

DIVIDING FENCES

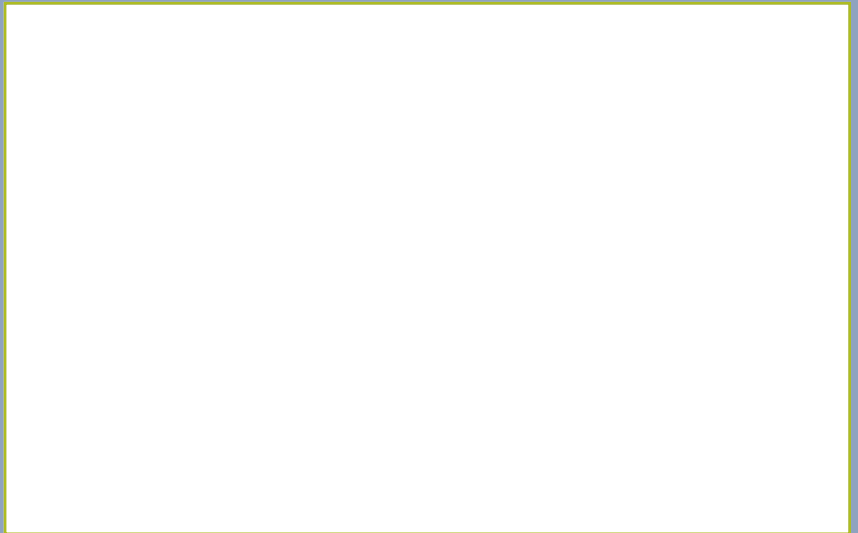
Responsibilities



Department of
Housing and Works

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Introduction

This booklet is intended to help you understand the *Dividing Fences Act 1961*. The Act provides a process for neighbours to agree on the fence that divides their properties, and to share the cost of construction and maintenance. The Act also provides for the courts to deal with disputes that may arise over dividing fences. The booklet outlines the processes in the Act, and provides answers to some frequently asked questions. You may obtain a copy of the *Dividing Fences Act 1961* from the State Law Publisher, or consult it online at http://www.dhw.wa.gov.au/policy/policy_legislation.cfm

The Department of Housing and Works has provided the information in this booklet as a public service.

The Department or the State Government does not have any role or powers to advise on individual issues or resolve disputes. If you need advice on a dividing fences matter you must seek independent professional advice. Your local government authority can advise you of any local laws that may affect your dividing fences. Retaining walls that form part of a dividing fence are regulated by the local government in your area, and are not covered by the *Dividing Fences Act 1961*.

This brochure is intended to help you understand your rights and obligations under the *Dividing Fences Act 1961* (the Act).

The general rule is that owners of adjoining land are each required to pay half the cost of erecting or repairing a **“sufficient fence”** between their properties. This applies whether the adjoining land is vacant or built on. In some cases, a tenant has to contribute – see section dealing with **“Landlord and Tenant”** on page 11.

To maximise recovery of half the cost, you should not commence construction of the fence until you have a clear agreement, in writing, with the adjoining owner or have obtained a court order.

State and Local Government

Note: The Act does not apply to the Crown or to land used for public purposes such as roads, parks and reserves under the control of local governments. This means that if your property adjoins such land you have to pay the full cost of the dividing fence.

Dividing Fence

A dividing fence is a fence that separates the land of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary. A dividing fence does not include a retaining wall.

Sufficient Fence

Local governments (councils) may have local laws that prescribe what is a sufficient fence. If you want information on what type of fence is allowed in your area, contact your local government. Owners may decide on what type of fence they want as long as it does not conflict with the local laws.

A **“sufficient fence”** is:

- (a) a fence prescribed by a local government local law;
- (b) a fence of any standard agreed upon by adjoining owners provided that it does not fall below the standard prescribed by the relevant local government local law;

- (c) a substantial fence that is ordinarily capable of resisting the trespass of cattle and sheep; or
- (d) a fence determined by a Magistrate in a Magistrates Court to be a sufficient fence.

Note: A fence which accords with (c) or (d) is only a sufficient fence where no local law or agreement is made.

If you decide to erect a dividing fence of a higher standard than a sufficient fence without obtaining the agreement of the adjoining owner, you may only claim half the cost of erecting and maintaining a sufficient fence, as defined above.



Erecting a New Fence

The best way to erect a fence is by agreement between the adjoining owners. Such an agreement should be in writing and should include details regarding payment. The following procedure to obtain an agreement is recommended.

Step 1 – Giving Notice

Give notice in writing to the owner of the adjoining land.

If you do not know the name and address of the adjoining owner, your local government can provide this information. A notice given to an adjoining owner of a proposal to construct or repair a fence **must be in writing**.

Each notice must be served by either:

- (a) delivering it in person; or
- (b) sending it by registered mail to the person's usual or last known place of residence.

If the notice is to be given to a company it may be served by: -

- (a) delivering it to the head office of the company in the State in which the company is incorporated; or
- (b) sending it by registered mail to the company's principal officer.



Sample letter: No 1

Dear

I hereby give notice, under the Dividing Fences Act 1961, that I propose to erect a 1.8 metre corrugated fibrous cement fence on the boundary line between our (property addresses) properties. I have obtained quotes (see copies attached) and propose to accept the quote from AB Fencing Contractors for \$400. Your share will be \$200. Please let me know within 21 days if you agree with this proposal.

