

Authorised Version

Fences Amendment Act 2014

No. 30 of 2014

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Authorised Version



Victoria

Fences Amendment Act 2014[†]

No. 30 of 2014

[Assented to 15 April 2014]

The Parliament of Victoria enacts:

PART 1—PRELIMINARY

1 Purposes

The main purposes of this Act are—

- (a) to amend the **Fences Act 1968**—
 - (i) to provide a procedure for the sharing of costs between neighbours for the construction and repair of dividing fences; and

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- (ii) to provide a mechanism for the resolution of disputes about dividing fences; and
 - (iii) to provide for other matters relating to dividing fences; and
 - (b) to make consequential amendments to the **Crown Land (Reserves) Act 1978**, the **Emerald Tourist Railway Act 1977**, the **Land Act 1958** and the **Zoological Parks and Gardens Act 1995**.

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
 - (2) If a provision of this Act does not come into operation before 1 December 2014, it comes into operation on that day.
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PART 2—AMENDMENTS TO THE FENCES ACT 1968

3 Insertion of heading

Before section 1 of the **Fences Act 1968** insert—

"PART 1—PRELIMINARY".

See:
Act No.
7733.
Reprint No. 6
as at
18 February
1999
and
amending
Act Nos
74/2000,
12/2004,
63/2006 and
6/2010.
LawToday:
www.
legislation.
vic.gov.au

4 Section 2 repealed

Section 2 of the **Fences Act 1968** is repealed.

5 Section 3 substituted and new sections 4, 5 and 6 inserted

For section 3 of the **Fences Act 1968**
substitute—

"3 Definitions

In this Act—

adjoining land in relation to an area of land,
means land that shares a common
boundary with the area of land;

agricultural land means land used primarily
for agricultural or pastoral purposes,
regardless of whether the land is also
used for commercial or residential
purposes;

authorised fencing works means fencing works and any subsidiary works carried out as provided for in section 12(1)(a), (b), (c) or (d);

boundary survey notice means a notice of intention to have a common boundary defined given under section 28;

commercial land means land used primarily for commercial purposes, regardless of whether the land is also used for agricultural or residential purposes;

common property has the same meaning as in the **Owners Corporations Act 2006**;

corporation means any body corporate whether formed within or out of Victoria;

dividing fence means a fence that—

- (a) is located on the common boundary of adjoining lands (whether or not it is continuous or extends along the entire length of the adjoining lands); or
- (b) is not located on the common boundary of adjoining lands, but the purpose of which is to separate adjoining lands (whether or not it is continuous or extends along the entire length of the adjoining lands);

fence means a structure, ditch or embankment, or hedge or similar vegetative barrier, that encloses or bounds land, and—

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- (a) includes the following—
- (i) any gate, cattle grid or apparatus necessary for the operation of the fence;
 - (ii) any foundation or support built solely for the support and maintenance of the fence;
- (b) does not include the following—
- (i) any retaining wall;
 - (ii) any wall that is part of a house, garage or other building;

fencing notice means a notice of proposed fencing works given in accordance with section 13;

fencing notice agreement means an agreement between owners of adjoining lands, or owners of adjoining lands and long-term tenants (as the case requires), about proposed fencing works and any subsidiary works to be undertaken, that is reached after a fencing notice has been given to one of the owners;

fencing works means any one or more of the following—

- (a) the construction, replacement, repair, demolition, removal or maintenance of the whole or part of a dividing fence;
- (b) the planting, replanting, repair or maintenance of a hedge or similar vegetative barrier that is the whole or part of a dividing fence;

(c) the cleaning, deepening, enlargement, repair or alteration of a ditch or embankment that is the whole or part of a dividing fence;

incorporated association has the same meaning as in the **Associations Incorporation Reform Act 2012**;

licensed surveyor has the same meaning as in the **Surveying Act 2004**;

long-term tenant means a tenant under a lease with an unexpired term referred to in section 10(2)(a) or (b);

lot affected by an owners corporation has the same meaning as in the **Owners Corporations Act 2006**;

municipal council has the same meaning as *Council* has in the **Local Government Act 1989**;

owner has the meaning given in section 4;

owners corporation has the same meaning as in the **Owners Corporations Act 2006**;

reasonable inquiries has the meaning given in section 5;

Registrar has the same meaning as in the **Transfer of Land Act 1958**;

residential land means land that is used primarily for residential purposes, regardless of whether the land is also used for agricultural or commercial purposes;

subsidiary works means any one or more of the following—

- (a) the design of a dividing fence;
- (b) the preparation or clearing of land for the purpose of fencing works;
- (c) the surveying and marking of the common boundary of adjoining lands or other proposed line of fence for the purpose of fencing works;
- (d) obtaining an approval required for the purpose of fencing works;
- (e) using temporary barriers as a dividing fence until the completion of fencing works or work as described in paragraph (b);

traditional owner group entity has the same meaning as in the **Traditional Owner Settlement Act 2010**;

urgent fencing notice means a notice given under section 24.

