Government of **Western Australia**
Department of **Commerce**

Dividing fences
a guide

Building Commission

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Disclaimer
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This guide is intended to help you understand the *Dividing Fences Act 1961* (the Act) and outlines processes for neighbours to agree on the fence that divides their properties, to determine boundaries and to share the cost of construction and maintenance. The Act also enables the courts to deal with disputes that may arise over dividing fences.

The Building Commission recommends that you should not commence construction of a dividing fence until you have a clear agreement, in writing, with the adjoining owner or you have obtained a court order.

The Act does not apply to boundary construction, fence height restrictions or encroachments which have been approved under a building permit.

The Building Commission administers the Act it does not have any role or powers to advise on individual issues or resolve dividing fences disputes or resolve issues. In this regard, you should seek independent legal advice.

- **Landgate** provides information on issues such as defining and surveying boundaries and adverse possession.
- **Local governments** provide advice on local laws that may affect your dividing fence, retaining walls, parapet walls or the like; fences that form part of a swimming or spa pool barrier; construction on boundaries and advice on planning and building approval.
- The **Magistrates Court** may rule on dividing fence disputes and matters that are not related to the Act, such as disputes over retaining walls, trees, overhanging branches or falling leaves.

What is a dividing fence?

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

The Act does not apply to the Crown (government) or to land used for public purposes such as roads and paths under the control of local governments. This means that if your property adjoins such land you have to pay the full cost of the dividing fence. Local government laws regarding fences or what is a ‘sufficient fence’ will still apply.

Sufficient fence

Local governments may have local laws that prescribe what is a sufficient fence. If you want information on what type of fence is allowed in your area, contact your local government.

A ‘sufficient fence’ is:

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

Where no local law or no agreement is made, a sufficient fence is:

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

If you want to erect a dividing fence of a higher standard than a sufficient fence and cannot obtain the agreement of the adjoining owner, you may only claim half the cost of erecting and maintaining a sufficient fence.

Owners may decide what they want as long as it does not conflict with the local laws.

If your local government does not have any local laws covering fences, you are still obliged to contribute a half share of the cost of constructing a sufficient fence. Checking out the type of fencing that has been erected in your area will give you a good guide as to what is accepted as the fencing standard.

Step 1: Giving notice

If you wish to claim half the cost of erecting a sufficient fence and avoid any disputes over payment, you should approach the owner of the adjoining land to discuss your proposal and reach an agreement.

The Act provides a mechanism for sharing the cost of the fence.

The procedure is to give notice in writing to your neighbour describing the proposed dividing fence including materials to be used, costs, and specifying the boundary line to be fenced. See pages 21 to 23 of this booklet for sample letters for giving notice to erect a fence, effect repairs and to claim contribution for the cost of a fence.

If you do not know the name and address of the adjoining owner, the rates section of your local government may provide this information. Alternatively you may wish to arrange a land title search through Landgate.

Each notice must be served by either:

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

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

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

You may wish to attach a copy of this booklet to your written notice.

If agreement is reached with your neighbour confirm the agreement in writing and get it signed by all parties. Include details in your written agreement about when payment is to be made.

Whether agreement is reached or not, you should always keep copies of all quotations, documents and receipts.

If you and your adjoining owner cannot agree, then the use of an independent mediator may help. Mediation helps to sort out civil disputes in a confidential and non-threatening way. Details of mediation services available are listed in the Yellow Pages under 'Mediators'.

Step 2: Court action

The adjoining owner has 21 days to respond or write back if they dispute all or any part of your proposal. If you are unable to reach an agreement within that time, the matter may be referred to the Magistrates Court nearest to where the fence is situated.

Contact your nearest Magistrates Court to find out the procedure for lodging a complaint with the court.

Either owner may make an application to the Magistrates Court. In making its order, the court will consider the type of fence typically constructed in the area, how the lands are used and any local laws prescribing the type of fence for your area.

Where the owners agree, or where the court orders the erection of a fence, the owners must fulfil their obligations within the specified time or within three months if no time is specified. If an owner does not fulfil their obligations within this time, the other owner may complete the work and recover half the costs from the owner in default by making an application for an order in the Magistrates Court.

