

# FENCES ORDINANCE 1972

1113

No. 34 of 1972

## An Ordinance relating to Fences

[Assented to 31 July, 1972]

**B**E it ordained by the Legislative Council for the Northern Territory of Australia as follows:—

1. This Ordinance may be cited as the *Fences Ordinance* 1972. Short title

2.—(1.) The *Fences Act* 1892 of the State of South Australia and the *Fences Act Amendment Act* 1903 of the State of South Australia cease to have effect in the Northern Territory as laws of the Northern Territory. State laws not to apply

(2.) Section 8 of the *Acts Interpretation Act* 1901-1966, in its application to Ordinances by virtue of section 4 of the *Interpretation Ordinance*, has effect as if the *Fences Act* 1892 of the State of South Australia and the *Fences Act Amendment Act* 1903 of the State of South Australia were Ordinances and had been repealed by this Ordinance. Saving

3. This Ordinance does not bind the Crown. Ordinance not to bind Crown

4. The provisions of this Ordinance do not affect the operation or application of the *Control of Waters Ordinance* or sections 61 to 63B, inclusive, of the *Stock Routes and Travelling Stock Ordinance*, and nothing in this Ordinance authorizes or confers a power to authorize the construction of a dividing fence across the bed of any watercourse or lake. Saving of related Ordinances

5.—(1.) In this Ordinance, unless the contrary intention appears— Definitions

“adjoining lands” includes lands separated by a watercourse, lake or other natural feature of such a character as to be insufficient to prevent at all times the passage of stock and notwithstanding that the bed and banks of that watercourse, lake or natural feature may be Crown land and with respect to lands

so separated the term "common boundary" includes the bed and banks of the watercourse, lake or other natural feature by which those lands are separated;

"court" means a Local Court continued or established under the *Local Courts Ordinance*;

"Crown land" means land of the Crown or the Commonwealth which is not leased;

"dividing fence" means a fence separating the adjoining lands of different owners whether the adjoining lands are wholly or only partly separated thereby and whether the fence is on the line of or, in an appropriate case, on a line on the common boundary of the adjoining lands or on a line other than the line of or a line on the common boundary or partly on any one of those lines and partly on the other or others;

"fence" means a structure of posts and board, palings, rails, galvanised iron, metal or wire or a wall, ditch or embankment or a combination of any of these, enclosing or bounding land and includes any foundation, foundation wall or support reasonably necessary for the support and maintenance of a building but does not include a wall which is part of a building;

"lease" includes a lease, a sub-lease, an under-lease and an agreement for a lease but does not include a Crown lease and "lessee" has a corresponding meaning;

"notice to fence" means a notice served under section 7 of this Ordinance;

"notice to repair" means a notice served under section 15 of this Ordinance;

"order to fence" means an order to fence made under section 8 or 10 of this Ordinance;

"order to repair" means an order made under sub-section (3.) of section 8 of this Ordinance or under section 15 of this Ordinance;

"owner" includes every person who, whether jointly or severally at law or in equity—

(a) is entitled to land for any estate of freehold in possession;

(b) is a lessee of Crown land within the meaning of that expression under any law for the time being in force in the Northern Territory relating to the leasing of Crown land,

but does not include trustees or other persons having the control and management of land

which is a public reserve or park or is used for any public purpose which may be prescribed.

(2.) Where, in any proceedings under this Ordinance, a court has to determine what is a sufficient fence for the purposes of this Ordinance the court shall have regard to—

- (a) the nature of the neighbourhood in which the fence is to be erected;
  - (b) the purpose for which the fence is to be erected;
  - (c) whether any and if so what fences are usual in the neighbourhood; and
  - (d) the need for the protection of persons or the containment of stock in the neighbourhood,
- and the court may determine that no fence is, in the circumstances, required.

6.—(1.) Subject to this Ordinance and to any agreement between the parties concerned, the owners of adjoining lands not divided by a sufficient fence are liable to join in or contribute to the construction of a sufficient fence dividing their lands in equal proportions whether the adjoining lands are to be wholly or only partly separated by the proposed fence.

Liability to contribute to cost of fence

(2.) A court may, where it considers that there are special circumstances that justify it in so doing, order that the owners of adjoining lands not divided by a sufficient fence shall join in or contribute to the construction of a sufficient fence dividing their lands otherwise than in equal proportions, whether the adjoining lands are to be wholly or only partly separated by the proposed fence.

