such lands the logical position is that neither owner is able to take advantage of the Dividing Fences Act as the lands do not adjoin.[24]

4.22 Several different approaches have been adopted in other jurisdictions to redress these problems.

> In Tasmania and New Zealand the person making use of the fence is liable to contribute half the cost of repairs plus interest on half the current value of the fence at a prescribed rate. The interest payable operates as a form of rent for the use of the fence. However, the Law Reform Commission of Tasmania has recommended that, in line with its other recommendations, liability in such cases should be "proportional to the benefit derived".[25]

> In South Australia and the Northern Territory, the person making use of the fence is liable to contribute towards the cost or value of the fence. In South Australia, this includes all fencing work, including repairs, and contribution is proportional to the benefit derived; in the Northern Territory, liability extends only to half the value of the fence at the date on which the adjacent owner first made use of it.[26]

> The Law Reform Commission of Western Australia has recommended that liability for construction should be calculated by interest on half the value of the fence from time to time, and that liability for the cost of repairs should apply as if the lands were adjoining.[27]

4.23 The Commission regards all these solutions as partial and unsatisfactory. The mere fact that two properties are adjacent but not strictly adjoining should not defeat or limit contribution for fencing work. If a fence has been used as a dividing fence by the owners or can be reasonably used as such, it should be governed by the general provisions of the Act. The following recommendation, based on existing provisions in the Pastures Protection Act,[18] is made:

> The intervention of a road or watercourse between two parcels of land should not prevent the owners of those parcels from being taken to be adjoining owners for the purposes of the Dividing Fences Act; nor should such intervention prevent a claim for contribution under the Act in respect of a fence on either side of a road or watercourse. However, this provision should only apply if the fence has been used, or if in the opinion of the Local Court or local land board it can reasonably be used, as a dividing fence by the owners.

VI. FENCING EASEMENTS

4.24 In some circumstances a landowner may come under a common law obligation towards a neighbouring owner to maintain fences. While usually referred to as a fencing easement, such an obligation is more accurately described as “a right in the nature of an easement” because, unlike conventional easements, it requires the owner of land which is subject to it to perform positive acts and incur expenses if necessary.[29] The obligation is ancient in origin and developed as a means of requiring occupiers of land to prevent trespass by cattle, but it has been revived and expounded in several recent English cases. Fencing easements may be created by the document transferring the land to the current owner, either expressly or implied by its terms. Like conventional easements, they may also arise by prescription at common law or under the doctrine of lost modern grant.[30] Both these terms describe the process by which an interest in land is acquired by use over a long period of time. As prescription at common law requires an alleged right to have been capable of existing since the beginning of legal memory, which is set at 1189AD, this doctrine does not apply in Australia. Prescription under the doctrine of lost modern grant, which is part of the law of New South Wales, requires the person claiming a right to have used it as if entitled to it, continuously and with the acquiescence of the owner of the property claimed against, for at least twenty years.[31] Where a fencing easement by prescription is alleged, the practice of maintaining the fence must have arisen as a matter of legal obligation towards the adjoining owner.[32] In *Crow v Wood* the English Court of Appeal held that once validly created, a fencing easement is capable of passing with the title to the land so that later purchasers of the land burdened by it are bound, and that it is a right which is capable of being conveyed with the land under the English equivalent of the Conveyancing Act 1919, s67.[33] This section allows a transfer of land to include all easements without the need for them to be specifically mentioned.

4.25 Fencing easements have limited relevance in New South Wales. Although it is clearly possible for them to arise in relation to land under old system title and to pass with the title under s67 of the Conveyancing Act 1919, this section does not apply to Torrens title land.[34] There is strong recent authority for the view that easements by prescription or implication cannot be created over Torrens land in New South Wales.[35] However, subsisting implied easements may continue to exist after the land affected is brought under the Real Property Act, and this would also seem to be the case with easements by prescription.[36]

4.26 The Commission believes that this form of obligation in relation to fencing has no place in the law of New South Wales. Most cases involving fencing easements in modern times have occurred when the duty to maintain fences bounding private or common land was raised as a defence to the tort of cattle trespass. This tort has been abolished in New South Wales, and liability for trespass by animals now rests on the general law of trespass, negligence and other torts.[37] Where the owner of a fence which has not been maintained brings an action in negligence against a neighbour in relation to straying stock, the defence of contributory negligence serves the same purpose as the allegation of a fencing easement. The limited circumstances in which such an easement can exist, especially under the Torrens system, make it unlikely to assist many landowners. The Commission believes that the purpose of this obscure common law doctrine has been superseded in Australia by dividing fences legislation. Its continued existence contravenes the basic principles of such legislation: that obligations

between adjoining owners in relation to fences should be readily ascertainable and achieved by agreement or, failing that, by a simple adjudication.

4.27 The subject of fencing easements has already been addressed in South Australia, where the Law Reform Committee considered that the "requirement to keep up fences of a rather indeterminate obligation" which was established in *Crow v Wood* should be deemed to have never existed.[38] Accordingly, s21 of South Australia's Fences Act 1975 provides that:

> Any obligation to fence land, or to maintain a fence in a state of repair, that may exist by prescription, is hereby extinguished.