Please contact me at the above address,

telephone no....., fax no.....,

email if you would like to discuss the matter or to advise me of your decision.

If within 21 days we cannot reach agreement or you do not respond, the matter may be determined in the Magistrates Court.

Signed

Date:

Note: It is suggested that you attach a copy of this Dividing Fences booklet to your letter.

If agreement is reached you can proceed.

Whether agreement is reached or not, you should keep a copy of all quotes, correspondence and receipts.

Again, try to ensure that any agreement reached is confirmed in writing, signed by all parties and provides details of when payment is to be made.

If your adjoining owner does not respond, you are encouraged to contact him/her again to try to reach an agreement.

If you and your adjoining owner cannot agree, then the use of an independent mediator may help. Mediation helps to reduce the cost of legal action and assists people to sort out their differences in a confidential and non-threatening way. Details of mediation services available are listed in the Yellow Pages, under "Mediators".

Step 2 – Court Action

If your adjoining owner does not respond or writes back to you and disputes all or any part of your proposal and you are unable to reach an agreement within 21 days of the service of the notice, you or your adjoining owner may refer the matter for a decision to a Magistrate in the **Magistrates Court** nearest to where the fence is situated.

The Court can decide:

- whether the fence is necessary;
- what type of fence should be built;
- how long it should take to build;
- the boundary upon which the fence is to be built;
- the level of each adjoining owner's contribution to the fence and legal costs; and
- a different period of time for payment.

See page 16 "Court Action" .

Notice of the Court's decision, if it is given to the adjoining owner before the construction of the proposed fence, can compel the adjoining owner to pay half the value of the fence. The adjoining owner has three months within which to comply with the agreement made (**Step 1**) or to comply with the Order which has been made by the **Magistrates Court (Step 2)**, unless the adjoining owners agree or the Court orders a different period.

If after three months you have not received the other owner's contribution towards the cost of the fence, you may erect the fence and recover half of its cost by applying to the Local Court and issuing a Summons for Debt.

Contact the Clerk of Courts to find out the procedure for lodging a complaint with the Court.

The Court's decision is final with no right of appeal.

**The Magistrates Court can be contacted on
Telephone: 9425 2266 or www.justice.gov.au**



CLAIMING FOR A FENCE ERECTED

when one or both

OF THE ADJOINING LOTS OF LAND IS VACANT

This section **only applies** where one or both of the adjoining lots of land is **vacant**, and the dividing fence **has already been erected**.

Where one or both of the adjoining lots of land is vacant, you may erect a sufficient fence without giving notice or reaching agreement with the owner of the vacant land.

The owner who has erected the fence may claim from the adjoining owner whether or not notice was given or an agreement was reached.

The right to claim exists while the person continues to own the property, however, it is doubtful whether this right exists after the property is sold. The commonly held legal view is that the right **does not continue**.

The right to claim cannot be passed on from the owner who erected the fence to another owner who buys his/her land.

Except where there is an agreement or a court order, you cannot recover any of the costs from the owner of adjoining land that is vacant unless or until whoever is the current owner of the adjoining land:

- (a) has completed a substantial building or structure on the land; or
- (b) has occupied or occupies a building or structure on the land; or
- (c) has permitted or permits some other person to lawfully occupy a building or structure on the land.

If any of the above conditions are satisfied, you may give the other owner a notice claiming **half the value of the fence as estimated at the date of claim**.

Note: There is no specified method for determining the value of a fence. If it cannot be agreed upon between the adjoining owners, it may be necessary to have the matter decided in Court. Refer to Step 2.

An owner of adjoining land is liable to pay even if they were not the owner of the land when the fence was constructed and no previous adjoining owner has paid a claim to the owner who erected the fence.

Sample Letter: No 2

Dear

I am writing to you to give notice, in accordance with section 13 of the Dividing Fences Act 1961, about the dividing fence between our properties. I had the fence built six months ago. The cost was \$400. Enclosed is a copy of the quotes obtained and the invoice and receipt we received from the fencing contractor who carried out the work. Please pay me \$200, which is your half share of the value of the fence, within one month of the date of this letter.

Please contact me at the above address,

telephone no....., fax no.....,

email if you would like to discuss the matter or to advise me of your decision.

If you object in writing to this notice, the matter may be referred to the Magistrates Court nearest to where the fence is situated.

If within one month you have not paid the \$200 or provided me with details of any objection you have with my claim and we cannot reach agreement, action may be taken to recover the amount in the Small Disputes Division of any Local Court.

Signed

Date:

If the adjoining owner gives you written notice of objection and agreement cannot be reached on the claim, you may make a complaint to the Magistrates Court nearest to where the fence is situated. Complaint forms are available from the Court.

The Court will make a decision on the dispute.

If within one month of giving your notice of claim the adjoining owner does not pay the amount of the claim or gives notice that they dispute your claim, then they will be liable to pay. You may then recover the sum through the Small Disputes Division of any Local Court.

The Court's decision is final with no right of appeal.



Repair

OF DIVIDING FENCES

The ordinary rule is that when a dividing fence is in need of repair, the owners of land on either side are each liable to pay half the cost of those repairs. This applies to both developed and vacant land.

The Act defines the word “**repair**” as including “**realign and re-erect**” so the provisions which deal with repairing a dividing fence also apply in the same way to fences which need re-erection or realignment.