The Magistrates Court can be contacted on (08) 9425 2247. An application for an order can be obtained online from www.magistratescourt.wa.gov.au.

Vacant land

This section applies only where one or both of the adjoining lots of land is vacant.

Where one or both blocks are vacant, you should attempt to negotiate a written agreement with the owner of the adjoining block and the fence should be erected according to the terms of the agreement.

However, you may erect a sufficient fence without giving notice or reaching agreement with the owner of the vacant land and still obtain a contribution towards the cost.

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

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

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

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

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

Estimating the value of a fence

There is no specified method for determining the value of a fence. Obtaining a current day price for a similar fence may be useful in providing a base from which to estimate the value of the fence.

If it cannot be agreed upon between the adjoining owners, it may be necessary to have the matter decided through mediation or if that fails, in court.

The right to claim exists while the person who erected the fence continues to own the property, however, it is doubtful whether this right exists after the property is sold. The commonly held legal view is that the right does not continue and this would mean the right to claim cannot be passed on from the owner who erected the fence to another owner who buys their land.

If the adjoining owner gives you written notice of objection and agreement cannot be reached on the claim, you may make an application for an order to the Magistrates Court nearest to where the fence is situated.

Application forms are available by calling the Magistrates Court on (08) 9425 2247 or online at www.magistratescourt.wa.gov.au. The court will make a decision on the dispute.

Repairs

The Act provides for owners of land on either side of the fence to join in or contribute in equal proportions to the repair of the fence. This applies to both developed and vacant land.

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

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

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

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

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

Note: Costs may include labour, equipment hire and materials.

If the owner or owners do not object to your notice in writing within 14 days you may repair the fence. If a contribution is not made you will be able to recover half the cost of repairs from the other adjoining owner or owners by referring the matter to the Magistrates Court.

If the adjoining owner or owners object or do not agree to pay, you must apply to the Magistrates Court for an order. Where the adjoining owners have agreed to the repair or the court has ordered the repair, both owners must allow access to enable the dividing fence to be repaired.

Generally, when a dividing fence is in need of repair, the owners on each side of the fence that is in need of repair are responsible. **This also applies to land that is vacant.**

If the dividing fence was built partly by one neighbour, and partly by the other neighbour, each neighbour is responsible for the cost of repairing the part of the fence he or she built.

Redevelopment of properties

If your adjoining owner redevelops their land by demolishing existing buildings or erecting new ones, they may ask for a contribution for a new fence.

This may occur if the existing fence is:

- of a lower standard than a sufficient fence;
- is erected other than on the boundary line; or
- is in need of repair or replacement.

It may also occur because the adjoining owner wants a new fence.

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

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

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

The fence need only be a 'sufficient' fence as described on page 2 of this booklet.

Repair without notice

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

However, it is suggested that despite this right of action, it is better to try to give notice of your intention to repair the fence. Try to reach agreement on payment for repairs before taking court action.

What happens if the fence is damaged by your neighbour?

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

The Act only recognises a limited set of circumstances where an adjoining owner or owners who are at ‘fault’ are bound to repair or renew a dividing fence at their cost. These are where the dividing fence is damaged or destroyed in whole or in part by fire, or by the falling of any tree (or portion thereof). An element of neglect on the part of the adjoining owner or owners from whose land the fire originated or the tree fell must also be evident.

For all other fence damage the adjoining owners are liable to join in and contribute in equal proportions to the repairs.

If your neighbours are bound to repair the dividing fence at their cost and fail to do so, you as the adjoining owner may repair or renew the fence. You may then recover the whole cost of doing so from your neighbours by referring the matter to the Magistrates Court.

It is better to maintain harmony with neighbours by first negotiating with them to repair the fence.

Special rules for tenants and landlords.

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

If the term of the lease is between five and seven years, the landlord must pay three quarters of the cost and the tenant one quarter.

Example (a)

Total cost of construction or repair	$400
Half cost to each owner	= $200 each
Landlord's share	$150
Tenant's share	+ $50
	= $200

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

Example (b)

Total cost of construction or repair	$400
Half cost to each owner	= $200 each
Landlord's share	$100
Tenant's share	+ $100
	= $200

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

Example (c)

Total cost of construction or repair	$400
Half cost to each owner	= $200 each
Landlord's share	$ Nil
Tenant's share	+ $200
	= $200

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

Strata titles

Where adjoining land is owned under a strata title, a claim may still be made against the owners for a contribution towards constructing or repairing a dividing fence.

