PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

REVIEW OF THE FENCES ACT 1968

REPORT

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CHAIRMEN'S FOREWORDS

Hon. Carlo Furletti, MLC — Fences Act Inquiry Subcommittee Chairman

It gives me great pleasure to present the Law Reform Committee's report on the *Fences Act 1968* (Vic.) and related matters.

It was a pleasure to Chair a tripartite subcommittee of eager and diligent Parliamentarians each of whom, because of the nature of their constituencies and utilising their particular expertise, were able to contribute in an extraordinary way to the analysis and evaluation of the sixty-seven submissions and the voluminous evidence gathered in the course of the Inquiry.

At the outset, the subcommittee did not fully appreciate the intensity of the feelings and emotions that emanate from fencing and neighbour disputes, although towards the conclusion of its inquiries that very issue was the subject of journalistic comment in the daily media.

It became obvious very early in research that all fencing disputes are neighbour disputes. Many neighbour disputes merely use fencing and boundary issues as the climax of an accumulation of minor complaints or more rarely serious differences between the neighbours, which are unrelated to fencing.

During the course of the Inquiry, I had occasion to make the comment that 'proximity fuels acrimony and therefore, second only perhaps to family disputes, neighbour disputes can be amongst the most acrimonious'. Some of the evidence submitted to the subcommittee strongly supports that contention.

The subcommittee was surprised at the breadth and scope of the many submissions received, which drew its attention to the diversity of the nature of fences and the complexity of issues which could give cause for dispute.

Nor did the subcommittee fully understand the chasm between fencing issues that can arise in different parts of Victoria. The fencing concerns for residents of inner suburban Melbourne are dramatically different to those of the farmers who adjoin the Little Desert or the Buangor State Forest. The submissions made on video by a

number of farmers very starkly and vividly brought to the subcommittee's attention their particular plight.

The reference compelled the subcommittee to conduct enquiries throughout Victoria and public hearings were conducted in Melbourne and some regional centres. The subcommittee was obliged to consider the uses to which land is put, issues of privacy, safety, building on boundaries and planning in the context of the Fences Act.

The issue of Crown immunity and fencing of public lands, the confusion as to the applicability of the Fences Act to municipal councils, some government departments and State owned enterprises, and the conundrum of fencing in the body corporate environment all called extensively on the member's collective experience in compiling this report.

The public hearings revived in a number of witnesses strong emotional and financially draining experiences, as they shared those experiences with the subcommittee as part of its evidence gathering exercise. Most of that evidence was very much on point, while some was peripheral only to the Terms of Reference, but of significance so as to persuade the subcommittee to comment on those complex and difficult issues.

The report is significant in that the subcommittee has accumulated, analysed and considered the current state of fencing laws throughout Australia. In the course of the Inquiry, it has become obvious that it is impossible to deal with fencing issues in isolation. Boundary concerns arising from encroachments on land by buildings, footings and other structures, adverse possession rights between neighbours, the situation regarding retaining walls and rights of support of adjoining landowners (both above and below ground) are all fertile areas for disagreement and dispute. I am confident that the Fences Act Inquiry will be but a forerunner to other inquiries, which will be necessary to address those related and vexing problems that are presently simmering below the surface.

I must record my gratitude to all those individuals and organisations that made submissions to the subcommittee and to the numerous witnesses who attended the public hearings in the metropolitan area and in Echuca and Horsham. Particular thanks are due to those witnesses who drove many miles to the public hearings to make their contribution to this report.

To my subcommittee consisting of the Chairman of the Law Reform Committee, Mr Victor Perton MP, Mr Neil Cole MP, the Hon Monica Gould MLC and Mr Noel

Maughan MP, I express my thanks for their energy and endurance in isolating the issues and for their assistance and patience in the completion of the report.

Thanks to the Committee's research and administrative personnel who gathered, coordinated, collated, documented and edited the evidence and submissions received by the subcommittee and who then compiled the report.

The sensitivity and friendliness with which our principal researcher Ms Beverly Kennedy dealt with numerous witnesses, authors of submissions and other interested Victorians and Australians who contacted our offices during the course of the Inquiry, I am sure popularised the Law Reform Committee. In particular, I must acknowledge the time, effort and devotion to the task exhibited by the Committee's Director of Research Mr Douglas Trapnell. His dedication and hard work was very much appreciated.

I commend the report to the Parliament.

Hon Carlo Furletti, MLC
Fences Act Inquiry Subcommittee Chairman
11 November 1998

Mr Victor Perton, MP — Law Reform Committee Chairman

This has been a fascinating study, which has been very well conducted by the subcommittee under the chairmanship of Hon Carlo Furletti, MLC.

The members of the subcommittee have worked with great enthusiasm to distil the common knowledge of experts, academics and the experience of practical people. I particularly enjoyed the innovative ways in which people delivered evidence including the use of videotapes. On one occasion I drove into the mountains to look at innovative fencing practices of farmers.

A particular delight has been the Committee's ability to bring its technology expertise to bear for the benefit of the public. The fencing Internet guide for the ordinary citizen will help to provide a model for the delivery of information to the public.

So often the work done by the Committee is highly technical. In conducting this Inquiry the subcommittee has been involved with issues that affect ordinary people. I believe that the result is an excellent report, which provides sensible solutions to difficult problems.

I commend the report to the Parliament.

Mr Victor Perton, MP
Chairman
11 November 1998

FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

4E. The functions of the Law Reform Committee are—

(a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;

(b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

Under the powers found in Section 4F(1)(a)(ii) and Section 4F(3) of the **Parliamentary Committees Act 1968** the Governor in Council refers the following matters to the Law Reform Committee—

(a) The Committee is requested to review the Victorian **Fences Act 1968** ("the Act") and in particular to consider:

- whether the Act meets the objectives of planning schemes in Victoria as defined in Section 4(1) of the **Planning and Environment Act 1987**, especially having regard to the need to encourage the development of well-designed medium-density housing;
- whether the Act otherwise adequately deals with all situations associated with separating the lands of different occupiers, such as where buildings form a part of a common boundary between properties;
- whether the Act should be amended to provide a quicker, less expensive and more accessible means of resolving fencing disputes.

b) The Committee is requested to make its final report to Parliament by 11 November 1998.

Dated 23 September 1997

Responsible Minister: JAN WADE, MP
Attorney-General

Victoria Government Gazette, G 38, 25 Sept. 1997, p. 2713.
Amended by *Victoria Government Gazette*, G 34, 27 Aug. 1998, p. 2322.

LIST OF RECOMMENDATIONS

Availability of Information

Recommendation 1

The Attorney-General should authorise the production and distribution of a detailed guide to resolving dividing fence disputes in printed and electronic form and in community languages. The guide should incorporate information on common law principles that apply when fences are damaged, and should emphasise the role of mediation and mediation services available. The guide should be monitored and updated as and when necessary.

Paragraphs 1.28–1.31

Recommendation 2

The Attorney-General should promote the Committee's experimental Internet 'Quickguide' as a public information service to operate with links from the Victorian Government website and resources should be made available for its revision when necessary.

Paragraph 1.32

Scope of the Act

Recommendation 3

The scope of the Fences Act 1968 *(Vic.) should be expanded to address other issues associated with separating the land of different occupiers and the Act should be renamed the 'Dividing Fences and Boundaries Act'.*

Paragraphs 1.33–1.34

The Victorian Civil and Administrative Tribunal

Recommendation 4

Jurisdiction in respect of fencing and boundary disputes should be vested in the Victorian Civil and Administrative Tribunal.

Paragraphs 2.21–2.29

Powers of the Tribunal

Recommendation 5

The following additional powers should be included in the proposed Dividing Fences and Boundaries Act:

(1) General power to determine any difference or dispute arising in relation to fencing works or any liability under the Act on the application of any person affected by the difference or dispute and, without limiting the generality of the foregoing, landlords and tenants.

(2) Power to determine the person or persons by whom any fencing works are to be performed, and where it is to be performed by different persons, the part of the work to be performed by each.

(3) Power to determine the time at which fencing works are to be performed and the manner of its performance.

(4) Power to make any order or give any direction that may be necessary or expedient to overcome difficulties ascertained during the progress of fencing works.

(5) Power, on the application of any interested person, to extend any limitation of time prescribed by the Act (whether or not the time so limited has expired).

(6) Power to determine that, in all the circumstances, no dividing fence is required in respect of all or part of the boundary of adjoining lands.

(7) Power to order the cessation of any activity or the discontinuance of any conduct that in the opinion of the Tribunal is unreasonably damaging or threatens significant damage to a dividing fence.

(8) Power to determine disputes as to the colour, finish and workmanship of building walls which replace or stand in place of a dividing fence and to make orders with respect to the maintenance or rectification of building walls on boundaries which exhibit structural damage or deterioration.

Paragraphs 2.30

Case for a Neighbour Disputes Division of VCAT

Recommendation 6

There should be a 'Neighbour Disputes' Division of the Victorian Civil and Administrative Tribunal.

Paragraphs 2.31–2.32

‘Fence’ and ‘Dividing Fence’

Recommendation 7

The proposed Dividing Fences and Boundaries Act should define the term ‘dividing fence’ to mean ‘a construction, ditch or embankment, or a hedge or other vegetative barrier, enclosing or barring access to land, whether or not continuous or extending along the whole of a boundary, but serving to define the boundary of or separating the lands of different owners, whether or not located on the title boundary, and includes:

- *(a) any gate, cattlegrid or apparatus necessary for the operation of the fence; and*
- *(b) any natural or artificial watercourse which is ordinarily sufficient to prevent trespass by persons or stock entering on foot; and*
- *(c) any foundation or support necessary for the support and maintenance of the construction,*

but does not include a retaining wall or the wall of any building.

Paragraphs 3.3–3.8

‘Owner’ and ‘Occupier’

Recommendation 8

The proposed Dividing Fences and Boundaries Act should provide that owners of adjoining land are liable to contribute to the cost of fencing works.

Paragraphs 3.10–3.22

Recommendation 9

The provisions in the proposed Dividing Fences and Boundaries Act relating to service of fencing works notices, notices of assent and notices of dispute should provide that service on either the owner or the occupier of the subject land is effective for the purposes of the Act.

Paragraphs 3.10–3.22

Recommendation 10

The definition of ‘owner’ in the proposed Dividing Fences and Boundaries Act should be as follows:

‘Owner’ means—

- *(a) any person who jointly or severally (whether at law or in equity) is entitled to land for any estate of freehold in possession or who receives or is entitled to receive any rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise; and*

(b) in the case of land subject to an agreement for sale or a right of purchase, whether for cash or on terms, the person entitled to the benefit of that agreement or right of purchase.

Paragraphs 3.10–3.22

Recommendation 11

The proposed Dividing Fences and Boundaries Act should provide that where unalienated Crown land is occupied (other than for predominantly public purposes) by any person—

(a) under a lease or licence of more than one year; other than a licence under the Mineral Resources Development Act 1990 *(Vic.); or*

(b) under a right to occupy a residence area in respect of land under the Land Act 1958 *(Vic.) whether covered by a mining licence under the* Mineral Resources Development Act 1990 *(Vic.) or not,*

that person shall be deemed to be an 'owner' of the land for the purposes of contribution to the cost of fencing works under the Act.

Paragraphs 3.10–3.22

Recommendation 12

The definition of 'occupier' in the proposed Dividing Fences and Boundaries Act should be as follows:

'Occupier' means—

Any person in actual occupation of land or entitled to immediate possession and occupation thereof.

Paragraphs 3.10–3.22

Construction, Maintenance and Repair

Recommendation 13

The proposed Dividing Fences and Boundaries Act should contain common procedural requirements to compel contribution in respect of 'fencing works' (as defined).

Paragraphs 3.23–3.30

Recommendation 14

The proposed Dividing Fences and Boundaries Act should contain a definition of 'fencing works' as follows:

(a) the construction, replacement, repair or maintenance of the whole or part of a dividing fence, including:

(i) the planting, replanting and maintenance of a hedge or similar vegetative barrier; and

(ii) the cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as a dividing fence;

(b) the surveying, preparation or clearing of land along or on either side of the common boundary of adjoining lands for such a purpose, but not the construction of retaining walls;

(c) the design of a dividing fence; and

(d) the demolition of an existing dividing fence.

Paragraphs 3.23–3.30

Recommendation 15

The notice requirements for effecting all fencing works under the proposed Dividing Fences and Boundaries Act should contain an exemption to the effect that, where a dividing fence or any portion thereof is suddenly damaged or destroyed and urgent repair or reinstatement is necessary, an owner may repair or reinstate the dividing fence without giving the requisite notice. In these circumstances the person effecting the repair or reinstatement should be entitled subsequently to demand and recover from the other owner the proportion of the cost of repairing or reinstating the fence as agreed or as determined by the Victorian Civil and Administrative Tribunal.

Paragraph 3.23–3.30

The Concept of a 'Sufficient' Fence

Recommendation 16

The proposed Dividing Fences and Boundaries Act should provide that in cases other than those referred to in the present section 4(1)(a) of the Fences Act 1968 *(Vic.), owners are prima facie liable to contribute in equal proportions to the cost of a fencing norm for the area, as identified by the relevant local municipal council. Any owner demanding a higher requirement should meet any difference between the cost of a normal fence and a fence that meets that higher requirement.*

Paragraphs 3.32–3.41

Recommendation 17

For the purposes of determining the appropriate contribution by adjoining owners, local councils should be authorised to designate a fencing norm or standard of fence for various parts of their municipality, based on the type of dividing fencing most prevalent in the areas concerned. Such fencing norms should be advisory not prescriptive.

Paragraphs 3.32–3.41

Recommendation 18

The proposed Dividing Fences and Boundaries Act should contain a provision to the effect that where one owner proposes that an otherwise serviceable existing fence be upgraded (other than for appropriate repair and maintenance), the owner making the proposal should be liable for the full cost of the upgrade.

Paragraphs 3.42

Owners and Occupiers Purposes

Recommendation 19

The proposed Dividing Fences and Boundaries Act should provide that where a person other than the owner is lawfully in occupation of (or entitled to occupy) land, the owner before issuing a fencing works notice, or upon receiving same and before entering into any agreement in respect of fencing works, must give the occupier fourteen days' notice of the proposal. The occupier within that time may object by notice to both the owner and the adjoining owner on the grounds that the proposed fence is not sufficient for his or her purposes in occupying the land. Failing objection within the specified period, the occupier shall be deemed to have consented to the proposal.

Paragraphs 3.43–3.44

Recommendation 20

The proposed Dividing Fences and Boundaries Act should provide that where an occupier's purposes for a fence are higher or otherwise more costly or elaborate than the purposes the two owners would ordinarily require, subject to the terms and conditions under which the occupier holds the land, the occupier shall be liable to pay the cost of the difference.

Paragraphs 3.43–3.44

Recommendation 21

The proposed Dividing Fences and Boundaries Act should provide that, in respect of any dispute where the purposes or financial contribution of an occupier are in issue, the occupier may either initiate an application to the Tribunal or be joined as a party to any existing application, and that the Tribunal should be empowered to determine both the kind of fence to be constructed and the liability of the occupier for any additional cost.

Paragraph 3.43–3.44

Recommendation 22

The proposed Dividing Fences and Boundaries Act should retain provision for the service of notices by the occupier of land on an adjoining owner in appropriate circumstances.

Paragraphs 3.43–3.44

Contribution between Landlords and Tenants

Recommendation 23

Under the proposed Dividing Fences and Boundaries Act the apportionment of the cost of fencing works as between a landlord and a non-residential tenant should be as follows:

(a) Where the interest of the tenant at the time of giving or serving a notice, application or order under this Act is less than for a term of five years, the whole cost shall be payable by the landlord.

(b) Where the interest of the tenant at the time of giving or serving a notice, application or order under this Act is for a term of five years but less than ten years, the landlord and the tenant shall each pay one half of the cost.

(c) Where the interest of the tenant at the time of giving or serving a notice, application or order under this Act is for a term of ten years or more, the whole cost shall be payable by the tenant.

Paragraphs 3.45–3.46

Land Separated by Unused and Disused Roads

Recommendation 24

The proposed Dividing Fences and Boundaries Act should include a provision to the effect that an 'owner' (as defined in the Act) shall be liable to contribute to fencing works where:

(a) a road that has never been made or used or that is no longer used, and which is effectively enclosed within private land, intervenes between two parcels of land; and

(b) a fence has been, or in the opinion of the Tribunal could reasonably be, used as a dividing fence between that owner and an adjacent owner.

