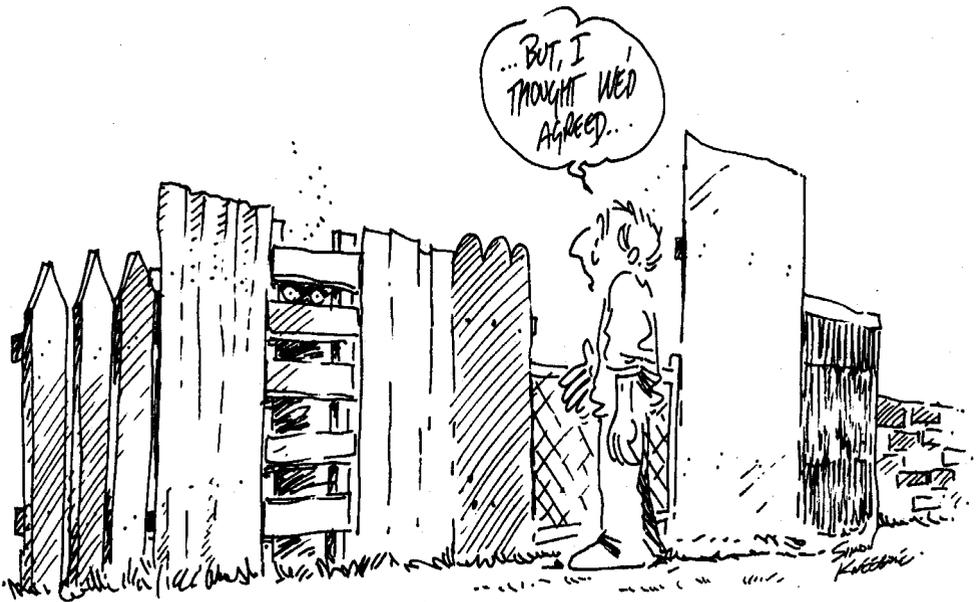


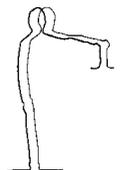
FENCES AND THE LAW



March 2001



A guide for neighbours produced by the
Legal Services Commission of South Australia
Supported by the Local Government Association



FENCES AND THE LAW

Talk to your neighbour first!

This booklet answers common questions about dividing fences and explains the legal procedure you need to follow when you want to erect, replace or repair a boundary fence. While the legal procedure is important, so are good neighbourly relations. So, before starting the legal procedure, talk to your neighbour first. Whatever you do about a fence will affect them also. A friendly approach may help you to reach an agreement quickly and easily and avoid unnecessary conflict.



Do I need my neighbour's consent?

Fences should be regarded as a joint asset between neighbours. Even if your neighbour has not paid for the fence they are still a joint owner. This is because a fence on the boundary is legally considered to be part of the land on each side.

If you intend to remove or alter an existing fence, you should have your neighbour's permission or a court order. If you want to put up a fence where there has not been one before, your neighbour has a right to object. It is therefore sensible to talk to your neighbour first.

Also, your neighbour does not have to pay anything towards the fencing work unless:

- they have agreed to, or
- the proper procedure has been followed, or
- a court orders them to.

Getting their consent is the quickest and easiest way.

If there is a problem in getting your neighbour's consent, consider mediation. Your local community mediation service may be able to arrange a meeting for you both to discuss the options with a mediator who can help you to reach agreement. See page 18 for more details.

Must we have a fence?

There is no general law requiring a fence between neighbours; most people simply agree to have one. However, the courts generally consider it reasonable to have a fence and to keep it in good condition.

In particular cases, a fence can be legally required.

Some examples are:

- Some housing developments have restrictive covenants controlling fencing
- Swimming pools must be fenced (Swimming Pools (Safety) Act, 1972)
- Dog owners have a duty to prevent their dogs wandering at large, so if the dog goes outside, the yard must be fenced
- Fencing may be required as a condition of council planning approval.

The wall of a building is not legally defined as a fence, though if it is on a boundary it may make one unnecessary. If the wall is removed, the owner is not necessarily obliged to fence the gap.

Railings

There is no law saying which side of the fence the railings should be. Discuss this with your neighbour and try to compromise. If you can't agree, consider a style of fence which conceals the railings, such as "good neighbour" fencing.

What kind of fence?