4 Meaning of *owner*

- (1) For the purposes of this Act, ***owner*** means the following—
 - (a) for land under the **Transfer of Land Act 1958** (other than land in an identified folio under that Act), the registered proprietor of the fee simple in the land, or a person who is empowered by or under an Act to execute a transfer of the land;

- (b) for land in an identified folio under the **Transfer of Land Act 1958** or land not under the **Transfer of Land Act 1958** but in respect of which the grant of an estate in fee simple has been made, a person who has an estate in fee simple in the land (except a mortgagee), or who is empowered by or under an Act to convey an estate in fee simple in the land;
 - (c) the holder of a right to occupy a residence area in respect of land under the **Land Act 1958** whether or not covered by a mining licence under the **Mineral Resources (Sustainable Development) Act 1990**;
 - (d) for land to which paragraphs (a), (b) and (c) and subsection (3) do not apply that is alienated from the Crown by grant of a lease or licence, the holder of that lease or licence.
- (2) Despite subsection (1), *owner* does not include any of the following—
- (a) a person in the occupation of or entitled to occupy land under a licence under the **Mineral Resources (Sustainable Development) Act 1990**;
 - (b) a person in the occupation of land held by yearly licence under any Act relating to the sale and occupation of Crown lands;
 - (c) a municipal council, trustee or other person or body in respect of land owned by or vested in, or under the care, control or management of, the municipal council, trustee, person or

body for the purposes of a public park or public reserve;

- (d) a traditional owner group entity to whom the Governor in Council has granted an estate in fee simple in land under section 19 of the **Traditional Owner Settlement Act 2010** in relation to that land.

Note

In section 16, the term *owner* includes the persons referred to in paragraph (c).

- (3) Despite subsection (1), if an area of land is common property for which an owners corporation is responsible, the owners corporation is taken to be the owner of the area of land for the purposes of this Act.

Note

Subsection (3) does not apply to an area of land which is a lot affected by an owners corporation. In this case, the owner of the lot is the owner of the area for the purposes of this Act.

5 Meaning of *reasonable inquiries*

For the purposes of this Act, *reasonable inquiries* may include (but are not limited to) the following actions—

- (a) making inquiries of any persons who occupy the adjoining land or land near the adjoining land about the whereabouts of the owner of the adjoining land;
- (b) making inquiries of the municipal council in which the adjoining land is located about the whereabouts of the owner of the adjoining land.

6 When is a dividing fence a *sufficient dividing fence*?

- (1) For the purposes of this Act, in determining whether a dividing fence is a *sufficient dividing fence* regard must be had to the following—
- (a) the existing dividing fence (if any);
 - (b) the purposes for which the owners of the adjoining lands use or intend the lands to be used;
 - (c) the reasonable privacy concerns of the owners of the adjoining lands;
 - (d) the types of dividing fences used in the locality;
 - (e) any policy or code relating to dividing fences adopted by the municipal council of the area in which the adjoining lands are situated;
 - (f) any relevant planning instruments relating to the adjoining lands or to the locality in which the lands are situated;
 - (g) any relevant building laws relating to the adjoining lands and the carrying out of fencing works and any subsidiary works;
 - (h) the existence of any agreements or covenants that are relevant to the adjoining lands;
 - (i) the duties (if any) of an owner of land under the **Catchment and Land Protection Act 1994** to control pest animals;

- (j) the need for a dividing fence, having regard to any existing waterway or obstruction (whether natural or manmade) that is on, or forms, the common boundary between adjoining lands.
- (2) Despite subsection (1), if different standards of dividing fence are required for different purposes, a *sufficient dividing fence* for those lands is the lesser standard of fence.
- (3) Despite this section, if agricultural land shares a common boundary with residential land, a *sufficient dividing fence* for those lands is a dividing fence that would be a sufficient dividing fence for agricultural lands.

Note

Section 7 provides for the liability of owners in respect of sufficient dividing fences."

6 Parts I, II, III and IV substituted

For Parts I, II, III and IV of the **Fences Act 1968** substitute—

"PART 2—CONTRIBUTING TO FENCES

7 General principle—owners are liable to contribute in equal proportions to a sufficient dividing fence

- (1) If there is no dividing fence between adjoining lands, the owners of the adjoining lands are liable to contribute in equal proportions to fencing works and any subsidiary works for the construction of a sufficient dividing fence for the adjoining lands.

- (2) If there is a dividing fence between adjoining lands for which fencing works and any subsidiary works are required so that the dividing fence would be a sufficient dividing fence, the owners of the adjoining lands are liable to contribute in equal proportions to the fencing works and any subsidiary works for a sufficient dividing fence.
- (3) Nothing in this section prevents owners agreeing to contribute in other proportions to the fencing works and any subsidiary works for a sufficient dividing fence.

8 Fences of a greater standard than sufficient dividing fences

- (1) If fencing works and any subsidiary works are required for a dividing fence between adjoining lands (including the construction of the fence) and an owner of one of the adjoining lands requires a fence that is greater than the standard for a sufficient dividing fence, that owner is liable for the entire cost of the fencing works and any subsidiary works so far as they exceed the standard for a sufficient dividing fence.
- (2) If fencing works and any subsidiary works are required for a dividing fence between adjoining lands and there is a dividing fence between the adjoining lands that was constructed to a standard that is greater than that for a sufficient dividing fence, the owner of the land for which the greater standard of dividing fence was required is liable for the entire cost of the fencing works and any subsidiary works so far as they exceed the standard for a sufficient dividing fence.

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- (3) Nothing in this section prevents owners agreeing to contribute in other proportions to the fencing works and any subsidiary works for a dividing fence that is of a standard greater than the standard for a sufficient dividing fence.

9 Owners who damage or destroy a dividing fence

- (1) An owner of land is liable for the entire cost of fencing works and any subsidiary works to repair or replace a dividing fence that separates the land and the adjoining land if the dividing fence is damaged or destroyed by a negligent or deliberate act by—
- (a) the owner; or
 - (b) a person who has entered the land with the express or implied consent of the owner.

Note

Causes of damage or destruction of dividing fences may include creepers, the piling of soil against fences or the attachment of objects such as clotheslines to dividing fences.