7. An owner desiring to compel an owner of adjoining land to join in or contribute to the construction of a dividing fence under this Ordinance (including the demolition of an existing fence and the erection of a new fence) may serve that owner of adjoining land with a notice to fence which shall be in writing and shall—

Notice to fence

- (a) specify the common boundary the line of which is to be fenced or, where, on account of physical features of the land, it is impracticable to construct a fence wholly on the line of the common boundary of such adjoining lands or where the adjoining lands are separated by a watercourse, lake or other natural feature insufficient to prevent at all times the passage of stock, the line on which it is proposed to construct such fence, and if part of the line of a common boundary is to be fenced, that part;

*Fences*

- (b) contain a proposal for fencing on the proposed line; and
- (c) specify the kind of fence to be constructed.

**Orders to fence**

8.—(1.) If, within one month after the service of a notice to fence, the owner served with the notice to fence and the owner who served that notice do not agree as to the construction of the proposed fence, the line of the proposed fence or the kind of fence proposed, either of those owners may apply to a court for an order determining—

- (a) whether the construction of the proposed fence or a part of it or of any fence between the adjoining lands is reasonably required;
- (b) what part of any dividing fence is to be constructed by each of such owners or that the whole of the fence shall be constructed by one owner and in that event what proportion of the cost of the construction of the fence shall be borne by each of the owners respectively;
- (c) the time within which the fence shall be constructed;
- (d) the line upon which the fence the subject of the order shall be constructed;
- (e) the amount of compensation or annual compensation to be paid by one owner to the other owner in consideration of the loss of occupation of any land as a result of the construction of the fence the subject of the order;
- (f) the kind of fence to be constructed; or
- (g) the nature of any other relief to which the applicant is justly entitled.

(2.) Upon an application made under the last preceding sub-section the court may make all or any of the orders sought in the application or such of the orders described in that sub-section as either party to the application, at the hearing, requests the court to make.

(3.) Where the demolition of an existing dividing fence and the erection of a new fence in place thereof was proposed by the notice to fence, the court to which application is made under sub-section (1.) of this section may, in lieu of making an order for the demolition of the existing fence and the erection of a new fence, make an order to repair the existing fence, specifying—

- (a) the nature of the repairs;

- (b) which of the adjoining owners shall effect the repairs;
- (c) the proportions in which the cost of the repairs shall be borne; and
- (d) the period of time during which no further order to fence may be served with respect to the fence to be repaired unless the consent of a court is first obtained.

(4.) Where there are two or more owners of adjoining land any one of those owners who has not been served with a notice to fence is entitled to be joined as a party to any proceedings under this section.

(5.) Where, by agreement or pursuant to an order to fence, a fence is constructed otherwise than wholly on the line of the common boundary of adjoining lands, the occupation by a person of any land adjoining that fence which he was not entitled to occupy immediately before the fence was erected shall not be deemed to be adverse possession of the land so occupied nor affect the title of any person to the land so occupied.

(6.) In determining the kind of fence to be erected under an order made under this section, a court shall take into account the kind of fence usually erected in the locality where the fence is to be constructed and whether it is usual to erect dividing fences in that locality.

9. Where an agreement is made between owners of adjoining lands as to the construction of a dividing fence or an order is made by a court as to any such fence and a person bound by that agreement or order fails to observe any liability placed on him by that agreement or order within the time specified in the agreement or order or, if no such time is specified, within six months after the making of the agreement or order, the other party to the agreement or the proceedings in which the order was made may carry out the work of constructing the fence the subject of the agreement or of the provisions of the order and recover from the first-mentioned person the extra cost occasioned to him by reason of the default of the first-mentioned person.

Enforcement  
of agreements  
and orders

10.—(1.) An owner may apply to a court for an order to construct a dividing fence notwithstanding that a notice to fence has not been served on the owner of the adjoining land.

Application  
for order  
*ex parte*

(2.) Upon an application made under the last preceding sub-section the court, if it is satisfied that the applicant has made reasonable enquiries and has been unable to ascertain the whereabouts of the owner of the adjoining land, may make an order *ex parte* authorizing the applicant to construct a dividing fence of the kind and on the line specified in the order.