This provision does not cover fencing easements which may be held to have arisen by implication, so the Commission recommends that:

> The Dividing Fences Act should be amended to provide that no obligation to perform fencing work shall arise or be held to have arisen by prescription or implication under the common law.

VII. SUCCESSORS IN TITLE

4.28 Section 6 of the Dividing Fences Act allows adjoining owners to enter into agreements which vary their respective rights and duties in relation to fencing costs. Thus one owner may agree to pay a greater contribution towards fences than he or she would be required to pay under the Act. This in fact occurs regularly, since the standard contract for sale of land contains a condition, usually known as a common fencing convenant, which exempts the vendor from contribution towards the erection of fences between the property sold and any land retained by the vendor. This condition also allows the vendor to require a covenant from the purchaser which exempts the vendor from contribution towards the construction of fences to any future purchaser of the land which has been sold.[39]

4.29 The common law distinguishes between covenants which are restrictive (or negative) and those which are positive in nature. Agreements such as the common fencing covenant just mentioned are restrictive in nature, since they do not actually require the covenantor (in this case the purchaser) to construct a fence. When properly created and registered, they are enforceable in equity against the original covenantor and all successors in title to the land burdened by the covenant. However, positive covenants, which require the covenantor to perform work or expend money, are unenforceable against the successors of the covenantor, either at law or in equity.[40] Thus an agreement between neighbouring landowners that one owner, A, will continue to repair the fence dividing their properties may be enforced by the other owner, B, against A as an ordinary contract; but B cannot require persons who purchase or otherwise obtain title from A to maintain the fence. Although A will remain liable under the contract after disposing of the property affected, the problems associated with enforcing such obligations were well explained by the English committee appointed by the Lord Chancellor to examine positive covenants:

> A covenant to maintain a wall or fence may have been entered between the owners at the time the wall or fence was erected. While the original parties to the covenant occupy the land, there are no problems, but after some years the covenantor may sell his property and move away; by the time the wall or fence needs repair he may be dead or impossible to trace and the covenant cannot be enforced against the present owner of the land. It is true that the purchaser from the original covenantor will usually have given an indemnity covenant to the covenantor and similar covenants may have been passed down through the chain of successive owners of the land, but such a chain of covenants will ensure that the present owner of the land repairs the wall or fence only if the person seeking to enforce the covenant can trace the first covenantor and if there has been no break in the chain of indemnities.[41]

While the significance of this problem is not as great in New South Wales as it is in England, since dividing fences legislation allows owners to claim contribution from their neighbours, it may still have some relevance. If, for instance, an owner wants an exotic fence which the neighbouring owner is unwilling to finance equally, the owner wanting the fence may agree to pay for the extra cost involved above that of a standard fence and may also undertake to pay for the expensive repairs involved. However, since the Dividing Fences Act only operates as between adjoining owners for the time being, later owners will not be bound by the agreement to repair and

may seek contribution under the terms of the Act. In other words, a new situation arises under the Dividing Fences Act each time one of the neighbouring properties changes hands.

4.30 Two elements would be necessary in order to establish an effective system which allowed positive fencing covenants to be binding on successors in title to the covenantor in New South Wales. Firstly, it would have to be established by statute that, contrary to the common law position, these positive covenants were enforceable against successors in title. Secondly, the system would need to allow for the registration of such covenants against the land under the Torrens system of land tenure. It is a fundamental tenet of the Torrens system that only interests properly noted on the register are enforceable against anyone dealing with the land. Thus, if the land burdened is registered under the Real Property Act 1900, restrictive convenants like the common fencing covenant mentioned in para 4.28 must be recorded against the land if it is to be effective against successors in title to the covenantor.[42] In New Zealand these obstacles have been overcome by legislation originally introduced in 1904 and now contained in the Fencing Act 1978. That Act distinguishes fencing covenants, which exempt one party from fencing costs, from other types of fencing agreements. Both types are registrable against the title to land under the Torrens system and are capable of binding successors in the title of the covenantor. Following complaints that common fencing covenants were clogging the land register, power was given to parties to require lapsed fencing covenants to be removed from the register and it is now provided that the registration of fencing covenants expires after twelve years.[43]

4.31 The Commission sought information and opinions on this system of registration through the New Zealand Registrar-General of Land. It appears that fencing covenants are very frequently registered while other types of fencing agreements are rare. In practice, therefore, little is achieved which is not currently possible in New South Wales by the entry of restrictive covenants on the register. Also, the New Zealand system can create problems for both conveyancers and the Land Titles Office. It may be difficult to establish whether fencing covenants and agreements are still operative when a search of the register is made. Registration of documents may be hampered when they are not made subject to a subsisting fencing covenant. The consequences of registered fencing covenants are compounded for conveyancers since it appears from decided cases that a subsisting fencing agreement which has not been disclosed by the vendor may constitute a blot on the title which entitles the purchaser to rescind the contract.[44] The introduction of a special system for the registration of fencing agreements would also involve considerable extra work for the Land Titles Office. As it appears that the costs of such a system would not be met with any substantial benefits the Commission declines to make any recommendations for its introduction.