Paragraph 3.47–3.50

Contribution where Negligent or Deliberate Act

Recommendation 25

The proposed Dividing Fences and Boundaries Act should contain a provision to the effect that, in determining contribution to the cost of fencing works, the Tribunal should take into account any wilful or negligent action by an owner (or where it is relevant an occupier) which shortens the life of a dividing fence.

Paragraphs 3.52–3.53

Recommendation 26

The proposed Dividing Fences and Boundaries Act should contain a provision to the effect that a person who wilfully or negligently damages a dividing fence is wholly liable for the cost of repairing or reinstating the fence so damaged.

Paragraphs 3.54

Liability on Sale or Purchase of Property

Recommendation 27

The Dividing Fences and Boundaries Act should provide that where an owner of land the subject of a contract of sale has notice that a fencing works notice has been received, but the fence has not been constructed or fully paid for, details of the fencing works notice and any debt outstanding in respect thereof, should be included in the statement of matters affecting land being sold required to be served by a vendor pursuant to section 32 of the Sale of Land Act 1962 *(Vic.).*

Paragraphs 3.55–3.58

Positioning Fences in Relation to Boundaries

Recommendation 28

The Master Fencers' Association should be encouraged to publish and promote industry standards providing guidance to fence-builders on how various types of fences should be positioned relative to property boundaries.

Paragraphs 3.63–3.65

Recommendation 29

The proposed Dividing Fences and Boundaries Act should provide that where there is a dispute concerning the side of a fence upon which rails or framing should be placed, the following principles shall apply:

- *(a) where a private residential property adjoins an area to which there is general public access, such as commercial or municipal premises or a right of way, the rails or framing shall be placed on the side of the fence facing into the residential property;*
- *(b) in all other cases where a fence is being replaced, the rails or framing shall be placed on the same side as they were located on the previous fence;*
- *(c) in all other cases where there was previously no fence or no fence of the type in question, the rails or framing shall be placed on the side least subject to weathering.*

Paragraphs 3.66

Location of Fences

Recommendation 30

The proposed Dividing Fences and Boundaries Act should contain a provision authorising annotations to be made on the titles to properties affected by any private agreement between neighbouring owners or any order of the Tribunal, which results in a dividing fence being located other than on the boundary to contiguous land.

Paragraph 3.67–3.70

Recommendation 31

The proposed Dividing Fences and Boundaries Act should omit the words 'where such further order is necessary' which presently appear in section 7(1)(c) of the Fences Act 1968 *(Vic.), and the proposed Act should provide to the effect that the order of the Tribunal regarding 'the position of the fence' should not give rise to a claim in adverse possession or affect any title to land.*

Paragraph 3.71

Pro Forma Fencing Works Notice

Recommendation 32

A pro forma fencing works notice should be developed and the proposed Dividing Fences and Boundaries Act should prescribe its use.

Paragraphs 3.72–3.79

Recommendation 33

The proposed Dividing Fences and Boundaries Act should provide that a signed fencing works notice and a signed notice of assent constitute a legally enforceable agreement and that the server of a fencing works notice is entitled to proceed to effect fencing works in accordance with the details contained in the fencing works notice and to recover from the other party the contribution sought in the fencing works notice in the Tribunal as a money debt.

Paragraph 3.72–3.79

Recommendation 34

The proposed Dividing Fences and Boundaries Act should contain provisions allowing the server of a fencing works notice, who has not been served with a notice of dispute, to obtain ex parte *orders—without the need for any appearance, but subject to proof of service of the fencing works notice—allowing him or her to effect fencing works in accordance with the said notice.*

Paragraph 3.72–3.79

Recommendation 35

The proposed Dividing Fences and Boundaries Act should provide that where an owner or occupier proceeds with fencing works despite the service on him or her of a notice of dispute, he or she may lose any right to contribution and may be ordered to remove the fencing works so undertaken.

Paragraph 3.72–3.79

Service Requirements

Recommendation 36

The proposed Dividing Fences and Boundaries Act should provide that service of notices, orders or awards must be effected either by personal service (as that expression is used in Order 5.03 of the Magistrates' Court Civil Procedure Rules 1989 (Vic.)) or by registered post, and that the formal requirements of both forms of service be defined in the Act.

Paragraph 3.80–3.84

Recommendation 37

The proposed Dividing Fences and Boundaries Act should provide that the person seeking to serve a fencing works notice should be able to serve the notice upon either the owner or the occupier of the property.

Paragraphs 3.80–3.84

Recommendation 38

The proposed Dividing Fences and Boundaries Act should contain provisions similar to sections 10(3) and 10(4) of the Fences Act 1968 *(Vic.) where an occupier of property receives any notice under the Act, and the pro forma fencing works notice should contain a clear warning to the occupier of the effect of these provisions.*

Paragraph 3.80–3.84

Procedures Relating to Bodies Corporate

Recommendation 39

Where only one body corporate is responsible for land under the Subdivision Act 1988 *(Vic.), that body corporate should be deemed to be the 'owner' of that land for the purposes of the proposed Dividing Fences and Boundaries Act.*

Paragraphs 3.85–3.91

Recommendation 40

Where multiple bodies corporate operate on the one site, the body corporate responsible for the common property pursuant to sections 27(2) and 28 of the Subdivision Act 1988 *(Vic.) and the regulations made thereunder should be deemed to be the 'owner' for the purposes of the proposed Divided Fences and Boundaries Act.*

Paragraphs 3.85–3.91

Recommendation 41

Where proposed fencing works relate exclusively to the boundary between two lots in a body corporate subdivision, the procedures existing under the Fences Act 1968 *(Vic.) should continue to apply under the proposed Divided Fences and Boundaries Act.*

Paragraphs 3.92

Recommendation 42

Where proposed fencing works relate to more than two lots within a body corporate or to one or more lots adjoining common property, such situations should be excluded from the definition of 'dividing fence' in the proposed Dividing Fences and Boundaries Act. All issues relating to fencing works in these circumstances within the perimeters of land upon which a body corporate operates should be excluded from the operation of the Act and should be matters for determination by the body corporate in the exercise of its powers.

Paragraphs 3.93

Enforcement Procedures

Recommendation 43

The proposed Dividing Fences and Boundaries Act should contain a provision similar to section 24 of the Fences Act 1968 *(Vic.) which should be extended to provide that unpaid fencing debts pursuant to Tribunal orders should be registrable as a charge upon land, with interest payable annually at the interest rate prescribed from time to time by the* Penalty Interest Rates Act 1983 *(Vic.) until the debt is discharged.*

Paragraphs 3.95–3.98

Power to Contract Out of the Act

Recommendation 44

Section 4(2) of the Fences Act 1968 (*Vic.) should be omitted from the proposed Dividing Fences and Boundaries Act. The words that presently appear in section 30 of the* Fences Act 1968 *(Vic.) 'except as in this Act provided' should be omitted likewise.*

Paragraphs 3.99–3.102

Ownership of Fences

Recommendation 45

The proposed Dividing Fences and Boundaries Act should contain a provision clarifying the ownership of dividing fences by providing that ownership vests jointly in the owners of the adjoining land, except where a fence is wholly located within one owner's property and has been paid for solely by that owner.

Paragraphs 3.103–3.104

Recommendation 46

The proposed Dividing Fences and Boundaries Act should provide that an owner of a dividing fence is entitled to make such use of his or her side of the fence as he or she thinks fit, subject to the rights of any co-owner to object to any use that is unreasonable or significantly prejudices the amenity of his or her property.

Paragraphs 3.105–3.106

Recommendation 47

The proposed Dividing Fences and Boundaries Act should provide that, where it is agreed or registered that ownership of a dividing fence vests in one property owner, that owner may compel the adjoining owner to refrain from using the fence for any unreasonable purpose.

Paragraphs 3.105–3.106

Provisions Relating to Vermin-Proof Fencing

Recommendation 48

The proposed Dividing Fences and Boundaries Act should integrate the provisions of Part III of the Fences Act 1968 *(Vic.) with the general provisions of that Act. What constitutes a 'vermin-proof fence' should be defined in section 3 of the proposed Act and the general provisions relating to the construction, maintenance and repair of dividing fences should be amended to include vermin-proof fences within their scope.*

Paragraphs 3.107–3.108

Recommendation 49

The Attorney-General should recommend to the Governor in Council that the question of whether sections 26 and 27 of the Fences Act 1968 *(Vic.) should be retained be referred to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.*

Paragraphs 3.109–3.111

Signage of Electric Fencing

Recommendation 50

The proposed Dividing Fences and Boundaries Act should contain a provision that warning signs should be placed on electric fences in locations where the public may come in contact with them and that such signs should be at sufficient intervals to convey adequate warning of the presence of an electric fence.

Paragraphs 3.112

Liability of State Owned Enterprises

Recommendation 51

The proposed Dividing Fences and Boundaries Act should include within it operation 'State owned enterprises' as defined in the State Owned Enterprises Act 1992 *(Vic.).*

Paragraphs 4.9–4.25

Victorian Government Departments and Public Authorities

Recommendation 52

The proposed Dividing Fences and Boundaries Act should contain a provision that makes the Crown liable under the Act to the same extent as a private person, where land owned by the Crown adjoins privately owned land in an urban area and the land owned by the Crown is used for any of the following purposes:

(a) a government school;

(b) a public hospital;

(c) the provision of public housing;

(d) ambulance, fire, police or other emergency services;

(e) a courthouse; and

(f) such other purposes as are prescribed by regulation as subject to the Act.

Paragraphs 4.26–4.35

Federal Government Housing Authorities

Recommendation 53

The Victorian Attorney-General should approach the Commonwealth Minister responsible for the Defence Housing Authority requesting the Commonwealth Government's cooperation in

waving the Defence Housing Authority's immunity from the provisions of the proposed Dividing Fences and Boundaries Act.

Paragraphs 4.36–4.37

Liability of Municipal Councils

Recommendation 54

The proposed Dividing Fences and Boundaries Act should make municipal councils liable under the Act to the same extent as a private person, where land owned by them is used for the purposes of the municipality or a council-owned or managed business, except where the land is used as a public reserve, public park, public road, railway or tramway or a drainage reserve, or for such other like public purposes.

Paragraphs 4.38–4.49

Alternatives to Crown Liability

Recommendation 55

Government departments, public authorities under the Crown and other government agencies responsible for the administration, management or control of Crown land should put in place formal mechanisms for making payments towards the cost of fencing materials used in the repair of dividing fences between Crown land in rural areas and private property.

Paragraphs 4.62–4.63

Recommendation 56

Where it is considered inappropriate to make an ex gratia *payment towards the cost of fencing, government departments, public authorities under the Crown and other government agencies responsible for the administration, management or control of Crown land should be encouraged to provide access to timber on Crown land and/or facilitate the provision of other fencing materials.*

Paragraphs 4.64–4.66

Recommendation 57

The proposed Dividing Fences and Boundaries Act should require the Crown to contribute half the cost of replacing or repairing a dividing fence between Crown land and private property which is destroyed or damaged by a natural disaster, where the cost of replacement or repair is not otherwise recoverable.

Paragraph 4.67–4.72

Clearance of Land for Fence Protection

Recommendation 58

The Good Neighbour Program or the Land Protection Incentive Scheme should be extended, or a new program established, to provide financial assistance with the clearance of vegetation (including tree limbs) for an owner of land adjoining Crown land who is unable to meet his or her share of the cost of such tree clearance, where a boundary fence is demonstrably being damaged through forest encroachment or by trees or branches falling from trees situated on Crown land.

Paragraphs 4.74–4.78

Rural Ombudsman

Recommendation 59

A Rural Ombudsman should be appointed to investigate complaints by owners of private land concerning the decisions of departmental officers in respect of disputed vegetation clearance for fence construction and clearance along Crown boundaries with private land.

Paragraph 4.79

'As of Right' Development and Fences

Recommendation 60

The proposed Dividing Fences and Boundaries Act should provide that notice of 'fencing works' (as defined) within one metre of any side or rear boundary must be given to the adjoining owner, regardless of whether contribution to the cost of such works is being sought, and that the recipient of such notice is entitled to have any matter determined in accordance with the Victorian Civil and Administrative Tribunal's powers under the proposed Dividing Fences and Boundaries Act.

Paragraphs 5.26–5.28

Recommendation 61

The proposed Dividing Fences and Boundaries Act should provide that, where part or the whole of an otherwise serviceable dividing fence is demolished as part of the development of neighbouring land or the construction of buildings on or near the boundary, the cost of such demolition and of reinstating a fence along any unfenced portion remaining after the development or construction, is to be borne wholly by the person for whose benefit the development or construction has been undertaken.

Paragraph 5.29

Access to Neighbouring Land

Recommendation 62

Building walls which act in lieu of a fence should not be included in the definition of 'fence' in the proposed Dividing Fences and Boundaries Act, but the Act should include a Part dealing with access to neighbouring land, which provides a procedure similar to that under the Access to Neighbouring Land Act 1992 *(Tas.). There should be a further Part in the proposed Act that deals with building walls on boundaries.*

Paragraphs 5.30–5.41

Recommendation 63

The proposed Dividing Fences and Boundaries Act should include provisions requiring notice to be given to an adjacent owner when a building wall is to replace the whole or part of a dividing fence or otherwise to stand in lieu of a dividing fence, and should grant adjacent owners a right to negotiate as to the colour, finish and/or workmanship of the wall, and to have the Victorian Civil and Administrative Tribunal determine any dispute.

Paragraphs 5.30–5.41

Recommendation 64

The proposed Dividing Fences and Boundaries Act should include a provision enabling an adjoining owner to apply to the Victorian Civil and Administrative Tribunal for an order for reasonable maintenance of a building wall at the expense of the building owner, if the wall exhibits structural damage or deterioration. If the adjoining owner causes structural damage to a wall, the common law principles of negligence, nuisance and trespass making a person liable for such damage should apply.

Paragraphs 5.42

Building Encroachments

Recommendation 65

The Committee should be given terms of reference to conduct an inquiry into the law relating to the encroachment of buildings in Victoria and the right to support from adjoining land.

Paragraphs 5.43–5.47

Adverse Possession: Assessment of the Situation in Victoria

Recommendation 66

The detailed guide to resolving dividing fence disputes (the subject of Recommendation 1 of this report) should contain a simplified plain English statement of the law of adverse possession as it relates to dividing fences.

Paragraphs 6.47–6.56

Court Jurisdiction in Adverse Possession Cases

Recommendation 67

Section 100 of the Magistrates' Court Act 1989 *(Vic.) should be amended to permit the Magistrates' Court to determine matters affecting interests in real property where the value of the property affected by the claim at the time the proceeding is commenced is within the jurisdictional limit of the Court, or the parties consent in writing to jurisdiction in that Court.*

Paragraphs 6.57–6.61

Recommendation 68

Section 4 of the Transfer of Land Act 1958 *(Vic.) should be amended to provide that, for the purposes of sections 9, 26E, 60 and 99, 'Court' includes the Magistrates' Court, where the value of the land affected does not exceed the jurisdictional limit of the Magistrates' Court, or, notwithstanding that the value of the land affected exceeds the jurisdictional limit, where all parties consent in writing to such jurisdiction.*

Paragraphs 6.57–6.61

Matters Arising

Recommendation 69

The following suggestions for reform should be referred to the Minister for Conservation and Land Management so that they can be considered by officers of her Department and form part of a general review by the Land Registry of the law and procedure relating to boundary adjustments:

(1) A dispossessed owner should be able to make application under the Transfer of Land Act 1958 *(Vic.) to have the affected part of his or her land excised from the title and 'quarantined', pending any claim to possession of that part.*

(2) The Transfer of Land Act 1958 *(Vic.) should be amended to permit adversely possessed land adjoining land of which the applicant is already the registered proprietor to be incorporated into the applicant's certificate of title by amendment, rather than form a separate title.*

Paragraphs 6.62–6.

1 INTRODUCTION

Scope of the Inquiry

1.1 The Law Reform Committee has reviewed the law of fences as contained in the *Fences Act 1968* (Vic.), under Terms or Reference from the Governor-in-Council dated 23 September 1997.[1] The Committee was requested to give particular consideration to the following matters: whether the Act meets the objectives of section 4(1) of the *Planning and Environment Act 1987* (Vic.), in the context of the need to encourage the development of well-designed medium-density housing; whether the Act otherwise adequately deals with all situations associated with separating the lands of different occupiers, such as where buildings form part of a common boundary; and whether the Act should be amended to provide a quicker, less expensive and more accessible means of resolving fencing disputes than the current Magistrates' Court jurisdiction.

