



Magistrates' Court
Victoria

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Melbourne Magistrates' Court
Civil Registry
233 William St
Melbourne 3000

Current @ May 2008

INFORMATION SHEET

Procedure relating to 'fencing' disputes and issuing a Complaint (form 4a)

The following is a **general** guide for the completion of the complaint initiating civil proceedings in the Magistrates' Court where the dispute is covered by either *Part I* or *Part II* of the *Fences Act 1968* -

- *Part I* deals with the construction of dividing fences;
- *Part II* deals with the repair of dividing fences.

For information concerning situations involving:-

- *agricultural or pastoral land;*
- *where a watercourse or road is the boundary;*
- *disputes between landlord and tenants;*
- *unalienated Crown land*

advice should be sought from a solicitor.

Before taking any Court action, it is strongly recommended that parties seek mediation which is available through the

***Dispute Settlement Centre of Victoria,
Level 4, 456 Lonsdale St, Melbourne, 3000
Ph: 96038370 Toll free: 1800 658 558
Email: dscv@justice.vic.gov.au.***

This option does **not** involve legal cost and if a resolution is **not** reached, the matter can still be taken to Court.

Further information on the Dispute Settlement Centre with regard to fencing and other disputes is available from the Department of Justice Website at www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/Types+of+Disputes/JUSTICE+-+Fence+Disputes.

The Victorian Law Reform Committee has available a "Quickguide" on the Fences Act at www.parliament.vic.gov.au/lawreform/fences/quickguide/default.htm

PART I OR PART II OF THE *FENCES ACT*?

Part I: Construction of a dividing fence

Prior to the filing of proceedings, the owner of the adjoining property **must** be served with a **Notice to Fence** (section 6). This **Notice** shall:-

- a) be in writing/print;
- b) specify the boundary to be fenced (*eg: b/n 14 Wood St and 16 Wood St, Ringwood, 3134*)
- c) contain a proposal for fencing the boundary (*eg: 50% to be paid by each party*)
- d) specify the kind of fence proposed to be constructed (*eg: 1.5m high paling fence*)

If 1 month (from the date the adjoining property owner is served with a **Notice to Fence**) goes by and there is **no** agreement as to either **b)**, **c)** or **d)** above, a complaint can be made to the Magistrates' Court nearest the property.

Part II: Repair of a dividing fence

Prior to the filing of proceedings under this *Part*, the owner of the adjoining property **must** be served with a **Notice to Repair** (section 15). This **Notice** shall request the adjoining owner to:-

- a) repair the fence, if the fence has been destroyed or damaged through the neglect of the adjoining owner

or

- b) join in or contribute to the repair of the fence in proportions to be agreed.

If there is **no** agreement as to either **a)** or **b)** above after 7 days from service of the **Notice**, the fence may be repaired and the cost, or proportion of the cost, may be recovered by the filing of a complaint at the Magistrates Court nearest the property.

Under either *Part I* or *Part II*, the complaint should be a **Form 4A Complaint**.

Court forms (*eg: Form 4A, Form 5A, etc*), , are prescribed forms and may be drafted on a computer in accordance with the *Magistrates' Civil Procedure Rules 1999* or, if available, obtained from a Court Registry or from the Magistrates' Court website www.magistratescourt.vic.gov.au.

PREPARING THE COMPLAINT (FORM 4A)

General Heading

The Court where the Complaint is filed should be nominated (ie: the Court nearest the property where the fence is proposed or nearest the defendant's address);

The full names of both the plaintiff(s) and the defendant(s) and their addresses should be stated where provided for.

- The defendant(s) is/are the owner(s) of the adjoining land and against whom the complaint is made. The defendant may be a corporation.
- The plaintiff(s) is/are the person(s) filing the complaint and who owns the property.

The “**address for service of the plaintiff**” is usually the plaintiff's address but may be another address at which correspondence may be sent to, and served upon, the plaintiff. This address may include a postal box number.

The “**name and address of solicitor**” is only required if the plaintiff is legally represented and then usually the solicitor will have drafted the complaint anyway.

If the plaintiff sues in a “**representative capacity**”, the that capacity should be stated

Statement of Claim

The correct address of the properties which are divided by the proposed fence in question should be cited.

State when a **Notice to Fence/Notice to Repair** was served upon the defendant(s).

Usually the dispute is over-

- (a) whether the construction of a new fence is necessary; and/or
- (b) the kind of fence to be built; and/or
- (c) the cost to be borne by each party

Only the issues in dispute need be addressed in the claim and where the dispute includes a monetary amount the amount sought, **not** including the costs of the issue of legal process, should be stated;

State that there has been **no** agreement between the plaintiff and the defendant on the issues relating to the construction/repair of the dividing fence.

Attach a copy of the **Notice to Fence/Notice to Repair** to the Complaint

Attach to the Complaint a copy of a quote from a fencing contractor or the account from the fencing contractor if the fence has been repaired under *Part II*.

If a non-monetary claim, specify what is sought;

If the claim is under *Part I* of the *Fences Act*, state what other remedy is also sought (ie: height of fence, type of fence, boundary, etc).