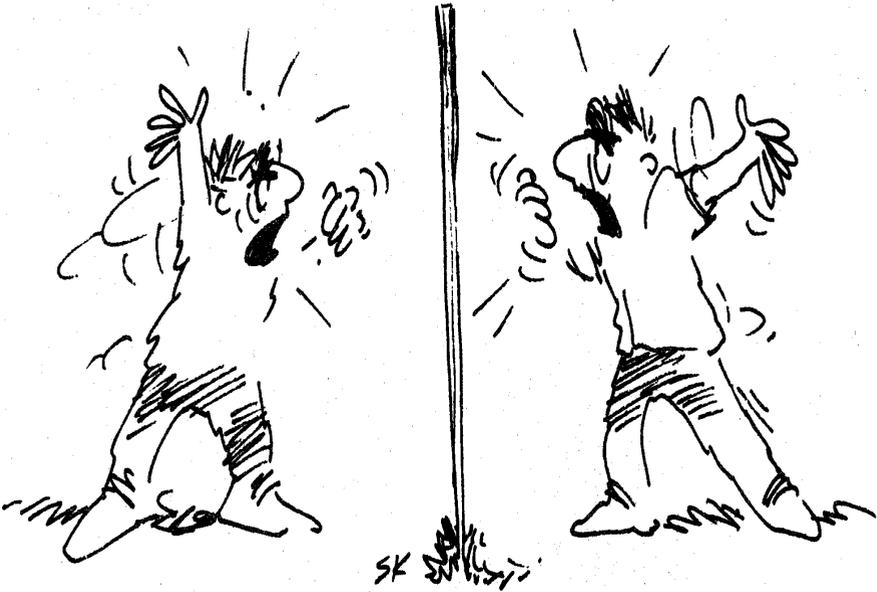
The courts resolve disputes about what kind of fence is needed by looking at what is "adequate" (Fences Act, 1975). This means the fence should be typical of good fencing in your area and meet the reasonable needs of both neighbours. Depending on the locality, an adequate fence could be a line of trees or bushes, a waterway or even a ditch. In rural areas, post and wire fencing may be adequate, but in residential areas, a steel (Zincalume or Colorbond) fence is usually considered adequate.

Where residential blocks adjoin rural blocks of more than 0.8 hectares, an adequate fence is the cheaper of the rural and residential fencing options. If a residential type fence is proposed, the rural land owner does not have to contribute more than their fair share of a cheaper rural fence.

Obviously, neighbours may disagree about what sort of fence is adequate for them. There may be several adequate options. Talk to your neighbour and try to work out a type of fence that suits you both.

Where should the fence be?

The fence should be on the boundary, but in practice, many fences are not precisely on the boundary. This does not change who really owns the land and need not matter if both neighbours can accept it.



Whether or not it is precisely on the boundary, a dividing fence is still the legal responsibility of both neighbours. However, if there is a dispute about where a fence should go, get a survey done which will show exactly where the boundary is. If you both want the survey, you can agree to share the cost, but if not, the person who arranges the survey will have to pay for it. Under a Fences Act notice, a survey can be included as part of the proposed fencing work. However, your neighbour may object to paying for a survey if they believe it is not necessary. If they object and it goes to court, a Magistrate will have to decide if a survey is reasonably required.

If necessary, a court can order the removal of a fence that is not located on the proper boundary and this can be expensive. However, a court is unlikely to order the relocation of a fence if the diversion from the proper boundary is minor.

Generally, a fence should straddle the boundary line, but a masonry fence, which may take up space, should usually be on the land of the person who wants it, with the outer face on the boundary.

How is the cost of fencing work shared?

Usually, the cost is shared half each, though you can agree on some other arrangement. It really depends on the benefit that each owner will obtain from

the fence. Where one neighbour wants a better than adequate fence, for example if they want a high fence where a lower fence would do, or a brush fence where steel sheeting is adequate, they should pay the extra cost. This might be adjusted a bit for any benefit the other neighbour gains, for example, extra privacy. If the case goes to court, the court will normally order that the objecting neighbour pay half the cost of a fence that is adequate.

Where two blocks of land abut a public road, the owner of land across the road can be asked to contribute to the cost a fence if it also benefits them. For example, if the owner has stock animals and their neighbour's fence saves them the expense of erecting a fence on their side of the road.