Note: The WA Supreme Court, in *Basell v Meredith*, 1997, held that the replacement of an existing fence with an entirely different type of fence, for instance replacing a damaged old picket fence with a new fibrous cement fence, is not a repair.

This is regarded as an erection of a new fence.

Accordingly the procedures for erecting a **new** fence in **Steps 1 and 2**, should be followed.

However, if the new fence is of the same character as the old fence, it may be regarded as a repair.

Note: It is important to determine whether the condition of the existing fence justifies it being replaced by the same type of fence.

If you wish to have a dividing fence repaired, you should give the adjoining owner a notice describing the kind and extent of the repairs to be made, and stating that you are prepared:

- (a) to repair the fence and pay half the cost if the other owner will also pay half the cost;
- (b) to permit the other owner to repair the fence and you will pay half the cost; or
- (c) to pay half the cost of having the fence repaired by a third party.

Note: “Cost” may include labour, equipment hire and materials.

Note: See page 15 “Redevelopment of Properties”.

The other owner then has 14 days within which to object. They must notify you in writing of the objection. If the other owner objects you may apply to the Magistrates Court nearest to where the fence is situated for an Order.

If the adjoining owner does not object within 14 days you may repair the fence and you will be able to recover half the cost of repairs from the other adjoining owner through the Small Disputes Division of any Local Court.

If the adjoining owner objects or does not agree to pay you may take action in the Magistrates Court nearest to where the fence is situated to enforce payment. Where the adjoining owners have agreed to the repair or the Court has ordered the repair, both owners must allow access to enable the fence to be repaired.

Sample letter: No 3

Dear

I am writing to you to give notice, in accordance with the provisions of section 15 of the Dividing Fences Act 1961 (the Act). The fence dividing our properties is in need of repair because a number of pickets are missing. I have obtained quotes to have the repairs done (see copies attached).

I propose to accept the quote from AB Fencing Contractors for \$300. Your half share will be \$150. Please let me know within 14 days if you agree with this proposal.

Please contact me at the above address,

telephone no....., fax no.....,

emailif you would like to discuss the matter or to advise me of your decision.

If within 14 days you give me notice of your objection to the proposal and we can't reach agreement, the Act provides that the matter may be determined in the Magistrates Court nearest to where the fence is situated. If you do not respond within 14 days, the Act provides that I may repair the fence and then recover through the Small Disputes Division of any Local Court, half of the repair costs.

Signed

Date:

Note: See page 16 “Entering Your Neighbour’s Property”.



REPAIRING

without notice

Where a dividing fence is damaged or destroyed in whole or in part by flood, fire, lightning, storm, tempest or accident, the owner on either side of the fence may **immediately** repair the fence without notice. The party who repaired the fence is then entitled to recover half of the expenses of doing so from the owner of the adjoining land through the Small Disputes Division of any Local Court.

However, it is suggested that despite this right of action, it is better to try to give notice of your intention to repair the fence.

Also, try to reach agreement on payment for repairs before taking Court action.



WHAT HAPPENS IF THE FENCE IS

damaged by your neighbour

Situations may arise where you consider that your neighbour should be paying for the entire repair of the fence because it has been damaged by their actions or inaction.

The Act only recognises a limited set of circumstances where a neighbour who is at "fault" is bound to repair or renew a dividing fence at his/her cost. These are where the dividing fence is damaged or destroyed in whole or in part by fire, or by the falling of any tree (or portion thereof). An element of neglect on the part of the neighbour from whose land the fire originated or the tree fell must also be evident. All other fence damage repairs require an equal contribution by the adjoining owners.

If your neighbour is bound to repair the dividing fence, at his or her cost, according to the above, and fails to do so, you as the adjoining owner, may repair or renew the fence. You may then recover the whole cost of doing so from your neighbour through the Small Disputes Division of any Local Court.

However, again it is suggested that it is better to first try to have your neighbour repair the fence.

Landlord

AND TENANT

In this explanation, "the cost" is half the **total cost** of construction or repair of the dividing fence.

This follows the general rule that each adjoining owner is to pay half the total cost of construction or repair of a dividing fence.

As a tenant you do not have to pay for the cost of construction or repair of a dividing fence unless the term of the lease is for a period of **five years** or more.

(a) If the term of the lease is between **five (5) and seven (7) years**, the landlord must pay three quarters of the cost and the tenant one quarter.

Total cost of construction or repair	\$400
Half cost to each owner -	\$200
	<hr/>
	\$200
Landlord's share	\$150
Tenant's share	\$50
	<hr/>
	\$200

(b) If the term of the lease is between **seven (7) and twelve (12) years**, the landlord and the tenant must each pay one half of the cost of construction or repair of the dividing fence.

Total cost of construction or repair	\$400
Half cost to each owner -	\$200
	<hr/>
	\$200
Landlord's share	\$100
Tenant's share	\$100
	<hr/>
	\$200

(c) If the term of the lease is **longer than 12 years** the tenant must pay the whole of the cost.

Total cost of construction or repair	\$400
Half cost to each owner -	\$200
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	\$200
Landlord's share	Nil
Tenant's share	\$200
	<hr/>
	\$200

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Strata

TITLES

Where adjoining land is owned under a strata title, a claim for fence construction or repair against the owners for their contribution may be made.

