



ANNO VICESIMO QUARTO

ELIZABETHAE II REGINAE

A.D. 1975

No. 44 of 1975

An Act to provide for the erection, replacement, repair and maintenance of fences; to repeal the Fences Act, 1924-1926; and for other purposes.

[Assented to 10th April, 1975]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

Short title.

1. This Act may be cited as the "Fences Act, 1975".

**Commence-
ment.**

2. This Act shall come into operation on a day to be fixed by proclamation.

**Repeal and
saving
provision.**

3. (1) The following Acts are repealed:—
the Fences Act, 1924;
the Fences Act Amendment Act, 1926.

(2) Any proceedings commenced pursuant to the repealed Act may be continued and completed subject to and in accordance with the provisions of that Act in all respects as if this Act had not been enacted.

Interpretation.

4. (1) In this Act, unless the contrary intention appears—
"adjoining owners" means the owners of contiguous land;
"cost" in relation to fencing work—
(a) includes the cost of any survey that is reasonably required for the purposes of the fencing work;
(b) includes the cost of any work reasonably required to facilitate the performance of the fencing work;
and
(c) where an adjoining owner has done, or proposes to do, any of the work personally, includes a reasonable allowance for his labour:
"council" means a municipal or district council and includes any body corporate that is, by virtue of any Act, deemed to be, or vested with the powers of, a municipal or district council:

“court” in relation to any proceedings relating to a fence or fencing work means the local court nearest to the location or proposed location of the fence or fencing work to which the proceedings relate, or any other local court in which the parties agree to litigate the proceedings:

“Crown lands” means Crown lands within the meaning of the Crown Lands Act:

“dividing fence” means a fence dividing contiguous land of adjoining owners:

“fencing work” means the erection of a new dividing fence, or replacement, repair or maintenance work in relation to an existing dividing fence:

“owner”—

(a) in relation to land alienated from the Crown by grant, means the proprietor at law or in equity of—

(i) an estate of fee simple in the land;

or

(ii) a life estate in the land;

(b) in relation to land of the Crown subject to an agreement for sale, or a right of purchase, means the person entitled to the benefit of that agreement or right of purchase;

(c) in relation to land held of the Crown under a lease, means the lessee;

and

(d) in relation to land held of the Crown under a licence, the term of which exceeds twelve months, means the licensee,

and includes an occupier of land who, with the consent of the owner, carries out, or proposes to carry out, fencing work in relation to the land:

“proponent” and “adjoining owner” mean, respectively—

(a) the owner of land who proposes to erect a fence dividing his land from contiguous land, or to perform replacement, repair, or maintenance work in relation to such a fence;

and

(b) the owner of that contiguous land:

“public road” means a road or thoroughfare to which the public has access:

“replacement, repair or maintenance work” means the replacement, repair or maintenance of the whole or any part of a fence and includes trimming or maintaining any vegetation that serves as a fence, and cleaning, deepening, straightening, enlarging or altering any watercourse, ditch, channel or other geographical configuration that serves as a fence:

“the repealed Act” means the Fences Act, 1924-1926, repealed by this Act.

(2) For the purposes of this Act land is contiguous with other land if—

(a) there is a common boundary between that land and the other land;

or

(b) that land is separated from the other land by a right of way of no more than one metre in width.

Notice of
intention to
perform
fencing work.

5. (1) Where the owner of any land proposes to erect a fence dividing his land from the land of an adjoining owner, he may serve notice of that intention upon the adjoining owner.

(2) The notice must be in the Form No. 1 in the schedule to this Act and must state—

(a) the length and position of the proposed fence;

(b) the nature of the proposed fence;

(c) an estimate of the cost of the erection of the proposed fence;

(d) the amount that the proponent seeks to recover from the adjoining owner towards the cost of the proposed fence;

(e) where the proposed line of the fence encroaches into the land of the adjoining owner, whether the proponent proposes to pay compensation to the adjoining owner for loss of occupation, and, if so, the amount of that compensation;

(f) the name and address of any contractor or other person by whom the proposed fence is to be erected.

(3) Where the owner of any land proposes to perform any replacement, repair or maintenance work in relation to a fence dividing his land from the land of an adjoining owner, he may serve notice of that intention upon the adjoining owner.

(4) The notice must be in the Form No. 2 in the schedule to this Act and must state—

(a) the nature and location of the proposed work;

(b) the cost of the proposed work;

(c) the amount that the proponent seeks to recover from the adjoining owner towards the cost of the proposed work;

and

(d) the name and address of any contractor or other person by whom the proposed work is to be performed.

