

DIVIDING FENCES.

10° Elizabeth II., No. XLIV.

No. 44 of 1961.

**AN ACT relating to the Construction and repair of
Dividing Fences between Certain Lands and for
incidental and other purposes.**

[Assented to 23rd November, 1961.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.—PRELIMINARY.

1 (1) This Act may be cited as the *Dividing Fences Act, 1961*.

Short title
commence-
ment and
arrangement.

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

(3) This Act is arranged as follows:—

PART I.—PRELIMINARY, ss. 1-6.

PART II.—CONSTRUCTION OF DIVIDING FENCES,
ss. 7-13.

PART III.—REPAIR OF DIVIDING FENCES, ss. 14-16.

PART IV.—MISCELLANEOUS, ss. 17-23.

Repeal.

2. (1) The Cattle Trespass, Fencing, and Impounding Act, 1882-1957, and the Ordinance 4 William IV No. 4 (An Act to regulate the Fencing of Town and Suburban Allotments) are repealed.

Savings.

(2) (a) All notices, orders, agreements, instruments and generally all acts of authority that originated under either of the enactments repealed by this Act, and are subsisting or in force on the coming into operation of this Act, shall enure for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.

(b) All matters and proceedings commenced under either of those repealed enactments, and pending or in progress on the coming into operation of this Act, may be continued, completed and enforced under this Act.

(3) The provisions of subsection (2) of this section do not affect the application of the provisions of the Interpretation Act, 1918, to this Act.

Savings as to
certain Acts.

3. Nothing in this Act affects the provisions of the Land Act, 1933, the Local Government Act, 1960, the Vermin Act, 1918, or the Bush Fires Act, 1954, and where any provision of those Acts is inconsistent with any provision of this Act the former provision, to the extent of the inconsistency, prevails.

Crown not
bound by
Act.

4. This Act does not bind the Crown.

5. In this Act, unless the contrary intention appears,— Interpreta-
tion.

“court of petty sessions” means a court of petty sessions constituted by a stipendiary magistrate;

“dividing fence” means a fence that separates the lands of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary;

“lease” includes an original or derivative lease or an under-lease or an agreement for a lease;

“owner”, in relation to land, includes every person who—

(a) jointly or severally, whether at law or in equity—

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

(ii) is entitled to receive or is in receipt of or if the land were let to a tenant would be entitled to receive the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; or

(b) is the holder of a lease of land the unexpired term of which is not less than five years at the time—

(i) notice to fence is given by or to him pursuant to section eight;

(ii) he makes application to a court of petty sessions under subsection (1) of section eleven;

(iii) a copy of an order made pursuant to subsection (2) of section eleven is given to him;

- (iv) notice is given by or to him pursuant to section fifteen,

but does not include any trustees or other persons in whom land is vested as a public reserve, public park or for such other public purposes as may be prescribed, or a person who has the care, control and management of a public reserve, public park or land used for such other public purposes as may be prescribed;

“section” means section of this Act;

“sufficient fence”, in relation to a dividing fence or a boundary fence referred to in section sixteen, means—

- (a) any fence prescribed by a by-law under paragraph (e) of section two hundred and ten of the Local Government Act, 1960, as a sufficient fence for the part of the district of a municipality wherein it is proposed to erect the dividing fence or the dividing fence is erected or wherein the boundary fence is erected; or
- (b) any fence of the description and quality agreed upon by the parties concerned which does not fail to comply with any by-law referred to in paragraph (a) of this interpretation; or

where no such by-law or agreement is made, means—

- (c) any substantial fence that is ordinarily capable of resisting the trespass of cattle and sheep; or
- (d) any fence determined to be a sufficient fence by a court of petty sessions pursuant to this Act;

“surveyor” means a surveyor licensed under the Licensed Surveyors Act, 1909, whose name appears in the register kept under section twelve of that Act.

6. Nothing in this Act affects any covenant, contract or agreement made between landlord and tenant or between the owners of adjoining lands, or between any other persons relative to the cost of erecting or repairing dividing fences.

Act not to interfere with agreements.

PART II.—CONSTRUCTION OF DIVIDING FENCES.

7. Subject to this Act, the owners of adjoining lands not divided by a sufficient fence are liable to join in or contribute in equal proportions to the construction of a dividing fence between those lands.