VIII. OPTIONS TO PURCHASE

4.32 Section 19 of the Dividing Fences Act provides that if land is subject to an option to purchase and that option is subsequently exercised, all contributions towards the construction or repair of dividing fences which were paid by the owner of the land during the time the option existed shall be paid to that owner by the person exercising the option. This provision is anomalous and the Commission can see no reason for its existence. It was first introduced in the 1951 Act without explanation, and is not paralleled in any other dividing fences legislation in Australia or New Zealand. As there is no time limit on the liability of the person exercising the option (the optionee), and as such an option may extend for a considerable period, an optionee nay end up paying for a fence which decayed long before the option is exercised. The Commission therefore recommends that s19 of the Dividing Fences Act should be repealed.

FOOTNOTES

1. Decided on 18 April 1961 and reported in (1981) 5 *Petty Sessions Review* 2398. The same conclusion was reached in the District Court by Stephen DCJ in *Votrubec v Scott* (1964) 6 Law Book Co's Land Laws Service 204.

2. [1981] 2 NSWLR 77 at 79.

3. (1985) 3 Butterworths Property Reports 9387 at 9389.

4. *Dalton v Angus & Co* (1881) 6 App Cas 740; *Backhouse v Bonomi* (1861) 9 HLC 503; 11 ER 825 per Lord Cranworth at 829; *Ulrick v Dakota Loan & Trust Co* (1891) 49 NW 1054.

5. *Public Trustee v Hermann* [1968] 3 NSWR 94; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; Sir Robert Mmegarry and HWR Wade, *The Law of Real Property* (5th ed Stevens 1984) at 842-843.

6. *Da1ton v Angus & Co* (1881) 6 App Cas 740; Johns v Delany (1890) 16 VLR 729 Higginbotham CJ at 733 *Byrne v Judd* [1908] NZLR 1106; A 3 Bradbrook and M A Neave, *Easements and Restrictive Convenants in Australia* (Butterworths 1981) at 143. This rule has been abrogated by the New Zealand Court of Appeal: *Bagnuda v Upton & Shearer Pty Ltd* [1972] NZLR 741, adopting the United States approach which imposes liability upon adjoining owners for negligent withdrawal of lateral or subjacent support (see *Restatement Torts* 2d, ss819, 821; *Walker v Strosnider* (1910) 67 SE 1087).

7. *Bower v Peate* (1876) 1 QBD 321; *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127.

8. *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165; *Hall v Duke of Norfolk* [1900] 2 Ch 493; *Restatement, Torts* 817 note j; *McKamy v Bonanza Sirloin Pitt, Inc*. (1976) 237 NW 2d 865. The contrary position, that the duty to maintain support is incumbent upon owners so that they are required to maintain retaining walls, was taken in *Foster v Brown* (1920) 55 DLR 143, *Gorton v Schofield* (1942) 41 NE 2d 12, and recently in *Salmon v Peterson* (1981) 311 NW 2d 205.

9. [1908] NZLR 1106.

10. *Thynne v Petrie* [1975] Qd R 260.

11. Bradbrook and Neave, note 6 at 149.

12. See eg *Stoneman v Lyons* (1975) 133 CLR 550 per Stephen J at 566-567.

13. (1987) 9 NSWLR 738, affirming the decision of Cohen 3, reported in (1985) 3 *Building and Construction Law* 115.

14. Local Government Ordinance 70 cl 31.

15. Law Reform Commission of Western Australia *Report on Alteration of Ground Levels* (Project No 44, 1986).

16. Dividing Fences Act 1951 s14(2)(b).

17. Fences Act 1975 (SA) sub-ss16(2), (3).

18. (1980) 1 Butterworths Property Reports 9273 at 9277.

19. [1955] VLR 52 at 59.

20. Cf *Payne v Payne* [1969] NZLR 509 where Macarthur J thought that the doctrine of substantial performance applied to dividing fences legislation, even though a fencing agreement was in the nature of a statutory contract.

21. Project No 33 (1975) at 25.

21. *Mayor etc of the Borough of New Plymouth v Taranaki Electric Power Board* [1933] AC 680 at 682; *Spillers Ltd v Carditt (Borough) Assessment Committee* [1931] 2 KB 21; Re *Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430 at 440-441.

22. *Harding v Board of Lands and Works* (1882) 8 VLR (L) 402 at 412; Ramsay v Offer (1918) 20 WAR 65; *Minister of Works v Antonio* 54 at 61-62.

23. B A Helmore *The Law of Real Property in New South Wales* (2nd ed Law Book Co 1966) at 43. The common law presumption is deemed to apply to Torrens title land by s45A of the Real Property Act 1900.

24. See, however, *Fawaz v Khan* (1919) VLR 132 at 136, where Hood 3 of the Victorian Supreme Court held that "lands may be adjoining within the meaning of [the Dividing Fences] Act even though separated by a creek." The case was affirmed by the High Court without specific reference to this point: *Khan v Fawaz* (1919) 27 CLR 289.