1.2 The Law Reform Committee is a joint investigatory committee of the Victorian Parliament with statutory power to conduct investigations into matters concerned with legal, constitutional and parliamentary reform or the administration of justice.[2] The Committee's membership, which includes lawyers and non-lawyers, is drawn from both Houses of the Victorian Parliament and all three political parties are represented.

1.3 The Committee consulted widely in Victoria and interstate during its Inquiry. Following the public advertisement of the reference and media publicity both in metropolitan Melbourne and rural Victoria, sixty-seven written submissions were received.[3] These submissions were from a broad cross-section of interested parties, including private home-owners, residents groups, farmers, fencing consultants and contractors, surveyors, solicitors, government departments, statutory authorities and industry bodies.

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1 *Victoria Government Gazette*, G 38, 25 Sept. 1997, p. 2713 as amended by *Victoria Government Gazette*, G 34, 27 Aug. 1998, p. 2322. See *supra*, p. xix.

2 *Parliamentary Committees Act 1968* (Vic.), s. 4E.

3 Appendix A contains a list of the names of people who made written submissions to the Inquiry.

1.4 The Committee took evidence in public hearings in Melbourne, Echuca and Horsham.[4] The Committee also had consultations in New South Wales, South Australia and Western Australia.

1.5 Following a meeting with the Chief Magistrate, statistical and other information was provided by the Magistrates' Court. This gave the Committee valuable insight into the present dispute resolution process.[5] A number of Senior Magistrates took the opportunity to comment on the issues raised by the reference, particularly those relating to dispute resolution.

1.6 Information was received from the Department of Natural Resources and Environment, which has responsibility for the administration of Crown lands and the Land Registry, on policies and procedures affecting fencing of Crown boundaries with private land and programs offering financial or other assistance with fencing. The Department of Infrastructure provided material pertaining to the planning aspects of the reference.

1.7 The publicity given to the reference resulted in numerous requests for advice and information from the public. These contacts highlighted the need for enhanced public access to information about the Fences Act. Responding experimentally to those requests, the Committee developed a model electronic 'Quickguide' to the Fences Act, which can be accessed at the Committee's Internet site: <http://www.lawreform.org.au>.

History of the Statute

1.8 The first fencing statute that applied in Victoria was the 1828 New South Wales Act entitled: 'An Act to Regulate the Dividing Fences of Adjoining Land'.[6] The law relating to dividing fences was subsequently consolidated as *The Fences Statute 1865*.[7] It made owners or persons legally possessed of adjoining lands liable to contribute to the erection or repair of fencing in equal proportions. If one party did not contribute, the other was permitted to cut timber for the fence from the land of the non-contributor. Monetary sums were recoverable only if there was insufficient timber on the adjoining land. The Crown was exempted from liability under the

4 Appendix B contains a list of the names of people who gave oral evidence to the Inquiry.

5 Statistical material relating to the frequency of fencing disputes dealt with by the Magistrates' Court is contained in Appendix C.

6 9 Geo. IV, No. 12 (1828).

7 28 Vict., No. 239 (1865).

Statute, but recovery could then, as now,[8] be made from the first occupier taking possession from the Crown. Any dispute as to the necessity or sufficiency of a proposed fence was to be taken to an arbitrator. Section 6 contained a novel provision making a party liable for all repairs if he did not clear his land of inflammable materials to a depth of fifteen feet along the boundary, when his neighbour had done so.

1.9 *The Fences Statute 1874*,[9] which commenced on 1 January 1874, repealed *The Fences Statute 1865*. The 1874 statute established the basic matrix of later fencing legislation in Victoria and was in five Parts: 'Introduction', 'Construction of Dividing Fences', 'Maintenance and Repairs of Fences', 'Proceedings for the Recovery of Contributions', and 'General Provisions'. Its provisions were far more detailed than those of its predecessor, and included a catalogue of fences designated as 'sufficient' for the purpose of section 4 of the Act. The specifications were such as to amount to an industry standard, as well as defining the kind of fence an arbitrator could order. The change from liability of the 'owner' to liability of the 'occupier' to contribute occurred at this time, and a definition of 'occupier' was included, which is essentially the current position.[10] Other provisions—concerning fencing of watercourses, notices to fence, procedures to be followed when an adjoining occupier is not known, and access to neighbouring land for the purpose of fencing—have also survived in existing legislation with only minor changes, despite the large number of intervening amendments and consolidations. Like its predecessor, the 1874 Statute accorded the Crown immunity from liability and specified that occupiers other than the Crown were liable 'in equal proportion'.

1.10 The *Fences Act 1889* supplemented *The Fences Statute 1874*, until the two were consolidated as the *Fences Act 1890*. The latter had only four Parts, the 'Introduction' of the 1874 statute being dispensed with.

1.11 The 'rabbit menace' being at its height in 1901, the *Land Act 1901* (sections 291 and 292) responded to this growing problem by linking vermin-proof fencing with 'sufficiency' as defined in the *Fences Act 1890*. The detailed provisions relating to vermin-proof fencing in Part III of the *Fences Act 1968* arise from the *Fences Act Amendment Act 1908*. As one Member of Parliament commented at the time, the amendment 'has more to do with vermin destruction than with fencing'.[11] The same Member complained that there were ten different classes of fences in three Acts (the

8 *Fences Act 1968* (Vic.), s. 12.
9 37 Vict., No. 479 (1874).
10 ibid., s. 3.
11 Victoria, Legislative Assembly, *Debates*, 28 Jul. 1908, p. 361, per Mr Robertson.

Fences Act 1890, the *Land Act 1901* and the *Fences Act Amendment Act 1908*) that could constitute sufficient vermin-proof fences.[12] Four of those classes survive in the *Fences Act 1968*.[13]

1.12 In 1915 the law relating to dividing and vermin-proof fences was consolidated in the *Fences Act 1915*, an Act in five Parts. Parts I, II, IV and V corresponded to the four Parts of the *Fences Act 1890*, and Part III contained 'Special Provisions relating to Vermin-Proof Fences' (that is, the content of the *Fences Act Amendment Act 1908)*. The structure of this consolidating Act is retained in the *Fences Act 1968*.

1.13 Notwithstanding changes introduced in the *Fences Act 1928* and the *Fences Act 1958* and in 1958[14] and 1959[15] amending Acts, Victoria's fencing legislation up to 1968 continued to provide that adjoining occupiers were liable to contribute to dividing fencing 'in equal proportions' and specified in detail the kinds of fences considered sufficient for the purposes of the respective Acts.

1.14 In 1965 the Statute Law Revision Committee of the Victorian Parliament (SLRC) was asked to inquire into aspects of the legislation, largely in response to a submission from the Master Fencers' Association. That committee approached its task on the assumption that 'the Fences Act provisions are intended to provide only a code of fair play in the event of mutual agreement as between neighbours proving impossible'.[16] It emphasised the parties' 'unrestricted right to deal with each other'[17] and, failing agreement between the parties, the liberty of the court to make a ruling, unhampered by statutory restrictions as to the kind of fence it could order. The keynotes were flexibility and minimal statutory intervention. The suggestion by the Master Fencers' Association that standards of residential fencing be prescribed was held to be 'out of step with the general scheme of the Act, which does not deal with such restrictions, nor with the enforcement of minimum standards'.[18] Instead, the SLRC recommended the repeal of the existing section 4 definitions, leaving 'sufficiency' to be defined by the needs of the individual parties.

1.15 The SLRC also declined to adopt the Master Fencers' Association's invitation to define precisely how different kinds of fences should sit in relation to the

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12 ibid., p. 363.
13 See s. 17.
14 *Fences (Amendment) Act 1958.*
15 *Fences (Amendment) Act 1959.*
16 Victoria, Parliament, Statute Law Revision Committee, *Report from the Statute Law Revision Committee upon Proposals to Amend the Fences Act 1958 together with Minutes of Evidence and Appendices*, Parl. Paper 8795/66, A.C. Brooks, Government Printer, Melbourne, 1966, p. 1.
17 ibid., para. 13.
18 ibid., para. 10.

boundary-line—that is, whether, in the case of a paling fence, the boundary should run along the outside of the plinth, the face of the posts, or the middle line of the posts. It concluded that 'certain practices [had doubtless] grown and been accepted as to the position of fences', and that it would be 'both difficult and undesirable to attempt to lay down rules by statute'.[19] This Committee was again asked to consider the issue, and to give directions as to how fences of differing construction should sit in relation to boundaries. Consideration of this topic and the Committee's conclusions are in Chapter 3.[20]

1.16 After considering the position of a rural landholder whose land abuts residential land—presumably in the context of the rapidly developing urban sprawl—the SLRC recommended that a 'guide' be included in the Act, to the effect that the burden of fencing residential land should fall to the subdivider of land rather than the farmer, who should be required to meet only one half of the cost of a fence sufficient for his or her own needs.[21] When this recommendation was implemented in section 4(1)(a) of the *Fences Act 1968*, the requirement that adjoining occupiers contribute 'in equal proportions' was deleted from the core provisions. Section 4(1)(b) now provides that 'in other cases' contribution shall be 'in such proportions as are agreed upon or, in the absence of agreement, are determined by the Magistrates' Court'.

1.17 The *Fences Act 1968*, in which the SLRC's recommendations were implemented, is therefore based on what the Attorney-General of the time described as the 'common sense shown by neighbours in their dealings with one another'.[22] Consequently, it does not seek to specify requirements for a 'standard' fence or define 'sufficiency' of purpose, nor does it give guidance as to the proportions in which parties should contribute. But, if common sense does not prevail, section 7 sets out the considerations which a court or arbitrator takes into account in resolving the dispute. Whether this remains an adequate solution will be discussed in Chapter 3.[23]

1.18 In the thirty years since the Fences Act was last comprehensively reviewed there have been many social and lifestyle changes which impact on boundary fencing. A number of submissions adverted to the question of sufficiency of dividing fences.[24] The *Fences Act 1968* deleted a catalogue of 'sufficient fences' which had

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19 ibid., para. 35.
20 *infra*, paras. 3.59–3.62.
21 Statute Law Revision Committee, op.cit., para. 15.
22 Victoria, Legislative Assembly, *Debates*, 22 Oct. 1968, p. 1103, per G. O. Reid (Attorney-General).
23 *infra*, paras. 3.32–3.41; recommendations 16 & 17.
24 Submission nos. 3, 4, 20 & 40.

appeared in previous fencing statutes,[25] on the basis that the fences were all of a kind used in rural districts and were unsuitable in residential areas.[26] In addition, privacy has become a far more valued commodity than in the days when the height of a standard dividing fence was allegedly calculated to prevent a horse from nibbling a neighbour's shrubbery, but still to allow neighbours to converse over the fence.[27] There have also been significant changes in planning policy, particularly the policy of urban consolidation, which have changed the environment in which the *Fences Act 1968* operates.

General Observations

Level of Disputation

1.19 Historically, there has been little call upon the courts to interpret the provisions of the Fences Act. The very small number of cases going to hearing indicates that the legislation is reasonably effective,[28] or at least does not obstruct parties from reaching a resolution. Cases that reach the courts frequently resolve before the hearing commences, so that orders are entered by consent of the parties. When a hearing is conducted, argument generally centres on the facts of the case, rather than legal interpretation.

1.20 A perusal of Magistrates' Court orders in fencing matters made during the period 3 June 1995 to 3 June 1998 indicates that monetary claims for contribution to fencing are generally in the region of $500 to $1000 and often less than $500. The orders also disclose that most cases are resolved by negotiation at the door of the court, with the proceedings either being withdrawn with the consent of both parties, or orders being made by mutual agreement. Both the small monetary sums involved and the propensity for matters to resolve once the parties are brought together compulsorily, provide grounds to suggest that jurisdiction might more appropriately be vested in a tribunal, and that mediated outcomes should be encouraged.

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25 See e.g., *Fences Act 1958*, s. 4.

26 Victoria, Legislative Assembly, *Debates*, 22 Oct. 1968, p. 1103, per G. O. Reid (Attorney-General).

27 Submission no. 49.

28 See *infra*, para. 1.5; *supra*, para. 2.15 and Appendix C.

Public Expectations and Concerns

1.21 In a very detailed submission,[29] the Dispute Settlement Centre of Victoria (DSCV) outlined the expectations their clients had of the Fences Act, based on a sample of opinions commonly expressed to its Dispute Assessment Officers. The Centre, which operates chiefly within metropolitan Melbourne, handled 3105 telephone inquiries in 1996/7 in respect of fencing, from which 368 offers of mediation were made.

1.22 The DSCV summarised some of the beliefs and expectations of the public as follows:[30]

- People have quoted to us parts of the 'Master Fencers Guide to better Fencing' as if it were an appendix to the Fences Act.
- Many expected that there was a detailed code, stating what heights were acceptable and what weren't, which way the palings should be, and where the fence should sit on the boundary line.
- Most expected more detail within the Act itself about standards of fence construction.
- Many thought local councils had the power to arbitrate.
- Often people presumed that the Small Claims Tribunal, or some similar body, had authority to act, and many people were surprised to discover the Magistrates' Court would have to be involved if they couldn't sort the matter out themselves.
- Few people had any idea about what costs were involved if litigation were involved.
- Some believed that all they had to do was issue a fencing notice.
- Many wanted a definition as to what constituted a fence.
- Some people were confused about the difference between a pool fence and a dividing fence.
- Some people thought paling fences were mandatory, rather than a dividing fence that was sufficient for the needs of both parties.

1.23 The Committee's own experience of inquiries from the public also suggests that the public is seeking greater guidance from the Act and greater access to information as to its contents.

1.24 The DSCV submitted that the present law maximises flexibility, but queried whether that flexibility is achieved at the cost of an unnecessarily high degree of uncertainty.[31] It further submitted that common law principles of liability—which might apply, for example, where fences are destroyed through negligence, or as a

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29 Submission no. 20.
30 ibid., p. 5.
31 ibid., pp. 8–9.

result of tree roots invading neighbouring property—are difficult for the public to access without the assistance of legal representatives.[32]

1.25 A number of the issues raised in the submissions received by the Committee echo those before the Statute Law Revision Committee in 1965. These included requests for quality of fencing materials to be prescribed, for the concept of 'sufficiency' of purpose to be clarified, and for inclusion of a definition of a 'standard' fence, which would prevail when parties were unable to agree as to fence type and determine contribution.[33] They also included requests for guidance as to how fences of differing constructions should be positioned with respect to the boundary line[34] and suggestions to facilitate recovery of contribution, including a proposal that unrecovered contributions become a charge on the land of the non-contributing party.[35] Some submissions called for the reintroduction of the '50% contribution rule'.[36]

1.26 The quest for greater certainty brought a call for the Act to be comprehensive in its statement of fencing law, and to include a codification of applicable common law principles.[37] A number of submissions expressed concern about the effect on fences of invasive tree roots, creepers, and soil piled against fences, and sought a statement in the Act as to the appropriate uses of fences, with a power to terminate inappropriate uses and remedies for damage sustained.[38]

1.27 Certainty of title was also an issue, with a number of submissions favouring compulsory survey on acquisition.[39] Frequently this was coupled with the suggestion that fences be immediately reinstated to boundaries that accorded with the Certificate of Title, and that the recognition currently given to possessory title be revoked.[40]

Availability of Information

1.28 While the submissions raised a number of other issues, including those arising from developments in planning law and the recurring issue of Crown and municipal liability, the general tenor of the submissions favoured increased regulation and

32 ibid.
33 Submission nos. 3, 4, 20, 62 & 65.
34 Submission nos. 19, 27 & 64.
35 Submission nos. 6 & 48.
36 Submission nos. 6 & 20.
37 Submission no. 20.
38 Submission nos. 3, 4, 14, 18, 20, 26, 62 & 65.
39 Submission nos. 2, 6, 7, 31 & 32.
40 ibid.

greater specificity, so that parties entering into negotiations with their neighbours were armed with better and more certain information as to their rights and obligations under the Fences Act.[41]

1.29 One source of fencing disputes is ignorance of the provisions of the Fences Act and the difficulty of accessing appropriate legal advice. Municipal councils do not concern themselves with fences except as required under their local planning scheme. Fencing industry bodies are primarily concerned with the relationship between client and fencing contractor. Consulting a solicitor is generally not an option, as costs generally equal or exceed the fencing contribution. Voluntary mediation services encourage negotiation but do not give legal advice. Some cases arrive at court by default. In the words of one Senior Magistrate:[42]

> Most parties appear in person and have not sought legal advice. The majority of disputes are resolved if a Magistrate explains the provisions of the Act to the parties and then enables the parties to either negotiate between themselves or with the assistance of a Court Registrar.