Cross-notice.

6. (1) Where an adjoining owner objects to any of the proposals contained in a notice served upon him in pursuance of this Act, he may, within thirty days after the service of the notice, serve a cross-notice upon the proponent.

(2) The cross-notice must be in the Form No. 3 in the schedule to this Act and—

(a) must state to which of the proposals the adjoining owner objects;

and

(b) may contain counter-proposals in relation to the proposed erection of a fence or the proposed performance of replacement, repair or maintenance work.

(3) Where the proponent objects to any counter-proposal contained in a cross-notice under this section, he may, within thirty days after the service of the notice, serve notice in writing of his objection upon the adjoining owner.

(4) An objection may be made to a proposal or counter-proposal either because the objector objects generally to the proposals or counter-proposals or because of some specific objection to the proposal or counter-proposal but it shall not be necessary to assign any reason for an objection in a notice under this Act.

7. Where a person to whom a proposal or counter-proposal has been made under this Act does not serve notice of his objection to the proposal or counter-proposal in accordance with this Act, he shall be deemed to have agreed to the proposal or counter-proposal.

Agreement
upon basis of
proposals and
counter-
proposals.

8. (1) Where notice of the proposed erection of a fence, or the proposed performance of replacement, repair or maintenance work in relation to a fence has been served in accordance with this Act, the proponent may proceed with the fencing work—

Performance of
fencing work.

(a) after the expiration of thirty days from the date of service of the notice, if he is not served with a cross-notice during that period;

or

(b) if he is served with a cross-notice during that period, after agreement has been reached upon the proposals and counter-proposals (if any) or any differences have been adjudicated upon by the court.

(2) Except as otherwise provided in this Act, no contribution shall be recoverable under the provisions of this Act in respect of fencing work performed before the proponent becomes entitled to proceed with the fencing work under subsection (1) of this section.

(3) If the proponent does not proceed with the fencing work within twenty-eight days after the day on which he becomes entitled to do so in accordance with subsection (1) of this section, or such longer period as may be agreed upon by the parties or fixed by the court, the adjoining owner may proceed with the fencing work.

(4) If the fencing work is discontinued by either party for more than twenty-eight days prior to its completion the other party may proceed to complete the work.

(5) If neither the proponent nor the adjoining owner proceeds with the fencing work for a period in excess of the prescribed period, or the work is discontinued for any such period, the agreement shall, as to the part of the work that then remains to be performed, lapse.

(6) The prescribed period referred to in subsection (5) of this section is a period agreed upon by the proponent and the adjoining owner, or determined by order of the court, or in the absence of any such agreement or order, a period of four months.

Whereabouts
of adjoining
owner
unknown.

9. (1) Where a person desires to perform fencing work in the nature of erecting, replacing, repairing, or maintaining a dividing fence, and the identity or whereabouts of the adjoining owner has not, after reasonable inquiry by the proponent, been ascertained, he may—

(a) affix a notice of his intention to perform the fencing work in the Form No. 1 of the schedule to this Act on some prominent part of the land of the adjoining owner, and, if no cross-notice is served upon him in accordance with this Act, proceed with the work as if the adjoining owner had agreed to the proposals contained in the notice;

or

(b) apply to the court for a determination under subsection (2) of this section.

(2) The court may upon the hearing of an application for a determination under this subsection approve, with or without modification, a proposal for the performance of fencing work submitted to the court by the proponent, and order that an amount, determined by the court, be paid by the adjoining owner towards the cost of the fencing work.

(3) Where the identity and whereabouts of the adjoining owner, or a successor in title to the adjoining owner, are ascertained the proponent or a person claiming under him—

(a) may institute proceedings for the recovery of contribution towards the cost of the fencing work;

or

(b) proceed to enforce an order under this section against him.

(4) In proceedings under paragraph (a) of subsection (3) of this section the court may order the payment of such contribution as it considers just in the circumstances.

No adjoining
owner.

10. (1) Where a person proposes to perform fencing work in the nature of erecting, replacing, repairing or maintaining a dividing fence, and there is no adjoining owner of the contiguous land from which his land is or is to be divided, he may apply to the court for a determination under this section.

(2) The court may, upon the hearing of the application approve, with or without modification, a proposal for the performance of fencing work submitted to the court by the proponent, and may order that when a person becomes the owner of the contiguous land, he shall pay to the proponent an amount, determined by the court, towards the cost of the fencing work.

Case where
fence divides
land from
public road
and owner of
land abutting
upon road
derives benefit
from fence.