25. Boundary Fences Act 1908 (Tas) s19; Fencing Act 1978 (NZ) s18; Law Reform Commission of Tasmania *Report on the Boundary Fences Act 1908* (Report No 37, 1984) at 13.

26. Fences Act 1975 (SA) s11; Fences Act 1972 (NT) s16.

27. Law Reform Commission of Western Australia *Report on Dividing Fences* (Project No 33, 1975) at 19, 31.

28. Pastures Protection Act 1934 s127.

29. *Crow v Wood* [1971] 1 QB 77 at 85 per Lord Denning MR.

30. A J Bradbrook and M A Neave, note 6 at 169-170.

31. *Hamilton v Joyce* [1984] 3 NSWLR 279 at 289-90 per Powell J.

32. Egerton v Harding [1975] QB 62 at 68 (Court of Appeal); Jones v Price (1965) 2 QB 618 at 636 per Willmer LJ.

33. *Crow v Wood* [1971] 1 QB 77; Law of Property Act 1925 (UK) s62. For discussions of this case, see (1971) 87 *LQR* 13; (1971) 45 *ALJ* 155.

34. Conveyancing Act 1919 s67(5). However, Starke J noted in *Dabbs v Seaman* (1925) 36 CLR 538 at 574-5 that the same result could be achieved by the comprehensive definition of land in s3 of the Real Property Act 1900 and the effect of ss42 and 47 of the same Act, which relate to easements.

35. *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618; see also R A Woodman *The Law of Real Property in New South Wales* vol 1 (Law Book Co 1980) at 302-303, 307.

36. *Jobson v Nankervis* (1943) 44 SR (NSW) 277; *Cowlinshaw v Ponsford* (1928) 28 SR (NSW) 331 at 333, 336 per Harvey CJ in Eq; A J Bradbrook and M A Neave, note 6 at 181.

37. Animals Act 1977 ss4, 7.

38. Law Reform Committee of South Australia *Report Concerning the Amendment of the Law Relating to Fences and Fencing* (Report No 27, 1972) at 7.

39. Condition 16 of the Agreement for Sale of Land (1986 edition), published by the Law Society of New South Wales and the Real Estate Institute of New South Wales; see P J Butt *The Standard Contract for Sale of Land in New South Wales* (Law Book Co 1985) at 787-789.

40. *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750. For an explanation of the law of covenants affecting land, see Peter Butt *Introduction to Land Law* (Law Book Co 1980) ch 16.

41. *Report of the Committee on Positive Covenants Affecting Land* (Cmnd 2719 (1965) at 2.

42. Conveyancing Act 1919 s88(3).

43. Fencing Act 1978 (NZ) ss2, 5-6; Land Transfer Act 1952 (NZ) s71; G W Hinde, D W McMorland and P B A Sim *Land Law* (Butterworths 1979) at 1211-1213.

44. *Meickle v Gibbons* (1913) 32 NZLR 698; *Nunn v McGowan* [1931] NZLR 47.

Appendix A - Draft Legislation

Dividing Fences Bill 1988
Miscellaneous Acts (Dividing Fences) Repeal and Amendment Bill 1988

DIVIDING FENCES BILL 1988

NEW SOUTH WALES

[STATE ARMS]

TABLE OF PROVISIONS

DIVIDING FENCES BILL 1988

NEW SOUTH WALES

[STATE ARMS]

A BILL FOR

An Act to provide for the apportionment of the cost of dividing fences.

The Legislature of New South Wales enacts:

PART 1 - PRELIMINARY

Short title

1. This Act may be cited as the Dividing Fences Act 1988.

Commencement

2. This Act commences on a day 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 reasonably necessary for the operation of the fence; and

(b) any natural or artificial watercourse which separates the lands of adjoining owners; and

(c) any foundation, foundation wall or support reasonably necessary for the support and maintenance of the fence,

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

"fencing work" means -

(a) the design, construction, replacement, repair or maintenance of a fence, in whole or in part; 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 trimming, replanting and care 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 fence;

"lease" includes a sublease and an agreement for a lease; "local land board" means a local land board constituted under the Crown Lands Consolidation Act 1913 or under the Western Lands Act 1901 for the district in which the fence concerned is or is proposed to be located or, if the 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 -

(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 leased would be entitled to receive) the 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 fence"

4. If, in any proceedings under this Act, a court or local land board has to determine what is the standard for a sufficient fence for the purposes of this Act, the court or board shall have regard to all the circumstances of the case, including the following matters:

(a) the kind of fence usual in the locality;

(b) the purposes for which the adjoining lands are used or intended to be used;

(c) any policy or code relating to fences which has been adopted by the council of the local government area in which the adjoining lands are situated;

(d) the privacy of the persons occupying the adjoining lands;

(e) any relevant rule, regulation, by-law, ordinance or 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 -

(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) Subsection (1) only applies if the fence has been used or, in the opinion of a court or local land board can reasonably be used, as a dividing fence by the owners of the land on either side of it.