REGISTRAR OF THE MAGISTRATES' COURT

The Registrar of the Court where the Complaint is being filed needs to be specified. The complaint should be filed at the Court nearest the address where the fence is to be built or nearest the defendant's address (*ie*: proper venue)

THE AMOUNT OF CLAIM AND COSTS (the paragraph commencing "IF YOU PAY")

This is completed **only** if a monetary amount is in dispute and the boundary and the type of fence have been resolved and agreed upon. If all matters are in dispute or if the claim is a **non-monetary** one, **DO NOT COMPLETE**.

If applicable, the amount of the claim (if a monetary figure is claimed) should be stated (*ie*: the proportion of the cost of the fence sought) and the costs of filing the complaint should be specified;

The costs include the Court fee for filing and may include the anticipated costs of a process server to serve the completed Complaint document after it has been filed with the Magistrates' Court..

If the defendant is a **corporation**, the costs of a company search may be claimed. A separate figure for this claim may be added and the form amended.

For example:-

"IF YOU PAY the amount of \$ and \$ costs and \$
search fee to the plaintiff....."

ISSUING/DATE OF FILING/COURT NUMBER

The "**Date of Filing**" is the date that the Registrar will endorse as the date of filing with the Court;

On the date that the Complaint is filed and subsequently is processed, it will be allotted a **Court number**. A Complaint is only valid for service if it bears the date of filing and the Court number;

After filing, a cover sheet generated by the Court computer will be returned to the plaintiff. **The responsibility for endorsing the Court number on any copy Complaint for service and any other Court form lies with the plaintiff.**

Only the original Complaint is lodged at the Registry for filing therefore photocopies of the Complaint will need to be made for service before it is sent to the Registry and retained.

If the costs claimed on the Complaint are incorrect (*ie*: by over claiming), the Complaint will be returned for correction.

The signature of the Registrar or a Court seal is **no longer required** on a Complaint form.

SIGNATURE OF PLAINTIFF & DATE OF FILING

Claim to be signed and dated. If the plaintiff is a **company or a firm**, it is suggested that the position of person (authority) also be stated and the name printed.

AFTER ISSUE, WHAT TO DO NEXT?

After receiving the cover sheet from the Registry, **one copy of the Complaint together with two (2) copies of the defence notice (Form 9A)** must be served on **each defendant** against whom the money/remedy is sought;

Remember that the Court number and date of issue are found on the coversheet and must be endorsed on the copy Complaint(s) for service.

Service on **individuals** must be by what is specified as **personal service**. This can be achieved in either of 3 ways, that is, by handing the documents to the defendant(s), by leaving the documents for the defendant(s) at their residence with some person apparently over 16yrs, or by leaving them at the place of business (where the defendant(s) conduct a business) with someone apparently over 16yrs apparently in charge or employed in the office;

The plaintiff may employ a process server or otherwise arrange for service.

If service is required to be effected on a **corporation**, the Complaint and defence notices may be served by post to the **registered office** of the company (the registered office may be obtained by doing a relevant company search);

AFTER SERVICE, WHAT HAPPENS NEXT?

IF A DEFENCE IS FILED

If a defence (**Form 9A**) is filed, it must be served by the defendant on the plaintiff and filed with the issuing Court **within 21 days of service** of the complaint but at **any time before** an order is obtained by the plaintiff.

If a defence is received by the Registry, the matter will be usually be listed for a Pre-hearing Conference before a Registrar

IF NO DEFENCE IS FILED

If **no defence** is received within the 21 day period then, it is recommended that the following procedure be adopted-

- As soon as the 21 day period for filing a defence has expired and **no** defence has been received, an **Application (Form 20A)** should be prepared and filed with the Court at which the Complaint has been filed seeking an order against the defendant(s) in the terms of the claim. This **Application** is to be accompanied by an affidavit in support of the application which outlines the circumstances of the dispute and repeats the terms of the claim sought.
- The **Application** will be issued by the Registry and listed at the *Magistrates' Court [which issued the complaint]*. A copy of the **Application** need **not** be served on the defendant(s) as **no** defence has been filed but the **applicant will need to attend** the Court in support of the application on the nominated hearing date.
- Before (or at the same time) as a **Form 20A Application** is filed, an **affidavit of service (Form 5A)** of the complaint upon the defendant(s) be filed with the Registry. This affidavit of service needs to state the name of the person who was served, the address, time of day and date when service was effected.

If service has been effected by **post to a corporation** then **two (2) working days extra** should be allowed from the date of posting when calculating the 21 day period.

FEES

There are Court fees for the filing of the Complaint depending on the **amount** or the **nature of the claim**. Traditionally, the fee for fencing disputes is the figure which relates to claims other than for monetary amounts. This figure can be found from the “Costs and Fees Ready Reckoner” from the “Related Pages” panel to the right of the Fencing Disputes website page.

If the claim is solely for a monetary amount, the scale of fees applied is also as set out in the Costs and Fees Ready Reckoner

If a process server is employed to serve a document, he/she may charge a fee.

There is also a fee on any **Form 20A Application**.

PLEASE NOTE:

It is again stressed that this resume is a **guide only** and does **not** cover all situations. It is generally a guide for disputes in residential areas between owners of adjoining properties.

It is no substitute for legal advice which may be obtained from a solicitor (who may charge a fee). Court staff may only advise on what **can** be done **not** what **should** be done.