- (2) Subsection (1) does not apply to the damage or destruction caused in the course of authorised fencing works.
- (3) To avoid doubt, the damage or destruction of a fence by a negligent or deliberate act includes the damage or destruction of a dividing fence that occurs in the course of developing land.
- (4) To avoid doubt, subsection (1) does not affect any rights of an owner of land who is liable under that subsection against the person who caused the damage or destruction of the dividing fence.

10 Circumstances where long-term tenants may be liable to contribute to fencing works

- (1) Despite section 7 and subject to subsection (3), a tenant of land is liable to the owner of land the tenant leases to contribute to fencing works and any subsidiary works for a sufficient dividing fence for the land as set out in subsection (2).
- (2) If the owner gives or receives a fencing notice in respect of the land the tenant leases and, if on the day the owner gives or receives the fencing notice—
 - (a) the tenant's lease has an unexpired term of 5 years or more, but not more than 10 years—the tenant is liable for 50% of the amount that the owner of the land the tenant leases is liable to contribute to the fencing works and any subsidiary works; or
 - (b) the tenant's lease has an unexpired term of more than 10 years—the tenant is liable for the entire amount that the owner of the land the tenant leases is liable to contribute to the fencing works and any subsidiary works.
- (3) A tenant is not liable to contribute to fencing works and any subsidiary works unless—
 - (a) the tenant is notified under section 15; and
 - (b) the owner who gives a fencing notice is seeking a contribution from the owner of the adjoining land.

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- (4) This section does not apply to any of the following—
- (a) a tenant under a tenancy agreement to which the **Residential Tenancies Act 1997** applies;
 - (b) a tenant under a retail premises lease to which the **Retail Leases Act 2003** applies;
 - (c) a tenant under a lease agreement that provides for contributions to fencing works and any subsidiary works (whether or not the tenant is liable to contribute under the lease).

PART 3—PROCEDURES

Division 1—Procedure for fencing works

11 Meaning of *adjoining owner* and *notifying owner* in Division 1

In this Division—

adjoining owner means the owner of the adjoining land to the land of the notifying owner, being the adjoining land for which the fencing notice is given;

notifying owner means an owner of land who gives a fencing notice to the owner of the adjoining land under section 13.

12 Owners must not undertake fencing works unless in accordance with an agreement or otherwise in accordance with this Act

- (1) An owner of land must not undertake fencing works or any subsidiary works unless the works are carried out—

- (a) in accordance with a fencing notice agreement; or

Note

Section 3 defines a *fencing notice agreement* as an agreement between owners of adjoining lands, or owners of adjoining lands and long-term tenants, about proposed fencing works and any subsidiary works to be undertaken, that is reached after a fencing notice has been given to one of the owners.

- (b) in accordance with an order of the Magistrates' Court; or

- (c) otherwise in accordance with this Act; or

- (d) in accordance with another agreement between the owners of adjoining lands.

- (2) If an owner of land carries out fencing works and any subsidiary works that are not works carried out as provided for in subsection (1)(a), (b), (c) or (d), the owner of the adjoining land may file a complaint in the Magistrates' Court seeking an order under section 30C.

13 Seeking agreement to proposed fencing works under the Act—giving a fencing notice

- (1) If an owner of land proposes to undertake fencing works and any subsidiary works for a dividing fence for the land and any

adjoining land, the owner may give a notice under this section to the owner of the adjoining land seeking the agreement of the owner of the adjoining land to the proposal to carry out the fencing works and any subsidiary works.

Note

Section 14 makes provision for locating an owner of adjoining land. Sections 19 and 21 make provision for when an owner of adjoining land cannot be located.

- (2) In a notice given under subsection (1), the notifying owner may require the adjoining owner to contribute, under this Act, to the fencing works and any subsidiary works.
- (3) A notice given under subsection (1) must be in writing and contain the following information—
 - (a) the date of the notice;
 - (b) the name and contact details of the notifying owner;
 - (c) a statement that the notice is a notice under section 13 of this Act;
 - (d) the boundary line on which the fencing works and any subsidiary works are proposed to be carried out or, if it is impracticable to carry out the works on the common boundary because a waterway or other obstruction (whether natural or manmade) is on, or forms, the common boundary, the line on which it is proposed to carry out the works;

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- (e) if a dividing fence is not required for part of the common boundary because a waterway or other obstruction (whether natural or manmade) is on, or forms, the common boundary, a statement to that effect;
 - (f) the type of fencing works and any subsidiary works proposed to be carried out, including the type of fence to be constructed or the nature of the repairs or maintenance;
 - (g) the name and contact details of any person who may be engaged to undertake the fencing works and any subsidiary works proposed to be carried out;
 - (h) if the notifying owner requires the adjoining owner to contribute under this Act—
 - (i) an estimate of the cost of the fencing works and any subsidiary works proposed to be carried out and an explanation of the basis of that estimate; and
 - (ii) the proportion of the estimated cost that each owner is proposed to contribute; and
 - (iii) the estimated amount that the adjoining owner will be required to contribute;
 - (i) a statement that either owner may seek assistance from the Dispute Settlement Centre of Victoria to resolve any disputes about the proposed fencing works and any subsidiary works.

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- (4) Failure to include the information referred to in subsection (3)(a), (b), (g) or (i) in a notice given under subsection (1) does not invalidate the notice.
 - (5) A notice under this section may be in the prescribed form.
 - (6) For the avoidance of doubt, this section applies whether or not an adjoining owner is in occupation of the land.

