

The Fences Act Review
C/o Department of Justice
Level 24, 121 Exhibition Street
Melbourne VIC 3000

21 February 2013

Via email: civil.law@justice.vic.gov.au

Dear Sir/Madam,

Dividing fences review – proposals to reform the *Fences Act 1968*

Loddon Campaspe Community Legal Centre (LCCLC) welcomes the opportunity to comment on the proposed reforms to the *Fences Act 1968*.

In summary, we submit that:

- Liability for the construction and maintenance of boundary fences lie with the registered proprietors of the abutting properties,
- Procedures for litigation of fencing disputes be clear and simple, and the instruments of application be purpose designed,
- The procedure for litigation of fencing disputes includes compulsory mediation.

About LCCLC

LCCLC is a generalist community legal centre based in Bendigo, servicing Central Victoria and the Goulburn Valley through our Goulburn Valley CLC division. LCCLC provides free legal advice and assistance to people who cannot afford a private solicitor or who are ineligible for legal aid.

Fencing disputes

Fencing matters which come to generalist community centres are usually referred to mediation services once preliminary advice is provided about legal rights and remedies. Matters often return to centres where mediation is not successful. At that stage, litigation is the most likely action. Centres often provide advice and sometimes representation to litigate in these circumstances.

LCCLC has reviewed the Department of Justices' document *Dividing fences review Proposals to reform the Fences Act 1968* and we make the following submissions.

Shifting liability from occupiers to owners

A shift of liability from occupiers to owners would be more just than the present situation: Non-owner occupiers are usually tenants and fencing is an improvement in property. It adds to the value of a property which is of primary and enduring benefit to the owner, not the tenant. It should be the responsibility of the person who will enjoy the primary and enduring benefit to bear the responsibility and immediate financial burden for the cost or partial cost of construction, repair or replacement.

Entitlement to require 'sufficient fence'

It is not our experience that the present Act causes a problem when neighbours have different fencing preferences or needs. It is established law that the neighbour with the greater or more costly preferences or needs should bear the related additional expense.

The question of what constitutes a reasonable or sufficient fence is vague and this is usually to the advantage of those intending to construct a fence. Rigid specifications, such as those seen in covenants, often do not satisfy the individuality of owners. The guidelines for determining what constitutes a sufficient fence, as proposed in the paper, closely resemble present practice.

Fairer rules for apportioning contribution

We agree that where properties of different use abut, the cost of fencing borne by each proprietor should reflect their own need. However, the need of the properties should be based in the first instance on their zoning or permitted use and not their actual use. Owners who then have special or peculiar needs, such as for certain animals or for pools etc. should contribute to the extent of these needs on a case-by-case basis. Contrast the generic scenario where agricultural land residential land, where the cost of constructing or repairing residential fencing should be borne by the residential owner.

Providing guidance for the location of a dividing fence

Experience shows that, particularly in old areas, fences are frequently not on the surveyed boundary. Proprietors who survey their properties and find the fences out of place in their favour, can seek a grant of adverse possession, or more commonly, negotiate with their neighbour to purchase the encroached property through a Not in Common Ownership re-subdivision of the property.

Legislation which required fences to be on the surveyed boundary should only apply to newly constructed fences, not repairs or replacements, lest the provision be cited in support of wholesale boundary realignments and undermine or remove proprietors' legitimate rights for adverse possession.

Simpler and fairer procedures

The present procedure for litigation of fencing matters is not clear nor simple. The Magistrates' Court web site states that the correct form for litigation is a *Complaint* (Form 5A ; previously form 4A). This form is neither a good fit for fencing matters nor any application for specific performance and is geared to awards of money.

Magistrates Court registry staff will sometimes not accept a Form 5A *Complaint* for a fencing dispute and insist on a *Complaint and Summons Theron* which is specifically geared to fencing matters. The registry staff's logic for doing this is that the *Fences Act* dates from 1968 when this later form was first introduced and that form has not been

superseded. Further, the former *Magistrates' Court (Civil Procedure) Rules 1999* and the new *Rules of 2010* came after the *Fences Act* and do not specifically deal with fencing disputes.

The *Complaints and Summons Theron* form does not allow for the filing of a Defence and merely asks the parties to attend Court to make their case.

Magistrates' Court proceedings are costly and lengthy. Recently, more neighbourhood disputes have been placed in the jurisdiction of the Victorian Civil and Administrative Tribunal. That body's focus on simplicity and speed would be well suited to fencing disputes. We note that the VCAT has experienced an increase in its workload recently and this would have to be considered if its jurisdiction was expanded.

Respondents in fencing disputes frequently use non co-operation as a tactic. A respondent may not respond to a *Notice to Fence*; not respond to requests for mediation and force an applicant to the Magistrates' Court. Careful thought needs to be given to instituting a case managed approach to such disputes, encouraging pre-litigation negotiation (and potentially mediation) and mediation following the initiation of a proceeding.

The LCCLC submits that fairer and simpler procedures in fencing disputes would include the following:

- A specified process of *Notice to Fence*, including appropriate dispute resolution and litigation,
- Specific, purpose designed forms for the proceedings,
- Hearing of matters in VCAT or through a simplified Magistrates' Court procedure.

Fencing where the neighbouring owner is absent

If owners are responsible rather than occupiers as aforementioned, it follows that responsibility should remain with owners who are absent.

Please contact Michael Hennessy on 03 5444 4364 or at michael@lcclc.org.au if you have any questions about this submission.

Please note that unless we hear otherwise, we will publish our submission on our website.

Yours sincerely

LOODON CAMPASPE COMMUNITY LEGAL CENTRE