Of course, the cost of a fence between neighbours is only shared if you have agreed on this, or followed the proper procedure. If you have gone ahead without doing this, you pay the whole cost.

What if we agree?

If you and your neighbour agree on the work and the cost-sharing, you do not have to follow the procedure under the Fences Act. However, even if you do not follow the procedure, it is wise to make a written agreement, signed by both of you. It should state clearly what work is to be done, what materials will be used, what quotes have been accepted, and how the cost will be shared. An example of an

agreement is on page 17. Attach copies of quotes for all work. A clear, signed agreement should spell out what was agreed to - without it you could still end up in court.

What if we can't agree?

If you can't agree, try mediation first. This can be cheaper and quicker than court, and can help preserve a good neighbourly relationship. However, if this does not work, or your neighbour will not take part, you will need to follow the Fences Act procedure, unless you decide to abandon the fencing work, or to pay for it all yourself. Even if you pay the whole cost you should still get their permission before doing the work.

The Fences Act procedure

Much of the law about fences is in the Fences Act, 1975. It applies to the fencing of all land, including vacant land, developed land, and rural properties, except for government or council land more than one hectare in size, or land forming a road or road reserve. It applies to all kinds of fences, but not to retaining walls or the walls of buildings.

However, the Fences Act does not contain all the law about fences. Common law, private contracts, planning regulations and other laws may apply. It also does not deal with encroachments, where one person's building is partly on another person's land – these are dealt with under the Encroachments Act, 1944. Legal advice should be sought in this situation.

How do I get my neighbour to pay if we don't agree?

If you and your neighbour don't agree, you must use the Fences Act notice procedure. It is the only legal method if you want to build, repair or replace a boundary fence and you want your neighbour to contribute to the cost, but they don't agree. The process involves filling in a form (called a notice) with details of the work you propose and serving it on (legally delivering it to) your neighbour for response. This booklet contains notice forms which you can use. Your neighbour does not have to contribute unless you follow the procedure correctly.

Notices

If you want to put up a new fence and want your neighbour to contribute, you must serve on the adjoining owner a 'Notice of Intention To Erect A Fence' using Form 1 on page 13.

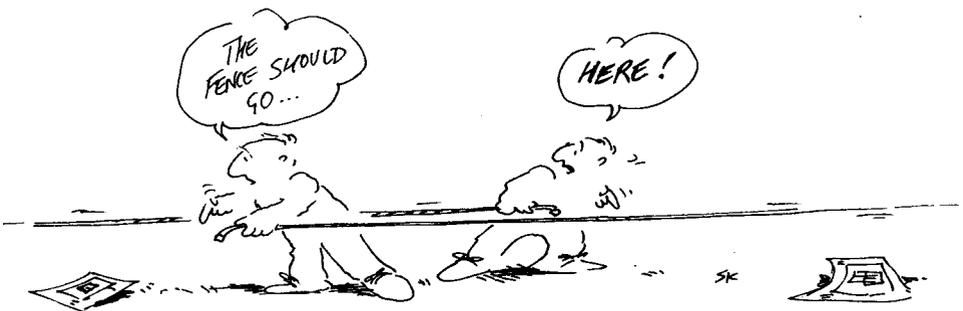
If you want to repair, replace or carry out maintenance work on the fence and want your neighbour to contribute, you must serve a 'Notice of Intention to Replace or Repair a Fence' using Form 2 on page 14.

All notices must be served on the adjoining owner either by handing them to the owner personally or by sending them by Registered Post.

Leaving it in their mailbox, putting it under the door or sending it by ordinary post do not count, even if your neighbour actually gets it. Similarly, giving it to someone else who lives there, or a family member or tenant of your neighbour does not count. If you are not sure who the legal owner is, you can ask your local council or search at the Lands Titles Office. If there is more than one owner, you should serve all of them. Keep a copy of any notice you serve, and also a record of the date, time and method of service, in case your neighbour later says they did not get it.

Once the Form 1 or 2 notice has been served on the other owner, you must wait 30 days before starting any work. In this time the other owner may object with a cross-notice, which may include counterproposals. This cross-notice should be the Form 3 on page 15.

If the adjoining owner agrees with the proposal, work can commence



immediately, but you should get their agreement in writing or else wait for the 30 day notice period to expire. See the sample agreement on page 17.