Notes

- 1 Any form in or to the like effect of the prescribed form is sufficient in law: see section 53 of the **Interpretation of Legislation Act 1984**.
- 2 The giving of a fencing notice to an owner does not apply to another person who subsequently acquires the land. A new fencing notice will need to be given.

14 Owner must make reasonable inquiries to locate adjoining owner

- (1) An owner of land who proposes to undertake fencing works and any subsidiary works who does not know the whereabouts of the owner of the adjoining land must make reasonable inquiries to locate that owner for the purpose of giving a fencing notice.
- (2) A municipal council may disclose the name and address of an owner of land if the municipal council is satisfied the person to whom the name and address is given will use the name and address for the purpose of giving a fencing notice.

15 Additional notices where a long-term tenant may be liable to contribute

- (1) If a notifying owner requires a long-term tenant of the notifying owner's land for which the fencing notice is given to contribute under this Act to the fencing

works and any subsidiary works referred to in the fencing notice, the notifying owner must, on the same day the fencing notice is given to the adjoining owner—

- (a) give a copy of the fencing notice to the long-term tenant; and
 - (b) give the long-term tenant a notice, in writing—
 - (i) seeking the long-term tenant's agreement to the proposed fencing works and any subsidiary works referred to in the fencing notice (but not to any matters set out in the fencing notice under section 13(3)(d)) and requiring the long-term tenant to contribute; and
 - (ii) estimating the amount that the long-term tenant will be required to contribute; and
 - (c) give the adjoining owner a notice, in writing, stating that there is a long-term tenant who is liable to contribute to fencing works and any subsidiary works under this Act.
- (2) If an adjoining owner receives a fencing notice for the adjoining owner's land and the adjoining owner requires a long-term tenant of the adjoining owner's land to contribute under this Act to the fencing works and any subsidiary works referred to in the fencing notice, the adjoining owner must, as soon as practicable after receiving the notice—
- (a) give a copy of the fencing notice to the long-term tenant; and

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- (b) give the long-term tenant a notice, in writing—
- (i) seeking the long-term tenant's agreement to the proposed fencing works and any subsidiary works referred to in the fencing notice (but not to any matters set out in the fencing notice under section 13(3)(d)) and requiring the long-term tenant to contribute; and
 - (ii) estimating the amount that the long-term tenant will be required to contribute; and
- (c) give the notifying owner a notice, in writing, stating that there is a long-term tenant who is liable to contribute to fencing works and any subsidiary works under this Act.
- (3) Any notice under this section may be in the prescribed form.

Note

Section 10 sets out the circumstances in which long-term tenants may be liable to contribute to fencing works and any subsidiary works.

16 Owners may agree on a fence line other than common boundary where waterway or other obstruction

- (1) To avoid doubt, the owners of adjoining lands may agree to carry out fencing works and any subsidiary works on a line that is not the common boundary if it is impracticable to carry out the works on the common boundary because a waterway or other obstruction (whether natural or manmade) is on, or forms, the common boundary.

- (2) Despite section 4(2)(c), for the purposes of determining, under subsection (1), a line for carrying out fencing works and any subsidiary works that is not the common boundary of adjoining lands, *owner* includes a municipal council, trustee or other person or body in respect of land owned by or vested in, or under the care, control or management of, the municipal council, trustee, person or body for the purposes of a public park or public reserve.

17 Procedure if adjoining owner responds but owners do not agree

If an adjoining owner responds to a notifying owner within 30 days of a fencing notice being given, but, after that 30 days, the owners have not agreed about any one or more of the matters specified in the notice, either owner may seek an order under section 30C by filing a complaint in the Magistrates' Court.

18 Procedure if long-term tenant responds but does not agree

If a long-term tenant responds to an owner within 30 days from the day the notifying owner gave a fencing notice to the adjoining owner, but, after that 30 days, the long-term tenant and the owners have not agreed about any one or more of the matters specified in that notice—

- (a) the long-term tenant may seek an order under section 30D by filing a complaint in the Magistrates' Court; or
- (b) either owner may seek an order under section 30C by filing a complaint in the Magistrates' Court.

19 Procedure if adjoining owner has not responded or cannot be located

An owner of land may commence fencing works and any subsidiary works without agreement from the owner of the adjoining land if—

- (a) the owner gives the owner of the adjoining land a fencing notice and the owner of the adjoining land has not responded within 30 days from the day the fencing notice was given; or
- (b) after making reasonable inquiries, the owner of the adjoining land is unable to be located.

20 Procedure if long-term tenant has not responded

- (1) A notifying owner may commence fencing works and any subsidiary works for which a long-term tenant of the notifying owner's land is liable to contribute under this Act, without agreement from the long-term tenant, if the long-term tenant has not responded to the notice given by the notifying owner under section 15(1) within 30 days from the day the notifying owner gave the fencing notice to the adjoining owner.
- (2) A notifying owner may commence fencing works and any subsidiary works for which a long-term tenant of the adjoining owner's land is liable to contribute under this Act, without agreement from the long-term tenant, if the long-term tenant has not responded to the notice given by the adjoining owner under section 15(2) within 30 days from the day the notifying owner

gave the fencing notice to the adjoining owner.

21 Recovering contributions from owner of adjoining land for works commenced under section 19

- (1) If an owner of land who commences fencing works and any subsidiary works under section 19 seeks to recover a contribution from the owner of the adjoining land, the owner may do so by filing a complaint in the Magistrates' Court seeking an order under section 30C.
- (2) An owner of land who is unable to locate the owner of the adjoining land after making reasonable inquiries may file the complaint in the Magistrates' Court without having located the owner of the adjoining land.
- (3) If the owner of the adjoining land is liable to contribute to fencing works and any subsidiary works under an order made by the Magistrates' Court in that owner's absence (*first order*), and that owner considers that the first order is inequitable, that owner may seek a further order under section 30C by filing a complaint in the Magistrates' Court within 30 days after the service of the first order.