The owners of the strata title land may be:

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

The name of the strata company and information about this type of strata scheme, the by-laws of the strata company and whether a notice has been recorded on the strata/survey-strata plan can be obtained online from Landgate by calling (08) 9273 7373 or visiting www.landgate.wa.gov.au.
Note: There are fees payable for this information.

Useful information on strata titles can be obtained by contacting Landgate on (08) 9273 7373

Liability for upkeep and maintenance of dividing fences – strata title

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

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

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

Negotiating with your neighbour

Although informal discussions are okay, it is better to have agreements in writing. This clears any ambiguity and clarifies any point of difference. It can also be used later to show what has been agreed if the matter comes before mediation, arbitration or the courts. Note that agreements between owners with regard to the cost of erecting or repairing a dividing fence override the Act.

It is in both neighbours' interests to attempt to resolve dividing fences matters in a courteous and friendly manner.

There are many steps that can be taken to reach agreement with a neighbour including:

- Providing a copy of this booklet.
- Explaining why you are seeking to renew or repair the fence, for example to provide a barrier for a pool.
- Understanding your neighbour has a right to protect their property and animals especially during construction.
- Considering a longer time to pay or a payment plan because your neighbour may be concerned about their capacity to pay.

Entering your neighbour's property

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

Before repairing or constructing a fence, you should:

- inform your neighbour of what you are doing;
- tell them that you may need to go onto their land to construct or repair the fence; and
- obtain your neighbour's agreement before undertaking any work relating to dividing fences.

You should be careful not to enter onto or interfere with your neighbour's property unless it is necessary to carry out the work.

Please note that if carrying out building or demolition work which affects other land you may be required to obtain consent from adjoining owners of the land. For more information refer to the Building Commission's publication 'Work affecting other land - a guide' at www.buildingcommission.wa.gov.au.

Other matters to be aware of

Boundary walls

Under the *Building Act 2011*, responsibility for maintenance and repair of boundary walls rests with the owner of the land on which it is constructed unless otherwise agreed.

Where it is not practical to erect a dividing fence due to a boundary wall the Building Act provides for a reasonable standard of finish on the outward facing side of the wall.

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

A boundary wall may not be considered a dividing fence and an adjoining owner may still erect a sufficient fence along the boundary line.

Tree debris, encroaching roots and overhanging branches

Trees are a highly desirable part of our landscape and essential to our environment so a certain amount of inconvenience associated with them should be tolerated.

Information on your rights about tree nuisance is available online at www.legalaid.wa.gov.au.

You should be aware that these issues are not covered under the Dividing Fences Act.

Only where a dividing fence has been destroyed in whole or in part by the falling of a tree does the Act provide for the adjoining owner to repair the fence immediately and recover the costs in the Magistrates Court.

Under Schedule 3.1 of the *Local Government Act 1995*, your local government may serve a notice on owners of land to ensure that a tree on that land that endangers any person or thing on adjoining land is made safe. Contact your local government authority for more information.

Fences constructed adjacent to a dividing fence

Situations may arise where a property owner wishes to construct a fence on their own land adjacent to an existing dividing fence. The Act does not prevent this second fence from being erected, however, it is recommended that you contact your local government to find out whether it has any restrictions on structures of this type.

The adjoining owner may still seek your contribution for maintaining the existing dividing fence, even where you erect a second fence on your property adjacent to it.

Your privacy

If the dividing fence does not provide adequate privacy, contact your local government for more information on their local fencing laws. Some local governments permit the use of lattice attached to a fence or allow you to erect a privacy/garden screen as a separate structure from the fence.

Boundary line

Section 12 of the Act provides a process for establishing a boundary line where one or both owners do not agree on its accurate position.

To define the boundary, both owners can agree to engage a land surveyor (surveyor) licensed under the *Licensed Surveyors Act 1909* to define the correct boundary line and share the cost. However, if one owner believes the surveyor is not necessary, the Act provides a mechanism for resolving the process that is described below involving Owner A and the neighbour, Owner B.