The owners of the strata title land may be:

- the strata company; or
- another person, depending on the nature of the strata scheme and the by-laws of the strata company. It will also depend on whether a person has lodged a notice for recording on the strata/survey-strata plan with the Registrar of Titles in accordance with section 123A(3) of the *Strata Titles Act 1985* (WA).

The name of the strata company and information about this type of strata scheme, the by-laws of the strata company and whether a notice has been recorded on the strata/survey-strata plan can be obtained from the Customer Services Branch of Department of Land Information (DLI) 1 Midland Square, Midland WA, Ph: 9273 7373. Note: There are fees payable for this information.

Liability for Upkeep and Maintenance of Dividing Fences – Strata Title

For most schemes (single tier strata schemes and survey-strata schemes), unless an objection has been lodged or a by-law has been registered on the plan, then:

- if the fence divides a strata lot and the adjoining property (which is not part of the scheme), the owners of the lot and the adjoining property are liable;
- if the fence divides common property and the adjoining property (which is not part of the scheme), the strata company and the owner of the adjoining property are liable;
- if the fence divides two (2) lots in the strata scheme, the owners of those lots are equally liable;
- if the fence divides both a lot and common property in the scheme, the owner of lot and the strata company are liable; and
- if the fence divides common property in the scheme, the strata company is liable.

In other schemes (for example in a multi storey scheme), the strata company and the owner of the adjoining land are equally liable for these costs.

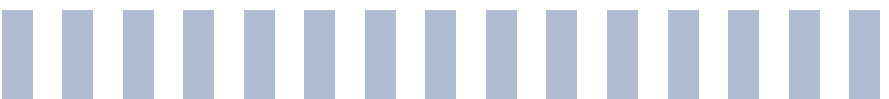


Other matters

Retaining Walls

The Act **does not** cover retaining walls. However, in some cases in order to erect or repair a dividing fence it may be necessary to construct a retaining wall or repair an existing retaining wall.

The general common law rule is that the property owner who changes the level of the land, either by excavation or filling, is responsible for building a retaining wall to make sure that there is no risk of earth movement. The responsibility for maintaining the wall passes on to people who buy the property.



If both adjoining owners have altered the level of the land to some extent, then each adjoining owner will be responsible for the construction and maintenance of the retaining wall to the extent of the alteration caused by each owner.

A building licence is generally required for the construction of a retaining wall above a specified height.

Note: If no agreement can be reached the matter may need to be settled in a court.

Contact your local government for advice as some have policies on retaining walls construction, including details of a specified height for building licence purposes.

Walls Constructed Adjacent to Lot Boundaries

The Act **does not** cover walls constructed adjacent to lot boundaries. These walls, such as a house wall, garage wall, a shed or the like, are built solely on one property under a building licence and belong to the owner who constructed the wall. Responsibility for construction and maintenance rests with the owner of the land on which it is constructed.

An adjoining owner is not permitted to paint, render or attach anything (such as pot plants, clotheslines and basketball hoops) to the wall without the permission of the owner of the wall. It is suggested that any such permission be in writing.

Where a boundary wall divides the adjoining properties it can serve the purpose of a dividing fence. However, it is **not** a dividing fence and either adjoining landowner can serve a notice under the Act for a sufficient fence to be erected adjacent to the boundary wall.

Trees, Roots, Overhanging Branches and Vegetation Affecting Fences

If a branch or root encroaches on your land and is damaging your fence, you are entitled to cut and remove the offending branch or root at any point up to the boundary of your land. You must not cut the branch or root on your neighbour's side without his/her agreement.

Any material cut is legally the property of your neighbour and should be returned to your neighbour if requested.

You should seek to resolve with your neighbour any dispute over the proposed cutting and disposal of trees, roots, overhanging branches and vegetation affecting fences and put any agreement in writing.

There may be significant costs involved in repairing damage to fences caused by fences being cracked or pushed out of alignment by your neighbour's tree. You should advise your neighbours in writing of the damage and request that they remove the tree or the offending part.

Once you make your neighbour aware that a tree on his/her land is causing damage, there is a common law obligation on him/her not to allow the damage to continue. If nothing is done or no agreement is reached it may be necessary for you to seek legal advice.

You should make every endeavour to reach an agreement with your neighbour on how to deal with a tree you consider to be a danger to persons or things, prior to contacting your local government.

Under the *Local Government Act 1995*, your local government may serve a notice on owners of land to ensure that a tree on land that endangers any person or thing on adjoining land is made safe.

Redevelopment of Properties

If your adjoining owner redevelops his/her land by demolishing existing buildings and erecting new ones, he/she may ask for a contribution for a new fence.

This may occur if the existing fence is of a lower standard than a sufficient fence, is erected other than on the boundary line or is in need of repair or replacement. It may also occur because the adjoining owner wants a new fence.

Development approvals by some local governments require the developer to build new fences or require that they be to the local government's satisfaction.

This does not prevent the adjoining owner from serving notice under the Act on the other owner seeking a contribution for half the fence construction or repair costs.

However, for a claim to be successful it will depend on whether the fence was in a condition requiring its replacement.

Court Action

Contact the Clerk of Courts to find out the procedure for lodging a complaint with the Court.

Entering Your Neighbour's Property

Where an agreement or court order exists, or where the provisions of the Act are being followed, a contractor or person erecting or repairing a fence has access to the adjoining property. This access is "at all reasonable times" to effect the erection or repair of a dividing fence.