(3.) Where a fence is constructed in pursuance of an order made under this section and the successful applicant ascertains the whereabouts of a person who was liable to be served with a notice to fence at the time the application was made, the successful applicant may serve on that person a copy of the order to fence.

(4.) Upon service of a copy of an order to fence made under this section—

- (a) the person so served may apply to set aside the order on the grounds that the order was not, at the time it was made, in accordance with the justice of the case; or
- (b) unless an order under the last preceding paragraph has been made, the successful applicant is entitled to recover from the person so served one half of the cost of the construction of the fence or one half of the value of the fence at the date of service (whichever is the lesser amount).

Liability of new owner for existing fence

**11.** Where an owner of land has constructed a dividing fence between his land and adjoining Crown land and that adjoining Crown land is thereafter alienated from the Crown or the Commonwealth then the owner of the first-mentioned land may recover from the person to whom the adjoining Crown land has been alienated half the value of that dividing fence assessed as at the date of the alienation of the adjoining Crown land to that person.

Proceedings for defining boundary line by registered surveyor

**12.—(1.)** Where the owners of adjoining lands do not agree as to the position of the common boundary between their respective lands upon which a dividing fence is proposed to be constructed, either one may give notice to the other of his intention to have the common boundary line defined by a licensed surveyor.

(2.) The owner to whom notice is given shall, within thirty days after the service of the notice—

- (a) if satisfied of the position of the common boundary line, define it by pegs; or
- (b) employ a licensed surveyor to define the common boundary line,

and in either case shall notify the adjoining owner in writing of what he has done.

(3.) If within two months from the service of the notice provided for in sub-section (1.) of this section the owner to whom the notice was given has failed to have the common boundary line defined by a licensed surveyor, then the owner

who gave such notice may have the common boundary line defined by a licensed surveyor.

(4.) If the common boundary line when defined by a licensed surveyor is ascertained to be in substantially the same position as defined by pegs placed there by the owner receiving the notice given in pursuance of sub-section (1.) of this section, that owner shall be entitled to recover the costs incurred by him in placing the pegs from the owner giving such notice, but where a licensed surveyor has been employed by either such owner all reasonable expenses actually incurred and not reimbursed by the Commonwealth shall be borne in equal shares by the adjoining owners.

**13.** Where an order to repair is made by a court under sub-section (3.) of section 8 or under section 15 of this Ordinance and any person bound by that order fails within the time named in that order, or, if no such time is named, within three months after the date of that order, to comply with that order, then the owner of the land separated by the dividing fence the subject of the order from the land of the person in default may repair the whole fence the subject of the order and may recover from the person in default that part of the cost of such repair which the owner of the adjoining land was liable to pay under the order or under this Ordinance or, if the whole of such repair was by that order required to be carried out by the person in default, the whole of the cost of such repair.

Action in default  
of compliance  
with order

**14.—(1.)** Subject to this Ordinance and to any agreement between the parties concerned, the owners of land on either side of an existing dividing fence are liable to contribute equally to the cost of the repair of the dividing fence between their adjoining lands.

Repair of  
fences

(2.) A court may, where it considers that there are special circumstances that justify it in so doing, order that the owners of land on either side of an existing fence shall contribute otherwise than equally to the cost of the repair of the dividing fence.

**15.—(1.)** The owner of land separated from adjoining land by an existing dividing fence may serve a notice to repair on the owner of adjoining land requiring the last-mentioned owner to contribute to the repairing of the fence.

Notice to  
repair

(2.) Such a notice shall specify the part of the dividing fence to be repaired, the nature of the repair proposed but shall not specify any method or materials for the repair of the fence which would make the repaired fence a fence of a different kind from the fence which was in existence at the date of the notice.

*Fences*

(3.) If no agreement as to the sharing of the cost of the repair of a fence the subject of a notice under the last preceding sub-section is reached within one month of the notice the owner serving such notice may repair the fence and recover half the cost of that repair from the person on whom a notice complying with this section was served.

(4.) If a dividing fence is damaged or destroyed by flood, storm, lightning or tempest, or by fire or accident where the damage or destruction by fire or by accident is not attributable in whole or in part to the intention or negligence of the owner of the land on either side of the fence or of a servant of such owner the owner of the land on either side of the fence may immediately repair the fence without serving a notice to repair on the owner of the adjoining land and thereupon is entitled to recover half the cost of the repair from the owner of the adjoining land.