Owner A gives notice to adjoining Owner B stating that he/she is going to engage a surveyor to define the boundary line.

If, after receiving the notice, Owner B thinks a surveyor is unnecessary, Owner B can place pegs where they think the boundary is, or if Owner B wants to engage a surveyor, they can engage the surveyor and recover half the cost from Owner A.

Where Owner B has not used a surveyor, but has defined the boundary by pegs and Owner A is still not satisfied, Owner A must wait one month after first giving the notice to Owner B to engage a surveyor, and Owner A may then have the boundary line defined by the surveyor.

If the surveyor finds the boundary is where Owner B placed the pegs, then Owner A has to pay the full cost of the surveyor. Otherwise the Act provides that both Owner A and Owner B share the cost.

For further information contact Landgate or the Land Surveyors Licensing Board at www.lslb.wa.gov.au.

Swimming pool barriers

Western Australia has legislation to restrict unsupervised access by young children to a private swimming or spa pool.

The *Building Regulations 2012* allow a dividing fence to form part of the enclosure of a swimming or spa pool, providing the fence satisfies the requirements of Australian Standard AS1926.1 'Fencing for Swimming Pools' (1993 version).

For more information about swimming pool barriers and fences, please contact your local government or download the publication 'Rules for Pools and Spas' available at www.buildingcommission.wa.gov.au.

Planning and building approval

Any substantial structure built along a boundary is likely to require planning approval and a building permit issued prior to construction. This is particularly the case for retaining walls, walls that form part of buildings, unusually high fences or fences made from unusual materials.

Fences that form part of a swimming or spa pool barrier also require a building permit from your local government prior to construction.

In many local government areas, brick and masonry fences require a building permit. Although simple, conventional dividing fences may not need a building permit.

You should always check with your local government first, as construction without planning and building approval is an offence.

Sample letter to erect a new dividing fence

(Your address)

Dear Neighbour

I am writing to advise that I propose to erect a dividing fence on the boundary line between our properties (include property addresses).

The fence I wish to erect is a (specify here the description of the fence, ie. type, length, height, material and the boundary line to be fenced).

I have obtained quotes (copies attached) and propose to accept the quote from (fencing company - eg. ABC Fencing Company) for (amount - eg. $400). Your share of the dividing fence will be (half of the cost - eg. $200) which is half the cost of a sufficient fence according to the local government laws in the area.

Please let me know within 21 days if you agree or disagree with this proposal.

If you would like to discuss this with me I can be contacted on telephone number (your number) or by email at (your email address).

If within 21 days we cannot reach agreement or you do not respond, the *Dividing Fences Act 1961* provides for the matter to be determined in the Magistrates Court.

(Your signature, name and date)

sample

Sample letter to repair an existing fence

(Your address)

Dear Neighbour

I am writing to seek your agreement and contribution for the repair of the dividing fence which separates our properties, (include property addresses) in accordance with Section 15 of the *Dividing Fences Act 1961.*

The dividing fence is in need of repair because (give reasons eg. several pickets are missing).

I have attached copies of quotes to have the repairs done. I suggest we accept the quote from (company - eg. ABC Fencing) for (amount - eg. $300). Your half share will be (half of the cost - eg. $150).

Please let me know within 14 days if you agree or disagree with this proposal.

If you would like to discuss this with me I can be contacted on telephone number (your number) or by email at (your email address).

If within 14 days we cannot reach agreement or you do not respond, the *Diving Fences Act 1961* provides that I may repair the fence and then recover half of the repair costs through the Magistrates Court

(Your signature name and date)

Sample

Sample claim for a fence already erected

(Your address)

Dear Neighbour

I am writing to seek your contribution to the dividing fence between our properties (include property addresses) that was constructed (eg 6 months ago) when your land was vacant. The *Dividing Fences Act 1961* allows owners of adjoining land, who erected the fence, to seek contribution from their neighbour the construction of a building or structure has been completed.

Now that you have completed your construction, I wish to seek half the value of the dividing fence which cost (eg $400) to erect. Under the local government fencing laws, the fence is classed as a sufficient fence.

I estimate that the value of the fence is current and therefore seek payment of your half share of the fence, that is (half of the cost - eg $200).