Liability of owners of adjoining lands to fence.

8. An owner of land desiring to compel the owner of adjoining land to join in or contribute to the construction of a dividing fence under this Act may give him a notice which shall—

Notice to fence to be given.

- (a) specify the boundary to be fenced, or if on account of the physical features of the adjoining lands it is impracticable to construct a fence on the common boundary of those lands, the line upon which it is proposed to construct the fence;
- (b) contain a proposal for fencing the common boundary or other line; and
- (c) specify the kind of fence proposed to be constructed.

9. (1) If within twenty-one days after the giving of a notice referred to in section eight, the owner giving and the owner receiving the notice do not agree as to all or any of the following matters—

Proceedings in default of agreement.

- (a) as to the need for the construction of the dividing fence;
- (b) the boundary or line upon which it is proposed to construct the fence; or
- (c) the kind of dividing fence that is to be constructed,

a court of petty sessions held nearest to the place where it is proposed to erect the fence, on the complaint of either of those owners may make an order determining all or any of the following matters on which the owners are not in agreement—

- (d) as to the need for and the kind of fence to be constructed;
- (e) what portion of the fence shall be constructed by each owner; and
- (f) the time within which the fence shall be constructed; and

if the court thinks it is necessary, the court may determine—

- (g) the boundary or line upon which the dividing fence is to be constructed; and
- (h) the compensation in the form of an annual payment to be paid by the one owner to the other owner in consideration of loss of occupation of any land.

(2) Where an order made under subsection (1) of this section determines that the dividing fence is to be constructed otherwise than on the common boundary of adjoining lands, the occupation of land on either side of that fence in pursuance of or as a result of the order is not and shall not be deemed adverse possession as against the owner of the land or affect the title to or possession of the land except for the purposes of this Act.

(3) When making an order under this section, the court of petty sessions shall be guided as to the type of sufficient fence the court orders to be constructed by the kind of fence usually constructed in the locality where it is proposed to construct the fence, the purpose for which the lands that will be separated by the fence are used and the type of sufficient fence (if any) prescribed under a by-law made by the municipality for that locality.

(4) An order of a court of petty sessions made under this section is final.

10. (1) Where the owner giving and the owner receiving a notice given pursuant to section eight agree as to the construction of the fence to which the notice relates, or where, in default of such agreement, an order of a court of petty sessions is made pursuant to section nine, and in either case either of those owners fails within the time named in the agreement or order, or, if no time is named, within three months after the date of the agreement or order, to perform his part of the agreement or to comply with the order, then the other of those owners may construct the whole fence as agreed upon or determined by the order.

Proceedings
on failure to
carry out
agreement
or order.

(2) The owner who constructs the fence pursuant to subsection (1) of this section may recover from the owner in default half the cost thereof.

11. (1) Where the owner of land satisfies the court of petty sessions held nearest to the place where he proposes to construct a dividing fence, that he has made reasonable inquiries and has been unable to ascertain the whereabouts of the owner of the adjoining land for the purpose of giving a notice as required by section eight, the court of petty sessions may, upon application in the prescribed form by the firstmentioned owner for an order authorising the construction of a dividing fence as set out in the application, proceed *ex parte* to make an order authorising the applicant to construct a fence of the kind specified in the order upon the boundary or line specified therein.

Cases where
owner of
adjoining
land cannot
be found.

(2) Where a person constructs a dividing fence in compliance with an order made under subsection (1) of this section, if afterwards during the continuance of that fence, the person ascertains the whereabouts of the owner of the adjoining land, whether or not such owner was the owner of the land at the time of the construction of the fence, the person may give to such owner a copy of the order.

(3) The owner to whom the copy of the order is given shall, after the expiration of one month from the date the notice is given to him, be liable to pay to the person who constructed the fence half the value of the fence at the date of the giving of the copy of the order.

(4) If the owner to whom the copy of the order is given considers the order inequitable, the court of petty sessions that made the order may, on the complaint of that owner made within one month after the giving to him of the copy of the order—

- (a) relieve the complainant from a portion of the sum claimed as the value of the fence; and
- (b) order that the position of the fence be altered on such terms as the court may think fit.

(5) The value of the fence shall be ascertained as soon as practicable after the giving of the copy of the order, pursuant to subsection (3) of this section, and, in default of agreement between the owners, the value may, on the complaint of either of them, be determined by the court of petty sessions.

