Dividing fences [1]

Restrictions concerning the style of dividing fence may operate in your local area because of council policies, heritage protection or restrictive covenants (e.g. a subdivision may have an agreement that all fences be of a particular type). Also some fences may need council approval. Check your local council website for any guidelines concerning fences in your area.

Special fencing requirements apply where the boundary or dividing fence forms part of the child resistant barrier that must surround a swimming pool. See Water [2].

Dividing Fences Act

The Dividing Fences Act 1991 regulates neighbours’ responsibilities towards dividing fences and is designed to settle the contentious aspects of sharing a fence. Nothing in the Act prevents neighbours coming to their own agreement about a fence, for example that one owner will pay the whole cost, or coming to an agreement that exceeds the requirements set out in the Act.

Legislation

Dividing Fences Act 1991 [3]


The Dividing Fences Act 1991 applies where a landowner wants an adjoining owner to contribute to the costs of constructing, replacing, repairing or maintaining a dividing fence. It covers issues such as cost-sharing, location and the standard of dividing fences and sets out procedures for carrying out the work and resolving disputes.

It does not apply to public authorities such as those with control over Crown land, public parks, reserves and roads. Although not liable under the Act to contribute to fencing costs, they are often willing to make some contribution.

The general principle in the Act for liability for costs is that adjoining owners are to contribute equally to the fencing work for a dividing fence of a sufficient standard. If an owner wishes to have a fence of a higher standard, that owner is liable for the extra cost above the sufficient standard. If an owner wants to carry out additional trimming, lopping or removal of vegetation than is needed for the purpose of the fencing work, then that owner is liable for the extra work. Where the fencing work includes special requirements for enclosing a swimming pool, in accordance with the Swimming Pools Act 1992, these extra expenses must be met by the owner of the property that contains the pool (Swimming Pools Act 1992, section 33).

Where the dividing fence needs rebuilding or repairing because of negligent or deliberate damage caused by an adjoining owner (or by a person entering the land with their permission) that owner is liable for the entire cost of restoring it to a reasonable standard.

Under the Act, a dividing fence is a fence separating the land of adjoining owners whether or not it is on the common boundary. It can be a structure, ditch, embankment, hedge or similar vegetative barrier and includes:

- any gate, cattlegrid or apparatus necessary for the operation of the fence
- any natural or artificial watercourse that separates the land of the adjoining owners
- any foundation or support necessary for the support and maintenance of the fence.

It does not include a wall that is part of a house, garage or other building and it only includes a retaining wall where the retaining wall is a foundation or support necessary to the support and maintenance of the fence (Dividing
As well as the construction, replacement, repair and maintenance, the fencing work involved also includes:

- design
- surveying
- preparation of the land along or on either side of the common boundary (for example trimming, lopping or removing vegetation)
- planting, replanting or maintaining a hedge or similar vegetative barrier
- cleaning, deepening, enlarging or altering any ditch, embankment or water course that serves as a dividing fence.

The procedure set out in the Act to require a neighbour to contribute, is to issue the neighbour with a Fencing Notice containing the details of the proposed work. Where the neighbour is a tenant, the Fencing Notice would usually be issued to the owner (sections 3 and 11). It can only be issued to a tenant where the unexpired term of the tenancy, at the time of issuing the fencing notice, is five years or more. There is no standard format for a valid Fencing Notice but section 11 of the Act states that it must specify:

- the boundary line or, if impracticable, the line of the proposed fence
- the type of fencing work proposed
- the estimated cost, and
- if it is not to be equally shared, then the share proposed.

**Fencing notice**

Find information about dividing fences, boundary disputes and retaining walls at [LawAccess NSW - Fences](https://www.lawaccess.nsw.gov.au), including flowcharts and forms.

See [LawAccess - Fencing Notices](https://www.lawaccess.nsw.gov.au) for sample fencing notices and a step by step guide to preparing and serving a fencing notice.

If the parties cannot agree on the fencing work proposed in the notice, they can attend mediation at a Community Justice Centre or, after a month has elapsed, either party can apply to the Local Court or the NSW Civil and Administrative Tribunal (NCAT) for an order deciding the matter (*Dividing Fences Act 1991*, sections 12-13). Where the land is the subject of a lease under the *Crown Land Management Act 2016* the application can only be made to NCAT (subsection 13(1A)).