Please let me know within 21 days if you agree or disagree with this proposal. I have attached copies of the quotes obtained and the invoice and receipt we received from the fencing contractor.

If you would like to discuss this with me I can be contacted on telephone number (your number) or by email at (your email address).

If within 21 days we cannot reach agreement or you do not respond, the *Dividing Fences Act 1961* provides for the matter to be referred the Magistrates Court for determination

(Your signature name and date)

Sample

Frequently asked questions

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

If you wish to claim a contribution and the adjoining land is not vacant, there must be an agreement or a court order in place before erecting the fence.

Where the adjoining land is vacant, you do not need an agreement.

Once the fence is erected a claim for a contribution can be made on the owner when there is a substantial building erected on the land, or when the land owner occupies or permits the occupation of any building on the land.

You do not need an agreement if you want to erect the fence entirely at your own expense, and forego any right to a contribution under the Act. The fence you erect must still be a 'sufficient fence'.

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

Do I have to have more than one quote to give to my neighbour?

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

My neighbour is going to build a wall along the boundary and I am concerned about how it will look from my side.

This is not covered by the *Dividing Fences Act 1961*, however under section 88(3) of the *Building Act 2011*, an outward facing

wall along the boundary which forms part of a garage, shed, or building is required to be of a reasonable standard. Local government may, for the purpose of imposing a condition on a building permit, or making a building order, specify the way in which an outward facing side of a close wall must be finished. Contact your local government for further information.

Can I take down the existing dividing fence without my neighbour's agreement?

Once a dividing fence is erected, it becomes joint property. Both adjoining land owners are liable to maintain the fence, regardless of the contribution made to the cost of its erection.

Therefore either party cannot remove, alter or damage or in any way affect the structural integrity of the dividing fence.

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

The fence should normally be placed along the boundary line, with half the structure in each property. Where this is not practical you may agree to locate the fence wholly in one or other property. You should record an agreement to do this in writing. The Act allows for a fence to be considered a dividing fence even when it is not on the common boundary. This means both neighbours can be asked to contribute to the cost.

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

Mediation services may be used to assist with dispute resolution. If the former attempts fail, the Act provides that the matter may be settled through the court, however, it is recommended that you try to resolve the issue through discussion with your neighbour first.

Claiming for a fence erected on vacant land

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

You can make a claim when a substantial building has been completed. This should not be confused with a building that is substantially completed. It is only once the building is complete that you may make a claim under section 13 of the Act.

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

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

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

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

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

Yes, only if the minimum standard for a fence in that location is a brick fence. The minimum standard could be as a result of the local government's fencing local law or town planning scheme, or through a condition of sale imposed by the developer as a covenant. As a general rule you would have to contribute half the cost of a sufficient fence, this being the minimum standard required by your local government.

I am about to build and do not like the fence my neighbour just erected and I do not want to pay them anything. Can I do this?

No, if the fence that is erected is a sufficient fence; is acceptable to the local government; and is in keeping with other fences in the immediate area, the adjoining landowner who erected it has a legal right under the Act to claim half payment of a sufficient fence when you complete your building.

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

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

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

Yes, an owner or owners of adjoining land are liable to pay even if they were not the owners of the land when the fence was constructed, provided that no previous adjoining owners had paid a claim to the owner who erected the fence. The Act does not specify any time limitations for seeking a contribution of costs between owners. If you are concerned that you may have run out of time to claim from your neighbour you should seek independent legal advice.

My neighbour and I are at about the same stage of building our houses. They want a metal fence and I want a fibrous cement one that goes into the ground. I have a dog to contain and it could easily dig under a metal one. What can I do about this?

The best way to erect a fence is by agreement with the adjoining owner. You should first try to resolve any differences by discussing the matter with the owner. You may wish to consult a mediator, who can assist you in resolving differences. If you cannot reach an agreement, the matter may be referred to the Magistrates Court.

My neighbour's fence is ten years old. Do I have to pay for half the value of the fence when it was constructed or what it is worth now?

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

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

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

Repairs

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

As a general rule, each of the adjoining owners must pay half the cost of repairs unless the adjoining owners agree to an alternative arrangement or the court rules differently. The Act provides for specific situations when one owner who is ‘at fault’ pays the whole cost. These specific situations are where the fence is damaged by fire or by the falling of a tree, or part of it. There must be an element of neglect by the owner at fault in these specific situations.

