

FENCES AMENDMENT ACT 2014: MAIN CHANGES

The main changes made by the *Fences Amendment Act 2014* are set out below.

1. Combined process for construction and repair of dividing fences

The pre-amendment *Fences Act 1968* contained separate processes in relation to construction of a dividing fence (Part I) and maintenance and repair of an existing dividing fence (Part II).

The *Fences Amendment Act 2014* has one process for all fencing works and subsidiary works, whether those works involve construction of a new dividing fence or repair of an existing dividing fence. This simplifies the process.

2. Changes in liability for dividing fences

Under the pre-amendment *Fences Act*, the responsibility for undertaking fencing works and contributing to dividing fences was on occupiers of land. The *Fences Amendment Act* shifts this liability to owners of land in most instances, in recognition that a dividing fence is an improvement to the land that most often benefits the owner.

Under the *Fences Amendment Act*, the owner will generally be the registered proprietor of land or someone who holds an estate in fee simple. Owners corporations are also deemed to be owners in respect of dividing fences between common property in an owners corporation subdivision and external land.

There are some exclusions from the definition of 'owner' and, therefore, from fencing responsibilities. For example, municipal councils and others who own or manage land for the purposes of a public park or public reserve are excluded and the Crown exemption from contributing to dividing fences between Crown land and adjoining land remains unchanged.

The pre-amendment *Fences Act* also contained provisions for land occupied by a tenant, setting out how fencing contributions should be borne between tenant and landlord. The *Fences Amendment Act* retains provisions that make long-term tenants of land liable to contribute to fencing works but with some changes (see Part 4 below).

3. Contributions between owners and sufficient dividing fence factors

The pre-amendment *Fences Act* provided that contributions were to be in equal proportions to 'a fence sufficient for the purposes of both occupiers'. However, little guidance was provided in relation to what is 'sufficient'.

The *Fences Amendment Act* clarifies that owners must contribute in equal proportions to a 'sufficient dividing fence' and sets out a number of factors to be considered in determining what is a sufficient dividing fence. These factors include: the existing dividing fence, if any; the purposes for which the owners use the adjoining lands or intend for them to be used; reasonable privacy concerns; the types of dividing fences used in the local area; and other factors.

Other than in the agricultural context, the pre-amendment *Fences Act* did not address the situation where one occupier's needs for particular standard of dividing fence exceeded the needs of the other occupier. The *Fences Amendment Act* clarifies that where one owner wants a

standard of dividing fence that is greater than a sufficient dividing fence, that owner pays the difference in cost.

4. Changes in relation to contributions of long-term tenants

Under the pre-amendment *Fences Act*, long-term tenants were liable to contribute to fencing works in some instances. The *Fences Amendment Act* maintains this position, but provides for a simpler breakdown of contributions between owner and long-term tenant.

The *Fences Amendment Act* also makes the process fairer, by providing that in order for a long-term tenant to be required to contribute to the cost of a dividing fence, the long-term tenant must be given notice and allowed to participate in negotiations (and, if necessary, court proceedings) about the dividing fence.

Particular types of tenants, such as most residential tenants and retail tenants, are also exempted from the operation of the *Fences Amendment Act* and cannot be made liable to contribute. This means that the tenancy provisions introduced by the *Fences Amendment Act* will largely apply to commercial leases and particular types of retail leases that are exempted from the operation of the *Retail Leases Act 2003*.

5. Notice of proposed fencing works even where no contribution is sought

Under the pre-amendment *Fences Act*, notice was only required where a financial contribution was being sought. If an occupier did not want a financial contribution to the fencing works from their neighbour, they could undertake fencing works without giving notice to the adjoining occupier or seeking the adjoining occupier's agreement.

The *Fences Amendment Act* provides that an owner must generally give notice to an adjoining owner before undertaking fencing works, unless the owners have already agreed outside of the *Fences Act*. There are some exceptions if the works are urgent or the adjoining owner cannot be located.

The fencing notice forms the basis for the owners to negotiate and agree about the fencing works.

6. Process where adjoining owner cannot be located or does not respond

As the *Fences Amendment Act* requires a fencing notice to be given in most circumstances, it is necessary for the Act to also provide for what happens when an adjoining owner cannot be located or is given a fencing notice but does not respond.

If an owner wishes to undertake fencing works but cannot locate the adjoining owner after making 'reasonable inquiries'—including asking any person who occupies the property and asking the local council—that owner may undertake the works. If an owner gives a fencing notice but after 30 days the adjoining owner has not responded, the owner wishing to undertake the works may do so.

