

# Dividing Fences

The Dividing Fences Act 1991 (NSW) addresses how the cost of a dividing fence is shared between adjoining land owners where an owner wants to erect a dividing fence or repair or renovate an existing dividing fence.

It sets out the minimum requirements and owners may always agree to an arrangement exceeding those requirements. The Act also details the procedure for resolving disputes involving the cost, type and position of a fence.

Under the Act, a 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. The cost of a dividing fence includes the cost of all related fencing work, such as surveying, preparation of land, design, construction, replacement, repair or maintenance of the dividing fence.

It is worth noting that the Dividing Fences Act only covers situations where a financial contribution is sought. If your neighbour wants to bear the whole expense of a fence on their land, you may not be able to influence the type of fence that they decide on. However, if the proposed fence requires council approval, you may have the opportunity to lodge an objection

Restrictions concerning the style of dividing fence may operate in your local area because of council policies, heritage protection or restrictive covenants (e.g. a subdivision may have an agreement that all fences be of a particular type). Also some fences may need council approval. Check your local council website for any guidelines concerning fences in your area.

Special fencing requirements apply where the boundary or dividing fence forms part of the child resistant barrier that must surround a swimming pool.

## DIVIDING FENCES ACT

The *Dividing Fences Act 1991* regulates neighbours' responsibilities towards dividing fences and is designed to settle the contentious aspects of sharing a fence. Nothing in the Act prevents neighbours coming to their own agreement about a fence, for example that one owner will pay the whole cost, or coming to an agreement that exceeds the requirements set out in the Act.

The *Dividing Fences Act 1991* applies where a landowner wants an adjoining owner to contribute to the costs of constructing, replacing, repairing or maintaining a dividing fence. It covers issues such as cost-sharing, location and the standard of dividing fences and sets out procedures for carrying out the work and resolving disputes.

It does not apply to public authorities such as those with control over Crown land, public parks, reserves and roads. Although not liable under the Act to contribute to fencing costs, the Act does not prevent public authorities from entering fencing agreements, and they are often willing to make some contribution.

The general principle in the Act for liability for costs is that adjoining owners are to contribute equally to the fencing work for a dividing fence of a **sufficient standard**. If an owner wishes to have a fence of a higher standard, that owner is liable for the extra cost above the sufficient standard. If an owner wants to carry out additional trimming, lopping or removal of vegetation than is needed for the purpose of the fencing work, then that owner is liable for the extra work. Where the fencing work includes special requirements for enclosing a swimming pool, in accordance with the *Swimming Pools Act 1992*, these extra expenses must be met by the owner of the property that contains the pool (*Swimming Pools Act 1992*, section 33).

Where the dividing fence needs rebuilding or repairing because of negligent or deliberate damage caused by an adjoining owner (or by a person entering the land with their permission) that owner is liable for the entire cost of restoring it to a reasonable standard.

Under the *Dividing Fences Act 1991*, a dividing fence is a fence separating the land of adjoining owners whether or not it is on the common boundary. It can be a structure, ditch, embankment, hedge or similar vegetative barrier and includes:

- any gate, cattlegrid or apparatus necessary for the operation of the fence
- any natural or artificial watercourse that separates the land of the adjoining owners
- any foundation or support necessary for the support and maintenance of the fence.

It does not include a wall that is part of a house, garage or other building and it only includes a retaining wall where the retaining wall is a foundation or support necessary to the support and maintenance of the fence (*Dividing Fences Act 1991*, section 3).

As well as the construction, replacement, repair and maintenance, the fencing work involved also includes:

- design
- surveying
- preparation of the land along or on either side of the common boundary (for example trimming, lopping or removing vegetation)
- planting, replanting or maintaining a hedge or similar vegetative barrier
- cleaning, deepening, enlarging or altering any ditch, embankment or water course that serves as a dividing fence.