My land survey shows that the dividing fence is out of alignment and my adjoining owner has some of my land. Who pays for the cost of the relocation of the fence onto the correct boundary and what steps should be followed to shift the fence?

The Act defines the word ‘repair’ as including ‘realign and re-erect’, so the provisions which deal with repairing a dividing fence also apply to fences which need realignment or re-erection. You should give the necessary notice and obtain agreement before commencing work to realign and reconstruct the fence on the correct boundary line. If you are constructing an entirely different type of fence this may be considered erection of a new fence, in which case the procedure for erecting a new fence should be followed.

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

The Act only applies to the erection of the first fence and then its repair. Replacing an existing fence with an entirely different type of fence is regarded as the erection of a new fence. If an old fence is replaced with a new fence that is the same as the old fence, it is classified as a repair, and the procedures relating to repairing fences must be followed.

The replacement of an existing fence with an entirely different type of fence, for instance replacing a damaged old picket fence with a new fibrous cement fence, is not a repair. This is regarded as an erection of a new fence and must be dealt with under Sections 9 and 10 of the Act if a contribution to the costs is sought.

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

No, you would not have to pay for a new fence unless you agree to this or your neighbour takes you to court and is successful in obtaining an order for you to contribute to a new fence. In such a dispute, it would be necessary for the owner taking the legal action to prove that the fence is in need of replacement and cannot or should not be repaired. That owner would generally seek to support such a case to the court with photographs of the existing dividing fence and a report or testimony from expert witnesses or building practitioners.

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

You would be required under the Act to contribute to half the cost of the repairs to the fence. If you refuse to pay your neighbour may seek a court order.

For more information on tree nuisance, such as tree roots and overhanging branches visit www.legalaid.wa.gov.au / Information About the Law.

Do I have to contribute to the repair of the dividing fence if my land is vacant?

Yes, subject to Part III Sections 14 and 15(3) of the Act.

The neighbouring property is owned by the Department of Housing and the fence is in need of repair, what should I do?

State Government departments are not bound by the Act, however, you should contact your nearest Department of Housing office to discuss the repair or replacement options.

Who is responsible for a retaining wall (whether on the boundary or close to the boundary) to prevent soil build-up from pushing over a fence?

The Act does not deal with different soil levels between adjacent land owners. One owner may allow soil build-up and the other may excavate soil away from a fence. It is recommended you seek independent legal advice with respect to liabilities and obligations in these circumstances. Should soil levels be changed as a result of building or demolition work undertaken by one party under a building permit, then the 'Work affecting other land' provisions of the *Building Act 2011* may apply. The 'Work affecting other land' guide is available online at www.buildingcommission.wa.gov.au.

Useful contact numbers and links

Citizens Advice Bureau **(08) 9221 5711**
Access to community lawyers/mediators - small fee
www.cabwa.com.au
email: cab@cabwa.com.au

Magistrates Court **(08) 9425 2247**
To resolve civil disputes in a court of law
www.justice.wa.gov.au or
www.magistratescourt.wa.gov.au/DividingFences

Landgate **(08) 9273 7341**
Land title searches, adverse possession information
www.landgate.wa.gov.au
email: mailroom@landgate.wa.gov.au

Health Department **(08) 9222 4222**
For removal and disposal of asbestos
www.health.wa.gov.au

Department of Local Government and Regional Development **(08) 9217 1500**
To obtain a contact number for your local government office
www.dlg.wa.gov.au
email: info@dlg.wa.gov.au

State Law Publisher **(08) 6552 6000**
To view legislation
www.slp.wa.gov.au
email: sales@dpc.wa.gov.au

Department of Commerce, Consumer Protection **1300 30 40 54**
For consumer advice
www.commerce.wa.gov.au
email: consumer@commerce.wa.gov.au

Department of Commerce
Building Commission

Telephone: 1300 489 099

Locked Bag 12
West Perth Western Australia 6872
Facsimile: (08) 9476 1333
National Relay Service: 13 36 77

Website: www.buildingcommission.wa.gov.au
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