(6) Where an owner has obtained an *ex parte* order under subsection (1) of this section he shall, within twenty-one days, give or cause to be given to the clerk of the council of the municipality of the district in which the fence referred to in that order is to be constructed, a copy of that order, and if the owner fails to comply with this subsection he is not entitled to recover any portion of the cost of constructing the fence from the owner to whom the copy of the order is given under this section.

(7) Where a copy of an order has been given to the clerk of a council in accordance with the provisions of subsection (6) of this section, the clerk shall record details of the order in the register of orders that the council is required to keep pursuant to section six hundred and ninety-four of the Local Government Act, 1960, as if the order were an order

relating to the land of the owner whose whereabouts cannot be ascertained, and in respect of which land the fence is to be constructed, made by the council under the provisions of that Act.

12. (1) When the owners of adjoining lands do not agree as to the accurate position of the common boundary line between those lands upon which either of the owners desires a dividing fence to be constructed pursuant to this Act, either one may give notice to the other of his intention to have that line defined by a surveyor.

Proceedings
for defining
boundary
line by
surveyor.

(2) The owner to whom a notice under subsection (1) of this section is given shall, within seven days after the giving of the notice—

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

and where that owner has taken action under either paragraph (a) or paragraph (b) of this subsection, he shall as soon as practicable thereafter give the owner of the adjoining land notice of the action he has taken.

(3) If within one month from the giving of a notice pursuant to subsection (1) of this section, the owner to whom the notice was given—

- (a) has defined the common boundary line by pegs; or
- (b) has failed to have the common boundary line defined by a surveyor,

then the owner who gave the notice may have that line defined by a surveyor.

(4) If the common boundary line when defined by a surveyor is found to be in the same position as defined by any pegs placed there by the owner receiving the notice given pursuant to subsection (1) of this section, that owner is entitled to recover any

costs of the survey, if any, incurred by him from the owner giving the notice, but in all other cases where a surveyor has been employed for the purposes of this section all reasonable expenses incurred shall be paid in equal shares by the owners of the adjoining lands.

Liability to
contribute
to cost of
dividing
fence.

13. (1) When an owner of land has constructed a dividing fence that separates his land from adjoining land if the fence is a sufficient fence, the owner of the adjoining land is liable to pay in accordance with the provisions of this section half of the amount of the value of the fence.

(2) When an owner of land has, whether before or after the coming into operation of this Act, without giving a notice pursuant to section eight or pursuant to any corresponding provision of any Act repealed by this Act, constructed such a dividing fence and the owner of the adjoining land had not paid to the owner who constructed the fence one-half of the amount of the value of the fence, then if he—

- (a) has completed or completes, or has caused or causes to be completed the construction of any substantial building or structure on his adjoining land; or
- (b) has occupied or occupies a building or structure constructed on the adjoining land; or
- (c) has permitted or permits the lawful occupation by a person of a building or structure erected on the adjoining land,

the owner who constructed the fence may give to the owner of the adjoining land a notice claiming the payment of half of the amount of the value of the fence as estimated at the date of the claim.

(3) Where the owner of the adjoining land—

- (a) disputes the need for the dividing fence;
- (b) claims that the dividing fence is not desirable;

- (c) disputes the need for a dividing fence of the particular type that has been constructed;
- (d) disputes the amount of the value of the dividing fence shown in the claim,

he may, within one month of the receipt of the claim, give notice to the claimant owner that he disputes the claim.

(4) The owner who constructed the fence may, in default of agreement between the owners upon all or any of the matters referred to in subsection (3) of this section, make a complaint in a court of petty sessions held nearest to the place where the fence was constructed claiming that the owner of the adjoining land has failed to pay half of the amount of the value of the fence in accordance with subsection (1) of this section.

(5) The court of petty sessions hearing a complaint made pursuant to subsection (4) of this section may, by order, determine—

- (a) the need for the dividing fence;
- (b) whether the fence is desirable;
- (c) the value of the fence as at the date of the claim made under subsection (2) of this section; and
- (d) the amount, if any, to be paid, and the period within which that amount is to be paid, by the owner of the adjoining land to the owner who constructed the fence.

(6) An order of a court of petty sessions made pursuant to subsection (5) of this section is final.