22 Recovering contributions from long-term tenant for works commenced under section 20

- (1) If a notifying owner who commences fencing works and any subsidiary works under section 20(1) seeks to recover a contribution from a long-term tenant of the notifying owner's land, the notifying owner may do so by filing a complaint in the

Magistrates' Court seeking an order under section 30C.

- (2) If a notifying owner commences fencing works and any subsidiary works under section 20(2) and the adjoining owner seeks to recover a contribution from a long-term tenant of the adjoining owner's land, the adjoining owner may do so by filing a complaint in the Magistrates' Court seeking an order under section 30C.

Division 2—Procedure for urgent fencing works

23 Urgent fencing works may be carried out

- (1) Without giving a fencing notice and without the agreement of the owner of the adjoining land (*adjoining owner*), an owner of land may carry out fencing works and any subsidiary works if—
 - (a) the fencing works and any subsidiary works need to be carried out urgently; and
 - (b) a dividing fence on the land has been damaged or destroyed; and
 - (c) it is impracticable to give a fencing notice to the adjoining owner.

Note

The types of circumstances in which fencing works and any subsidiary works may need to be carried out urgently include where the dividing fence has been damaged or destroyed by a falling tree or branch or by fire or flood.

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- (2) This section has effect subject to—
- (a) the operation of—
 - (i) the **Residential Tenancies Act 1997** in relation to urgent repairs;
or
 - (ii) the **Retail Leases Act 2003** in relation to urgent repairs; or
 - (b) a lease agreement that makes provision for urgent repairs.

24 Requiring an owner to contribute to urgent fencing works once complete

- (1) An owner of land who carries out fencing works and any subsidiary works under section 23, may give a notice to the adjoining owner requiring the adjoining owner to contribute under this Act to the fencing works and any subsidiary works for a sufficient dividing fence for the adjoining lands.
- (2) A notice under subsection (1) must be in writing and contain the following information—
- (a) a description of the land on which the fencing works and any subsidiary works were carried out;
 - (b) the boundary line on which the fencing works and any subsidiary works were carried out or, if it was impracticable to carry out the works on the common boundary because of a waterway or other obstruction (whether natural or manmade) is on, or forms, the common boundary, the line on which the works were carried out;

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- (c) the type of fencing works and any subsidiary works that were carried out, including the type of fence constructed or the nature of the repairs or maintenance;
 - (d) the reason the fencing works and any subsidiary works were required to be carried out urgently;
 - (e) the cost of the fencing works and any subsidiary works and a copy of the receipt for the works;
 - (f) the proportion of the cost that each owner is proposed to contribute to the fencing works and any subsidiary works;
 - (g) the amount that the owner to whom the notice is addressed is required to contribute.
- (3) A notice under this section may be in the prescribed form.

25 Procedure if adjoining owner responds to urgent fencing notice but does not agree

If, after 30 days from the day that an owner gave an urgent fencing notice to the adjoining owner, the adjoining owner has responded but the owners have not agreed about any one or more of the matters specified in the urgent fencing notice, either owner may seek an order under section 30C by filing a complaint in the Magistrates' Court.

26 Procedure if adjoining owner does not respond to urgent fencing notice

If, after 30 days from the day that an owner gave an urgent fencing notice to the adjoining owner, the adjoining owner has not responded, the owner who gave the notice may seek an order under section 30C by filing a complaint in the Magistrates' Court.

Division 3—Process if common boundary not agreed

27 Meaning of *adjoining owner* and *notifying owner* in Division 3

In this Division—

adjoining owner means the owner of the adjoining land to the land of the notifying owner, being the adjoining land for which the boundary survey notice is given;

notifying owner means an owner of land who gives a boundary survey notice to the owner of the adjoining land under section 28(1).

28 Boundary survey notice

- (1) An owner of land may give notice under this section to the owner of the adjoining land of the owner's intention to engage a licensed surveyor to have the common boundary defined.
- (2) A notice under this section must be in writing and specify the position that the notifying owner thinks is the position of the common boundary unless the notifying owner has specified that position in a fencing notice given to the adjoining owner.

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- (3) A notifying owner must not give a notice under this section unless—
- (a) the notifying owner has given or received a fencing notice in respect of the adjoining lands and the owners do not agree on the position of a common boundary; or
 - (b) the notifying owner gives a fencing notice in respect of the adjoining lands to the adjoining owner at the same time as giving a notice under this section.

29 Response to boundary survey notice

- (1) If an adjoining owner is given a boundary survey notice, the adjoining owner may, within 30 days from the day on which the adjoining owner was given the notice—
- (a) give the notifying owner a notice, in writing, that the adjoining owner agrees to the position of the common boundary specified in the boundary survey notice or the fencing notice; or
 - (b) specify the position that the adjoining owner thinks is the position of the common boundary in writing or by defining the position of the boundary line by marking it on the ground; or
 - (c) engage a licensed surveyor to have the common boundary defined.
- (2) If an adjoining owner has the common boundary defined under subsection (1)(c), the adjoining owner must give the notifying owner notice, in writing, of the common boundary as defined by the licensed surveyor.