If you get no reply from the other owner after 30 days, they are taken to have agreed and you can go ahead with the work described in the notice and claim their share of the cost from them. If you sent the notice by Registered Post, check with the post office to see when your neighbour actually collected the notice. You should allow 30 days from that date and also give at least two days notice of intention to commence fencing work.

Objections and counterproposals

If you receive a Form 1 or 2 notice and you object to the proposal, you should complete a Form 3 cross-notice (see page 15). This cross-notice must be served on the adjoining owner within 30 days of receiving the fencing notice. The same rules of service apply as above.

You do not have to give reasons for objecting - you may simply state "I object to your proposal". Nor do you have to make a counter-proposal. However, if the case goes to court you will be required to tell the court your objections to the proposed work, and if you do not have good reasons, the court may order the work, and may also order you to pay court costs. So, if you have good reasons, it makes sense to state them in your cross-notice. If you want to suggest something different from what your neighbour has proposed, you

should do so, giving details of the work and the cost. Your neighbour then has 30 days to answer your notice.

It is not a sufficient objection for a cross-notice that you are about to sell your land and will not get the benefit of the proposed work. As long as you are the owner, the Fences Act procedure binds you. However, you may wish to let your neighbour know that you are selling, as they may agree to wait and deal with the new owner. Nor is it reasonable to object to fencing simply because you are not living at the place where the fence is to be built.

An inability to afford the work is sometimes the reason for an objection, but this will not stand up in court, particularly if the fence is in a poor state and the work is obviously needed. If you agree that the work is required but you cannot afford to pay for it at this time, you should discuss terms of payment with your neighbour. If you cannot agree on a solution, consider using a mediation service. See 'Paying for fencing work' on page 9.

Other reasons that are not acceptable in court include that you don't care about the state of the fence, or don't think a fence is needed. The court normally considers it reasonable for neighbours to have a boundary fence and for the fence to be kept in a good state of repair. However, it may be proper to object if the proposed fence is quite different to other fences in your area.

If you have served a Form 1 or 2 and you receive a Form 3 cross-notice in reply, the same rules apply to you. If there are any counter-proposals with which you disagree, you must serve a written objection (the Form 3 notice can be used) within 30 days. If necessary you can make a counter-counter proposal if you think it will help to resolve the matter. If there are no counter-proposals in the cross-notice (that is, it contains an objection only) you do not have to reply – the notice procedure is finished without agreement or right to proceed.

If you receive a Form 1, 2 or 3 and do not object within 30 days, you will be legally bound to contribute to the proposal described on the form. This is true even if you have told your neighbour that you do not agree, or you are sure that they already know this. Serving a Form 3 or a written objection is the only legally effective way of saying that you disagree.

No agreement

If the procedure does not result in agreement, then you can:

1. Negotiate with the other owner, or
2. Contact a Community Mediation Service for help to settle the dispute. (See page 18), or
3. Go ahead with the fencing work **at your own cost** (if the neighbour gives you permission to remove the existing fence and enter their property), or
4. Apply to your local Magistrates Court for a decision, or
5. Not proceed with the fencing work.

Taking the case to court

If a fencing dispute remains unresolved, either neighbour can apply to the local Magistrates Court, or to any other Magistrates Court if the other person agrees, see page 18. The case is started by filling in a form at the court counter, and arranging for it to be sent to the other person. Copies of all Fences Act notices should be attached to the court form. The court will set a date for both parties to attend for hearing.

Normally, each owner attends court in person. Lawyers do not usually appear in court unless both owners agree or there are special circumstances. However, you can get legal help to prepare the court forms. On the hearing day, be prepared to argue your case and bring any letters, quotes, photographs, surveys etc., relevant to the matter. In some cases, the magistrate may visit the fence site. He or she will decide what should happen and can make a wide variety of orders to end to the dispute. They will also normally order the loser to pay the winner's costs.

Failure to proceed

If you reach agreement using the procedure, or a court order is made, and you do not start the work within 28 days, the other owner may do it and require you to pay your share. Similarly, if you stop work for more than 28 days, the other owner may complete it. The work must be completed within the time agreed upon or set by the court, or if no time was agreed or set, within four months. If nothing has

been done after 4 months, the permission for the work lapses and the person who wants it done must start again with a Form 1 or 2.