11. (1) Where a person has erected a fence dividing his land from a public road, and any other person who is the owner of land abutting upon the road derives use of, or benefit from the fence, by reason of the proximity of the fence to his own land the person by whom the fence has been erected may

institute proceedings in the court for the recovery from that other person of a contribution towards the cost of erecting the fence or any further fencing work in relation to the fence.

(2) The court may order the person against whom the proceedings are taken to make such contribution as it considers just in view of the benefit that he derives in consequence of the erection of the fence or the performance of the further fencing work.

12. (1) Where any difference or dispute arises in relation to fencing work, or any liability arising under this Act, any person affected by the difference or dispute may by application to the court seek a determination of the matter. Powers of court.

(2) Upon the hearing of an application under subsection (1) of this section the court may determine the matter in such manner as it considers just and may—

- (a) make any finding, determination or order in relation to the erection of a fence, the nature of the fence to be erected, the line of fence to be adopted and the amount of compensation (if any) to be paid for loss of occupation of land as a result of the erection of a fence otherwise than upon the boundary of contiguous land;
- (b) make any finding, determination or order in relation to the performance of replacement, repair or maintenance work in relation to a dividing fence;
- (c) determine the person or persons by whom any fencing work is to be performed, and where it is to be performed by different persons, the part of the work to be performed by each;
- (d) re-open and correct or vary any agreement arrived at under this Act (including an agreement that is, by virtue of section 7 of this Act, deemed to have been made) upon such terms as the court considers just;
- (e) re-consider and vary upon such terms as the court considers just an order under section 9 or section 10 of this Act;
- (f) determine the time at which fencing work is to be performed and the manner of its performance;
- (g) make any order that may be necessary or expedient in relation to entry upon or access to land for the purposes of performing fencing work;
- (h) order the removal of a fence or any portion of a fence not erected upon the proper boundary;
- (i) determine the cost of fencing work and the persons by whom and the proportions in which the cost is to be borne;
- (j) make any order or give any direction that may be necessary or expedient to overcome difficulties ascertained during the progress of fencing work;
- (k) determine, and order payment of, compensation for any damage for which compensation is payable under this Act, or any other Act or law;

and

- (l) make such order for costs as the court considers just.

(3) The court may, on the application of any interested person, extend any limitation of time prescribed by this Act (whether or not the time so limited has expired).

(4) Where the owner of land claims to be entitled to the payment of an amount from an adjoining owner in respect of the performance of fencing work either in pursuance of the provisions of this Act, or any agreement under this Act, he may apply to the court for an order for payment of that amount.

(5) The court may upon an application under subsection (4) of this section make an order for any person to pay an amount for which he is so liable.

(6) Subject to subsection (7) of this section, any dispute as to the relative proportion in which the cost of fencing work is to be borne as between adjoining owners shall be determined according to the benefit that each of the adjoining owners derives from the performance of the fencing work, and, in the absence of proof to the contrary it shall be presumed that the adjoining owners derive equal benefit from the performance of the fencing work.

(7) If fencing work consists in the erection of an adequate fence or a fence of better quality than an adequate fence, or the conversion of an existing fence into an adequate fence or a fence of better quality than an adequate fence, then, in the absence of agreement between the adjoining owners, the contribution for which an adjoining owner is liable shall be one-half of the minimum cost of erecting an adequate fence, or converting the existing fence into an adequate fence.

(8) For the purposes of this section—

(a) an adequate fence is a fence that conforms with general standards of good fencing existing in the locality in which the fencing work has been or is to be performed and is adequate for the purposes of the owner against whom contribution is sought;

and

(b) a fence may be an adequate fence notwithstanding that it is discontinuous where any vegetation, watercourse, ditch or other geographical configuration serves as a fence or portion thereof.

(9) Any person who is, in accordance with this Act, liable to either of the adjoining owners of land in respect of fencing work shall be entitled to appear in any proceedings relating to that fencing work under this section.

Jurisdiction
of court.

13. (1) All proceedings under this Act shall be justiciable by a local court of limited jurisdiction unless they involve a monetary claim for an amount in excess of two thousand five hundred dollars.

(2) Any proceedings under this Act that do not involve a monetary claim for an amount in excess of five hundred dollars shall be deemed to be proceedings based upon a small claim for the purposes of the Local and District Criminal Courts Act, 1926-1974.

(3) Any proceedings under this Act that involve a monetary claim for an amount in excess of two thousand five hundred dollars shall be justiciable by a local court of full jurisdiction (whether or not the amount of the claim exceeds the jurisdictional limit prescribed under the Local and District Criminal Courts Act, 1926-1974).