Where the fence has been damaged or destroyed and the circumstances require urgent fencing work, the owner can carry out the urgent work without first issuing a fencing notice, if the circumstances make it impracticable. The adjoining owner is still liable for half the cost but this can be reviewed by the Tribunal or Local Court at a later stage.

**Courts and mediation**

- [Community Justice Centres](https://www.communityjustice.nsw.gov.au)
- [Local Court](https://www.nswcourts.nsw.gov.au)
- [NSW Civil and Administrative Tribunal (NCAT)](https://www.ncat.nsw.gov.au)

The Local Court and NCAT have jurisdiction under the Act to hear and determine disputes. It can make orders on matters such as:
- the boundary or line the fence will be built on
- the contribution of each party
- the fencing work to be carried out, including the type of fence
- where the neighbours are sharing the work, how the work is to be allocated
- the time frame for the work
- compensation for the loss of occupation of any land
- whether a dividing fence is needed.

Under section 4 of the Act, in determining the sufficient standard for the dividing fence, the Local Court or NCAT must consider all the circumstances of the case, including:

- any existing dividing fence
- the purposes the adjoining lands are used for or intended to be used
- the privacy and other concerns of the adjoining landowners
- the kind of fence that is usual in that locality
- any local government policy or code that applies in the area
- any relevant environmental planning instrument relating to the land or locality
- where the land is leased under the *Crown Land Management Act 2016*, the tribunal must also consider any order in place under that Act.

The court or tribunal may also award costs of the case against either party, or order that they be shared. Any order made that involves an amount of money can, if not paid, be pursued as a debt in an appropriate court.

The *Dividing Fences Act 1991* is designed for requiring neighbours to contribute to the costs of a dividing fence. It will not be available for example, where a landowner does not seek a contribution from their neighbour and so does not issue a fencing notice in accordance with the Act.

If you do not like the choice of dividing fence that your neighbour proposes but you are not asked to contribute to its cost, you could try negotiating with the neighbour or try mediation through a Community Justice Centre. If you wish the style of fence to be of your choice, you may wish to issue a fencing notice yourself. Under the Act you will be expected to share the costs involved.

**Reaching an agreement**

If you want to build or repair a dividing fence, consult with your neighbour first. Reaching an agreement with them can save the extra cost, delay and strain of a legal dispute that may end up in the Local Court or NCAT. Do your research beforehand and get quotes to discuss with them the type of fence you want and the possible costs. Find out whether council approval will be needed and any restrictions that apply.

If you and your neighbour can agree on the location and type of fence, the costs and the fencing work involved, put the terms of the agreement in writing. Both of you should sign the agreement and keep a copy. The agreement should cover all relevant details of the cost and design, including:

- height
- type of material
- colour
- cost
- position of the fence
- arrangements for the removal of any existing fence
- any additional work that will be done and who will bear these costs.

An agreement between neighbours regarding a dividing fence or an order made under the *Dividing Fences Act 1991* will not be binding on subsequent owners, should one of the properties be sold.
Case study - Fencing Agreement

Jeff and John discussed replacing their dividing fence for a long time and finally came to a casual agreement. After pricing materials and getting some quotes for the work they decided to share the fencing work themselves.

Work began in February but by May little had changed. Both yards looked like a building zone and there was no fence in sight. Jeff kept pressing John about it but John had other commitments, tight schedules and his back was playing up. He'd 'get to it', he kept saying.

Unfortunately the gentleman's agreement just wasn't working out. In June, Jeff contacted a Community Justice Centre for some help. John was a little offended when the CJC contacted him, but he agreed to mediation.

Some other problems that were brewing, surfaced at the mediation. John didn't actually like the fence design they'd agreed on. He'd done a lot of building and was concerned about its durability. He had tried to tell Jeff, but felt he was ignored. And with all their talking they hadn’t once discussed a time frame for completing the work. John did have other commitments at present whereas Jeff could be more flexible.