Fences Constructed Adjacent to a Dividing Fence

Situations may arise where a property owner wishes to construct a fence on his/her own land adjacent to an existing dividing fence.

The Act does not prevent this second fence from being erected, however, it is recommended that you contact your local government to find out whether it has any restrictions on structures of this type.

Note: Your adjoining owner may still claim a half contribution for the existing dividing fence, even where you erect a second fence on your property adjacent to it.



Legal

ADVICE

Where you have failed to obtain agreement with the adjoining owner, it may be advisable to obtain legal advice before making any commitments or carrying out any fencing or associated work that would involve significant cost or before starting legal proceedings.

This brochure does not claim to be, nor intended to represent, legal advice.

Q 1.1. What is the law covering fences?

A 1.1. The *Dividing Fences Act 1961* (“the Act”) covers the rights and obligations of adjoining land owners in relation to “dividing fences”. A dividing fence is a fence that separates the lands of different owners.

The Act obliges adjoining owners whose land is not divided by a “sufficient fence” to construct a sufficient fence to divide their properties. The Act also provides for the repair of dividing fences.

The Act does not interfere with the rights of adjoining owners to enter into a private agreement about a dividing fence.

Your local government may also have local laws that cover fencing matters, such as the types of materials that can be used, the maximum and minimum height of fences, any special provision for corner lots such as truncations, whether fences can be erected forward of the building line and if so on what conditions, etc

Q 1.2. Does the law covering dividing fences include retaining walls?

A 1.2. No, retaining walls are not covered by the Act. If you have any questions about retaining walls, such as whether a building licence is required, contact the building department of your local government.

Q 1.3. What is a Sufficient fence?

A 1.3. The Act requires that the dividing fence you erect is a “sufficient fence”.

You should first check whether your local government has prescribed in its local laws what a sufficient fence is. If there are local laws, the dividing fence you erect must comply with those laws.

If there aren’t any local laws, the Act describes a sufficient fence as one that would ordinarily withstand the trespass of cattle or sheep. Alternatively a Magistrates Court may determine what is sufficient in each particular case.

You may also agree with the adjoining landowner about the type of dividing fence you erect. The fence that you agree upon must comply with your local laws (if there are any).

Q 1.4. How can I get a copy of my local government's fencing local laws?

A 1.4. You would need to contact your local government (usually the building section) to obtain a copy of it, or for any advice on its fencing local laws. It may be that the local laws are available on its web site, so check this out first.

Q 1.5. My local government does not have local laws covering fences so what now?

A 1.5. If your local government does not have any local laws covering fences, you are still obliged to contribute a half share of the construction of a sufficient fence. The *Dividing Fences Act 1961* requires that your fence must be ordinarily able to resist the trespass of cattle or sheep. This does not mean that you need to have sheep or cattle on your property, but as a minimum requirement it must be of such a type and strength so that it can ordinarily resist the trespass of cattle or sheep. Checking out the type of fencing that has been erected in your area will give you a good guide as to what is accepted as the fencing standards.

Q 1.6. Do dividing fences agreements have to be in writing?

A 1.6. The best way of maintaining a good neighbourly relationship and complying with the requirements of the *Dividing Fences Act 1961* is to enter into an agreement with the adjoining owner. The Act provides that agreement between owners for the erection or repair of fences overrides the legislative provisions. Verbal agreements through informal discussion are often reached by adjoining owners discussing the options on fencing matters.

Although informal discussions are okay, it is always beneficial to have any agreements reached, in writing. This clears any ambiguity and clarifies any point of difference. It can also be used later to show what has been agreed if the matter comes before mediation, arbitration or the courts.

Questions and Answers

Q 1.7. Who pays for the construction or repair of dividing fencing?

A 1.7. As a general rule, owners of adjoining land are responsible for half the cost of erecting or repairing a sufficient fence that divides their properties.

Please note that this is a general rule only and there may be exceptions.

Q 1.8. My land has a road along side of it. Can I get my local government to pay for half the cost of fencing it off?

A 1.8. No. The *Dividing Fences Act 1961* does not apply to the Crown i.e. the State or the Commonwealth Government, or to local governments for land used for public purposes such as roads and parks under the control of local governments.

Q 1.9. How do I serve notice on my adjoining owner?

A 1.9. By delivering it in person and giving it to the adjoining owner or by sending it by registered mail to the adjoining owner's usual or last known address. The notice can be in the form of a letter.

See "Step 1 – Giving Notice" on page 3 of information booklet.

Q 1.10. How do I find the owner of the land next door?

A 1.10. You can check with the tenants or the estate agent if the house is rented or leased out, or do a land title search through the Department of Land Information, or check with the rates section of the local government in whose district your property is located.

Q 1.11. What do I do when I have a dispute with my neighbour on where the boundary line is?

A 1.11. If you cannot agree on the boundary line for the purpose of constructing or repairing a fence, you may give the owner of adjoining land notice of your intention to have the boundary line defined by a land surveyor, licensed and registered with the Department of Land Information. Within one month of receiving a notice, an adjoining owner must define the boundary line by pegs or employ a land surveyor to define the common boundary line. Once the owner of adjoining land has done this he or she must give you notice of the action taken.