The Senior Magistrate at Moe also commented on the frequent inquiries received by the Court and assistance given in explaining the provisions of the Act.[43]

1.30 The Committee accepts the need for there to be more information available to the public on the obligations and rights of neighbours in respect of dividing fences. However, in the Committee's opinion, the common law appears to be working well in cases where recourse needs to be had to it. The Committee is mindful that the Fences Act deals essentially with rights and obligations of adjoining occupiers, and that conduct by either party causing damage to a fence can be taken into account by a decision-maker in apportioning contribution to maintenance, repair or reconstruction,[44] without putting the parties to the test of proving negligence or nuisance at common law. There would therefore seem to be little gain in attempting to codify common law principles within the Act. The option of broadening the scope of the existing provision determining liability where damage from fire or a falling tree is caused by the neglect of one party[45] is considered in Chapter 3, where the Committee has concluded that it is unnecessary for the Fences Act to address all situations where the law of negligence might impact upon fencing rights and obligations.[46]

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41 See in particular submission nos. 17, 20 & 64.
42 R. Kumar, letter to Committee dated 15 Jun. 1998.
43 J. Dugdale, letter to Committee dated 23 Jun. 1998.
44 See *Fences Act 1968*, s. 14.
45 See *Fences Act 1968*, s. 14(a).
46 *infra*, paras. 3.52–3.54; recommendations 25 & 26.

1.31 The Committee recommends that public access to information on fencing law should be enhanced through written and electronic publications that provide guidance on these matters. The Committee notes that the Western Australian Department of Local Government and that State's Legal Aid Commission have produced helpful brochures. These are useful models of the guidance that can be given through written publications. The Committee is aware also of the 'Fences' fact-sheet produced by the Dispute Settlement Centre of Victoria, but considers the fact-sheet to be a starting-point for a brochure which should be made widely available at government electronic kiosks and through local councils. All publications should summarise applicable common law rights and obligations as well as the content of the Fences Act, should emphasise mediation opportunities and services and should be available in community languages.

Recommendation 1

The Attorney-General should authorise the production and distribution of a detailed guide to resolving dividing fence disputes in printed and electronic form and in community languages. The guide should incorporate information on common law principles that apply when fences are damaged, and should emphasise the role of mediation and mediation services available. The guide should be monitored and updated as and when necessary.

1.32 The Committee also recommends that its experimental Internet 'Quickguide' be promoted as a public information service to operate with links from the Victorian Government website, that provision be made for revision of the 'Quickguide' to incorporate any changes in fences legislation arising from the present report, and that reference to the 'Quickguide' be made in any material produced pursuant to Recommendation 1.

Recommendation 2

The Attorney-General should promote the Committee's experimental Internet 'Quickguide' as a public information service to operate with links from the Victorian Government website and resources should be made available for its revision when necessary.

Scope of the Act

1.33 Attorney-General Reid conceded in 1968 that the Fences Act 'deals with the subject in a rather limited way'.[47] The Act effectively entitles an occupier of land to

[47] Victoria, Legislative Assembly, *Debates*, 22 Oct. 1968, p. 1103, per G. O. Reid (Attorney-General).

construct a dividing fence (unless there are restrictive covenants to the contrary), but is substantially concerned with the obtaining and recovery of contribution to the cost of fencing and operates only in that context.

1.34 Having regard to the need to address issues arising where properties are separated by walls of buildings rather than by fences and other issues relating to the separation of lands of adjoining occupiers raised in the submissions, the Committee considers that the scope of the Act should be expanded to enable it to meet needs which have developed with the growth in multi-density housing. For reasons discussed more fully in Chapter 5,[48] the Committee recommends broadening the ambit of the Fences Act and changing its title to the 'Dividing Fences and Boundaries Act'.

Recommendation 3

The scope of the* Fences Act 1968 *(Vic.) should be expanded to address other issues associated with separating the land of different occupiers and the Act should be renamed the 'Dividing Fences and Boundaries Act'.

Framework of this Report

1.35 Since 1965 when the Act was last reviewed, mechanisms to resolve disputes outside costly court processes have developed and diversified. An extensive administrative tribunal system, centring on the Administrative Appeals Tribunal, was introduced in 1984, and has recently been consolidated as the Victorian Civil and Administrative Tribunal.[49] There has also been a significant growth in alternative dispute resolution. The Committee makes recommendations regarding the most appropriate forum for the resolution of fencing disputes in Chapter 2 of this report.

1.36 Chapter 3 provides an analysis of the more general provisions of the Fences Act, the submissions and evidence relating thereto and the anomalies that appear to exist. The Committee's findings in relation to these matters are presented and recommendations are made regarding:

(a) definitional provisions;

(b) the relationship between construction, maintenance and repair of fences;

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48 *infra*, paras. 5.40–5.41.

49 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic.).

(c) contribution to the cost of fencing works;

(d) issues concerning adjoining properties separated by roads and fencing along waterways;

(e) contribution in the case of negligent and deliberate acts;

(f) liability for fences on sale or purchase of property;

(g) positioning of fences in relation to boundaries;

(h) the location of fences;

(i) fencing works notices;

(j) procedures relating to bodies corporate;

(k) guidance on kinds of fence;

(l) enforcement procedures;

(m) contracting out of the provisions of the Act;

(n) the ownership of fences; and

(o) specific rural fencing issues.

1.37 Exemption of the Crown from liability under the Fences Act was the subject of many submissions, chiefly from rural Victoria.[50] The issue was also raised in the urban context, where it was suggested that liability should extend at least to Crown-owned or managed residential facilities.[51] In addition, clarification was sought as to the position of State Owned Enterprises and municipal councils.[52] Local government does not fall within the shield of the Crown, and is not expressly exempted from liability either under the Fences Act or by any provision in the *Local Government Act 1989* (Vic.). Liability of the Crown, along with the position of municipal councils, is dealt with in Chapter 4.

1.38 Chapter 5 considers the interface between the Fences Act, the Victorian Planning Provisions, the *Building Act 1993* (Vic.) and the Building Regulations 1994 in light of the process of urban consolidation that has taken place in Victoria in recent years. The Committee's Terms of Reference specifically require it to examine whether the Fences Act meets the objectives of planning schemes in Victoria as defined in section 4(1) of the *Planning and Environment Act 1987* (Vic.), especially having regard to the need to encourage the development of well-designed medium-density

50 Submission nos. 11, 15, 22, 29, 33, 36, 39, 41, 42, 45, 50, 56, 60, 64, 65 & 67.
51 Submission no. 11.
52 Submission nos. 9, 31, 39 & 64.

housing. In this context, the Committee discusses and makes recommendations regarding 'as of right' development and fences, access to neighbouring land and building encroachments.

1.39 As part of its Inquiry, the Committee considered a number of submissions relating to the law of adverse possession as it applies to land enclosed as a result of a wrongly placed fence.[53] The Committee has examined and passed comment in Chapter 6 on the law of adverse possession as it applies to dividing fences.

Approach Adopted by the Committee

1.40 The Committee's approach to its reference is based on four principles:

(a) The need for the Fences Act to be transparent and comprehensive, to give the parties clear guidance as to their obligations, minimising the need to seek legal advice disproportionately expensive to the occasion.

(b) The need for information concerning the most common areas of dispute to be freely and widely available.

(c) The need for a dispute-resolution mechanism that is quick, patently fair and inexpensive, to avoid disputes being magnified by becoming protracted and costly.

(d) The need for flexibility in dispute-resolution, so that issues surrounding or underlying the ostensible cause of the dispute can be addressed and resolved.

The Committee believes that its recommendations maximise the achievement of these principles.

[53] Submission nos. 2, 6, 7, 13, 31, 32, 42, 43 & 47.

2.1 Jurisdiction in nearly all matters arising under the *Fences Act 1968* (Vic.) currently vests in the Magistrates' Court of Victoria.[54] The Court consists of approximately one hundred magistrates, including the Chief Magistrate and five Deputy Chief Magistrates, and comprises fourteen metropolitan courts and forty-two country courts, administered as eight regions.[55] As provided by the *Magistrates' Court Act 1989* (Vic.),[56] to be appointed a magistrate a person must now be a barrister and solicitor of the Victorian Supreme Court or the High Court of Australia of more than five years standing or have been an officer of the Supreme Court, the County Court or the Magistrates' Court or a clerk of a children's court or a coroner's clerk for an aggregate of ten years.[57] Being a court of law, the Court is bound by the rules of evidence, and its jurisdictional limit in civil matters is now $40,000.

History of Fences Act Jurisdiction

2.2 *The Fences Statute 1874*, which set the pattern for later fencing legislation in Victoria, provided for fencing disputes under the Act to be determined by 'two justices of the peace, of whom one shall be a police magistrate'.[58] They in turn could by order appoint an arbitrator,[59] on terms similar to section 7(2) of the present Act. The *Fences Act 1915* preserved this arrangement,[60] but recognised it as constituting jurisdiction in a court of petty sessions. The requirement that one of the justices be a police magistrate—the forerunner of a stipendiary magistrate—indicates that fencing disputes were regarded with some seriousness, as civil disputes at that time were

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54 *Fences Act 1968* (Vic.) s. 4(1)(b), s. 7(1) & (2), s. 8(1), s. 9(2), (7) & (8), s. 10(2), s. 12(2) & (3), s. 13(2), s. 14(b), s. 15(2) & (3), s. 23(2) & (4), s. 24(1) (3) (5) & (6), s. 26, s. 27, s. 29(1).

55 Victoria, Department of Justice, *Law Calendar 1998*, Courts and Tribunal Services Division, Melbourne, 1997, pp. 20–35.

56 s. 7(3).

57 Magistrates appointed before 1 Sept. 1990 may have been a clerk or deputy clerk of the Magistrates' Court.

58 *The Fences Statute 1874*, s. 3.

59 ibid., ss. 3 & 8.

60 *Fences Act 1915*, ss. 3 & 8.

often left in the hands of honorary justices.[61] However, neither police magistrates nor justices were required to be legally qualified.

2.3 The conferral of civil jurisdiction on the courts of petty sessions in 1846 and its subsequent expansion in 1857 arose from 'the need to provide the growing rural population of Victoria with access to "cheap, simple and efficient" justice, particularly to enable recovery of small debts'.[62] The courts operated across a wide geographic area and were regarded as the local court.[63] In 1859 there were approximately 100 police magistrates and more than 2000 justices.[64]

2.4 The monetary value of jurisdiction was at a modest level.[65] As late as 1962, the monetary jurisdictional limit in causes of action in contract was 250 pounds.[66] This was increased to 300 pounds in 1963,[67] and remained at that level when the present Fences Act was enacted in 1968.

2.5 In 1969 courts of petty sessions were renamed Magistrates' Courts.[68] The constitution, jurisdiction and procedures of the Magistrates' Courts were set out in the *Magistrates' Court Act 1971* and *Magistrates' Court (Summary Proceedings) Act 1975.* However, it was not until 1979 that the role of honorary justices was discontinued and magistrates were required to have legal training[69] as prescribed by the *Public Service Regulations.*[70] Up until 1984[71] magistrates were members of the public service, and virtually all appointees were drawn from the clerks of court.[72] Only since 1984 have magistrates been independent judicial officers, and only since 1989 have they been in practice required to be qualified for admission to the legal profession.

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61 La Trobe University, Legal Studies Department: *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts,* Occasional Monograph no. 1, Melbourne, 1980, p. 12.

62 Victoria, Attorney-General's Advisory Committee (L. Hill, Chairperson), *Report on the Future Role of Magistrates' Courts,* Melbourne, 1986, p. 6.

63 ibid., para 2.1, p. 6.

64 *Guilty, Your Worship,* op. cit., p. 11.

65 Victoria, Attorney-General's Advisory Committee, loc. cit.

66 *Justices (Amendment) Act 1962,* s. 4.

67 *Justices (Jurisdiction) Act 1963,* s. 2.

68 *Justices (Amendment) Act 1969,* s. 2(1).

69 Victoria, Attorney-General's Advisory Committee, para. 2.6, p. 7.

70 Public Service Regulations 1975 (Vic.), reg. 28(2).

71 *Magistrates' Courts (Appointment of Magistrates) Act 1984.*

72 *Guilty, Your Worship,* loc. cit.

Development of Alternatives to Court-Based Resolution Since 1968

2.6 At the same time as the above developments were increasing the 'independence, status and quality' of the Magistracy,[73] a system of administrative tribunals and alternative dispute resolution was developing. In September 1984 the Victorian Attorney-General established an Advisory Committee to report on 'the future role of the Magistrates' Courts within the judicial system'.[74] The Advisory Committee's report considered that the introduction of these administrative tribunals and other forms of alternative dispute resolution resulted from 'dissatisfaction with the manner in which the court system has dealt with particular types of claim'[75] and commented:[76]

> There have been a variety of reasons for the development of these alternatives. A common theme, however, has been an expressed desire to avoid the perceived formality, expense and inflexibility of traditional court proceedings which have been regarded as presenting significant barriers to access.

2.7 In the 1980s there was a substantial increase in the number of specialised tribunals in Victoria. The Small Claims Tribunals were established in 1973,[77] the Residential Tenancies Tribunal in 1980,[78] the Administrative Appeals Tribunal[79] and the Equal Opportunity Board (now the Anti-Discrimination Tribunal)[80] in 1984, the Credit Tribunal in 1989,[81] and the Domestic Building Tribunal in 1995.[82] These Tribunals have now been absorbed into a single tribunal, the Victorian Civil and Administrative Tribunal, which has three divisions—Administrative, Civil and Town Planning.[83]

2.8 In addition to the development of tribunals, there has been a shift away from adversarial models of dispute resolution towards methods that depend to varying degrees on negotiation and control of outcomes by the parties themselves. The most prevalent of these is mediation, in which the parties consent to the appointment of a person who assists them in formulating their own resolution, sometimes without

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73 Victoria, Attorney-General's Advisory Committee, p. 7.
74 ibid., p. vii.
75 ibid., p. 13.
76 ibid.
77 *Small Claims Tribunals Act 1973* (Vic.).
78 *Residential Tenancies Act 1980* (Vic.).
79 *Administrative Appeals Tribunal Act 1984* (Vic.).
80 *Equal Opportunity Act 1984* (Vic.).
81 *Credit (Administration) Amendment Act 1989* (Vic.).
82 *Domestic Building Contracts and Tribunal Act 1995* (Vic.).
83 *Victorian Civil and Administrative Tribunal Act 1998* (Vic.) (hereafter cited as 'VCAT Act').

direct reference to the legalities of the dispute. Most court processes now offer the parties an opportunity to mediate before the formal hearing of the dispute. Mediations can range from quite formal occasions where the parties agree to be legally represented, to self-represented voluntary mediations, such as those offered by the Dispute Settlement Centre of Victoria (DSCV). In practice, many fencing disputes reach a mediated resolution.[84]

2.9 Conciliation and arbitration also offer alternatives to court or tribunal-based determination of disputes. Conciliators are mediators whom the parties empower to take greater initiative in formulating possible solutions to a dispute and who seek to persuade the parties towards resolution, whilst arbitrators are given the power to make determinations and awards that are binding on the parties. Many arbitrators are experts in the subject matter of the dispute and most bring a combination of technical expertise and legal knowledge of the particular field to the decision-making process. Under the *Fences Act 1968* the Magistrates' Court has power to refer the determination of matters to an arbitrator.[85]

2.10 The Institute of Arbitrators and Mediators Australia made a submission to the Inquiry[86] in which it advocated a two-tiered dispute resolution procedure for fencing matters, involving first mediation and then referral to a magistrate who might in turn appoint an arbitrator if the dispute was of a technical nature, a procedure available under current legislation.[87]

The Present Situation

2.11 Over recent years the Magistrates' Court has changed its procedures and documentation. Court forms have been simplified and are available in community languages and court registrars continue to assist members of the public to complete forms. Above all, the court gives parties the opportunity of mediation and, even if

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84 For example, of the 368 files on fencing matters opened by the Dispute Settlement Centre of Victoria in 1996/7, 76 were assisted to settle prior to mediation and 71 out of a further 75 mediated cases settled at mediation. This is a success rate at mediation of 95%. The comparatively low proportion of mediated cases to total files is explained by the voluntary nature of mediation and the absence of pressure from imminent court proceedings. Copy orders obtained from the Magistrates' Court indicate that a high proportion of Magistrates' Court proceedings relating to fencing—in fact, more than half—settle before or at the pre-hearing conference stage, which the parties attend before cases are set down for hearing and where discussion between them takes place.

85 s. 7(2).

86 Submission no. 52. This submission was elaborated in oral evidence see L. Cunningham, *Minutes of Evidence*, 2 Apr. 1998, pp. 75–80.