Landlord and
tenant.

14. (1) Subject to any agreement between a landlord and tenant and the provisions of this section, the landlord may recover, as a debt due to him, contribution towards the satisfaction of any liability incurred by the landlord during the tenancy in respect of fencing work performed in relation to fences dividing the land occupied by the tenant from the land of adjoining owners.

(2) The contribution recoverable under subsection (1) of this section shall be determined in accordance with the following principles:—

- (a) where at the time of the performance of the fencing work a period of less than three years remains of the term of the tenancy, no contribution is payable by the tenant;
- (b) where at the time of the performance of the fencing work a period of at least three years but less than six years remains of the term of the tenancy, a contribution of one-quarter of the liability incurred by the landlord is payable by the tenant;
- (c) where at the time of the performance of the fencing work a period of at least six years but less than twelve years remains of the term of the tenancy, a contribution of one-half of the liability incurred by the landlord is payable by the tenant;

and

- (d) where at the time of the performance of the fencing work a period of at least twelve years remains of the term of the tenancy, the landlord may recover a sum sufficient to satisfy his total liability from the tenant.

(3) Subject to any relevant agreement, where a tenant exercises a right or option to purchase land occupied by him for a sum fixed in an agreement, or fixed in accordance with principles contained in an agreement, with the landlord, the former landlord may recover as a debt from the former tenant, in augmentation of the purchase price, any sum paid by the landlord during the tenancy, in respect of fencing work relating to the land subject to the tenancy.

(4) It shall be a defence to an action for the recovery of any moneys under this section that—

- (a) the fencing work was not required as a result of any act or default on the part of the tenant;
- (b) the tenant was not afforded adequate opportunity to make representations in relation to the proposals and counter-proposals (if any) before they became binding on the landlord or was afforded such an opportunity and objected to the proposals or counter-proposals by notice in writing served upon the landlord a reasonable time before the proposals or counter-proposals became binding upon him;

and

- (c) the tenant was not bound by the order of a court to make contribution towards the cost of the fencing work by order of a court made pursuant to the provisions of this Act before the commencement of the fencing work.

15. (1) Where a life tenant incurs any liability for fencing work, he shall be entitled to recover from the remainderman or the reversioner a contribution towards that liability.

Contribution
as between
life tenant and
remainderman.

(2) The contribution to which a life tenant is entitled under this section shall be the proportion of the liability incurred by the life tenant that the value of the interest of the remainderman or reversioner bears to the value of an estate of fee simple in the land.

Damage to or
destruction of
dividing fence.

16. (1) Subject to this section, where a dividing fence is damaged or destroyed, and there is an urgent need to repair or restore the fence, either of the adjoining owners may, without notice to the adjoining owner, carry out the requisite fencing work and recover one-half of the cost of the fencing work from the other adjoining owner.

(2) Where a dividing fence is damaged or destroyed as a result of a wrongful act or default on the part of any person, an adjoining owner who has properly incurred any cost or expense in repairing or restoring the fence (whether in pursuance of this Act or otherwise) may recover from that person, as a debt, the cost or expense so incurred.

(3) An adjoining owner shall not be entitled to recover contribution for any fencing work under this Act in so far as that fencing work consists in the repair of damage resulting from his own wrongful act or default.

Position of
fence does not
give rise to
title by adverse
possession.

17. Notwithstanding the provisions of the Real Property Act, where a dividing fence is erected otherwise than upon the boundary to contiguous land either in pursuance of an agreement under this Act, or of an order of the court, neither of the adjoining owners shall, by reason of his occupation of the land enclosed by the fence, be deemed to be in adverse possession of any land of the other so as to acquire title to that land in derogation of the title or interest of the other.

Power of entry.

18. (1) Subject to subsection (2) of this section and to any agreement or order, any person may, for the purpose of carrying out authorized fencing work, enter at any reasonable time upon land with any vehicle or equipment reasonably required for the purposes of the fencing work and do anything that may be reasonably required for the purposes of the fencing work.

(2) Except in the case of an emergency, the powers conferred by this section shall not be exercised unless at least two days before the land is entered in pursuance of this section notice in writing of the intended entry has been served upon the owner of the land.

(3) The powers conferred by this section shall be exercised as far as reasonably practicable so as not to cause injury to the land or property of any other person.

(4) In this section—

“authorized fencing work” means—

(a) fencing work in respect of which agreement has been reached in pursuance of this Act;

(b) fencing work authorized in accordance with the order of a court;

or

(c) fencing work otherwise authorized by this Act.

Manner in
which notice
is to be given.