If the owner who has been given the notice does not do anything then you may have the common boundary surveyed. If after you have the land surveyed the boundary is found to be in the same position as defined by the pegs placed there by the owner receiving the notice, then the owner is entitled to recover the costs, if he paid a surveyor.

If the boundary is found to be in a different position to that claimed by you, then you will be liable to pay half of the surveyor's costs.

Q 1.12. The fence separating my neighbour's place from our place does not give us any privacy. Can we do something about it?

A 1.12. The fencing local laws of your local government may make provision for an over-height fence. This should be followed up at your Council Office for details. Some local governments permit the use of lattice attached to a fence or you may be able to erect a privacy/garden screen as a separate structure from the fence.

Again, your Local Council Office should be contacted for its position on lattice attachments to fences and privacy screens. You will most probably be required to pay for such alterations to the fence.

Questions and Answers

SECTION 2

ERECTION OF A NEW FENCE

Q 2.1. Do I need my adjoining neighbour's agreement before I erect a new fence?

A 2.1. Where the adjoining land is vacant, you do not need an agreement. If you do not obtain agreement, a claim for a contribution to the fence can be made on the owner when there is a substantial building erected on the land, or when the land owner occupies or permits the occupation of any building on the land.

Where the adjoining land is not vacant, if you wish to claim a contribution for the cost of erecting the fence, there must be an agreement or a court order in place before the erection of the fence.

You do not need an agreement if you want to erect the fence entirely at your own expense, and forego any right to contribution under the Act. The fence you erect must still be a "sufficient fence" (see question 1.2 for what constitutes a "sufficient fence").

If you decide to erect a fence at your own expense, it is recommended that you give the adjoining owner the details of the proposal as a courtesy, and to enable them to make arrangements to protect their property or animals, etc. during the construction process. A decision to erect a fence entirely at your own cost does not give you the right to enter the adjoining owner's property without their permission during the erection of the fence.

Q2.2. Do I have to have more than one quote to give to my neighbour when I approach him looking for his half payment to a new fence?

A 2.2. The Act does not specify a requirement for the obtaining of quotes but it is suggested that you should try to get at least two written quotes.

Q 2.3. I am about to put up my new dividing fence and want to know where on the boundary it should go. Does it have to be located wholly on my property?

A 2.3. It is preferable that the boundary between the adjoining owners has been identified by a survey conducted by a licensed land surveyor, registered with the Department of Land Information. In such a case there would be survey pegs in place to clearly identify the boundary line.

If the boundary is not clear and there is disagreement (or potential for it) between adjoining landowners, then having a survey done should be considered before the fence goes up. As a fence is a shared ownership responsibility, similarly the adjoining landowners should share the fence with (in pure terms) half the fence on one side of one property and half the fence on the other property. This relates to the total fence structure and would include taking into account posts, pillars, fence footings, etc.

It should be considered that the *Dividing Fences Act 1961* in defining a dividing fence tells us that a fence can still be a dividing fence “whether the fence is on the common boundary or on a line other than the common boundary”.

A good example of this is where it is not practical to place a fence on the true boundary because of a high limestone block retaining wall that is erected on one of the adjacent properties and adjacent to the boundary. In such situations, it is commonly accepted practice, by agreement between the adjoining owners, to place the fence other than on the true boundary.

For example, adjoining owners could agree to place a fibrous cement dividing fence in-ground on the highest ground level side. Alternatively, if it is a post and rail with metal or timber fence, it might be agreed to place it either in-ground on the highest ground level side, or into the centre of the retaining wall.

If a fence is to be located into a retaining wall, the wind load effect on the structural integrity of the retaining wall may need to be considered.

Often where a dividing fence is placed on the true boundary and one or both properties either brings in land fill or cuts into their land to

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establish new levels, the fence does not provide the level of security and privacy that a fence erected on the higher ground level side would provide.

Despite the above scenarios, it is recommended that wherever possible dividing fences be erected on the common boundary.

Q 2.4. My neighbour and I are at about the same stage of building our houses. He wants a metal fence and I want a fibrous cement one that goes into the ground. I have a dog to contain and he could easily dig under a metal one. What's the law on such disagreements?

A 2.4. The best way to erect a fence is by agreement with the adjoining owner. You should first try to resolve any differences by discussing the matter with the owner. You may wish to consult a mediator, who can assist you in resolving differences, before going to court.

If the owners cannot agree, the matter could be determined by the Magistrates Court.

SECTION 3

REPAIRS TO FENCES

Q 3.1. Can I go onto my neighbour's land to construct or repair my fence?

A 3.1. When you are constructing or repairing a dividing fence, you may enter your neighbour's land. However, you can only do so if it is necessary or reasonably required in order to carry out the construction of, or repair to, the fence.

Prior to undertaking repairs or constructing a fence, you should inform your neighbour of what you are doing, and tell him or her that you may need to go onto his or her land to construct or repair the fence. You should always try to obtain your neighbour's agreement before undertaking any work relating to dividing fences.

You should be careful not to enter onto, or interfere with your neighbour's property unless it is necessary that you do so in order to carry out the work.

Q 3.2. The fence has been damaged by my neighbours, why should I have to pay for half of it?

A 3.2. As a general rule, each of the adjoining owners must pay half the cost of repairs unless the adjoining owners agree to an alternate arrangement or the court rules differently. The *Dividing Fences Act 1961*, provides for specific situations when one owner who is 'at fault' pays the lot.