87 *Fences Act 1968* (Vic.), s. 7(2).

that is rejected, convenes a preliminary conference before a registrar, the purpose of which is to ascertain that the matter is ready for hearing. In practice, however, it provides an opportunity for negotiation and frequently results in settlement.

Evidence Received by the Committee

2.12 The Committee received some comment favouring retention of the Magistrates' Court jurisdiction.[88] This was on the basis that Magistrates' Court orders were 'final...enforceable and...accepted by the protagonists'.[89] Some other submissions suggested that mediation or arbitration should be included as alternatives to determination by the Magistrates' Court[90] or that there should be a two-tier process still involving the Magistrates' Court.[91] But most accepted positively the current power of a magistrate to refer a matter to arbitration.

2.13 There was stronger support for transferring jurisdiction to a tribunal, conciliator / arbitrator or other less formal arrangement, which was seen as more appropriate to the subject-matter, less intimidating and above all less likely to place users in jeopardy of substantial legal costs.[92] One submission from the Royal Victorian Association of Honorary Justices proposed that jurisdiction be in effect 'returned' to honorary justices, who would provide 'an impartial and commonsense decision in a matter that calls more for those qualities than complex legal analysis'.[93] Some magistrates also expressed the view that fencing matters are best resolved through mediation rather than court processes.[94]

2.14 In practice, it is common for litigants in fencing cases that reach hearing to appear in person and it is likely that they represent themselves quite adequately, given that most disputes involve questions of fact rather than legal technicality. Nonetheless, the Committee is aware that for many people the thought of 'going to court' is both psychologically and financially intimidating, with the result that they may feel themselves to be without redress.[95] Others who have taken the route to court have expressed frustration at the delay and the cost.[96]

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88 (i) P. Byrne, letter to Committee dated 10 Jun. 1998. (ii) S. D. Page in submission no. 23. (iii) A country solicitor during the Committee's visit to Echuca.

89 P. Byrne, letter to Committee dated 10 Jun. 1998.

90 Submission nos. 16 & 20.

91 Submission no. 52.

92 Submission nos. 1, 26, 31, 39, 55, 57, 64 & 66. See also T. Zerella, *Minutes of Evidence*, 27 Mar. 1998, p. 36, 39.

93 Submission no. 57.

94 J. Murphy and R. Kumar in separate letters to Committee dated 15 Jun. 1998.

95 R. Campagna, *Minutes of Evidence,* 27 Mar. 1998, p. 39. See also submission no. 48.

96 Submission no. 28.

2.15 Statistics obtained by the Committee from the court database of the Department of Justice indicate that from June 1995 to June 1998 a total of 372 fencing complaints were issued in the Magistrates' Court across Victoria, 166 of which were defended.[97] That is an average of 55 cases per year with the resulting conclusion that over 200 cases were resolved before hearing. Moreover, a perusal of the sample of the orders made in the cases which went to hearing indicates that most actions for recovery of contribution to fencing costs are in respect of sums of money generally between $500 and $1000 and that most orders are made by consent. This propensity of matters to settle before or during hearing, rather than requiring determination, confirms the desirability of mediation and suggests that fencing disputes may be a waste of court time, when what is required is a procedure to compel the parties to the negotiating table.[98]

Local Land Boards in New South Wales

2.16 In examining the New South Wales system, the Committee became interested in that State's Local Land Boards, which share jurisdiction with the Local Courts (equivalent to Victoria's Magistrates' Courts) under the *Dividing Fences Act 1991* (NSW). The Local Land Boards are created under the *Crown Lands Act 1989* (NSW) and consist of a Chairman, who sits in all cases, and who seconds members drawn from the local community to constitute the Board. In this case, however, the Chairman is both an expert in land matters and legally qualified.[99] The fact that he or she sits in all cases promotes consistency in decision-making. The local members contribute local knowledge, including familiarity with local soil types, which helps determine what is an appropriate fence. Nearly all hearings are conducted on site or involve site inspection.[100] This combination of legal and practical expertise, the balance between independence and local sympathy, and the Board's no-nonsense hands-on approach to its task impressed the Committee. It was advised that Local Courts in New South Wales frequently transfer fencing matters to the Local Land

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97 Victoria, Department of Justice, Courtlink, *Magistrates' Court—Civil: Number of Cases Initiated in Period 3 June 1995–3 June 1998 for Fencing Act Complaints.*

98 See P. Byrne, letter to Committee dated 18 Jun. 1998, which notes that 'after "judicial intervention" settlement is almost invariably reached'; J. Murphy, letter to Committee dated 15 Jun. 1998, to the effect that he has 'always managed to convince the parties to come to an amicable agreement'; and R. Kumar, letter to Committee dated 15 Jun. 1998, which comments that: 'The majority of disputes are resolved if a Magistrate explains the provisions of the Act to the parties and then enables the parties to either negotiate between themselves or with the assistance of a Court Registrar'.

99 Legal qualifications are not essential for appointment as Chairman; however, the present incumbent possesses them.

100 Information provided by T. J. McCue, Chairman of the NSW Local Land Boards, at a meeting with the Committee held in Sydney on 30 Jan. 1998.

Boards, which is becoming the dominant jurisdiction in such matters.[101] The Boards are geographically accessible by country residents and sit more comfortably with the practicalities of rural life than exclusively judicial bodies.

The Role of Mediation

2.17 Mediation is clearly the mode of dispute resolution most appropriate to neighbour disputes, given:

(a) the parties' ongoing relationship as neighbours;

(b) their close physical proximity;

(c) the fact that there may be several disputes running between them at the same time;

(d) the costs of court action relative to the financial dimension of most such disputes; and

(e) in the case of fence disputes, the fact that the resulting fence (or lack of it) serves as a constant reminder of the dispute.[102]

There was general agreement among those appearing before the Committee[103] and in submissions[104] and comments[105] received by the Committee that mediation should be an important and integral part of the dispute resolution process. It was a strongly expressed view that disputes should not be determined by adversarial means before mediation has been tried.[106]

2.18 However, while voluntary mediation appears to be highly successful—the success-rate of fencing matters mediated by DSCV in 1996/7 being 95 per cent[107]—the DSCV expressed frustration at two aspects of its present operation. The first was the voluntary nature of the mediation process, which makes it possible for a party simply to side-step the opportunity to resolve a dispute by declining to attend. It was suggested in evidence that while compulsion was at odds with the philosophy of

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101 ibid.

102 Submission no. 20, p. 5.

103 D. Leonard, *Minutes of Evidence*, 27 Mar. 1998, p. 50; A. Abrahams, *Minutes of Evidence*, 2.Apr. 1998, p. 69; L. Cunningham, *Minutes of Evidence*, op. cit., p. 75; J. O'Donoghue, *Minutes of Evidence*, 2 Apr. 1998, p. 84; R. Day, *Minutes of Evidence*, 3 Apr. 1998, pp. 121, 132; T. Nikolson, *Minutes of Evidence*, 3 Apr. 1998, p. 132.

104 Submission nos. 6, 20, 26, 31, 52 & 64.

105 J. Murphy, letter to Committee dated 15 Jun. 1998; R. Kumar, letter to Committee dated 15 Jun. 1998.

106 See especially submission nos. 20 & 52; *Minutes of Evidence* of D. R. Leonard, A. Abrahams, L. Cunningham & R. Day, op. cit.

107 ibid.

mediation, which relies on the parties to construct their own solution, in practice compulsory mediations such as those currently ordered by the Supreme and County Courts appeared to be successful.[108] A party who was compelled to attend would not always participate, but once at the table most parties did so.[109]

2.19 The second frustration arose from the fact that settlements reached at voluntary mediation are unenforceable. Section 21L of the *Evidence Act 1958* (Vic.) provides that:

> Evidence of anything said or of any admission or agreement made at, or of any document prepared for the purpose of, a conference with a mediator in connection with a dispute settlement centre is not admissible in any court or legal proceeding, except with the consent of all persons who were present at that conference.

Understandably, clients who believe they have achieved a settlement express dissatisfaction when the other party walks away from the agreement with impunity.[110]

2.20 While the Committee sympathises with these difficulties, it believes that voluntary mediation which relies for its enforcement on the parties' sense that they have reached a satisfactory compromise has a continuing role to play in neighbourhood dispute resolution, and the availability of voluntary mediation through the Dispute Settlement Centre of Victoria should be encouraged and widely publicised.

The Victorian Civil and Administrative Tribunal

2.21 The newly formed Victorian Civil and Administrative Tribunal (VCAT) appears to offer opportunity for the adoption of a less formal approach to fencing disputes. Its aims include improving access to justice and increasing alternative dispute resolution by providing a range of procedures including compulsory conferences and mediations to urge parties to reach agreement quickly; developing flexible cost-effective practices; and facilitating the use of technology, such as video link-up and interactive terminals, to improve access to justice.[111] The Tribunal is able to sit anywhere in Victoria[112] and can conduct on-site inspections,[113] which may save

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108 T. Zerella, *Minutes of Evidence*, 27 Mar. 1998, p. 34.
109 ibid.
110 ibid., p. 41.
111 See Victoria, Legislative Assembly, *Debates*, 9 Apr. 1998, p. 973, per Hon. J. Wade (Second Reading speech).
112 Fences Act, s. 38.
113 ibid., s. 129.

the need for lengthy depositions and ensure the visibility of the key issues. Ordinary individuals and companies can generally not be legally represented unless all parties consent[114] or the Tribunal so permits or directs.[115] The Tribunal has power to refer a matter to an expert for opinion or to a referee for decision.[116]

2.22 In an informal meeting with the Committee's Chairman, the VCAT President agreed that VCAT was an appropriate jurisdiction for fencing disputes and indicated that the Tribunal would be interested in availing itself of the opportunity of informal, on-site hearings in fencing matters.[117] He also indicated that the cost of applications to VCAT in comparable matters was modest, certainly in comparison with Magistrates' Court fees.

2.23 On the evidence before it, the Committee considers that the public is likely to be better served in resolving fencing disputes in an environment where initiating fees are modest, legal representation is excluded (other than in exceptional cases) and in the normal course of events each party bears its own costs,[118] which are also modest. This stands in contrast to the Magistrates' Court procedure where legal representation is generally perceived as essential, the environment is more formal and imposing and legal costs for the losing party are doubled because costs generally follow the event.

2.24 The Tribunal is also uniquely placed to enforce any settlement reached between the parties, not by reinstating the proceeding as in the Magistrates' Court, but by virtue of section 93 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.) (Fences Act), which provides that, if settlement occurs, any member of the Tribunal, including a member acting as mediator, has power to make orders to give effect to the settlement.

2.25 With respect to the comments made concerning the greater ease with which Magistrates' Court orders can be enforced, the Committee notes that sections 121 and 122 of the Fences Act provide for monetary and non-monetary orders of VCAT, respectively, to be enforced by filing in the appropriate court and that in both cases no charge is made for filing a copy of the order and accompanying affidavit.[119] Non-

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114 ibid., s. 62. The section contains some express exceptions, including a child, a municipal council, a representative of the State and a public authority and provides that a party may be legally represented if the other party to the proceeding is a professional advocate or falls within the exceptions and is legally represented.

115 ibid., s. 62(1)(c).

116 ibid., s. 95.

117 Meeting with Hon. Justice M. Kellam on 30 Jun. 1998.

118 Fences Act, s. 109.

119 ibid., s. 121(2) and s. 122(2).

monetary orders become orders of the Supreme Court and monetary orders, orders of the court that would have jurisdiction to enforce a debt of an amount equivalent to the amount ordered.[120] This means that both the process and costs of enforcement are virtually the same, as between the Court and the Tribunal, once the administrative step of filing the orders in the court is taken.

2.26 Moreover, the Committee notes that the Tribunal is empowered to grant an injunction, including an interim injunction, in any proceeding if it is just and convenient to do so.[121] This power assumes some relevance in view of the Committee's recommendations concerning notice and the rights of a person to seek injunctions in respect of fencing disputes.[122]

2.27 So far as the role of mediation in resolving fencing disputes is concerned, the Committee notes that VCAT has powers to compel attendance at a compulsory conference[123] or mediation[124] once application is made to the Tribunal, and that the Fences Act includes strong sanctions for non-attendance at a compulsory conference equivalent to those applying in the Magistrates' Court.[125] Likewise, while evidence of anything said or done in the course of a mediation ordered by VCAT is not admissible in any hearing before the Tribunal unless all parties agree,[126] where a settlement is reached at a mediation, evidence regrading the terms of settlement is admissible in enforcement proceedings. By section 93 of the Fences Act a settlement reached at any time may be the subject of tribunal orders giving effect to the settlement, and specifically the section encompasses settlement at mediation.[127] If an offer of settlement is at any time made and accepted in accordance with sections 113 and 114 of the Fences Act, the Tribunal may make orders other than those giving effect to the settlement, including orders to dismiss the proceeding if the non-complying party was the applicant or, if the aggrieved party was the applicant, orders awarding the things requested in the application.[128]

2.28 The Committee notes also that while there is no express sanction for a party's failure to attend a Tribunal-ordered mediation, such failure is one of the matters open

120 ibid., s. 122(3) and s. 121(4).
121 ibid., s. 123.
122 Regarding notice see *infra,* paras. 3.80–3.84 and injunctions see *infra* recommendation 5(7).
123 Fences Act, s. 84.
124 ibid., s. 89.
125 ibid., s. 87.
126 ibid., s. 92.
127 ibid., s. 93(2).
128 ibid., s. 115(b).

to the Tribunal to take into account under section 109 of the Fences Act in awarding costs.[129]

2.29 The Committee is therefore confident that vesting jurisdiction in VCAT will provide a cheaper, more efficient and more flexible means of resolving disputes than the present Magistrates' Court jurisdiction under the *Fences Act 1968*. The Committee also envisages a role for the Magistrates' Courts in determining disputes where the position of fences impacts on rights in real property, and the value of the property affected is within the Court's jurisdictional limit or the parties consent in writing to jurisdiction in the Magistrates' Court. A recommendation that section 100 of the *Magistrates' Court Act 1989* (Vic.) be amended to enable this to occur is made in Chapter 6 in the context of a discussion of dividing fences and the law of adverse possession.[130]

Recommendation 4

Jurisdiction in respect of fencing and boundary disputes should be vested in the Victorian Civil and Administrative Tribunal.

Powers of the Tribunal

2.30 The current powers of the Magistrates' Court to determine matters under the *Fences Act 1968* appear variously in sections 4(1)(b), 5(2), 7, 8(1), 9, 10(2), 12(2), 12(3), 13(2), 16, 23(2), 23(4), 24, 26, 27 and 29. However, the Committee considers that in addition to these, powers and remedies available in other States[131] would be of benefit to VCAT in the discharge of its functions under the proposed Dividing Fences and Boundaries Act.

Recommendation 5

The following additional powers should be included in the proposed Dividing Fences and Boundaries Act:

> ***(1) General power to determine any difference or dispute arising in relation to fencing works or any liability under the Act on the application of any person affected by the difference or dispute and, without limiting the generality of the foregoing, landlords and tenants.***

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129 ibid., s. 109(3)(a)(i).

130 *infra*, paras. 6.57–6.61; recommendation 67.

131 e.g., *Fences Act 1975* (SA), s. 12.

(2) Power to determine the person or persons by whom any fencing works are to be performed, and where it is to be performed by different persons, the part of the work to be performed by each.

(3) Power to determine the time at which fencing works are to be performed and the manner of their performance.

(4) Power to make any order or give any direction that may be necessary or expedient to overcome difficulties ascertained during the progress of fencing works.

(5) Power, on the application of any interested person, to extend any limitation of time prescribed by the Act (whether or not the time so limited has expired).

(6) Power to determine that, in all the circumstances, no dividing fence is required in respect of all or part of the boundary of adjoining lands.

(7) Power to order the cessation of any activity or the discontinuance of any conduct that in the opinion of the Tribunal is unreasonably damaging or threatens significant damage to a dividing fence.

(8) Power to determine disputes as to the colour, finish and workmanship of building walls which replace or stand in place of a dividing fence and to make orders with respect to the maintenance or rectification of building walls on boundaries which exhibit structural damage or deterioration.

Case for a Neighbour Disputes Division of VCAT

2.31 Fencing disputes are a significant cause of neighbour tensions. They comprised approximately 48 per cent of telephone inquiries to the Dispute Settlement Centre of Victoria in the 1996–7 financial year[132] and 25 per cent of files opened.[133] Conversely, neighbour tensions cause fencing disputes. The fencing dispute may enable the parties to play out feelings derived from other issues—whether these concern trees, noise, children's behaviour, cultural differences, unwanted development and the like—the legal resolution of which is either unavailable or out of reach.[134] In evidence before the Committee it was recognised, especially by those close to the dispute resolution process, that a significant proportion of fencing

[132] D. Leonard, op. cit., p. 32.