(7) If the owner of adjoining land on whom a notice of claim has been made pursuant to subsection (2) of this section does not—

- (a) pay the amount of the claim within one month of the receipt by him thereof; and
- (b) within that period give notice to the claimant owner that he disputes the claim in accordance with subsection (3) of this section,

he is liable to pay to the owner who constructed the dividing fence referred to in subsection (1) of this section, the amount of the claim.

(8) Where an owner of land who is liable, under an order of a court of petty sessions made under subsection (5) of this section, to pay half of the amount of the value of a dividing fence, fails to do so within the period ordered by the court, the owner to whom the money is payable may proceed to recover the amount in accordance with section eighteen.

PART III.—REPAIR OF DIVIDING FENCES.

Liability of adjoining owners to repair dividing fence.

14. When a dividing fence is out of repair the owners of land on either side of the fence are liable, subject to the provisions of section fifteen, to join in or contribute in equal proportions to the repair of the fence.

Procedure to compel contribution to repair dividing fence.

15. (1) The owner of land separated from adjoining land by a dividing fence may give a notice to the owner of the adjoining land requiring him to assist in repairing the fence.

(2) A notice given pursuant to subsection (1) of this section may state that the owner giving the notice—

- (a) is prepared to repair the fence at his cost and the cost of the owner to whom the notice is given, in equal shares;
- (b) is prepared to permit the owner to whom the notice is given to repair the fence at the cost of both the owners, in equal shares; or
- (c) is prepared to bear half of the cost of having the fence repaired by a third party.

(3) An owner who has been given a notice pursuant to subsection (1) of this section shall, within fourteen days of the receipt by him of the notice, advise in writing the owner giving the notice that—

- (a) he is prepared to join in the repairing of the fence in such one of the alternative manners set out in the notice as he specifies in the advice; or
- (b) that he disputes the need for repairing the fence and is not prepared to bear any portion of the cost of repairing the fence.

(4) Where an owner who has been given a notice pursuant to subsection (1) of this section advises, in writing, the owner giving the notice that he disputes the need for repairing the fence and is not prepared to bear any part of the cost of repairing it as provided in subsection (3) of this section, the owner who gave the notice may make a complaint in a court of petty sessions held nearest to the place where the fence is situated claiming that the owner of the adjoining land has failed to assist in repairing the fence in accordance with this section.

(5) The court of petty sessions hearing a complaint made pursuant to subsection (4) of this section may by order determine—

- (a) whether the fence is in need of repair; and
- (b) if so, by whom the repairs are to be effected and the period within which they are to be carried out.

(6) An order of the court of petty sessions made pursuant to subsection (5) of this section is final.

(7) Where an owner, who has been given a notice pursuant to subsection (1) of this section, fails to advise the owner giving the notice as provided in subsection (3) of this section within fourteen days after the receipt by him of the notice, the owner giving the notice may repair the fence and demand

and recover from the owner to whom the notice was given, one-half of the cost of repairing the fence, but if—

- (a) any dividing fence has been constructed partly by one owner and partly by another owner each shall bear the cost of repairing the part so constructed by him;
- (b) any dividing fence or any portion thereof is damaged or destroyed by flood, fire, lightning, storm, tempest or accident the owner of the land on either side of the fence may immediately repair it without any notice to the other owner and is entitled to recover half of the expenses of so doing from the owner of the adjoining land;
- (c) any dividing fence is damaged or destroyed in whole or in part by fire or by the falling of any tree or portion thereof the owner of the land through whose neglect the fire originated or caused damage or destruction to the fence, or the tree or part thereof fell, is bound to repair or renew as soon as practicable after the damage or destruction occurs the fence so damaged or destroyed.

(8) If an owner of land who is liable under paragraph (c) of subsection (7) of this section to repair or renew a dividing fence fails to do so, the owner of the adjoining land may repair or renew the fence and recover from the owner so liable and in default the whole of the cost of the repair or renewal.

Liability of
person using
fence on
further side
of road.

16. (1) Where the owner of land bounded by a road constructs a sufficient fence on the boundary of the land and the road and another owner of land afterwards adopts any means whereby his land is in any way enclosed by that fence, or afterwards avails himself of that fence or renders it of beneficial use to himself, the lastmentioned owner is liable, so long as his land is so enclosed or he avails himself of the fence or makes beneficial use of it, to join in or contribute in equal proportions to the repair of so much of the fence as encloses his land or is availed or made beneficial use of by him.