The procedure set out in the Act to require a neighbour to contribute, is to issue the neighbour with a Fencing Notice containing the details of the proposed work. Where the neighbour is a tenant, the Fencing Notice would usually be issued to the owner (sections 11 and 3). It can only be issued to a tenant where the unexpired term of the tenancy, at the time of issuing the fencing notice, is five years or more. There is no standard format for a valid Fencing Notice but section 11 of the Act states that it must specify:

- the boundary line or, if impracticable, the line of the proposed fence
- the type of fencing work proposed
- the estimated cost, and
- if it is not to be equally shared, then the share proposed.

See [LawAssist Fencing Notices](#) for sample fencing notices and a step by step guide to preparing and serving a fencing notice.

If the parties cannot agree on the fencing work proposed in the notice, they can attend mediation at a Community Justice Centre or, after a month has elapsed, either party can apply to the Local Court or the NSW Civil and Administrative Tribunal (NCAT) for an order deciding the matter (*Dividing Fences Act 1991*, sections 12-13).

Where the fence has been damaged or destroyed and the circumstances require urgent fencing work, the owner can carry out the urgent work without first issuing a fencing notice, if the circumstances make it impracticable. The adjoining owner is still liable for half the cost but this can be reviewed by the the Tribunal or Local Court at a later stage.

The Local Court and the Civil and Administrative Tribunal has jurisdiction under the Act to hear and determine disputes. It can make orders on matters such as:

- the boundary or line the fence will be built on
- the contribution of each party
- the fencing work to be carried out, including the type of fence
- where the neighbours are sharing the work, how the work is to be allocated
- the time frame for the work
- compensation for the loss of occupation of any land
- whether a dividing fence is needed.

In determining the sufficient standard for the dividing fence, the Local Court or Tribunal must consider all the circumstances of the case, including:

- any existing dividing fence
- the purposes the adjoining lands are used for or intended to be used
- the privacy and other concerns of the adjoining landowners
- the kind of fence that is usual in that locality
- any local government policy or code that applies in the area
- any relevant environmental planning instrument relating to the land or locality
- any order in place under the *Western Lands Act 1901* where the land is leased under that Act.

The court or tribunal may also award costs of the case against either party, or order that they be shared. Any order made that involves an amount of money can, if not paid, be pursued as a debt in an appropriate court. Orders made by the court or tribunal are final and can only be appealed to the Supreme Court if there has been an error of law.

## NSW Civil and Administrative Tribunal (NCAT)

This new 'super' tribunal started on 1 January 2014. It replaces various specialist tribunals, including Local Land Boards, which resolved disputes relating to a variety of matters such as dividing fences, Crown leases and road closures.

For information on making an application regarding a dividing fence matter see [dividing fences section](#) of NCAT's Consumer and Commercial Division.

The *Dividing Fences Act 1991* is designed for requiring neighbours to contribute to the costs of a dividing fence. It will not be available for example, where a landowner does not seek a contribution from their neighbour and so does not issue a fencing notice in accordance with the Act.

If you do not like the choice of dividing fence that your neighbour proposes but you are not asked to contribute to its cost, you could try negotiating with the neighbour or try mediation through a Community Justice Centre. If you wish the style of fence to be of your choice, you may wish to issue a fencing notice yourself. Under the Act you will be expected to share the costs involved.

## Reaching an agreement

If you want to build or repair a dividing fence, consult with your neighbour first. Reaching an agreement with them can save the extra cost, delay and strain of a legal dispute that may end up in court or at the NSW Civil and Administrative Tribunal. Do your research beforehand and get quotes to discuss with them the type of fence you want and the possible costs. Find out whether council approval will be needed and any restrictions that apply.

If you and your neighbour can agree on the location and type of fence, the costs and the fencing work involved, put the terms of the agreement in writing and both of you should sign it and keep a copy. The agreement should cover all relevant details of the cost and design, including:

- height
- type of material
- colour
- cost
- position of the fence
- arrangements for the removal of any existing fence
- any additional work that will be done and who will bear these costs.

An agreement between neighbours regarding a dividing fence or an order made under the *Dividing Fences Act 1991* will not be binding on subsequent owners, should one of the properties be sold.