[133] ibid., p. 33.

[134] M. Viscovich, 'Neighbour Rage', *Sunday Herald Sun*, 20 Sept. 1998, p. 1; 'Neighbours Fight for 30 years', ibid., p. 4; 'Taming The Hell Next Door', ibid., p. 61 discusses the prevalence of neighbour disputes, their potential for longevity, and their impact on neighbourhood amenity and property values.

disputes, and a high proportion of those that reach hearing, occur in a context where neighbours are already antagonistic and not speaking.[135]

2.32 The Committee believes that VCAT could perform a larger role in providing an efficient and cost effective forum for the resolution of a wider range of neighbour disputes. Consequently, the Committee recommends the creation of a 'Neighbour Disputes' Division of the Tribunal with the jurisdiction under the proposed Boundaries and Dividing Fences Act at its core.

Recommendation 6

There should be a 'Neighbour Disputes' Division of the Victorian Civil and Administrative Tribunal.

[135] D. Leonard, op. cit., p. 50; R. Day, op. cit., p. 121; and R. Kumar, letter to Committee dated 15 Jun. 1998.

3 ANOMALIES AND SOLUTIONS

3.1 Most suggestions for detailed amendments to the *Fences Act 1968* (Vic.) made in submissions to the Committee were aimed at meeting public expectations or clarifying the legal position of parties so as to expedite negotiated outcomes. Other amendments considered in this Chapter have been prompted by the example of legislation in other States.

Definitions

3.2 The Fences Act contains only three definitions.[136] 'Dividing fence' is defined as a 'fence separating the lands of different occupiers'. The term 'occupier' is defined to include any person in actual occupation of, or entitled as owner to occupy, any land purchased or alienated from the Crown and also 'the holder of a right to occupy a residence area in respect of land under the *Land Act 1958*'. Expressly excluded from the definition of 'occupier' is:

> (a) any person in occupation of or entitled to occupy land under a license under the **Mineral Resources Development Act 1990**; or
>
> (b) any person in the occupation of land held by yearly license under any Act relating to the sale and occupation of Crown lands which has been in force or comes into force.

The expression 'to repair' is defined to include 'to trim keep and maintain a live fence'.

'Fence' and 'Dividing Fence'

3.3 Notably, the Fences Act contains no definition of 'fence', leaving this word to have its ordinary English meaning. The *Oxford English Dictionary* defines a 'fence' to be:[137]

> A railing or barrier constructed of posts of any of various materials connected by wire, planks, etc., used to enclose and prevent entry to and exit from a field, yard, etc.

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136 See *Fences Act 1968* (Vic.), s. 3.

137 See e.g. L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles*, Clarendon Press, Oxford, 1993, p. 933.

The definition of 'fence' refers the reader to the word 'live' where 'live fence', which originated in the United States, means 'a hedge'.[138] Another definition of 'fence' is contained in the *Macquarie Dictionary*, which defines the word to mean: 'an enclosure or barrier, usually of wire or wood, as around or along a field, garden, etc.'[139] Neither the Oxford nor the Macquarie definitions in their terms contemplate a vegetative barrier within the definition of 'fence'; however, the definition of 'to repair' in the Fences Act shows clearly that live fences are fences for the purposes of the Act.

3.4 One submission lamented the lack of a definition of fence in the Act and saw the inclusion of such a definition as desirable.[140]

3.5 There is a dearth of statutory definitions of the word 'fence' in Victorian legislation. While Part I of the *Land Act 1958* (Vic.), which deals with 'Crown Lands Generally', contains a definition of 'fence', this prescribes four kinds of fence in a manner similar to the pre-1968 list of 'sufficient fences' in the Fences Acts.[141]

3.6 The New South Wales, Queensland and Northern Territory Acts all contain a definition of 'fence' which stands behind the definition of 'dividing fence'.[142] Only in South Australia is the ordinary meaning of the word 'fence' relied upon. The New South Wales Act provides perhaps the best model. It defines a 'fence' as follows:[143]

> 'fence' means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole boundary separating the land of adjoining owners, and includes:
>
> (a) any gate, cattlegrid or apparatus necessary for the operation of the fence; and
>
> (b) any natural or artificial watercourse which separates the land of adjoining owners; and
>
> (c) any foundation or support necessary for the support and maintenance of the fence,
>
> but does not include a retaining wall or a wall which is part of a house, garage or other building.

3.7 In the Victorian Supreme Court case of *City of Greater Geelong v. Herd*,[144] where the issue of what constitutes a fence arose under planning law rather than the Fences Act, Batt J. held that a fence, in the ordinary sense, has two essential features: that of enclosing or barring an area; and that of being located along or serving to define the

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138 ibid., p. 1608.

139 A. Delbridge, et. al.(eds.), *The Macquarie Dictionary*, 3rd edn, The Macquarie Library, Sydney, 1997, p. 776.

140 Submission no. 20.

141 *Land Act 1958* (Vic.), s. 3.

142 *Dividing Fences Act 1991* (NSW), s. 3; *Dividing Fences Act 1953* (Qld), s. 6; *Fences Act* (NT), s. 5.

143 *Dividing Fences Act 1991* (NSW), s. 3.

144 (1997) 1 V.A.R. 424.

boundary of an area. It that case it was held that a structure erected to bar a view, which did not bar access at ground level, did not run for anything like the full length of the boundary, and did not serve to define a boundary (because an existing conventional fence already served that purpose), was a not a fence under the relevant planning scheme.

3.8 The Committee considers that the proposed Dividing Fences and Boundaries Act would benefit from the inclusion of a comprehensive definition of 'dividing fence' and recommends that this be achieved by the amalgamation of the definition in the present *Fences Act 1968* (Vic.) with the New South Wales and Northern Territory definitions of 'fence' and the principles enunciated in *City of Greater Geelong v. Herd*.[145]

Recommendation 7

The proposed Dividing Fences and Boundaries Act should define the term 'dividing fence' to mean 'a construction, ditch or embankment, or a hedge or other vegetative barrier, enclosing or barring access to land, whether or not continuous or extending along the whole of a boundary, but serving to define the boundary of or separating the lands of different owners, whether or not located on the title boundary, and includes:

(a) any gate, cattlegrid or apparatus necessary for the operation of the fence; and

(b) any natural or artificial watercourse which is ordinarily sufficient to prevent trespass by persons or stock entering on foot; and

(c) any foundation or support necessary for the support and maintenance of the construction,

but does not include a retaining wall or the wall of any building.

3.9 The Committee's definition excludes retaining walls because these structures serve quite different purposes from fences. They generally exist for the purpose of stabilising the face of land or providing structural support for material on and below the surface of land and not for the purpose of separating the land of adjoining occupiers.[146] The rights and obligations of neighbouring landowners concerning the

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145 ibid.

146 See *Gollan v. Cranfield* (1985) 3 Butterworths Property Reports 9387, 9389 per Cohen J. (NSW Supreme Court) and *Carter v. Murray* [1981] 2 N.S.W.L.R. 77, 79 per McLelland J. (NSW Supreme Court). See generally, New South Wales, Law Reform Commission, *Dividing Fences*, Community Law Reform Project, Report LRC 59, the Commission, Sydney, 1988 (hereafter cited as 'NSWLRC Report'), pp. 72–76.

erection and maintenance of retaining walls are best governed by the common law doctrine of support to land and therefore are not properly the subject of dividing fences legislation.

'Owner' and 'Occupier'

3.10 Liability to contribute to the construction or repair of dividing fences under the Fences Act rests with the 'occupiers of adjoining lands'.[147] By section 3, 'occupier'

> includes any person who is—
>
> in the actual occupation of or entitled as owner to occupy any land purchased from the Crown under contract of sale or alienated from the Crown by grant lease or licence; and
>
> the holder of a right to occupy a residence area in respect of land under the **Land Act 1958** whether covered by a mining licence under the **Mineral Resources Development Act 1990** or not -
>
> but does not include—
>
> (a) any person in the occupation of or entitled to occupy land under a licence under the **Mineral Resources Development Act 1990**; or
>
> (b) any person in the occupation of land held by yearly licence under any Act relating to the sale and occupation of Crown lands which has been in force or comes into force.

The term 'owner' is not defined and is used only in sections 24 and 27, although contribution as between landlord and tenant is the subject of section 10. Section 27 exempts the owner, the occupier and their agents from the offence of snaring and trapping vermin within 11 metres of a vermin-proof fence. Section 24 effectively extends liability to contribute to the construction or repair of a vermin-proof fence to an owner, if the occupier is unable to pay. This special situation is discussed below.[148]

3.11 The only other State or Territory in Australia where liability for fencing costs attaches to occupiers rather than owners is the Australian Capital Territory,[149] where the use of the term 'occupier' is consistent with the distinctive system of land tenure in that Territory, in that most property is held on a lease from the Crown. In the absence of any feature distinguishing land tenure in Victoria from that of other States, there would appear to be no particular rationale for the different approach taken in Victoria.

147 *Fences Act 1968* (Vic.), s. 4.

148 *infra*, paras. 3.18 & 3.96.

149 *Common Boundaries Act 1981* (ACT), s. 2.

3.12 Victoria's divergence from the approach in other States occurred in 1874, prior to which liability to contribute to the cost of fencing attached to owners of land.[150] The change in focus from owners to occupiers occurred with the enactment of *The Fences Statute 1874* and followed more than two years of disputation between Upper and Lower Houses of the Parliament on unrelated matters. When the first form of the Bill was introduced in 1871,[151] its purpose was said to be to extend the reach of the Act from freehold owners to selectors who had elected to purchase land from the Crown in accordance with the provisions of Part II of the *Land Act 1862* (Vic.).[152] Those provisions enabled selectors to enter what was in effect a credit contract, whereby the selector paid a deposit and annual rental[153] and was considered a lessee until final payment was made. Although they were not owners, selectors were 'in actual occupation of, or entitled to occupy' the lands they selected. The change to 'occupier' was made to encompass this significant category of landholders, without consideration apparently being given to the alternative approach of defining 'owners' to include such persons.

3.13 That alternative approach was adopted elsewhere, where the term 'owner' is defined to include not only persons who are legally or equitably entitled to an estate of freehold in possession or otherwise in receipt of or entitled to receive rents and profits from the subject land, but leaseholders and licensees of various kinds[154] and, in the case of Tasmania, 'purchaser[s] on credit of Crown land and every person deriving title from same'.[155]

3.14 The Committee notes that the Statute Law Revision Committee of the Victorian Parliament (SLRC) in 1965 considered various suggestions for amending the definition of 'occupier' in the Victorian Fences Act and recommended some changes,[156] but did not address the question of whether the Act should impose liability on owners, as against occupiers.

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150 See 'An Act to Regulate the Dividing Fences of Adjoining Owners', 9 Geo. IV, c. 12 (1828), which applied in Victoria and *The Fences Statute 1865*, 28 Vict., No. 239.

151 Victoria, Legislative Assembly, *Debates*, 1 Aug. 1871, p. 686, per Mr Longmore.

152 25 Vict., No. 145.

153 ibid., ss. XXI–XXIII.

154 See *Dividing Fences Act 1991* (NSW), s. 3; *Fences Act 1975* (SA), s. 4; *Dividing Fences Act 1953* (Qld), s. 6; *Dividing Fences Act 1961* (WA), s. 5; *Boundary Fences Act 1908* (Tas.), s. 4; and *Fences Act* (NT), s. 5.

155 *Boundary Fences Act 1908* (Tas.), s. 4.

156 Victoria, Parliament, Statute Law Revision Committee, *Report from the Statute Law Revision Committee upon Proposals to Amend the Fences Act 1958 together with the Minutes of Evidence and Appendices*, Parl. Paper 8795/66, A.C. Brooks, Government Printer, Melbourne, 1966 (hereafter cited as 'SLRC Report'), p. 1, paras. 5–7.

3.15 From its examination of the matter, the Committee has concluded that the liability of occupiers rather than owners under the Victorian Act is an historical anomaly and that Victorian legislation ought to be brought into conformity with other States in this respect. In reaching this conclusion the Committee has taken account of the fact that a fence, once constructed, forms part of the land to which it is affixed and becomes the property of the legal owner of the land.[157] As a matter of equity, it would seem appropriate that the obligation to contribute to the cost of fence construction should be borne by the owner, the value of whose property is thereby increased. Since it is likely that an owner's interest in the land will outlive that of a tenant, it is also appropriate for an owner, rather than an occupier, to negotiate to determine the location and characteristics of the fence, albeit having regard to his or her tenant's needs.

3.16 As the Fences Act presently stands, an owner's proprietary rights may be jeopardised by an agreement between neighbouring occupiers to position a fence other than on the title boundary, without notice to the owner. Except in section 5(4), which applies to land beside watercourses, the Act provides no protection for an owner against claims in adverse possession arising from fences positioned elsewhere than on the title boundary, whether by agreement or otherwise.

3.17 In the course of its Inquiry, the Committee has considered a number of issues for which the change from occupier to owner has significance. These include: specification of vendor and purchaser obligations where a fencing notice is received in the context of the sale of a property,[158] registration on title of agreements for 'give and take' fences,[159] clarification of the liability of body corporate members,[160] and the imposition of charges on land in respect of unpaid fencing debts.[161]

3.18 With respect to charges on the land, the Committee notes that the present section 24 shifts liability from the occupier to the owner before providing that a charge may be registered on title. The liability in the owner arises only **after** the Court is satisfied that the occupier is unable to pay[162] and takes effect after the adjoining occupier has performed the whole of the fencing work pursuant to an order of the Court.[163] The contribution outstanding to the adjoining occupier then becomes

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157 *Interpretation of Legislation Act 1984* (Vic.), s. 38, where '**land'** is defined for the purposes of all Victorian legislation as including 'buildings and other structures permanently affixed to land'.

158 See *infra*, paras. 3.55–3.58 & recommendation 27.

159 See *infra*, paras. 3.69–3.70 & reccomendation 30.

160 See *infra*, paras. 3.85–3.93 & recommendations 39–42.

161 See *infra*, paras. 3.95–3.98 & recommendation 43.

162 ibid., s.24(1).

163 ibid., s.24(2).

and remains a charge upon the land occupied by the person in default[164] until the owner or occupier of that land or any mortgagee or lienee[165] pays the outstanding amount, including any interest payable.[166] The amount for which 'any person' is liable may be the subject of a complaint by either party or the owner for the time being and the owner may appear in any proceeding.[167] The Committee considers that this is a cumbersome means to a desirable end, and is best circumvented by making the owner liable, subject to the provisions of the Act apportioning contribution as between landlord and tenant in the case of non-residential leases.[168]

3.19 The Committee is also of the view that primary liability in the owner would improve the procedural arrangements that currently apply where landlord and tenant are each part liable.[169] Under the current provisions, a tenant is formally the liable party.[170] For tenancies under twelve years—which can be assumed to be most tenancies in Victoria (other than Crown leases and licences, to which different provisions apply)—the landlord is liable to pay a sum greater than or equal to his or her tenant.[171] If the landlord does not agree to pay that sum, the tenant may be sued and may join the landlord in the action with the result that a landlord's refusal to pay can result in the tenant having to go to court. Section 10(2) permits a tenant to pay the whole sum and set the landlord's contribution off against the rent. However, this puts a tenant in an invidious position if the major contribution is to come from the owner and the owner wishes to maintain his or her opposition to the fence being proposed.

3.20 For these reasons, the Committee recommends that the proposed Dividing Fences and Boundaries Act should make owners of land primarily liable for contribution towards the cost of fencing works. However, the Committee considers that the convenience of the present arrangement for service of notices upon the occupier, without the need to determine the actual ownership of land, should be maintained and that service of such notices either upon the occupier or the owner should be effective under the Act. Moreover, the relationship between owners and occupiers of the same land in respect of fencing works needs to be addressed in the

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164 ibid., s.24(3).

165 ibid., s.24(4). Any amount paid by a mortgagee or lienee is deemed to be part of the principal sum secured by the mortgage or lien.

166 By section 24(2) interest is calculated annually at 6%.

167 Fences Act, s. 24(5) & (6).

168 See *infra*, paras. 3.45–3.46 & recommendation 23.

169 See Fences Act, s. 10.

170 As the 'occupier' pursuant to Fences Act, ss 3 & 4.

171 ibid., s. 10.

proposed Act. Consequently, a definition of 'occupier' (other than as owner) needs to be retained in an amended form.