(5.) Where a dividing fence has been damaged or destroyed by an act done or commenced or an event, other than an event described in the last preceding sub-section, happening on land on one side of that dividing fence, the owner of the land on which the act was done or commenced or on which the event happened is liable to repair the damage so caused or to reinstate the fence so destroyed and if that owner does not do so within one month of the doing of the act or the occurrence of the event, the owner of the adjoining land may repair the damage or reinstate the fence and recover the reasonable cost of doing so from the first-mentioned owner.

(6.) A person on whom a notice to repair has been served may, within one month after the date of the service of that notice, apply to a court for an order determining—

- (a) that the fence is not in need of repair;
- (b) what repair to the fence is reasonable in the circumstances;
- (c) in the appropriate case, that the existing fence should be demolished and a new fence constructed and in that case the kind of new fence to be constructed; or
- (d) the proportion of the cost of the repair or of the erection of a new fence which should be borne by each owner of the adjoining lands; and
- (e) whether both or which of the owners of the adjoining lands shall effect the repairs.

(7.) A court has jurisdiction to make any order sought upon an application under the last preceding sub-section and any other orders as to fencing on the line of the existing fence as to it may seem just.



16. If the owner of land bounded by a road constructs a sufficient fence on the boundary of his land which is contiguous with the road and another owner thereafter adopts any means whereby his land is enclosed by that fence or makes use of that fence in any way, that other person is liable to pay to the owner who constructed the fence one half of the value of that fence at the date on which he first had or took some step to have any use or benefit from the existence of that fence.

Fences  
bounding  
roads

17. A court has jurisdiction to hear and determine an application made under this Ordinance as an action under the *Local Courts Ordinance*, and an order made under this Ordinance may be enforced accordingly as a judgment of that court.

Jurisdiction  
of courts

18. A court may vary or cancel an order made under section 8, section 10 or section 15 of this Ordinance.

Court may vary  
an order

19.—(1.) Any moneys (including costs ordered to be paid by a party to proceedings under this Ordinance) which a person is required or is liable to pay in pursuance of this Ordinance may be sued for and recovered in any court of competent jurisdiction.

Recovery of  
money

(2.) In any proceedings for the recovery of moneys payable under an order of a court a certificate under the hand of the clerk of the court certifying that the order was made and the terms thereof is evidence of the matters to which it certifies.

20. Where a fence is constructed or repaired and the fence divides any land held by a person as a lessee from any adjoining lands, the contribution payable in respect of the fence shall, as between the lessee and the owner of the leased land, be payable according to the unexpired term of the lease at the time of the construction or repair of the fence, as follows:—

Apportionment  
as between  
owner and  
lessee

- (a) where the term had less than five years to run the contribution is payable by the owner;
- (b) where the term had more than five but less than ten years to run the lessee shall pay one quarter and the owner shall pay three quarters of the contribution;
- (c) where the term had more than ten but less than fifteen years to run the owner and the lessee shall each pay half of the contribution;
- (d) where the term had more than fifteen years to run the lessee shall pay the whole of the contribution.

21. Where any land in respect of which a contribution has been paid by the owner in respect of the construction or repair of a dividing fence is at the time of the payment subject to an

Liability  
where option  
to purchase  
exists

option to purchase, the purchaser if the purchase is completed, shall pay to the owner the amount of the contribution so paid.

Entry onto  
other land

22. Every person engaged in the construction or repair of a dividing fence and his servants and agents may at all reasonable times enter upon the land adjoining the fence for the purpose of carrying out the construction or repair of the fence.

Form of  
service of  
notices

23.—(1.) A notice under this Ordinance may be served personally or by post.

(2.) Service of a notice may be proved by affidavit.

(3.) The description in a notice under this Ordinance of any land, fence, line or boundary need not particularly define the land, fence, line or boundary if—

(a) it reasonably identifies the land, fence, line or boundary; or

(b) it is proved that the person served knew that land, fence, line or boundary.

(4.) A person serving a notice under this Ordinance is excused from serving more than one of a number of joint owners of land if he proves that, after making reasonable enquiry the name or whereabouts of the other owner or owners was unknown to him.

Regulations

24. The Administrator in Council may make regulations, not inconsistent with this Ordinance, prescribing all matters which are required or permitted to be prescribed by this Ordinance or which are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.