30 Boundary survey

- (1) The notifying owner may have the common boundary defined by a licensed surveyor engaged by the notifying owner if, after 30 days from the day on which the notifying owner gave the boundary survey notice—
 - (a) the adjoining owner has not agreed to the position of the common boundary; and
 - (b) the adjoining owner has not had the common boundary defined under section 29(1)(c).
- (2) A notifying owner who intends to have the common boundary defined under subsection (1) must, within 21 days after the day on which the 30 day period expires, engage a licensed surveyor to define the common boundary.
- (3) The notifying owner must give the adjoining owner notice, in writing, of the common boundary as defined by the licensed surveyor.

30A Contributions to boundary survey

- (1) Subject to subsection (2), the notifying owner and the adjoining owner are liable to contribute in equal proportions to any reasonable cost of engaging the licensed surveyor under section 29(1)(c) or 30(1).
- (2) An adjoining owner is not liable to contribute to the reasonable cost of engaging a licensed surveyor under section 30(1) if the common boundary defined by the licensed surveyor is in the same position as the position specified by the adjoining owner under section 29(1)(b).

30B Right to file complaint in Magistrates' Court suspended while common boundary established

On the giving of a boundary survey notice, the period of 30 days set out in section 17, 18, 19(a) or 20 is suspended until either of the following occurs—

- (a) the owners agree, in writing, to the position of the common boundary specified in the fencing notice or the boundary survey notice or to another position; or
- (b) a licensed surveyor, in accordance with section 29 or 30, defines the common boundary of the adjoining lands.

PART 4—RESOLVING FENCING DISPUTES

30C Orders about fencing works

- (1) The Magistrates' Court may make an order in relation to any one or more of the following matters in respect of a complaint filed under this Act, if the case so requires—
 - (a) the line on which the fencing works and any subsidiary works are to be carried out, whether or not that line is on the common boundary of the adjoining lands;
 - (b) the line that is the common boundary of the adjoining lands;
 - (c) whether or not a dividing fence is required and whether or not fencing works and any subsidiary works should be carried out, and if any works should

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- be carried out, the nature of the works to be carried out;
- (d) the nature of the fence that constitutes a sufficient dividing fence for the adjoining lands;
 - (e) the person by whom fencing works and any subsidiary works should be carried out and, if the works are to be performed by different persons, the work to be performed by each person;
 - (f) whether a person is liable under this Act to contribute to fencing works and any subsidiary works;
 - (g) the way in which contributions for the fencing works and any subsidiary works are to be apportioned or reapportioned or the amount that each owner or long-term tenant is liable to pay for the works;
 - (h) any other work to be carried out (including work for a retaining wall) that is necessary so that the fencing works and any subsidiary works agreed on by the parties or specified in the order can be carried out;
 - (i) the time within which the fencing works and any subsidiary works are to be carried out (including any specific dates and times at which a person who carries out the works may enter land for the purpose of carrying out the works) and the manner in which those works are to be performed;

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- (j) whether an owner is to pay compensation to the owner of the adjoining land for loss of occupation of land arising from the placement of a dividing fence (including because of loss of an unrealised possessory right) and, if so, the amount of any compensation to be paid;
 - (k) that a party to the proceeding cease an activity or discontinue conduct that, in the opinion of the Court, is unreasonably damaging or may unreasonably damage a dividing fence;
 - (l) that an owner is authorised to carry out fencing works and any subsidiary works without the agreement or knowledge of an owner of adjoining land or a long-term tenant;
 - (m) any other matter, or any direction or relief that the Court considers appropriate.
- (2) In making an order under subsection (1) about the line on which the fencing works and any subsidiary works are to be carried out or the line that is the common boundary of adjoining lands, the Court may require that the common boundary be defined by a licensed surveyor.
 - (3) In making an order under subsection (1) about contributions, the Court may have regard to any negligent or deliberate acts that have shortened the life of a dividing fence.
 - (4) For the purpose of an order under subsection (1), if there is more than one owner of an area of land, the owners are jointly and severally liable to contribute to fencing

works and any subsidiary works for that area of land unless the Court determines otherwise.

- (5) The Magistrates' Court may make an order under subsection (1) in the absence of an owner of the adjoining land if that owner has not been served with the complaint and cannot be located after reasonable inquiries have been made.

30D Orders about fencing works—long-term tenants

- (1) The Magistrates' Court, in respect of a complaint filed by a long-term tenant under section 18(a) of this Act, may make an order in relation to any one or more of the matters referred to in section 30C(1)(c), (d), (e), (f), (g), (h), (i) or (k).
- (2) In making an order under subsection (1) about contributions, the Court may have regard to any negligent or deliberate acts that have shortened the life of a dividing fence.

30E Adverse possession claims arising from fencing disputes

- (1) A person may file a complaint in the Magistrates' Court under this section claiming title by possession to a part of adjoining land to the land that person owns if—
- (a) the land that person owns is land in respect of which a complaint is filed under another provision of this Act; and
- (b) the land that the person is claiming title by possession to is land on which fencing works and any subsidiary works that are the subject of that complaint are to be carried out.

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- (2) The Magistrates' Court may make an order in relation to who is entitled to title by possession of that part of the adjoining lands on which the fencing works and any subsidiary works are to be carried out.
 - (3) Nothing in this section affects the operation of the **Limitation of Actions Act 1958**, the **Transfer of Land Act 1958** or any other law in relation to adverse possession.

Note

A person who claims title by possession to land may apply to the Registrar under the **Transfer of Land Act 1958** for an order vesting the land in that person.