3.21 In considering an appropriate definition of 'owner', the Committee has consulted fencing legislation in all other States and the Northern Territory and the definition which appears in the *Building Act 1993* (Vic.).[172] The Committee considers that the definition proposed below satisfies the need to extend the ordinary meaning of 'owner' to encompass persons with some interests in land other than title interests.

3.22 So far as liability under the Act to contribute to the cost of fencing works is concerned, the Committee believes that the meaning of 'owner' should be expanded to include certain occupiers of unalienated Crown land. This will include a number of categories of persons within the concept of an 'owner' who presently fall within the definition of 'occupier' under the *Fences Act 1968* and will include others who may not presently be liable to contribute to the cost of fencing works.[173]

Recommendation 8

The proposed Dividing Fences and Boundaries Act should provide that owners of adjoining land are liable to contribute to the cost of fencing works.

Recommendation 9

The provisions in the proposed Dividing Fences and Boundaries Act relating to service of fencing works notices, notices of assent and notices of dispute should provide that service on either the owner or the occupier of the subject land is effective for the purposes of the Act.

Recommendation 10

The definition of 'owner' in the proposed Dividing Fences and Boundaries Act should be as follows:

'Owner' means—

> ***(a) any person who jointly or severally (whether at law or in equity) is entitled to land for any estate of freehold in possession or who receives or is entitled to receive any rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise; and***

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172 *Building Act 1993* (Vic.), s. 3.

173 e.g., licensees under the *Victorian Plantations Corporation (Amendment) Act 1998* (Vic.). See *infra*, para. 4.23.

(b) in the case of land subject to an agreement for sale or a right of purchase, whether for cash or on terms, the person entitled to the benefit of that agreement or right of purchase.

Recommendation 11

The proposed Dividing Fences and Boundaries Act should provide that where unalienated Crown land is occupied (other than for predominantly public purposes) by any person—

(a) under a lease or licence of more than one year; other than a licence under the* Mineral Resources Development Act 1990 *(Vic.); or

(b) under a right to occupy a residence area in respect of land under the* Land Act 1958 *(Vic.) whether covered by a mining licence under the* Mineral Resources Development Act 1990 *(Vic.) or not,

that person shall be deemed to be an 'owner' of the land for the purposes of contribution to the cost of fencing works under the Act.

Recommendation 12

The definition of 'occupier' in the proposed Dividing Fences and Boundaries Act should be as follows:

'Occupier' means—

Any person in actual occupation of land or entitled to immediate possession and occupation thereof.

Construction, Maintenance and Repair

3.23 The *Fences Act 1968* deals separately with the **construction** of dividing fences and the **maintenance** and **repair** of such fences. This situation has existed since 1874. Under Part I of the Act liability is imposed on the occupiers of adjoining lands to 'construct, or join in or contribute to the construction of' a dividing fence sufficient for both their purposes in accordance with certain provisions.[174] A person desiring to compel another to comply with this obligation may serve a notice to fence in writing containing certain specified information.[175] Where a notice to fence has been served the Magistrates' Court or an arbitrator can determine specified matters in dispute between the adjoining occupiers.[176] Where a person fails to perform his or her part of an agreement or to comply with an order or award, the other party may construct the

[174] Fences Act, s. 4(1).
[175] ibid., s. 6.
[176] ibid., s. 7.

whole fence and recover from the defaulting party the proportion of the cost agreed, ordered or awarded.[177] The Part contains a provision dealing with the situation where the occupier of an adjoining property cannot be found[178] and another provision which details the apportionment of the cost of fencing between landlord and tenant.[179] Other provisions deal with fencing of watercourses which form natural boundaries between properties,[180] recovering contribution towards the cost of fencing from the first occupier where land adjoins unalienated Crown land,[181] and temporary fences where a live fence is being established on land bounded by a road.[182]

3.24 Part II of the Act, which deals with 'maintenance and repairs of fences', imposes a liability on occupiers 'to repair, or join in or contribute to the cost of repair of' a dividing fence which is in a state of disrepair.[183] The procedure for compelling compliance with this obligation is contained in section 15 of the Act and differs from that in relation to the construction of fences, in that the notice required to be given to an adjoining owner has no prescribed content, and, if no response is received within seven days, repairs can proceed.[184] In default of agreement, the adjoining occupier's contribution to the cost of repairs can then be recovered in the Magistrates' Court.[185] Where a dividing fence is destroyed or damaged by fire or by a falling tree through the neglect of an occupier, the negligent occupier is liable to pay for the cost of repair of the entire fence or the damaged portion of it.[186] Where a dividing fence is damaged or destroyed by accident, either occupier may immediately repair the fence without notice to the other, and recover contribution later.[187]

3.25 The New South Wales Law Reform Commission has observed that 'the distinction between construction and repair is largely artificial'.[188] 'Construction', 'maintenance' and 'repair' are not defined in the Act. The Oxford English Dictionary defines 'construction' to mean 'the action of constructing something' and the word 'construct' is defined as 'make by fitting parts together; build, erect'.[189] 'Maintenance' is defined to mean 'the action of keeping something in working order, in repair'[190]

177 ibid., s. 8.
178 ibid., s. 9.
179 ibid., ss. 10 & 11.
180 ibid., s. 5.
181 ibid., s. 12.
182 ibid., s. 13.
183 ibid., s. 14.
184 ibid., s. 15(2).
185 ibid., ss. 15(2) & 16.
186 ibid., s. 14.
187 ibid., s. 15(3).
188 NSWLRC Report, op. cit., p. 33.
189 L. Brown (ed.), op. cit., p. 489.
190 ibid., p. 1669.

and the verb 'to repair' means 'restore (a structure, machine etc.) to unimpaired condition by replacing or fixing worn or damaged parts'.[191]

3.26 Nowhere is the distinction between construction and repair more confused than in the concept of 'replacement'. Is the replacement of an existing fence by a new one a construction or repair? As the New South Wales Law Reform Commission has observed:[192]

> The courts have proved equivocal on the distinction between the construction and repair of fences, particularly when the replacement of an existing fence is involved.

3.27 The Commission noted that in some cases repair has been held to include the replacement of a fence.[193] In *Palmer v. Lintott*[194] the Supreme Court of Western Australia held that a dilapidated existing fence that is entirely replaced with a new fence is a repair, and that the Part of the Western Australian Act dealing with construction contemplates only the erection of an original dividing fence. In other cases the courts have held that the replacement of an existing fence amounts to the construction of a new fence and is, therefore, not a repair.[195] In *Stacey v. Meagher*[196] Neasey J. of the Tasmanian Supreme Court thought that 'erection' included repair and replacement of an existing fence, as well as construction of a new fence. The New Zealand courts have adopted a test whereby the difference between construction and repair depends upon whether the previously accepted fencing line has been adhered to and the degree to which a fence of substantially different character has been created.[197]

3.28 This Committee considers that further confusion arises from the fact that section 15(3), which appears in the Part of the Victorian Act dealing with 'Maintenance and Repair', contemplates that where an entire dividing fence is destroyed by accident, its effective replacement can constitute a 'repair'.

3.29 Accordingly, the Committee can see no strong rationale for maintaining the historical distinction between construction on the one hand, and maintenance and

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191 ibid., p. 2547.

192 NSWLRC Report, op. cit., p. 32.

193 ibid. See e.g. *Palmer v. Lintott* [1981] W.A.R. 157; *Hennessey v. Petrie* (1977) 4 *Queensland Lawyer* 242.

194 [1981] W.A.R. 157.

195 e.g. *Lengyel v. Francis* (1983) 6 *Petty Sessions Review* 2833 (case stated to the Supreme Court of NSW).

196 [1978] Tas.S.R. 56.

197 See *Tibbits v. Gerrand* (1896) 14 N.Z.L.R. 678; *McSaveny v. Smith* (1905) 24 N.Z.L.R. 245; *Mulligan v. Nelson* [1959] N.Z.L.R. 733. See also *Storey v. Lockhart* (1915) 11 Tas.L.R. 163. See generally, NSWLRC Report, op. cit., pp. 32–33.

repairs on the other, and can see advantages in adopting the model of the New South Wales Act, which applies a single set of procedures to all fencing works.[198]

3.30 Such a change would mean that a longer period of notice would be required before a person seeking to obtain a contribution from a neighbouring owner to non-urgent fence repairs could effect the repairs. Where fence repair or restoration is more urgent, the Committee considers that a variant of the present section 15(3) should be incorporated within the common procedure, to permit an owner to repair or restore a fence without notice, subject to such owner being in a position, in the event of any challenge, to convince the Victorian Civil and Administrative Tribunal (the Tribunal) both of the urgency of the need and the suitability, in all the circumstances, of the works undertaken. A provision to this effect would preserve the flexibility of the present Act in meeting urgent needs, while limiting the opportunities for misuse of the provision. It is envisaged that orders for demolition and reconstruction should be among the remedies available if the requirements of urgency and reasonableness are not able to be satisfied or if the conduct of an adjoining owner is not in good faith.

Recommendation 13

The proposed Dividing Fences and Boundaries Act should contain common procedural requirements to compel contribution in respect of 'fencing works' (as defined).

Recommendation 14

The proposed Dividing Fences and Boundaries Act should contain a definition of 'fencing works' as follows:

(a) the construction, replacement, repair or maintenance of the whole or part of a dividing fence, including:

(i) the planting, replanting and maintenance of a hedge or similar vegetative barrier; and

(ii) the cleaning, deepening, enlargement or alteration of a ditch, embankment or watercourse that serves as a dividing fence;

(b) the surveying, preparation or clearing of land along or on either side of the common boundary of adjoining lands for such a purpose, but not the construction of retaining walls;

(c) the design of a dividing fence; and

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198 The Committee notes that the NSWLRC expressed a similar view and that its recommendation resulted in the NSW provision (*Dividing Fences Act 1991* (NSW), s. 3), which this Committee has adopted.

(d) the demolition of an existing dividing fence.

Recommendation 15

The notice requirements for effecting all fencing works under the proposed Dividing Fences and Boundaries Act should contain an exemption to the effect that, where a dividing fence or any portion thereof is suddenly damaged or destroyed and urgent repair or reinstatement is necessary, an owner may repair or reinstate the dividing fence without giving the requisite notice. In these circumstances the person effecting the repair or reinstatement should be entitled subsequently to demand and recover from the other owner the proportion of the cost of repairing or reinstating the fence as agreed or as determined by the Victorian Civil and Administrative Tribunal.

Contribution by Adjoining Owners

3.31 The Fences Act presently creates a liability in adjoining occupiers for the construction and repair of dividing fences and provides a mechanism for the resolution of disputes.[199] Under the Act, an occupier is prima facie entitled to have a dividing fence, but it must be such as to answer the purposes of both occupiers.[200] Where adjoining occupiers have different purposes—such that one may require a more substantial fence than the other—the Act envisages that the fence erected will answer the greater need (and thereby the lesser one), but is silent on the question of contribution to the cost of such fencing.

The Concept of a 'Sufficient Fence'

3.32 In order to reach agreement as to contribution to the cost of fencing works, parties must be able to assess their obligations or foreshadow how the Tribunal will determine those obligations. Fences statutes prior to 1968 obliged adjoining occupiers to contribute equally to a 'sufficient fence', regardless of whether one party had need of a fence, and contained an extensive list of kinds of fences considered 'sufficient'.[201] 'Sufficiency' was an objective standard, akin to the Australian Capital Territory concept of a 'basic fence',[202] which relies on the definitions of 'basic urban fence' and 'basic rural fence' in that Territory's Building Manual.[203] The concept of a 'sufficient

199 Contribution in respect of construction as between adjoining occupiers is dealt with in ss. 4(1) & 7 of the *Fences Act 1968* (Vic.) and as between landlords and tenants in ss. 10 & 11. Contribution in respect of repairs is the subject of ss. 14 & 16.

200 See Fences Act, s. 4(1).

201 See *Fences Act 1958* (Vic.), s. 4.

202 *Common Boundaries Act 1981* (ACT), s. 2(1).

203 Compiled pursuant to Part II of the *Building Act 1972* (ACT).

fence' achieved two things. It constituted a de facto industry standard of adequacy of construction and provided minimum specifications for what the Act considered a 'sufficient fence' between adjoining occupiers. Using these minimum levels as a guide, neighbouring occupiers could more readily agree on their respective contributions to the cost of fence construction; so that, where one neighbour required a level of construction higher than that specified in the Act as sufficient, the other neighbour could point to the Act to justify requiring the neighbour to pay the difference.

3.33 In an endeavour to create greater flexibility, the repeal of the extensive list of 'sufficient fences' in 1968 and its replacement with a more subjective notion of sufficiency to 'the purposes of both occupiers'[204] has created a degree of uncertainty as to the standard of fence to which a person can be required to contribute. In fact, the 1968 Act does not in all circumstances address the inter-relationship between several fundamental and distinct issues regarding fence construction: namely, (a) the purpose for which an occupier uses his or her land; (b) the kind of fence sufficient for that purpose; and (c) the level of contribution required of each adjoining occupier.

3.34 Under the proposed Dividing Fences and Boundaries Act two adjoining owners may have different, but reasonable, purposes requiring a particular type of fence. Where land used for agricultural purposes adjoins an urban residential property, a post and wire fence may be suitable for the farmer's purposes, but a 1600 mm paling fence would be more suitable for the residential property owner. Section 4(1)(a) of the present Act provides that a farmer in this situation is liable only for half the cost of a fence sufficient for his own purpose, although it is the Committee's understanding that an occupier of unfenced rural land is liable to contribute a half-share of the cost of a rural dividing fence, regardless of his or her own actual need for the fence. However, in other situations where purposes and needs may differ, the present Act offers no guide to proportionate contribution. For example, where a swimming pool is located close to a boundary, the swimming pool owner would require a higher standard of fencing than his neighbouring owner, and two adjoining owners may have differing security requirements for fencing because of the use they make of their land.

3.35 The question is whether it is reasonable to require one owner to pay a half share of the cost of meeting his neighbour's higher purpose and whether there are some purposes to which it is not reasonable to require the neighbour to contribute. The Committee notes that the present Act does provide some assistance in the

[204] Fences Act, s. 4(1).

resolution of these kinds of situation in that it provides that in default of agreement a court or arbitrator in making an order or award:[205]

> shall be guided as to the kind of fence to be constructed by the kind of fence usually constructed in the place where it is proposed to construct the fence.

However, this is not a comprehensive or adequate provision in such circumstances.

3.36 A number of the submissions sought to ameliorate this complexity by appealing to the concept of a 'standard fence'.[206] Like the 'sufficient fence', the 'standard fence' was seen as benchmarking both an industry standard and the type of fence likely to attract an obligation of equal contribution by each owner. In the former case, it would define a minimum standard; in the latter, it would determine the maximum contribution the owner not initiating the fencing works could be compelled to pay. It would formalise how things appear currently to operate in practice:[207]

> What we normally tell our clients is that the minimum fence has a certain cost, and that is what we call the minimum requirement share, and the person who wants a different type of fence, which usually is a higher cost item, pays the difference and is then entitled to have that fence.

Despite this statement, it is the Committee's understanding that a party is not entitled automatically to proceed with the more expensive of two competing options simply because he or she is willing to pay the extra cost or the whole cost.

3.37 While there appears still to be a public perception that each occupier is required to contribute a sum equal to half the cost of a 'standard fence', and most court orders appear to reflect that principle,[208] the Committee found such a standard to be non-existent in reality. Even the standard paling fence of the past was sometimes 5 foot 4 inches and sometimes 6 foot high, and is now sometimes 1600 mm and sometimes 1900 mm (neither of which corresponds exactly to its pre-metric counterpart). Fences today are made from a variety of materials using a variety of construction methods, and the kind of fencing prevalent in one area may be quite atypical of another. An attempt to specify whether a paling or pressed metal fence is the contemporary standard would meet the same difficulty as it does currently in individual cases, because there is not one standard but many. Moreover, standards will change over time.

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205 ibid., s. 7(6).

206 Submission nos. 3, 4, 20 & 40.

207 T. Nikolson, op. cit., p. 125.

208 See Appendix C to this report.

3.38 Accordingly, the Committee does not recommend a return to the past by reintroducing an extensive list of what constitutes 'sufficient fences' nor that standards for dividing fences be prescribed. It does consider, however, that the principles governing contribution might usefully be clarified if local councils were to be given the power to specify a norm for areas within their municipalities.