Circumstances in which Act binds Crown and local or public authorities

6. This Act binds the Crown and any local or public authority in respect of land of the Crown or the authority which is -

(a) situated in -

(i) a city or municipality; or

(ii) a shire, or part of a shire, in which the council of the shire may control and regulate the erection of buildings under Part 11 of the Local Government Act 1919; or

(b) less than one hectare in area; or

(c) prescribed land.

Relationship to other Acts

7. Nothing in this Act affects the Western Lands Act 1901, the Closer Settlement Acts, the Public Works Act 1912, the Crown Lands Consolidation Act 1913, section 232(e) of the Local Government Act 1919, the Pastures Protection Act 1934, section 13TC of the Maritime Services Act 1935, the Bush Fires Act 1949 or the Mining Act 1973.

Act not to affect agreements etc. or doctrine of right of support to land

8. Nothing in this Act affects -

(a) any covenant, contract or agreement in respect of a dividing fence or fencing work made before or after the commencement of this Act between adjoining owners; or

(b) any law relating to retaining walls (not being dividing fences), easements of support or other rights of support in relation to land.

PART 2 - LIABILITY FOR FENCING WORK

Liability for fencing work

9. If, in respect of adjoining lands, there is no sufficient dividing fence, an adjoining owner is liable to join in or 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 fence.

Contribution as between adjoining owners

10. (1) Adjoining owners are liable to join in or 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 fence.

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

(3) Nothing in this section affects section 12.

Contribution if immediate fencing work required

11. (1) If a dividing fence -

(a) is damaged or destroyed, in whole or in part; and

(b) requires urgent or immediate fencing work,

either adjoining owner may carry out the work and, except where section 12 applies, may recover half the cost of the work from the other adjoining owner.

(2) If practicable in the circumstances, the owner proposing to carry out the fencing work shall serve a notice under section 15 on the other adjoining owner.

(3) Failure to serve the notice does not prevent the owner proposing to carry out the fencing work from recovering half the cost of the work.

Liability for damage caused by negligent or deliberate act 12.

(1) If a dividing fence is damaged or destroyed by a negligent or deliberate act of an adjoining owner or a person who has entered the land with the express or implied consent of the owner, the owner is liable, except as provided by subsection (3), for the whole cost of the fencing work required to restore the fence to a reasonable standard, having regard to its state before the damage or destruction.

(2) If the owner fails to restore the fence to a reasonable standard, the other adjoining owner may carry out the fencing work required and recover the cost of the work from the owner at fault.

(3) Nothing in this section or in any other law affects the application of section 10 (apportionment of liability in case of contributory negligence) of the Law Reform (Miscellaneous Provisions) Act 1965 if both adjoining owners are partly at fault.

Apportionment of cost between lessor and lessee

13. (1) The cost, as between a lessor and a lessee of the owner, in respect of fencing work carried out on land occupied by the lessee is payable according to the unexpired term of the lease at the time the work is carried out, as follows:

(a) if the term has less than 5 years to run, the cost is payable wholly by the lessor;

(b) if the term has 5 years or more but less than 7 years to run, 25 per cent of the cost is payable by the lessee and 75 per cent of the cost is payable by the lessor;

(c) if the term has 7 years or more but less than 12 years to run, 50 per cent of the cost is payable by both the lessee and the lessor;

(d) if the term has 12 years or more to run, the cost is payable wholly by the lessee.

(2) If either the lessor or the lessee pays more than the proportion of the cost payable as determined by this section, the lessee or lessor may recover the excess from the other, and the lessee may set off any amount he or she may recover against any rent payable to the lessor.

Fencing easements etc. extinguished

14. No obligation to perform fencing work arises or shall be taken to arise by prescription or implication under the common law.

PART 3 - ENFORCEMENT

Notice to carry out fencing work

15. (1) An owner who desires to compel an adjoining owner to join in or contribute, under this Act, to the carrying out of fencing work shall serve a notice to that effect on the adjoining owner.

(2) The notice must -

(a) specify -

(i) the boundary line on which the fencing work is proposed to be carried out; or

(ii) if it is impracticable to carry out fencing work on the common boundary of the adjoining lands because of the physical features of the land, the line on which it is proposed to carry out the work; and

(b) specify the type of fencing work to be carried out; and Cc) specify the estimated cost of the fencing work.

(3) If the owner serving the notice proposes that the cost of the fencing work be borne otherwise than in equal proportions, the notice must state the proportions that are proposed.

(4) An adjoining owner is not liable to contribute to the cost of any fencing work -

(a) that is carried out before a notice under this section is served on the adjoining owner (unless the notice is served pursuant to section 26); or

(b) that is 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 or the matter has been determined by a Local Court or local land board.

(5) A duly completed notice in the form prescribed for the purposes of this section by the regulations is a sufficient notice for the purposes of this section.

Means of service of notices

16. (1) A notice under section 15 may be served on a person for the purposes of this Act -

(a) by delivering the notice personally to the person; or

(b) by delivering the notice at the usual or last known place of residence of the person and leaving it with a person at that place who is apparently above the age of 16 years; or

(c) by sending the notice by post to that place.

(2) Service of a notice may be proved by affidavit or orally.

(3) 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 it.