30F If adjoining owner defaults on agreement or order

- (1) If an owner of land (*first owner*) fails to comply with a fencing notice agreement or an order made under this Act about fencing works and any subsidiary works within the time specified in the agreement or order, or, if there is no specified time, within 3 months after the making of the agreement or order, the owner of the adjoining land (*adjoining owner*) may—
 - (a) carry out the fencing works and any subsidiary works; or
 - (b) recover from the first owner the amount that the first owner was liable to pay the adjoining owner under the fencing notice agreement or order.
- (2) An adjoining owner who carries out fencing works and any subsidiary works under subsection (1)(a) may recover from the first owner the amount that the adjoining owner was liable to pay the first owner under the

fencing notice agreement or order or otherwise under this Act.

30G Recovery of money—landlord against long-term tenant who is liable

The owner of land that is leased by a long-term tenant who is liable to contribute to fencing works and any subsidiary works under this Act may recover from the long-term tenant the amount that the long-term tenant is liable to contribute if the long-term tenant fails to comply with—

- (a) a fencing notice agreement made with the owners within the time specified in the agreement or, if there is no specified time, within 3 months after the making of the agreement; or
- (b) an order made under this Act about fencing works and any subsidiary works within the time specified in the order or, if there is no specified time, within 3 months of the making of the order.

30H Recovery of money for a dividing fence where unalienated Crown land is first acquired

- (1) If an owner carries out fencing works and any subsidiary works for a dividing fence and the adjoining land is unalienated Crown land, the owner may recover half of the value of the existing dividing fence from any person who later becomes the owner of the adjoining land by giving that person notice under this section.
- (2) A notice under this section must be in writing and contain the following information—

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- (a) a statement of the value of the dividing fence; and
 - (b) the amount that the owner to whom the notice is addressed is required to contribute.
 - (3) An owner who gives notice under this section must do so within 6 months after the day on which the owner to whom the notice is given acquired the land.
 - (4) Either owner may seek an order under section 30C by filing a complaint in the Magistrates' Court if, after 30 days from the day that an owner gave a notice under this section, the owners have not agreed about either of the following—
 - (a) whether an owner is liable, under this Act, to contribute to fencing works and any subsidiary works;
 - (b) the way in which contributions for the fencing works and any subsidiary works are to be apportioned or reapportioned or the amount that each owner is liable to pay for the works.
 - (5) An owner must not give notice under this section unless—
 - (a) at the time the notice is given, the dividing fence in respect of which the fencing works and any subsidiary works were carried out is in existence; and
 - (b) at or before the time the notice is given, the owner who gives the notice has not received contributions for the fencing works and any subsidiary works.

30I Substantial failure to comply required

Proceedings cannot be brought for the recovery of a proportion of the cost of fencing works and any subsidiary works on the grounds that the works were not carried out in compliance with a fencing notice agreement or an order made under this Act unless there was a substantial failure to comply with the conditions of the agreement or order.

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7 Heading to Part V amended

In the heading to Part V of the **Fences Act 1968**, for "**PART V**" substitute "**PART 5**".

8 Section 30 repealed

Section 30 of the **Fences Act 1968** is repealed.

9 Act not to apply to unalienated Crown lands

In section 31 of the **Fences Act 1968**—

- (a) for "sections 12 and 23" substitute "section 30H";
- (b) **omit** "the Minister administering section 19";
- (c) for "his office" substitute "his or her office";
- (d) for "the construction or repairing of" substitute "any fencing works and any subsidiary works for";
- (e) for "occupier" substitute "owner".

10 Sections 32 and 33 substituted and new sections 34 to 39 inserted

For sections 32 and 33 of the **Fences Act 1968** substitute—

"32 Placement of rails and framing

- (1) If residential land or commercial land shares a common boundary with land to which the public has general access or over which there is a right of way, the rails and framing must be placed on the side of the dividing fence facing into the residential land or commercial land (as the case requires).
- (2) If residential land shares a common boundary with commercial land, the rails and framing must be placed on the side of the dividing fence facing into the residential land.
- (3) In all other cases, the rails and framing for a dividing fence must be placed—
 - (a) if a dividing fence is being replaced by a similar dividing fence—on the same side as the rails and framing were located on the previous dividing fence; or
 - (b) if the dividing fence is being replaced by a different type of dividing fence or if there was no previous dividing fence—on the side least subject to weathering.
- (4) This section does not apply if an agreement or fencing notice agreement between the owners of adjoining lands, or an order made under this Act, specifies on which side of the dividing fence the rails and frames must be placed.

33 Right to access adjoining land to undertake fencing works

- (1) An owner of land who carries out fencing works and any subsidiary works under this Act, at any reasonable time, may enter the adjoining land for the purpose of carrying out the works.
- (2) For the avoidance of doubt, the right of an owner under subsection (1) may be exercised by an employee or agent of the owner.

34 Act not to affect agreements, other laws etc

Nothing in this Act affects any of the following—

- (a) a contract or an agreement (other than an agreement under this Act) made between owners of adjoining lands, or between an owner and a tenant;
- (b) a covenant that affects the adjoining lands;
- (c) a law about retaining walls or rights of support for land;
- (d) the operation of any other Act.

35 No entitlement to possession if fence not on common boundary because of waterways and other obstructions

If, under this Act, owners agree or the Magistrates' Court orders, that fencing works and any subsidiary works are to be carried out on a line that is not the common boundary because it is impracticable to carry out the works on the common boundary because a waterway or other obstruction (whether natural or manmade) is on, or forms, the common boundary—

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- (a) an owner is not taken to be in possession of any part of the adjoining land that the owner occupies merely because of the placement of the fence; and
 - (b) the construction of the fence does not affect the title to, or possession of, the adjoining land.

