

NEIGHBOUR FENCING DISPUTES

Disagreements over dividing fences can be a source of friction between neighbours. Approached incorrectly, they have the potential to escalate into much more serious situations with police involvement, AVOs and the breakdown of what otherwise had been a good relationship between neighbours.

Following the approach outlined by the relevant law can avoid the situation turning sour and help protect the relationship with your neighbour.

The Law

In New South Wales, the Dividing Fences Act 1991 (DFA) regulates the dividing fences between neighbouring properties and who is responsible for the cost of *fencing work*.

A *dividing fence* is a fence separating the land of adjoining owners, whether it is on the common boundary or not.

Fencing work means:

- (a) the design, construction, replacement, repair or maintenance of the whole or part of a dividing fence, and
- (b) the surveying or preparation of land along or on either side of the common boundary of the neighbouring properties for such a purpose.

A fence is a fence – Right?

Under the DFA, a fence means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners, and includes:

- (a) any gate, cattlegrid or apparatus necessary for the operation of the fence, and
- (b) any natural or artificial watercourse which separates the land of adjoining owners, and
- (c) any foundation or support necessary for the support and maintenance of the fence,
- (d) but does not include a retaining wall (except as provided by paragraph (c)) or a wall which is part of a house, garage or other building.

You can see from the definition that a fence can be something other than a traditional wood paling or metal panel fence.

Who pays for the fencing work?

Generally, adjoining owners are equally responsible for the cost of a *sufficient dividing fence*. Whether a fence is *sufficient* or not depends upon the particular situation. Factors a court will take into account to determine if a fence is sufficient or not include:

- the standard of the existing fence, if any
- the condition of the existing fence, if any
- the way in which the land on either side is used/intended to be used
- privacy and other relevant concerns
- the kinds of dividing fences usual in the area
- local council and other legal requirements

In some cases, an existing fence may be *sufficient* or no fence at all may be *sufficient*.

If one owner wishes to have a dividing fence to a standard higher than what is *sufficient*, then that owner is responsible for the extra cost involved. For example, if one neighbour wants a higher fence than 'normal', then that neighbour is responsible for the extra cost.

Generally speaking, if you are a tenant your landlord is responsible for the cost.

Notice to fence

Because a fence affects owners on each side, the DFA requires an owner to give the adjoining owner notice of any *proposed fencing work*. This is called a *Notice to carry out fencing work*.

There is no set form for a *Notice to carry out fencing work*. However it must be in writing and must include:

- An accurate description of the where the fence will be located
- The type of fencing work to be carried out. For example the material, height, and length of a paling fence
- Who will carry out the fencing work
- An estimated cost of the fencing work. It is advisable to obtain and include a quote with the *Notice to carry out fencing work*
- How much of the cost will be paid by each owner

See page 4 of this fact sheet for an example of a *Notice to carry out fencing work*.

A *Notice to carry out fencing work* can be served on the adjoining owner in person or by post to the owner's usual or last known residential or business address.

After the notice is served, adjoining owners can come to whatever agreement they like about the cost, contribution, type and location of the fence, provided of course that it complies with any relevant council and planning requirements.

A written agreement is the best way to prove what has been agreed to and to ensure that both sides uphold their side of the deal. Anything that has been agreed upon is enforceable. Also, without an agreement an owner does not have permission to enter the adjoining property to carry out the fencing work, and doing so may amount to trespass.

See page 5 of this fact sheet for a sample *Agreement To Carry Out Fencing Work*.

No Notice – no contribution from neighbour

An adjoining owner is not required to contribute to the cost of fencing work carried out before an agreement is reached (unless a court or tribunal determines the work was urgent).

We can't agree – what now?

If there is no agreement within one month after the *Notice to carry out fencing work* has been served, either owner can apply, usually to the New South Wales Civil & Administrative Tribunal (NCAT) or the Local Court, for a fencing order.

The NCAT/Local Court will notify the adjoining owner of the application. If the adjoining owner objects, a hearing is held. A court can make orders about:

- whether a fence should be built
- the location of the fence
- the type of fence
- how the costs will be shared
- when the fence will be built
- which owner will do the fencing work

Generally, the losing neighbour will be ordered to pay the winning neighbour's court costs.

Warning: This fact sheet is for information purposes only and should not be relied upon as legal advice.

This information applies only in New South Wales.

Fact sheet updated June 2014.

Mediation: Before you rush off to the NCAT/Local court, give serious consideration to mediation. In many cases the NCAT/Local Court will conduct/order that the parties attempt conciliation/mediation anyway, before proceeding to a hearing. Mediation is a less formal and less confrontational process, and it's free. The Community Justice Centres are free mediation services funded by the NSW Government. They are located throughout NSW.

Contact details are: 1800 990 777

<http://www.service.nsw.gov.au/nswgovdirectory/community-justice-centres>

The fence has been damaged – who pays?