Procedure if agreement not reached

17. (1) If an owner who serves a notice under section 15 and the adjoining owner on whom the notice is served do not agree within 1 month after service of the notice as to the fencing work to be carried out -

(a) the owners may attend a Community Justice Centre in an attempt to reach an agreement concerning the fencing work; or

(b) either owner may apply to a Local Court or a local land board for an order determining the manner in which the fencing work is to be carried out.

(2) If -

(a) an application under this section is pending in a Local Court or local land board (in this subsection called "the first tribunal"); and

(b) it appears to the first tribunal that, having regard to -

(i) the subject-matter of the application; and

(ii) the composition and nature of a Local Court or local land board which has jurisdiction to determine the application (in this subsection called "the second tribunal")

it is more appropriate that the application be determined by the second tribunal than by the first tribunal,

the first tribunal shall transfer the application to the second tribunal.

(3) A Local Court or local land board which has an application transferred to it under subsection (2) shall 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, shall lie in respect of the decision.

Mediation agreements binding

18. (1) Any agreement by adjoining owners in respect of fencing work reached at, or drawn up pursuant to, a mediation session within the meaning of the Community Justice Centres Act

(a) must be in writing; and

(b) may be in such form as may be prescribed for the purposes of section 15 by the regulations; and

(c) shall be binding and is admissible in evidence in any proceedings before any court.

(2) Sections 23(3) and 28(5) of the Community Justice Centres Act 1983 do not apply to an agreement referred to in subsection (1).

Orders to carry out fencing work

19.(1) Pursuant to an application under section 17 (l)(b), a Local Court or local land board nay 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 kind of fence to be constructed or the extent to which an existing fence is to be replaced, repaired or maintained;

(c) which portion of the fence is to be constructed or repaired by either owner;

(d) the time within which the fencing work is to be carried out;

(e) the amount of any compensation (in the form of an annual payment to be paid to either of the adjoining owners) in consideration of loss of occupation of any land;

(f) that, in the circumstances, no fence is required in respect of all or part of the boundary of the adjoining lands;

(g) in the case where a notice has been served pursuant to section 26, the amount of contribution to be paid by the adjoining owner on whom the notice has been served.

(2) If such an order determines that fencing work is to be carried out otherwise than on the common boundary of the adjoining lands, the occupation of land on either side of the fence as a result of the order shall not be 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.

(3) A Local Court may refer the parties to a dispute under this Act -

(a) to a mediation session within the meaning of the Community Justices Centres Act 1983; or

(b) to an arbitrator within the meaning of the Arbitration (Civil Actions) Act 1983.

Enforcement of agreements and orders

20. If, in respect of fencing work -

(a) an agreement is reached by adjoining owners; or

(b) 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 time specified in the agreement or order (or if no time is specified, within 3 months after the making of the agreement or order) to perform his or her part of the agreement or to comply with the order, then the other adjoining owner -

(c) may carry out the fencing work as agreed on or determined by the order; and

(d) may recover from the defaulting adjoining owner -

(i) the amount agreed or ordered to be paid by that adjoining owner; or

(ii) if the agreement or order does not specify the amount to be paid, half the cost of the fencing work so carried out.

Substantial compliance sufficient

21. Substantial compliance with the terms of any agreement or order referred to in section 20 is sufficient for the purposes of this Act, but the adjoining owner who performs the fencing work or causes the fencing work to be performed is liable to compensate the other adjoining owner for any defect or omission in the fencing work.

Application for order in absence of an adjoining owner

22. (1) On the application of an adjoining owner who satisfies a Local Court or local land board that he or she has made reasonable inquiries but has been unable to ascertain the whereabouts of the owner of the adjoining land for the purposes of serving a notice under section 15, the Court or board may make an order in the absence of the other adjoining owner authorising the carrying out of such fencing work as is specified in the order.

(2) If an adjoining owner carries out the fencing work authorised by the order and later ascertains the whereabouts of the other adjoining owner, he or she -

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

(b) shall, after I month from the date of service, be entitled to recover from the other owner half the original cost of carrying out the fencing work.

(3) The owner served with a copy of an order under subsection (2) 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 accordingly.

Proceedings for defining boundary line

23. (1) If adjoining owners do not agree as to the position of the common boundary line for the purposes of carrying out fencing work, either owner may give notice to the other of his or her intention to have the common boundary line defined by a registered surveyor.

(2) The owner to whom notice is given shall, within 7 days after service of the notice -

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

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

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

(3) If within 1 month after service of the notice 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 defined by a registered surveyor,

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

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

(5) In any other case, if a registered surveyor has been employed, all reasonable expenses shall 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.

24. (1) Subject to subsection (2), any order made by a Local Court or local land board under this Act is final.

(2) 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.

PART 4 - MISCELLANEOUS

Right to enter adjoining land

25. A person engaged in carrying out fencing work under this Act (including the person's employees or agents) may, at any reasonable time, enter on the land adjoining the fence for the purpose of carrying out the work.

Time for service of notices

26. If a Local Court or local land board considers it to be just and equitable in the circumstances, the Court or 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.

Costs

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

Recovery of money payable

28. (1) Any money which a person 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 19 or 22 is evidence of the matters set out in the certificate.