Power of entry

You cannot go onto your neighbour's land without legal authority. The simplest way is to ask their permission. However, if they say no, and you have followed the procedures under the Fences Act or have a court order, you can obtain a legal right to enter their land with the vehicles or equipment needed for the work, by giving 2 days written notice. (Less notice may be permissible in an emergency). Again, you must serve the notice either by handing it to them in person or by registered post.

You can only go on the land to the extent necessary for the work. Take care not to do any harm or go beyond what is reasonably necessary, or legal action for trespass or negligence could result.

Paying for fencing work

Whoever orders the fence is responsible to pay the contractor or supplier in full. This person then collects the agreed contribution from their neighbour. If you do the fencing work yourself, you can only charge for your labour if you have a building work contractor's licence (unless it is just post and wire fencing).

If the other owner cannot afford their share of the fence immediately, you can negotiate acceptable terms of repayment. If you cannot agree, a court can order regular payments according to what the other owner can reasonably afford. If an owner does not pay after all proper procedures are followed, debt enforcement proceedings through the Magistrates Court may be necessary and legal advice should be sought.



OTHER CONSIDERATIONS

Council approval

You normally need council approval to build a masonry fence higher than 1 metre, or any other kind of fence higher than 2 metres. The height is measured from the lower side. Some areas have special regulations, so check with your Council before starting any work.

Land for sale

You may have difficulty telling who is the owner of the land if it is in the process of being sold. If a contract of sale has been signed, it is best to serve both the seller and the buyer. Alternatively, it may be better to postpone serving the notice until you can be certain who is the legal owner. A buyer will not be registered as the owner until the title is legally changed into their name.

Housing estates

In some housing estates, the contract of sale may provide that an owner cannot collect a contribution towards the cost of fencing from the developer if the neighbouring block is unsold. A contract may also state that the buyer of the land has to pay the developer or the neighbour for existing fencing.

Rental property

A tenant may be authorised by a landlord to propose or carry out fencing work but as a general rule, a landlord cannot recover the costs of fencing from a tenant except where the work was required as a result of an act or fault of the tenant.

Absent or unknown owners

If you do not know who owns the land, contact the local council or the Lands Titles Office to find out who and where they are. If, after making reasonable enquiries, you cannot identify or find the other owner, your Form 1 or 2 notice must be prominently displayed on their land. If no objection or cross-notice is received after 30 days, you may proceed with the fencing work. When the other owner or the new owner later becomes known, you can require payment, and take legal action if they fail to pay. In court, you will have to prove that you made reasonable enquiries to find them and that the notice was prominently displayed. A photograph may help. Alternatively, to avoid a future dispute about whether the notice was adequately displayed, you should, before doing the work, apply to the court for approval of the proposal and for an order that the other owner pay a share.

Damage

Either party may use the fence to support a trellis, grow a creeper or provide shelter for plants etc, provided they do not damage the fence. If your fence requires repair or replacement because of things your neighbour has done, for example, damage by a car, soil build up, or animals, your neighbour should pay for this fencing work. If they refuse to pay, you can arrange for the work to be done using the Fences Act procedure.

If one neighbour wrongfully damages or pulls down the fence without the agreement of the adjoining owner, or without following the procedure under the Fences Act, they may be liable to compensate the other owner. It is therefore a good idea to obtain the agreement of the adjoining owner beforehand.

Dogs

Any owner of a dog may be prosecuted if their dog escapes through a hole in the fence and wanders at large, regardless of who has caused the hole in the fence, because dog owners have a legal duty to keep their dogs under control. For more information see our pamphlet – The Law and Your Dog.

Emergency repairs

Where an emergency has occurred and the situation is so urgent that notice cannot practicably be given, for example, where a storm-damaged fence allows animals to escape, an owner may carry out necessary repairs without giving notice to the neighbour and still recover part of the cost. They should use a type of fencing similar to what was already there.

Even in an emergency, where it is possible to give notice, you should do so. Even where 30 days notice cannot be given it is best to give as much notice as possible, explaining the urgency and what needs to be done.

Ownership of fencing materials

When a boundary fence is demolished, the ownership of the materials reverts to the adjoining owners in the same proportion in which they (or the owners before them) contributed to the cost of the fence.

Retaining walls

The Fences Act does not cover retaining walls. The general principle is that whoever creates the need for the retaining wall, either by cutting away or building up, should be responsible for retaining the soil. For advice about retaining walls, contact the Legal Services Commission or your local Community Legal Service (see Contact Points from page 18).