These specific situations are where the fence is damaged by fire or by the falling of a tree, or part of it. There must be an element of neglect by the owner at fault in these specific situations.

Q 3.3. I have had my land surveyed and it shows that the dividing fence is out of alignment and my adjoining owner has some of my land. Who pays for the cost of the relocation of the fence onto the correct boundary and how do I get it shifted?

A 3.3. The *Dividing Fences Act 1961* (the Act) in defining what a repair is, includes the realignment or re-erection of a fence. This means that the cost is liable to be shared equally by the adjoining landowners. The process for seeking a realignment of a fence is covered by Section 15 of the Act (see page 8 of this information booklet)

Note: The WA Supreme Court, in *Basell v Meredith, 1997*, held that the replacement of an existing fence with an entirely different type of fence, for instance a damaged old picket fence with a new metal fence, is not a repair and is regarded as a new fence.

Q 3.4. Our dividing fence is an old, picket fence that needs to be replaced. I want to put up a new brick fence. If I do so, what procedures do I need to follow?

A 3.4. Replacing an existing fence with an entirely different type of fence is regarded as the erection of a new fence. The procedure for erecting a fence must be followed where a fence is replaced with an entirely different one (see page 3 of this Booklet).

If an old fence is replaced with a new fence that is the same as the old fence, it is classified as a repair, and the procedures relating to repairing fences must be followed (see page 8 of this information booklet).

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Q 3.5. I believe that the dividing fence is OK and can be simply repaired in a few places and maybe realigned and straightened up a bit. My neighbour does not agree and told me he wants a new one. Do I have to pay half for a new fence just because he wants it?

A 3.5. No. You would not have to pay for a new fence unless you agree to this or your neighbour takes you to court and is successful in obtaining an order for you to contribute to a new fence. In such a dispute, it would be necessary for the owner taking the legal action to prove that the fence is in need of replacement and cannot or should not be repaired. He/she would generally seek to support their case through the presentation to the court with photographs and testimony from expert witnesses.

Q 3.6. My neighbour's trees are pushing against the fence and damaged it. I have asked that he cut the trees down or at least cut them back and repair the fence at his cost. He advised that as far as he is concerned the trees stay and that he will only pay half the cost of the repair. What are my rights?

A 3.6. Your common law right is that you are entitled to cut and remove any offending branch or root of a tree up to the boundary line and to return the material cut taking care that no damage or littering occurs. You would have to take civil action to seek to have the trees removed if the dispute cannot be agreed or resolved through mediation. You would be required under the *Dividing Fences Act 1961* to contribute to half the cost of the repairs to the fence, unless the court rules otherwise following your refusal to pay and your adjoining owner electing to take legal action against you for recovery.

Q 3.7. Do I have to pay for half the cost of the repairs to the retaining wall as well as the fence between my neighbour's property?

A 3.7. No. You would not have to contribute to the repairs to a retaining wall if it is located on your neighbour's property. Retaining walls are not covered under the *Dividing Fences Act 1961*.

Responsibility for the maintenance of a retaining wall is with the owner of the property it is located on, whether this is the person who was responsible for its construction or a subsequent owner of the property.

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Q 4.3. I built a fence when the adjoining land was vacant. I have sold my house and since then a house has been built on the vacant land. Can I pass my claim for payment for a share of the fence that I built to the person who I sold my house to?

A 4.3. No. The right to claim **cannot** be passed on from the owner who erected the fence to another owner who buys the house.

Q 4.4. I built the dividing fences on my property when the adjoining land was vacant. There is now a substantial building erected on the vacant land and I want to now claim my share of the fencing. How much can I claim?

A 4.4. You may give the adjoining owner a notice claiming half the value of a sufficient fence **as estimated at the date of claim**. Note that this is not the same as current day market price for the fence, although the obtaining of a current day price for a similar fence may be useful in providing a base from which to estimate the value of the fence.

Q 4.5. Is there a formula for arriving at the value I can claim for a share of the fence I erected?

A 4.5. No. There is no specified method for determining the value of a fence. Adjoining land owners should try to work out by agreement the value of the fence. If it cannot be agreed upon between the adjoining owners, it may be necessary to have the matter decided through mediation or if that fails, in Court. Obtaining a current day price for a similar fence may be useful in providing a base from which to estimate the value of the fence.

Q 4.6. My neighbour has served a claim on me for half the cost of the dividing fence and has not provided any back up paper work. Is it a legal requirement for a copy of the quotes, receipts etc to be provided to me as proof of payment?

A 4.6. No. There is no requirement for the owner claiming a share of the fence costs to provide you with copies of quotes or receipts for what was paid. Naturally if there are copies of the quotes and receipts in existence, this makes the process of claiming a bit easier for all concerned.

Q4.7. Does the right to claim a share of the cost of erecting a fence from an owner, without giving notice or reaching agreement, as provided for by section 13 of the *Dividing Fences Act 1961*, and summarised as Part 3 of the Department's Dividing Fences Book, apply in all situations?

A 4.7. No. This section **only applies** where one or both of the adjoining lots of land are **vacant**, and the dividing fence has **already been erected**.

If a dividing fence has been erected between developed properties (with substantial dwellings completed on them) without an agreement or a court order in place between the adjacent owners, there would be no support from the *Dividing Fences Act 1961* for any court action taken under Section 13 for recovery of any of the fencing costs.