Regulations

29. 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.

MISCELLANEOUS ACTS (DIVIDING FENCES)

REPEAL AND AMENDMENT BILL 1988

NEW SOUTH WALES

[STATE ARMS]

TABLE OF PROVISIONS

MISCELLANEOUS ACTS (DIVIDING FENCES)

REPEAL AND AMENDMENT BILL 1988

NEW SOUTH WALES

NSW Law Reform Commission: REPORT 59 (1988) - COMMUNITY LAW REFORM PROGRAM: DIVIDING FENCES

[STATE ARMS]

A BILL FOR

An Act to repeal the Dividing Fences Act 1951; and to amend various Acts and to enact certain savings and transitional provisions as a consequence of the enactment of the Dividing Fences Act 1988.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Miscellaneous Acts (Dividing Fences) Repeal and Amendment Act 1988.

Commencement

2. This Act commences on the commencement of the Dividing Fences Act 1988.

Repeal of Dividing Fences Act No. 8 1951

3. The Dividing Fences Act 1951 is repealed.

Amendments

4. Each Act specified in Schedule 1 is amended as set out in that Schedule.

Savings and transitional provisions

5. Schedule 2 has effect.

SCHEDULE 1 - AMENDMENTS

(Sec. 4)

Local Government Act 1919 No. 41

Section 232(e) -

Omit “, 1951”, insert instead “1988”.

Maritime Services Act 1935 No. 47

Section 13TC -

Omit “, 1951,”, insert instead “1988”.

Stock Diseases Act 1923 No. 34

Section 13(4) -

Omit “, 1902”, insert instead “1988”.

Strata Titles Act 1973 No. 68

Section 149 -

Omit “, 1951”, insert instead “1988”.

Strata Titles (Leasehold) Act 1986 No. 219 Section 187 -

Omit “1951”, insert instead “1988”.

SCHEDULE 2 - SAVINGS AND TRANSITIONAL PROVISIONS

(Sec. 5)

Definitions

1. In this Schedule -

“the new Act” means the Dividing Fences Act 1988; “the old Act” means the Dividing Fences Act 1951.

Construction of references

2. On and from the commencement of the new Act, a reference (however expressed) in any other Act (whether assented to before, on or after that commencement), or in any regulation, by-law or other statutory instrument, to the old Act shall be construed as a reference to the new Act.

Savings as to proceedings etc.

3. All matters and proceedings commenced under the old Act and pending or in progress at the commencement of the new Act, shall be continued, completed and enforced under the new Act as if they had been commenced under the new Act.

Operation of section 12 of new Act

4. For the purposes of determining an adjoining owner s liability under section 12 (liability for damage caused by negligent or deliberate act) of the new Act, it does not matter if the negligent or deliberate act concerned took place before the commencement of the new Act.

Appendix B - Fencing Notice

FENCING NOTICE
Dividing Fences Act 1988

To: (Name)

(Address)

The fencing work described on the attached proposal is required between our adjoining properties. I would be pleased if you would contribute to the extent shown.

(Signature)

(Name)

(Address)

(Telephone)

(Date)

IMPORTANT - YOU SHOULD READ THE NOTES N THE NEXT PAGE

NOTES FOR OWNERS

The **DIVIDING FENCES ACT** provides a simple procedure for the settlement of conditions under which fences dividing the properties of neigh-bouring owners are constructed or repaired. If one owner wants fencing work to be undertaken between two properties and wishes the owner of the neighbouring property to contribute towards the cost of the work, a notice should be sent to the other owner containing details of the proposed work. “Fencing work” includes the construction of a new fence, replacement of an existing fence, and repair of a fence.

Normally the owners of the properties affected must pay half the cost of fencing work which results in a sufficient fence. Whether an existing or proposed fence is sufficient depends on all the circumstances of each case, including these factors:

the kind of fence which is usual in the area

the purposes for which both properties are or will be used

the privacy of the persons occupying the properties

a policy or code adopted by the local council

other relevant laws, such as environmental planning instru-ments

If the proposed work is more expensive than work needed for a sufficient fence, the extra cost should be paid by the person wanting the special fence unless both owners agree to share the total cost.

The contribution between owners towards fencing work may be altered by an agreement between them. An agreement may be in any form, but it is recommended that the attached form be used. When completed, an agreement is legally binding. If one owner fails to perform his or her duties under it, the other owner may do the fencing work and recover the other owner's share from a court.

If a notice has been served on am owner and no agreement has been reached within one month, either owner may seek a hearing before a magistrate of a Local Court (disputes may also be heard by the local land board). The magistrate may order the owner who was served with the notice to contribute towards the cost of fencing work, and may order an owner to pay court and other costs. As this may involve large additional expense, both owners should try to come to an agreement before any legal action is taken.

Many local councils regulate the types and location of fences. You should check with your local council to see whether a fence code or policy is available. In some cases a building application may be required.

FENCING PROPOSAL

1. Properties affected (Street address):

(A) .....owned by.....

and

(B) .....owned by.....