In either circumstance—where the adjoining owner cannot be located or does not respond—a court order will be required if the owner who undertook the fencing works wishes to seek a contribution from the adjoining owner.

7. Urgent fencing works

As a fencing notice must be given in most circumstances, it is also necessary to provide for when fencing works need to be undertaken urgently. The *Fences Amendment Act* is flexible about the circumstances that may necessitate urgent fencing works, but if fencing works need to be undertaken urgently and it is impracticable to give a fencing notice, an owner may undertake the works without giving notice.

If an owner who has undertaken urgent fencing works then wishes to seek a financial contribution from the adjoining owner, they must give an urgent fencing notice, setting out matters including the nature of the works that were undertaken, how much they cost, the amount being sought, and the reason for the urgency. This provides the adjoining owner with an opportunity to be involved.

8. Greater powers for the Magistrates' Court

The *Fences Amendment Act* gives the Magistrates' Court the power to make a broader range of orders about anything that may be in dispute in a fencing matter.

Some of the new matters about which the Court may make orders include: the time within which the fencing works should be carried out; the person to carry out the works; the line that is the common boundary; and that any party cease or discontinue conduct that is unreasonably damaging (or may unreasonably damage) a dividing fence.

9. Boundary disputes

The *Fences Amendment Act* sets out a process for owners to resolve boundary disputes that arise in the context of fencing works. The process is intended to ensure that only one surveyor needs to be engaged in respect of a boundary dispute and to resolve disputes about payment of costs of the survey.

Either at the same time as, or after, a fencing notice is given, one owner (Owner A) may give the other owner (Owner B) a 'boundary survey notice' to the effect that if the common boundary is not agreed, Owner A intends to have the boundary surveyed.

In response to receiving the boundary survey notice, Owner B may:

- agree to Owner A's view about the location of the common boundary, or
- express their own view about the location of the common boundary, or
- engage a licensed surveyor to define the common boundary.

If, after 30 days from the date the boundary survey notice was given, the owners have not agreed about the location of the common boundary and Owner B has not engaged a licensed surveyor to define the common boundary, Owner A may themselves engage a licensed surveyor to define the common boundary.

Costs of the survey are generally to be paid equally by the owners, but there is an exception to this. Where Owner B in the above example receives a boundary survey notice and expresses a view about the location of the common boundary, but Owner A does not agree with this and decides to engage a licensed surveyor, but the survey shows that the location of the common boundary was in the same place as Owner B thought it was, Owner B does not have to

contribute to the cost of the survey. Owner A bears the full cost in recognition that only Owner A considered a survey to be necessary.

10. Adverse possession

Adverse possession law allows a person to claim title to someone else's land if they have continuously occupied that land for more than 15 years without the owner's permission. After 15 years, the original owner loses their right to bring an action to recover their land and their title to the land is extinguished.

In Victoria, adverse possession is covered by the *Limitation of Actions Act 1958*, the *Transfer of Land Act 1958* and the common law.

An adverse possession claim may come up in the context of a fencing dispute if a dividing fence has been in the wrong place for more than 15 years. The owner who has gained a strip of land because of the misplaced fence can bring a claim to that land in adverse possession.

The *Fences Amendment Act* clarifies that the Magistrates' Court has the power to hear and determine adverse possession claims that arise in the context of fencing disputes, but otherwise the law applying to the adverse possession claim remains the same.

11. Give and take fences

The *Fences Amendment Act* preserves the option for adjoining owners to agree to locate the dividing fence off the common boundary if a waterway makes it impracticable to locate the dividing fence on the common boundary. The main change is that this is extended to other obstructions, whether natural or manmade.

The *Fences Amendment Act* provides that arrangements about give and take fences do not affect title to or possession of land, and do not give rise to adverse possession.

12. Placement of rails and framing

The pre-amendment *Fences Act* did not deal with the side on which rails and framing on a fence, such as a paling fence, should be placed. The *Fences Amendment Act 2014* contains general rules about the side on which rails and framing should be placed for dividing fences between residential and commercial land, and between residential or commercial land and land over which the public has access.

If these provisions do not apply, the Act provides that the rails and framing should be placed on the same side as the previous dividing fence (if any). In all other cases, the rails and framing should be placed on the side least subject to weathering.

These provisions do not prevent owners agreeing otherwise about the side on which rails and framing on their dividing fence should be placed. The provisions do not apply to all types of fences, as some do not have rails and framing.