Within a couple of hours and with the help of the two trained mediators at the session Jeff and John were able to renegotiate a detailed, practical agreement about the fence. They would build it stronger but shorter using most of the materials they had purchased.

With John’s experience they were able to realistically divide up the tasks and calculate a time frame for each and include this in the agreement. Before leaving the mediation, Jeff and John signed the agreement and each went home happier, with a copy.

Jeff got started on the digging while John was able to complete his other commitments. They then did the main construction together on weekends during the next two months. When the job was finished, both were satisfied with the fence and they were pleased they had worked well together after all.

Case study - Boundary Fence

Arthur and Alfredo both agreed their dividing fence needed replacing, but when Arthur proposed, quite innocently, that a Colorbond fence be built along the common boundary line, Alfredo was outraged. Arthur couldn’t see the problem but for Alfredo the new fence would profoundly affect how his family used their property.

Arthur and Alfredo attended mediation but Alfredo wouldn’t budge. He could not agree to a fence along the boundary.

So with no progress on the fence, Arthur applied to the Local Court under the Dividing Fences Act 1991 for an order that the fence be erected along the common boundary line. Alfredo vigorously defended the action.

Alfredo wanted part of the fence to be built 30cms onto Arthur’s property. He argued that for the ten years he had owned his home, his family had been able to drive their cars into their backyard and park them safely in the garage and carport there. If the new fence was erected on the proper boundary line they could no longer do this.

Taking all relevant matters in to consideration, the magistrate made an order under section 14 of the Act that a Colorbond fence be erected partially along the boundary line and partially 30cms on Arthur’s land but that Alfredo pay the entire cost of the fence. The magistrate also reminded the parties that according to the Act, the order would not affect Arthur’s ownership of that piece of land.

Arthur appealed the magistrate’s decision to the NSW Supreme Court but the appeal was unsuccessful. He was unable to show that the magistrate had made any error of law.

This case study is based on the case Mezzagosto v Carnuccio [2004] NSWSC 285 [10]
Case study - Fence height

Ms Auchetti and Ms Kirk took their dispute about the height of their new dividing fence to the NSW Civil and Administrative Tribunal (NCAT). The old fence, which had separated their properties for 30 years, had only been 900 mm high but the Tribunal ordered that the new fence could be 1800mm high, the maximum height allowed under their local council regulations.

Dissatisfied with this decision, Ms Auchetti applied to the Tribunal's Appeal Panel for permission to appeal the order. Ms Auchetti claimed that the 1800mm fence would impact negatively on her health, on air circulation and light to her property, the privacy of her spare bedroom and her general quality of life. She also felt the Tribunal had not considered all the circumstances of the case, as was required under section 4 of the Dividing Fences Act 1991.

The Appeal Panel did not hold a hearing but dealt with the application using the Tribunal's decision and the papers provided by the parties. Based on these, the Appeal Panel was not persuaded by Ms Auchetti's claims.

In its decision, Auchetti v Kirk [11], only one of the medical records submitted by Ms Auchetti was considered relevant. It concerned her asthma that would be exacerbated by less light in her house and her chest pain due to anxiety about the height of the fence. This document was dated after the Tribunal's decision and no explanation was provided as to why it wasn't available at the time of the Tribunal hearing. As it had not been tested by cross-examination at the hearing, the Appeal Panel were not convinced that the doctor had the expertise to give an opinion about the increased height of the fence.

The Appeal Panel also rejected the privacy concern noting that the spare bedroom was only used occasionally and considered the ‘impact on her quality of life’ to be a mere assertion, not supported by any evidence. In addition, the Panel noted that the Tribunal's decision specifically referred to ‘all the circumstances of the case’ as required by section 4 of the Act.

On these grounds, the Appeal Panel refused Ms Auchetti’s application for permission to appeal and dismissed the appeal.

Related content

Neighbours, housing and the environment [15]

Having problems with neighbours over fences or trees? Or with your landlord? Or are you concerned with issues relating to planning or the environment?
LawAccess NSW - Fences [5]

A practical guide to dividing fences, boundary disputes and retaining walls.

Community Justice Centres [7]

Community Justice Centres can help you to resolve your dispute quickly and for free using mediation.

Dividing fences - NCAT [16]

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