2. **Fencing work to be done by** (name):

3. **Position of fencing work** (tick one box only):

on the existing fencing line [ ]

as indicated on the attached plan or description [ ]

4. **Length of fencing work** ..... metres

5. **Height(s) of fencing work:** .....

6. **Type(s) of fence:** .....

7. **Materials** .....

8. **Completion:** The fencing work will be completed by (date) If not completed within a reasonable time after that date, either of us may complete the fencing work and recover half the cost of the uncompleted fencing work from the other owner, as provided by section 20 of the Dividing Fences Act 1988.

10. **Contribution:** (name) will pay for the fencing work and will be paid the sum of $ by the other adjoining owner on completion.

(If another method of contribution is wanted, delete the above sentence and describe the method below):

.....

.....

AGREEMENT OF OWNERS

Property A

I/we agree to the above proposal

.....

(Signature)

(Address) .....

.....

(Date) .....

Property B

I/we agree to the above proposal

.....

(Signature)

(Address) .....

.....

(Date) .....

[Plan or Description]

Appendix C - Submissions Received

Institutions

Council of the City of Armidale

Council of the Municipality of Auburn

Baulkham Hills Shire Council

Burwood Municipal Council

Campbelltown City Council

Council of the Municipality of Casino

Central Western Law Society

Cessnock City Council

Community Justice Centres

Conference of Chamber Magistrates

Crown Lands Office

Department of Agriculture and Fisheries

Department of Education

Department of Family and Community Services

Department of Housing

Department of Lands

Department of Local Government

Dubbo City Council

Far Western Law Society

Fencing Industry Association of Australia,

Forestry Commission of New South Wales

Council of the Shire of Gunning

Hastings Municipal Council

Council of the Municipality of Holroyd

Council of the Municipality of Hunter’s Hill

Inverell Shire Council

Kempsey Shire Council

Council of the Municipality of Kogarah

Ku-ring-gai Municipal Council

Law Society of New South Wales

Legal Aid Commission

Council of the City of Lismore

Liverpool City Council

Local Government and Shires Associations

Manly Municipal Council

Council of the Municipality of Marrickville

Marrickville Legal Centre

Murrumbidgee Shire Council

Nambucca Shire Council

National Parks and Wildlife Service

Pastures Protection Boards Association

Penrith City Council

Council of the City of Queanbeyan

Redfern Legal Centre

NSW Branch

Richmond River Shire Council

Ryde Municipal Council

Scone Shire Council

Shoalhaven City Council

State Rail Authority of New South Wales

Council of the Municipality of Strathfield

Tamworth Pastures Protection Board

Council of the City of Wagga Wagga

Western Lands Commission

Wingecarribee Shire Council

NSW Law Reform Commission: REPORT 59 (1988) - COMMUNITY LAW REFORM PROGRAM: DIVIDING FENCES

Individuals

Mrs R L Abbott, Stroud Road

Mr R J Bartley, Solicitor, Bondi

Ms Louise Berry, Solicitor, Annandale

Mr Kevin Blume, Hill & Blume, Registered Surveyors

Mrs P Blyth, Loftus

Mr & Mrs F N Clancy, Queanbeyan

Confidential 1

Confidential 2

Mr John Cox, Local Government Association

Mr A Cutajar, Woden ACT

Mr H A Davidson, Cox Wiseman & Davidson, Solicitors, Wollongong East

I J and J L Dolbel, Rockley

Mr Laurence Elliott, Berry

Mr J Esterhuizen, Eungella

Mrs B M Fallon, Berkeley Vale

Mr Peter Forgarty, Solicitor, Leichhardt

Mrs Ivy Gorrie, Dorrigo

Mr A Heath, Bilgola Plateau

Mr T K Heffernan, Gunning

Mr Michael Henry, Newcastle

Mr J Holley, Punchbowi

Mr R Howard, Cardiff South

Mrs J Johnston, Bowraville

Mr Ian M Johnstone, A W Simpson & Co, Solicitors, Armidale

Ms Katherine Kovaras, Solicitor, St Leonards

Mr John Lane, Kempsey

Mr P F Larkin, Coolongolook

Mrs Lemach, Neutral Bay

Mr J N McGufficke, Jindabyne

M A and O A McKinnon, Narrandera

Mr A A McLellan, Solicitor, Scone

The Hon Mr Justice Mullane, Newcastle

Mrs Vera Naylor, Gladesville

Mr Ken 0'Hara, Drummoyne

Mrs Patricia Pendergast, Jindabyne

Mr R S Peterswald, Johnson & Sendall, Solicitors, Goulburn

Mr A Pilarski, Queanbeyan

Mr T R Port, Shire Clerk, Nambucca Shire Council, Bowraville

Mr S Roebuck, Five Dock

Mrs E Russell. Gosford

Ms A Schmidt, Lavington

Mr M C Saines, Young

Mr R C Shannon, Maclean

Mr David Shirlow, Solicitor, Glebe

Mr P C Simpson, Goulburn

Mr Harry Stanley, Broken Hill South

Mr Robert Steel, Bondi Junction

Mr W J Warriner, Kaleen ACT

Mr Ian Worrell, Barradine

Mr K Young, Gorokan