36 Act does not apply in certain circumstances—owners corporations

- (1) This Act does not apply to adjoining lands if—
 - (a) both areas of land are lots affected by the same owners corporation; and
 - (b) the rules of that owners corporation provide for contributions to fencing works and any subsidiary works between those lots.
- (2) This Act does not apply to adjoining lands if—
 - (a) one area of land is a lot affected by an owners corporation and the other area of land is common property for which the same owners corporation is responsible; and
 - (b) the rules of that owners corporation provide for contributions to fencing works and any subsidiary works between that lot and that common property.

37 Giving notices under this Act

- (1) A notice under this Act may be given to a person by delivering it personally to the person or by post.

Notes

- 1 Section 49(1) of the **Interpretation of Legislation Act 1984** sets out when service of a document by post is effected.
 - 2 The **Electronic Transactions (Victoria) Act 2000** applies to notices given under this Act.
- (2) A notice may be delivered personally to an individual—
- (a) by leaving a copy of the notice with the individual or, if the individual does not accept the copy, by putting the copy down in the individual's presence and telling the individual the nature of the notice; or
 - (b) by delivering a copy of the notice to the place of residence of the individual to an individual apparently above the age of 16 years who resides at that place but when the place of residence is a hotel, boarding house or similar establishment, to some individual apparently above that age who is apparently in charge of the establishment or engaged in the office of the establishment; or
 - (c) if the individual conducts a business, by delivering a copy of the notice to the place of business of the individual to an individual apparently above the age of 16 years who is apparently in charge of that business or is employed in the office of that business.

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- (3) For the purpose of giving a notice under this Act, the proper address—
- (a) for an owners corporation is the address that is shown on the records of the Registrar for that owners corporation; or
 - (b) for a corporation (other than an owners corporation) is the registered or principal office of the corporation; or
 - (c) for an incorporated association is the registered address (within the meaning of the **Associations Incorporation Reform Act 2012**) of the incorporated association.
- (4) If a person delivering a notice by post under this section made inquiries of a municipal council about the whereabouts of the owner to whom the notice is directed, at least one copy of the notice must be sent to the address provided by the municipal council (if any).

38 Regulations

- (1) The Governor in Council may make regulations for or with respect to—
- (a) prescribing forms for the purposes of this Act; and
 - (b) any matter or thing that is required or permitted to be prescribed or necessary to be prescribed to give effect to this Act.
- (2) Regulations under this Act—
- (a) may be of general or limited application; and
 - (b) may differ according to differences in time, place and circumstances.

39 Transitional provisions

- (1) This Act, as in force immediately before the commencement of the **Fences Amendment Act 2014**, continues to apply on and after that commencement to the construction and repair of a dividing fence begun before that commencement.
- (2) This Act, as in force immediately before its amendment by the **Fences Amendment Act 2014**, continues to apply on and after that amendment to any notices given, proceedings commenced or orders made under this Act before that amendment.
- (3) Nothing in this Act affects a contract or an agreement (other than an agreement under this Act) made between owners of adjoining lands, or between an owner and a tenant, before the commencement of the **Fences Amendment Act 2014**.
- (4) This Act applies to fencing works and any subsidiary works begun on or after the day on which the **Fences Amendment Act 2014** comes into operation."

11 Repeal of Schedule

The Schedule to the **Fences Act 1968** is repealed.

PART 3—AMENDMENTS TO OTHER ACTS

12 Crown Land (Reserves) Act 1978

In section 21(1) of the **Crown Land (Reserves) Act 1978**, for "*occupiers* in section 5" substitute "*owners* in section 16".

See:
Act No.
9212.
Reprint No. 10
as at
1 July 2011
and
amending
Act Nos
64/2004,
65/2010,
7/2012,
17/2012,
46/2012 and
31/2013.
LawToday:
www.
legislation.
vic.gov.au

13 Emerald Tourist Railway Act 1977

In section 48(1) of the **Emerald Tourist Railway Act 1977**, for "the construction or repairing of any dividing fence between the land of any occupier" substitute "fencing works and any subsidiary works in respect of a dividing fence between the land of any owner".

See:
Act No.
9020.
Reprint No. 2
as at
16 February
2006
and
amending
Act Nos
69/2009 and
6/2010.
LawToday:
www.
legislation.
vic.gov.au

See:
Act No.
6284.
Reprint No. 12
as at
27 April 2012
and
amending
Act Nos
43/2012 and
46/2012.
LawToday:
www.
legislation.
vic.gov.au

14 Land Act 1958

In the **Land Act 1958**—

- (a) in section 3(1), in the definition of *perpetual lessee*, omit "and in the term *occupier* in the **Fences Act 1968**";
- (b) in section 402(1), for "as if he were an occupier" substitute "as if he were an owner".

See:
Act No.
106/1995.
Reprint No. 2
as at
11 October
2013.
LawToday:
www.
legislation.
vic.gov.au

15 Zoological Parks and Gardens Act 1995

In section 15(1) of the **Zoological Parks and Gardens Act 1995**, for "*occupier*" substitute "*owner*".

PART 4—REPEAL OF AMENDING ACT

16 Repeal of amending Act

This Act is **repealed** on 1 December 2015.

Note

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).

ENDNOTES

[†] *Minister's second reading speech—*

Legislative Assembly: 12 December 2013

Legislative Council: 3 April 2014

The long title for the Bill for this Act was "A Bill for an Act to amend the **Fences Act 1968** to provide a procedure for the sharing of costs between neighbours for dividing fences and a mechanism for the resolution of disputes about dividing fences, to make amendments about other matters in relation to dividing fences, and to amend other Acts and for other purposes."