GUIDE TO FORMS

There are three forms under the Fences Act which are used to negotiate financial contributions towards fencing work.

FORM 1: To erect a fence where there is none.

FORM 2: To repair or replace an existing fence.

FORM 3: To object to proposals put to you by the adjoining owner, or to make counter proposals.

Special note: all notices must be delivered in person to your neighbour or sent by Registered Post. You should keep a copy of any notices you give to your neighbour.

Blank copies of these forms are attached with numbers on the left hand side. When filling in the spaces on the appropriate form, you should first look at the form and note the number on the left, and then refer to the numbered instruction below.

Note No.

Instructions

1. Name(s) of owner(s) of neighbouring land.
2. Addresses or description of neighbouring land.
3. Address or description of your land.
4. Length and position of proposed fence.
5. Type of fence (eg. 1.8 metre Heritage Red Colorbond with steel posts and rails).
6. Cost of work as quoted (attach quote).
7. Amount claimed from adjoining owner (usually half the cost of work as quoted).
8. Name and address of proposed contractor.
9. Full details of day, month, year (eg. 23rd day of March, 2001).
10. Your signature
11. Your name(s) and postal address.
12. Description of work to be done.
13. Put the date as it appears on your neighbour's notice to you.
14. State your objection to the neighbour's proposal (eg. The type of fence proposed is more expensive than others in the area). Read this booklet carefully for your options.
15. If you want to suggest an alternative to your neighbour's proposal, state the type of fence or fencing work you would be happy with, including the cost you propose that you neighbour contribute. If appropriate, attach a quote.

FORM NO. 1

Notice of Intention to Erect a Fence

(1) To: _____

(2) Owner of:

TAKE NOTICE that I propose that a fence be erected between your land described above and my land at:

(3) _____

The particulars of my proposal are as follows:—

(4) _____

(5) _____

(6) Total cost of fencing work \$ _____

(7) Amount claimed from you \$ _____

(8) Name and address of proposed fencing contractor:

N.B.—IF YOU DO NOT WITHIN THIRTY DAYS AFTER SERVICE OF THIS NOTICE SERVE UPON ME A CROSS-NOTICE IN ACCORDANCE WITH THE FENCES ACT, YOU WILL BE DEEMED TO HAVE AGREED TO THESE PROPOSALS AND WILL BE BOUND THEREBY.

This notice is given pursuant to the *Fences Act 1975*.

(9) Dated

(10) (Signed)

(11) Name and address for service of a cross-notice

FORM NO. 2

Notice of Intention to Perform Replacement, Repair or Maintenance Work

(1) To: _____

(2) Owner of: _____

TAKE NOTICE that I propose that work be performed in relation to a fence dividing your land and my land at:

(3) _____

The particulars of my proposal are as follows:—

(4) _____

(5) _____

(6) Total cost of fencing work \$ _____

(7) Amount claimed from you \$ _____

(8) Name and address of proposed fencing contractor:

N.B.—IF YOU DO NOT WITHIN THIRTY DAYS AFTER SERVICE OF THIS NOTICE SERVE UPON ME A CROSS-NOTICE IN ACCORDANCE WITH THE FENCES ACT, YOU WILL BE DEEMED TO HAVE AGREED TO THESE PROPOSALS AND WILL BE BOUND THEREBY.

This notice is given pursuant to the *Fences Act 1975*.

(9) Dated

(10) (Signed)

(11) Name and address for service of a cross-notice

FORM NO. 3

Cross-Notice

(1) To: _____

(13) TAKE NOTICE that I object to the notice given by you pursuant to the *Fences Act 1975* and dated the _____ day of _____

(14) The particulars of my objection are as follows:

(15) *I make the following counter-proposals:

+ N.B.—IF YOU DO NOT WITHIN THIRTY DAYS AFTER SERVICE OF THIS NOTICE SERVE UPON ME A WRITTEN NOTICE OF OBJECTION IN ACCORDANCE WITH THE FENCES ACT, YOU WILL BE DEEMED TO HAVE AGREED TO THE ABOVE COUNTER-PROPOSALS AND WILL BE BOUND THEREBY.

This Notice is given pursuant to the *Fences Act 1975*.

(9) Dated

(10) (Signed)

(11) Name and address

*These items are to be omitted where no counter-proposals are made.