(2) In this section "owner" includes any person who, at the time—

- (a) of the construction of the fence referred to in subsection (1) of this section;
- (b) of adopting any means whereby his land is in any way enclosed by the fence;
- (c) of availing himself of the fence; or
- (d) of rendering the fence of beneficial use to himself,

is the holder of a lease the unexpired portion of the term of which is not less than five years.

PART IV.—MISCELLANEOUS.

17. In any proceedings under this Act a court of petty sessions may award costs against either party to the proceedings.

Costs.

18. (1) Moneys that a person is, in pursuance of this Act, required or liable to pay may be sued for and recovered in any court of competent jurisdiction.

Method of recovering money payable under this Act.

(2) In proceedings for the recovery of moneys referred to in subsection (1) of this section, a certificate of a court of petty sessions as to the making and contents of an order made by it under section nine or section eleven is evidence of the matters set forth therein.

19. (1) Where, under the provisions of this Act, a fence is constructed or repaired, if the fence divides any land held by a person as tenant of any landlord from any adjoining lands, the contribution payable in respect of the cost of such construction or repair as between that landlord and tenant shall, unless otherwise agreed upon by the parties concerned, be payable in the proportions following:—

Apportionment of the costs of fencing as between landlord and tenant.

- (a) if the interest of the tenant at the time of the construction or repair of the fence is less than for a term of five years, the landlord shall pay the whole of the cost;

- (b) if the interest of the tenant at such time is for a term of five years or more and less than for a term of seven years, the landlord shall pay three-fourths of the cost and the tenant shall pay one-fourth of the cost;
- (c) if the interest of the tenant at such time is for a term of seven years or more and less than a term of twelve years, the landlord and the tenant shall each pay one-half of the cost;
- (d) in case the interest of the tenant at such time is for a term of twelve years or more, the tenant shall pay the whole of the cost.

(2) Where either the landlord or the tenant pays a greater proportion of the cost than he is required to pay under this section, he may recover, in manner referred to in subsection (1) of section eighteen, the excess from his tenant or landlord, and any tenant may set off any sum recoverable by him under this section against any rent payable to his landlord.

Purchaser under option to purchase liable for amount of contribution for dividing fence paid by owner.

20. Where land, in respect of which a contribution has been paid by the owner thereof towards the cost of the construction or repair of a dividing fence, is at the time of the making of the contribution subject to an option to purchase, if that option is exercised the purchaser under the option shall on completion of the purchase pay to the owner the amount of the contribution so paid by the owner.

Power to enter adjoining land.

21. Every person engaged in constructing or repairing a fence under this Act and his agents and servants may, at all reasonable times during the construction or repairing, enter upon the lands adjoining the fence and do upon those lands such acts, matters and things as are necessary or reasonably required to carry into effect the construction or repairing of the fence.

Notices to be in writing, method of giving notices, etc. c.f. s. 31, Act, No. 30 of 1918.

22. (1) Any notice or demand to be given or made under this Act shall be in writing and signed by the person giving or making it, or by his attorney or agent.

(2) Where a notice or demand is to be given or made under this Act to or on a person, not being a corporation, it shall be given or made—

- (a) by delivering the notice or demand to him personally; or
- (b) by sending the notice or demand by registered mail addressed to him at his usual or last known place of abode.

(3) Where a notice or demand is to be given or made under this Act to or on a corporation it shall be given or made—

- (a) by delivering or leaving the notice or demand to or at the principal office of the corporation in the State; or
- (b) by sending the notice or demand by registered mail addressed to the corporation at that principal office.

(4) The description of any land in a notice or demand given or made under this Act shall be regarded as a sufficient description of the land if the description allows no reasonable doubt as to what land is referred to in the notice or demand.

Sufficient
description
of land.

23. (1) The Governor may make regulations not inconsistent with this Act prescribing forms, fees and all matters that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Regulations.

(2) The regulations may impose a penalty not exceeding twenty pounds for breach thereof.

24. The council of a municipality constituted under the provisions of the Local Government Act, 1960, shall when required by the Minister for Local Government, make, for the purpose of interpreting "sufficient fence" in section four of this Act, a by-law under paragraph (e) of section two hundred and ten of the Local Government Act, 1960.