19. (1) Any notice under this Act must be signed by the person giving the notice or his solicitor, attorney or agent.

(2) Service of a notice under this Act must be effected personally or by registered post.

20. (1) Subject to subsection (2) of this section, this Act applies in respect of land of the Crown, an instrumentality or agency of the Crown, or a council. Application of Act to land of the Crown and councils.

(2) This Act does not apply in respect of any such land where—

(a) the land comprises, or is comprised in, a single parcel of land of more than one hectare in area;

or

(b) where the land comprises, or is comprised in a public road or a road reserve.

21. Any obligation to fence land, or to maintain a fence in a state of repair, that may exist by prescription, is hereby extinguished. Extinguishment of prescriptive fencing rights.

22. (1) Where a person proposes to perform fencing work on land, he may clear all scrub up to a width of two metres on each side of the fence, or the line of the proposed fence, and the cost of clearing the scrub shall be deemed to be part of the cost of performing the fencing work. Clearing of scrub in certain areas.

(2) The Governor may, by regulation, declare that this section shall not apply in respect of fencing work upon land, or land of a kind, specified in the regulation and the application of this section shall be modified accordingly.

23. (1) A notice or cross-notice that complies in substance with the requirements of this Act shall, notwithstanding that it is not in the form required by this Act, be deemed to comply with this Act. Departures from requirements of this Act.

(2) Where fencing work is carried out substantially in conformity with an agreement or order under this Act, the court before which any proceeding relating to the fencing work are brought may determine that subject to any adjustment or rights and liabilities ordered by the court, the rights and liabilities of the adjoining owners shall be determined as if the fencing work had been carried out in conformity with that agreement or order.

(3) Where a determination is made under subsection (2) of this section the rights and liabilities of the adjoining owners shall be determined in accordance with that determination.

24. Rules of court regulating the practice and procedure of the court in proceedings under this Act may be made subject to and in accordance with the Local and District Criminal Courts Act, 1926-1974. Rules of court.

25. The provisions of this Act shall not be construed as derogating from powers conferred upon any authority, body or person by any other Act. This Act is not to derogate from powers conferred by other legislation.

THE SCHEDULE

FORM No. 1

Notice of Intention to Erect a Fence

To A.B., Owner of [*Describe land with sufficient particularity to identify it*].

TAKE NOTICE that I propose that a fence be erected between the land described above and the contiguous land [*Describe land with sufficient particularity to identify it*] of which I am the owner.

The particulars of my proposal are as follows:—

- (a) [State the length and position of the proposed fence]
- (b) [Describe the nature of the proposed fence]
- (c) [State the cost of the erection of the proposed fence]
- (d) [State the amount that the person by whom the notice is given seeks to recover from the person to whom the notice is given]
- †(e) [State whether the person by whom the notice is given proposes to pay compensation to the person to whom the notice is given for loss of occupation of any land, and, if so, the amount of the compensation]
- (f) [State the name and address of any contractor or other person by whom the proposed fence is to be erected.]

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.

Dated this day of 19 .

(Signed) C.D.

Address for service of a cross-notice:

[Set forth an address at which service of a cross-notice may be effected upon the person by or on whose behalf the notice is given]

† This item is to be omitted where the line of the proposed fence does not encroach upon the land of the person to whom the notice is given.

FORM No. 2

Notice of Intention to Perform Replacement, Repair or Maintenance Work

To A.B., Owner of [*Describe land with sufficient particularity to identify it*].

TAKE NOTICE that I propose that fencing work be performed in relation to a fence dividing the land described above from contiguous land [*Describe land with sufficient particularity to identify it*] of which I am the owner.

The particulars of my proposal are as follows:—

- (a) [Describe the nature of the proposed fencing work]
- (b) [State the cost of the proposed fencing work]
- (c) [State the amount that the person by whom the notice is given seeks to recover from the person to whom the notice is given]
- (d) [State the name and address of the contractor or other person by whom the proposed fencing work is to be performed.]

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.

(Signed) C.D.

Address for service of a cross-notice:

[Set forth an address at which service of a cross-notice may be effected upon the person by or on whose behalf the notice is given]

FORM No. 3

Cross-Notice

To C.D.

TAKE NOTICE that I object to the notice given by you pursuant to the Fences Act, and dated the
day of 19 .

The particulars of my objection are as follows:—

[Set forth the proposals to which objection is made. (If objection is made to all of the proposals, a statement of that fact will suffice)]

† I make the following counter-proposals:

[Set forth any 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.

(Signed) A.B.

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

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

M. L. OLIPHANT, Governor