FENCING WORK AGREEMENT

Between the **Proposer**

owner of land at:

and the **Respondent**

owner of land at:

The parties agree to proceed with fencing work along the boundary between the properties described above. The particulars of the fencing work are as follows:

Total cost of fencing work \$ _____ as per attached quote from
_____ dated\\

The Respondent agrees to allow entry onto his/her land for the purposes of undertaking the fencing work, and to pay the Proposer \$ _____

- (A) within days of completion of the fencing work, OR
(B) regular payments of \$ commencing on\
and continuing weekly\fortnightly\monthly until the contribution is paid in full.

Dated

Signed by the Proposer

Signed by the Respondent

CONTACT POINTS

This information is a general guide to the law. It is not a substitute for legal advice. Contact the Legal Services Commission, a community legal centre or a private lawyer for detailed advice.

MAGISTRATES COURT

Central Switchboard for all courts:

(08) 8204 2444

Adelaide

Civil Registry

1st Floor

260 – 280 Victoria Square

Adelaide SA 5000

Holden Hill

Sudholz Road

Holden Hill

SA 5088

Mount Barker

Hutchinson Street

Mount Barker

SA 5251

Para Districts

15 Frobisher Road

Elizabeth

SA 5112

Port Adelaide

260 St Vincent Street

Port Adelaide

SA 5015

Southern Districts

98 Dyson Road

Christies Beach

SA 5165

Country Magistrates Courts are located in most regional centres.

COMMUNITY MEDIATION CENTRES

For an appointment phone

8384 5222 (metropolitan areas)

COMMUNITY LEGAL CENTRES

Adelaide Inner Northern Community Legal Service

21 May Street
Sefton Park 5084
Telephone 8342 1800

Noarlunga Community Legal Service

40 Beach Road
Christies Beach 5168
Telephone 8384 5222

Environmental Defenders Office

1/118 Halifax Street
Adelaide 5000
Telephone 8232 7599

Para Districts Community Legal Service

47 Wayford Street
Elizabeth Vale 5112
Telephone 8281 6911

Parks Legal Service

Parks Community Centre

Trafford Street
Angle Park 5010
Telephone 8243 5521

Port Augusta Women's Legal Service

8 Church Street
Port Augusta 5700
Telephone 1800 111 052

Riverland CLS

7 Wilson Street
Berri 5343
Telephone 8582 2255

South East CLS

9 Penola Street
Mount Gambier
Telephone 1300 369 236
8723 6236

Spencer Gulf CLS

60 Florence Street
Port Pirie 5540
Telephone 1800 114 442

Welfare Rights Centre

Torrens Building
220 Victoria Square
Adelaide 5000
Telephone 8226 4123

Women's Legal Service

19 Market Street
Adelaide 5000
Telephone 8221 5553 (Advice)
8231 8929 (Admin)

LEGAL SERVICES COMMISSION

www.lsc.sa.gov.au

Telephone Legal Advice

1300 366 424

(TTY 8463 3691)

Adelaide Office

82-98 Wakefield Street
Adelaide 5000
Telephone 8463 3555

Elizabeth Office

Windsor Building
Elizabeth Centre
Elizabeth 5112
Telephone 8207 9292

Modbury Office

4 Smart Road
Modbury 5092
Telephone 8265 4088

Noarlunga Office

Noarlunga House
Colonnades Shopping Centre
Noarlunga Centre 5168
Telephone 8207 3877

Port Adelaide Office

2 Marryatt Street
Port Adelaide 5015
Telephone 8207 6276

Whyalla Office

1st Floor RAA House
25 Forsyth Street
Whyalla 5600
Telephone 8648 8060

This booklet is published as a community service by the Legal Services Commission of South Australia with the support of the Local Government Association.

Some of the other free pamphlets published by the Commission are:

1. *Need Legal Help?*
2. *Power of Attorney*
3. *De Facto Relationships*
4. *Motor Vehicle Accidents*
5. *Wills*
6. *Debts*
7. *Carer Parents & Child Support*
8. *Liabile Parents & Child Support*
9. *Going to Court*
10. *You and the Police*
11. *Neighbours*
12. *Bankruptcy*

We also have free booklets on *Family Law and You*, *Cycling and the Law*, *Strata and Community Titles*, *Worker's Rights*, *Unfair Dismissals*, *Restraining Orders*, *The Law and Your Dog* and plus *Need Legal Help?* cards in 12 languages.

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