If a fence needs repair or replacement because of a deliberate or negligent act, the neighbour responsible for the damage must pay all of the costs.

I live next to a park or reserve

Councils and other public authorities that own or control parks, reserves and similar land do not have to contribute to fencing costs.

What if the fence requires urgent repairs?

Urgent repairs can be carried out without giving your neighbour notice and you can ask the neighbour to contribute to half the cost later. If your neighbour does not contribute you can recover the cost in the Local court. You will need to prove the repairs were genuinely urgent and that the circumstances made it impractical to first serve a *Notice to carry out fencing work*. Some examples may include: animals likely to escape, exposing neighbours/passers by to an unprotected swimming pool.

I disagree with the position of the common boundary

Disputes about the position of the boundary between adjoining properties can usually be resolved by having a survey done by a licensed surveyor. If the owners cannot agree to share the surveyor's costs, they can apply to the Land and Property Information for a boundary determination. <http://www.lpi.nsw.gov.au>

What if the fence is not built on the boundary?

A dividing fence is usually built/located on the common boundary between adjoining properties. Sometimes, because of the physical features of the land, it is not possible or reasonable to locate the fence on the common boundary and another position needs to be chosen. If neighbours cannot agree on another position, a Court can order where the fence is to be located.

The 'extra' land that may become available for the adjoining owner's use as a result of the fence not being on the common boundary will still belong to the original owner and the court can order compensation for the use of that land.

Disagreements over dividing fences can be challenging, however following the steps outlined above can help reduce the chances of conflict developing.

South West Sydney Legal Centre can assist with inquiries you may have about dividing fences.

Call us during our free legal advice times.

South West Sydney Legal Centre can assist you with any questions or concerns.

Free Phone Advice 9601 7777

Tuesdays: 12.30pm to 2.00pm

Tuesdays: 4.00pm to 6.00pm

Thursdays: 12.30pm to 2.00pm

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Fact sheet updated June 2014.

SAMPLE

4 January 2014

To:
Mr John Able
10 Paling St
Woodsville 2000

Notice to carry out fencing work

Dear Mr Able,

As you are aware, the existing fence between our boundaries is very old. I have had a professional fencer look at the fence. The fencer is of the opinion that it is more appropriate to replace the fence rather than try to repair it.

Please be advised that I wish to replace the existing fence with a new fence as follows:

Location:

On the boundary between your property, 10 Paling Street and my property, 8 Paling Street, Woodsville.

Type of fence:

Wooden paling fence using hardwood posts, rails and palings.

Height: 1.5 meters

Length: The full length of our boundary, which is about 28.5 metres

See attached quote from Fencers Pty Ltd dated 1.1.2014 for further details.

Fencing work to be arranged and performed by

I propose that I arrange for the fencing work to be done using Fencers Pty Ltd

Cost

The cost of the fence is estimated by Fencers Pty Ltd to be \$1,500. See quote from Fencers Pty Ltd.

Contribution

I propose that we each pay half the cost.

Can you please contact me as soon as possible to discuss agreement to undertake this fencing work.

You can contact me at 8 Paling Street Woodsville or by phone on 1112 111 222

I look forward to your reply.

singed
Adam Chen

SAMPLE
Agreement to Carry Out Fencing Work

Between

John Able of 10 Paling Street Woodsville (Mr. Able)

And

Adam Chen of 8 Paling Street Woodsville (Mr. Chen)

Mr. Able and Mr. Chen agree to carry out fencing work involving the removal and replacement of the existing fence with a new fence as follows:

Existing and New Fence Location

On the boundary between 10 Paling Street and 8 Paling Street, Woodsville.

New fence type

- Wooden paling fence using hardwood posts, rails and palings
- Height: 1.5 metres
- Length: The full length of the boundary, which is about 28.5 meters
- In accordance with the quote from Fencers Pty Ltd dated 1 January 2014 a true copy of which is attached to this agreement

Fencing work to be arranged by

Mr. Chen to arrange and coordinate Fencers Pty Ltd to perform the fencing work

Cost

- The cost of the fence is estimated by Fencers Pty Ltd to be \$1,500
- Mr. Able and Mr. Chen understand that the final cost may vary due to matters outlined in the quote from Fencers Pty Ltd.

Timing

The fencing work is to be completed on or before 15 February 2014

Agreement with Fencers Pty Ltd

Mr. Able and Mr. Chen agree to sign the relevant paperwork for Fencers Pty Ltd to commence and perform the fencing work.

Contribution

- Mr. Able and Mr. Chen each pay half the deposit required by Fencers Pty Ltd to commence the fencing work on or before 15 January 2014 by direct payment to Fencers Pty Ltd.
- Mr. Able and Mr. Chen to pay the balance of the final cost of the fencing work within 7 days after completion by direct payment to Fencers Pty Ltd.

Dated this 10th day of January 2014

Singed by John Able
Signature print name

Singed by Adam Chen
Signature print name