Q 4.8. My neighbour has claimed from me half the cost of the dividing fence he erected. I am the second owner of the property and feel that he should have got his money from the previous owner. Am I liable to pay the money claimed?

A 4.8. Yes. An owner of adjoining land is liable to pay even if they were not the owner of the land when the fence was constructed, provided that no previous adjoining owner has paid a claim to the owner who erected the fence.

Q 4.9. I erected the dividing fence when the next door lot was vacant. The adjoining owner is about to start building. Can I claim my 50% of the cost of the fence now?

A 4.9. There is nothing to stop a person lodging a claim with the adjoining owner at any time. However, under the *Dividing Fences Act 1961* (section 13), you cannot recover any costs for a fence unless and until the owner of the adjoining land:

- (a) Has constructed or constructs a substantial building or structure on the land; or
- (b) Has occupied or occupies a building or structure already on the land.

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(c) Had permitted or permits some other person lawfully to occupy a building or structure already on the land.

The rating section of your local government would be able to provide you with the ownership history of the property.

Q 4.10. The land next door is vacant but they have started building on it. How much of the building must be constructed before I can make a claim for half the cost of the fence?

A 4.10. Under s 13 of the *Dividing Fences Act*, you can make a claim when a **substantial building** has been completed. This should not be confused with a building that is **substantially completed**. It is only once the building is complete that you may make a claim under s 13 of the Act.

Q 4.11. How much time does the adjoining owner have to pay me my claim for half the fence cost now that a substantial building has been completed on his land?

A 4.11. The adjoining owner is required to pay within one month of the receipt of your claim. You may enter into an agreement with your neighbour to allow a longer time period or agree to accept payment by instalments. Such agreement should be committed to writing and signed and dated by the both parties.

Q4.12. I am about to build and do not like the fence my neighbour just erected, and I do not want to pay him anything. What can I do about it?

A 4.12. If the fence that is erected is a sufficient fence, ie acceptable to the local government and in keeping with other fences in the immediate area, the owner who erected it to meet his or her need has a legal right to do. He or she also has a right under the *Dividing Fences Act 1961* to claim half payment of a sufficient fence when you complete your building.

Q 4.13. My neighbour built his house first and erected a fence that I did not like. I wanted a green colorbond and he erected a wooden one. I have since built my house and erected a fence on my land. My neighbour has now given me a bill for the fence he erected. Do I have to pay?

A 4.13. Yes. The original fence is the dividing fence and you would be required to pay half the cost of it and also bear responsibility for a half share of the ongoing maintenance costs of the dividing fence. The cost for the erection and ongoing maintenance of the second fence would be yours entirely.

Q4.14. Do I have to contribute to the cost of a fence when my land is still vacant?

A 4.14. No. Not unless you have agreed to contribute before the fence is erected or unless the adjoining owner obtains a court order, before the fence is erected, requiring you to contribute.

Q 4.15. My lot was vacant and my neighbour has constructed a brick fence, do I have to pay for half of it?

A 4.15. No, not unless the sufficient fence (minimum standard) for a fence in that location is a brick fence. The minimum standard could be as a result of the local government's fencing local law or town planning scheme, or through a condition of sale imposed by the developer as a covenant.

You would as a general rule have to contribute half the cost of a sufficient fence, this being the minimum standard required by your local government.

Q 4.16. My neighbour's fence is 10 years old, do I have to pay for the half value of the fence when it was constructed or what it is worth now?

A4.16. The requirement is for payment of half the value of the fence as at the date of claim. The person making the claim has to estimate the value.

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If your neighbour erected a fence of a higher standard than a sufficient fence, as defined by your local government, unless you agreed to pay the higher cost, you would only have to pay half the cost of a sufficient fence.

If for example, a metal fence was erected and the sufficient fence, as defined by your local government, is a fibrous cement one, the obligation is for payment of half the cost of the lesser standard fence, being the fibrous cement one. The additional cost for the higher standard fence would be borne by the adjoining owner that requires it.

Q 4.17. What should I do about my neighbour who is refusing to pay for half of the cost of the fence?

A 4.17. It is recommended that discussion and negotiation be held with the adjoining owner to identify the issues, such as whether the fence is on the correct boundary, are repairs needed, whether payment as an option is acceptable to all parties, etc.

Mediation services may be used to assist with dispute resolution. If the former attempts fail, the *Dividing Fences Act 1961* provides that the matter may be settled through the courts.



Useful Contact Numbers

AND LINKS

- >> Citizens Advice Bureau - Telephone: **9221 5711**
www.iinet.net.au/~cab (Access to community lawyers/mediators- small fee)
- >> Magistrates Court – Telephone: **9425 2266**
www.justice.wa.gov.au
- >> DLI (Department of Land Information) –
Telephone: **9273 7373** (Adverse Possession information) www.dli.wa.gov.au
- >> Health Department - Telephone: **9222 4222**
(Environmental Health branch – Asbestos issues)
www.population.health.wa.gov.au/environmental/resources/asbestos_cement_products.pdf
- >> Local Government – Department of Local Government & Regional Development- (to obtain a contact number for your local government) Telephone: **9217 1500**
www.dlgrd.wa.gov.au
- >> State Law Publisher – Telephone: **9321 7688**
(To view Legislation) – www.slp.wa.gov.au



DIVIDING FENCES

>> Rights & Responsibilities



Department of
Housing and Works