3.39 In Western Australia proposed model local laws, if enacted, will prevent a person (without special permission) from erecting a dividing fence that is not a 'sufficient fence'. A 'sufficient fence' is one constructed and maintained in conformity with the materials, specifications and requirements prescribed in schedules, which apply respectively to residential, commercial and industrial, and rural lots. A representative of the Housing Industry Association of Victoria, who gave evidence before the Committee, warned against giving local government the power to determine minimum fencing standards for fear that the standard might be set too high and impose an onerous obligation on landowners.[209] Nor did the Municipal Association of Victoria in its evidence convey keenness on the part of its members to assume such a role.[210]

3.40 Consequently, the Committee has concluded that councils should neither determine an enforceable minimum for their municipalities nor formulate the standard to prevail in the event of dispute. However, it proposes that, for the purposes of determining **contribution to the cost** of fencing, councils should be empowered to define a fencing norm. This will enable parties to have a better idea of the kind of fence to which they would be expected to contribute equally. The Tribunal should, in the absence of agreement, determine the liability for any additional amount that may arise from a neighbour wishing to construct a more costly or elaborate fence. The fencing norm would also become one of a number of factors that the Tribunal could take into consideration in determining the kind of fence to be built,[211] but its main use would be as a benchmark in determining contribution.

3.41 To clarify the obligations of adjoining owners in 'other cases' as those words are used in section 4(1)(b) of the present Act, the Committee recommends that the proposed Dividing Fences and Boundaries Act should provide expressly that adjoining owners are prima facie liable to contribute fifty per cent each of the cost of

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209 T. Wishart, *Minutes of Evidence*, 3 Apr. 1998, p. 133.

210 J. O'Donoghue, *Minutes of Evidence*, 2 Apr. 1988, p. 83.

211 Under s. 7(6) of the present Fences Act. See further *infra*, para. 3.94.

erecting a dividing fence of a kind normal for the area in which the properties are located.

Recommendation 16

The proposed Dividing Fences and Boundaries Act should provide that in cases other than those referred to in the present section 4(1)(a), owners are prima facie liable to contribute in equal proportions to the cost of a fencing norm for the area, as identified by the relevant local municipal council. Any owner demanding a higher requirement should meet any difference between the cost of a normal fence and a fence that meets that higher requirement.

Recommendation 17

For the purposes of determining the appropriate contribution by adjoining owners, local councils should be authorised to designate a fencing norm or standard of fence for various parts of their municipalities, based on the type of dividing fencing most prevalent in the areas concerned. Such fencing norms should be advisory not prescriptive.

3.42 A further issue relating to contribution raised in evidence[212] concerned an occupier's liability to contribute to an upgraded fence, where there is an existing fence in good repair; for example, where a developer or home improver wants an otherwise structurally sound fence improved or replaced so as to benefit the overall amenity of the property or area. The Committee considers that, in the absence of agreement, such modification or replacement should be at the full cost of the person seeking the improvement.

Recommendation 18

The proposed Dividing Fences and Boundaries Act should contain a provision to the effect that where one owner proposes that an otherwise serviceable existing fence be upgraded (other than for appropriate repair and maintenance), the owner making the proposal should be liable for the full cost of the upgrade.

Owners and Occupiers Purposes

3.43 By creating liability in the occupier the present Fences Act ensures that the fence to be constructed will answer the needs of present usage. The fence must be 'sufficient for the purposes of both occupiers'. As previously argued, there are strong

[212] T. Wishart, op. cit., p. 120.

reasons for making the owner of property primarily liable for the cost of fencing works. However, if this occurs, there is a need to ensure that, where someone (other than the owner) occupies a property, the occupier's needs are considered. There is also a need to address liability for any additional cost arising from any fencing requirement of the occupier that is not covered by the legal relationship between the owner and the occupier, and which exceeds the ordinary needs the owner has of the fence. The Act must provide a mechanism for resolving any dispute that arises under the proposed Dividing Fences and Boundaries Act between owners and occupiers or between owners, where the dispute derives from the needs of an occupier. Finally, the Act must provide for the service of notices by the occupier of land in appropriate circumstances; for example, where repairs are needed to a fence and the owner is unable or unwilling to serve a fencing works notice, and where the occupier with the consent of the owner is prepared, or required by the Act, to assume the owner's liability for the cost of the fencing works.

3.44 To address these issues, the Committee proposes that where a person other than the owner is in occupation or entitled to occupy land, the owner, before issuing a fencing works notice, or upon being served with the same and before entering into any agreement in respect of the fencing works, must give the occupier fourteen days' notice of the fencing proposal. An occupier who is in dispute with the owner as to the kind of fence to be constructed must within that time give notice to both the owner and the neighbouring owner of his or her disagreement with the proposal, failing which the occupier will be deemed to have consented to it. If the occupier requires a fence that is higher or otherwise more expensive or elaborate than that which the owner would ordinarily require then, subject to the terms and conditions under which the occupier holds the land, he or she should be liable for the cost of the difference. In any dispute where the requirements of an occupier or an occupier's contribution are in issue, the occupier may either initiate an application to the Tribunal or be joined as a party in any existing application. The Tribunal should be empowered to determine both the kind of fence to be constructed and the liability of the occupier.

Recommendation 19

The proposed Dividing Fences and Boundaries Act should provide that where a person other than the owner is lawfully in occupation of (or entitled to occupy) land, the owner before issuing a fencing works notice, or upon receiving same and before entering into any agreement in respect of fencing works, must give the occupier fourteen days' notice of the proposal. The occupier within that time may object by notice to both the owner and the adjoining owner on the grounds that the proposed fence is not sufficient for his or her purposes in occupying the land. Failing objection

within the specified period, the occupier shall be deemed to have consented to the proposal.

Recommendation 20

The proposed Dividing Fences and Boundaries Act should provide that where an occupier's purposes for a fence are higher or otherwise more costly or elaborate than the purposes the two owners would ordinarily require, subject to the terms and conditions under which the occupier holds the land, the occupier shall be liable to pay the cost of the difference.

Recommendation 21

The proposed Dividing Fences and Boundaries Act should provide that, in respect of any dispute where the purposes or financial contribution of an occupier are in issue, the occupier may either initiate an application to the Tribunal or be joined as a party to any existing application, and that the Tribunal should be empowered to determine both the kind of fence to be constructed and the liability of the occupier for any additional cost.

Recommendation 22

The proposed Dividing Fences and Boundaries Act should retain provision for the service of notices by the occupier of land on an adjoining owner in appropriate circumstances.

Contribution between Landlords and Tenants

3.45 As distinct from the previous section which concerned relationships between owners and occupiers, which would include tenants, licensees and those holding other occupational rights, the present Act specifically addresses the relationship between landlords and tenants. Section 10 of the Fences Act apportions the cost of fencing as between landlord and tenant on a scale that reflects the extent of the tenant's future leasehold interest. Where the interest of the tenant at the time of the construction of the fence is for a term of less than three years, the whole cost is payable by the landlord.[213] Where such term is more than three years but less than six, the tenant's contribution is one-quarter;[214] where it is six years but less than twelve, it is one-half;[215] and where it is twelve years or more, the tenant pays the whole.[216]

[213] s. 10(1)(a).
[214] s. 10(1)(b).
[215] s. 10(1)(c).

3.46 The Committee considers that residential tenants should not be liable for the costs of fencing, except where their purposes require a fence that is more costly than the owner would ordinarily require. The erection or replacement of a fence is an improvement to the land, which should not be distinguished from other improvements for which a landlord is ordinarily responsible. In the case of longer-term commercial leases, and leases which are not predominantly for residential purposes—such as a mixed business with a shop and attached dwelling—the Committee considers that some contribution to the cost of fencing is appropriate. It recommends that the scale governing contribution be adjusted from that which applies under the present Act so as to simplify the law and to reflect changes in the life expectancy of some modern fences.[217]

Recommendation 23

Under the proposed Dividing Fences and Boundaries Act the apportionment of the cost of fencing works as between a landlord and a non-residential tenant should be as follows:

- ***(a) Where the interest of the tenant at the time of giving or serving a notice, application or order under this Act is less than for a term of five years, the whole cost shall be payable by the landlord.***
- ***(b) Where the interest of the tenant at the time of giving or serving a notice, application or order under this Act is for a term of five years but less than ten years, the landlord and the tenant shall each pay one half of the cost.***
- ***(c) Where the interest of the tenant at the time of giving or serving a notice, application or order under this Act is for a term of ten years or more, the whole cost shall be payable by the tenant.***

Land Separated by Unused and Disused Roads

3.47 There are many old subdivisions in rural Victoria where a road, which has never been made or used, or which is no longer used, is effectively enclosed within private land. However, the Fences Act does not provide for situations where a road intervenes between two occupiers whose occupation is contiguous, apart from that intervention.

3.48 The only provision in the Act that refers to fencing in connection with roads is section 13, which provides for a situation where the occupier of land bounded by a road 'desires to plant a live fence on the common boundary of his land and the road

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216 s. 10(1)(d).

217 See *infra*, para. 3.60.

and for that purpose to construct a temporary fence upon such road'. The section requires written notice to be given to the relevant municipal council 'describing the proposed fence and its proposed position'. On good and sufficient cause shown by the municipal council, the Magistrates' Court may order the occupier not to proceed with the construction of the temporary fence.[218] Otherwise, the occupier can construct a temporary fence not more than '1.83 metres distant from the nearest point on the boundary of his land', so long as the 'width of the road available for traffic after the construction of the temporary fence' is not less than 9.15 metres.[219] The temporary fence can be maintained on the road for a period not exceeding four years or such longer period as the municipal council allows 'until the live fence becomes a fence sufficient for the purposes of the occupier'.[220]

3.49 While the Committee is aware that sections 402(1) and 407(2) of the *Land Act 1958* (Vic.) contain some provisions relating to the fencing of unused roads, it notes that section 11 of the *Fences Act 1975* (SA) and section 5 of the *Dividing Fences Act 1991* (NSW) provide that a person deriving benefit from a dividing fence in these circumstances is liable to contribute to it in a just sum. The New South Wales section provides:

> (1) The intervention of a road or watercourse between 2 parcels of land does not prevent:
>
> (a) the owners of those parcels of land from being taken to be adjoining owners for the purposes of this Act; or
>
> (b) a claim for contribution for fencing work being brought in respect of a fence on either side of the road or watercourse.
>
> (2) This section applies only if the fence has been used or, in the opinion of a Local Court or local land board could reasonably be used, as a dividing fence by the owners of the land on either side of it.

3.50 The Committee considers that this is a useful provision that, with some modification, should be included in the proposed Dividing Fences and Boundaries Act.

Recommendation 24

The proposed Dividing Fences and Boundaries Act should include a provision to the effect that an 'owner' (as defined in the Act) shall be liable to contribute to fencing works where:

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218 *Fences Act 1968*, s. 13(2).

219 ibid., s. 13(3).

220 ibid., s. 13(4).

(a) a road that has never been made or used or that is no longer used, and which is effectively enclosed within private land, intervenes between two parcels of land; and

(b) a fence has been, or in the opinion of the Tribunal could reasonably be, used as a dividing fence between that owner and an adjacent owner.

Fencing along Waterways

3.51 Section 5(1) of the present Act provides:

> Where a waterway forms the boundary between adjoining lands but is not capable of resisting the trespass of cattle, the occupiers of the adjoining lands may agree upon such line of fence on either side of the waterway as will secure a fence from the action of floods.

Section 5(2) provides a mechanism for determining disputes, and section 5(4) provides that the occupation of lands on either side of the line of the fence in these circumstances

> shall not be deemed to be adverse possession, and shall not affect the title to or possession of any of the adjoining lands, except for the purposes of this Act.

The Committee notes that section 38 of the *Interpretation of Legislation Act 1984* (Vic.) defines a 'waterway' to mean: 'a waterway as defined in section 3(1) of the *Water Act 1989*'. The Water Act contains an extensive definition of 'waterway' which includes: a river, creek, stream, watercourse, natural (and some man-made) channels, lake, lagoon, swamp, marsh and land of a certain character.[221] The Committee believes that the principle underlying section 5 of the present Act should be retained in the proposed Dividing Fences and Boundaries Act.

Contribution where Negligent or Deliberate Act

3.52 Section 14(a) of the *Fences Act 1968* provides that:

> where the dividing fence has been destroyed or damaged by fire or by the falling of a tree through the neglect of an occupier—the occupier shall be liable to repair the entire fence or the damaged portion of it.

This is an exception to the general requirement in section 14(b) of the Act that each occupier is liable to contribute to the cost of repair in a proportion agreed upon or determined by the Court. Although section 14(a) is probably directed more towards damage caused to rural fences, it does have application in an urban setting; for example, where an incinerator causes a paling fence to catch fire.

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221 *Water Act 1989* (Vic.), s. 3.

3.53 It is noteworthy that section 14(a) addresses only negligent conduct causing damage by fire or a falling tree, and section 16, which allows an occupier immediately to repair a dividing fence destroyed by accident and to recover a proportion of the cost of repair from the adjoining occupier, does not appear to contemplate negligent or deliberate destruction. It is clear, however, that the Act is not intended to limit or restrict ordinary common law principles of negligence, which would normally apply in these circumstances to make the person causing the damage liable to restore the fence or repair the damage. In the view of the Committee, the Tribunal in determining contribution under section 14(b) of the Act would take into account all the circumstances, including the conduct of the parties. Thus the Tribunal, in determining contribution, would take into account any action by an owner (or where it is relevant an occupier) which damages or shortens the life of a dividing fence, including damage from tree-roots, heaped-up soil, and heavy creeper, as discussed in this context in a number of submissions.[222] Nonetheless, the Committee can see no harm in making this clear in the proposed Dividing Fences and Boundaries Act.

Recommendation 25

The proposed Dividing Fences and Boundaries Act should contain a provision to the effect that, in determining contribution to the cost of fencing works, the Tribunal should take into account any wilful or negligent action by an owner (or where it is relevant an occupier) which shortens the life of a dividing fence.

3.54 The Committee believes that for the purposes of clarification and completeness it is desirable that the proposed Dividing Fences and Boundaries Act contain specific provision to the effect that a person who wilfully or negligently causes damage to a dividing fence is wholly liable for the cost of repairing or reinstating the fence so damaged.

Recommendation 26

The proposed Dividing Fences and Boundaries Act should contain a provision to the effect that a person who wilfully or negligently damages a dividing fence is wholly liable for the cost of repairing or reinstating the fence so damaged.

[222] Submission nos. 3, 4, 14, 18, 20, 26, 47, 58, 62, 65 & 66.

Liability on Sale or Purchase of Property

3.55 Concern was expressed in a number of submissions in relation to the effect of a notice to fence when a property is the subject of a sale.[223] Three situations could arise in relation to fencing when a property is being sold: the notice to fence is served before the contract of sale is signed; the notice is served after the contract is signed but before settlement; or the fencing works have been completed and there is an unpaid debt arising therefrom. So far as land under the operation of the *Transfer of Land Act 1958* is concerned, clause 15 of the 'General Conditions of Sale of Land under the *Transfer of Land Act 1958*' provides:[224]

> The purchaser shall assume liability for compliance with any notices or orders relating to the property sold (other than those referring to apportionable outgoings) which are made or issued on or after the day of sale but the purchaser shall be entitled to enter the property sold (without thereby being deemed to have accepted title) at any time prior to the settlement date for the purpose of complying with any such notice or order which requires to be complied with prior to the settlement date.

Clause 15 of the 'General Conditions of Sale of Land' set out in the Third Schedule to the *Property Law Act 1958*, which relates to 'general law' land, is expressed in identical terms.[225]

3.56 It is clear, therefore, that a vendor is required to comply with a notice to fence served before a contract of sale is signed, while a purchaser is liable where a notice is served on or after the day of sale. The position is not as clear where either the vendor or the purchaser is not the occupier of the property the subject of the sale or purchase. However, section 10(2) of the Fences Act would allow an owner who is selling or purchasing a property to comply with any notice to fence and recover any tenant's contribution in the Magistrates' Court.

3.57 In so far as an unpaid debt arising from a notice to fence under the present Act is concerned, the ordinary rules of contract would apply to make the party in default liable under the contract. This matter was raised when the Fences Act was last reviewed, but was not resolved. The Statute Law Revision Committee in 1965 found as follows:[226]

> The suggestion that a vendor be required to declare debts for fences at the time of sale seems to depend either upon the assumption that the obligation to contribute will pass from occupier to occupier or that the outstanding balance should be a specific charge upon the land. The

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223 Submission nos. 3, 20 & 40.

224 See *Transfer of land Act 1958*, s. 48 & Seventh Schedule, Table A.

225 See *Property Law Act 1958*, s. 46 & Third Schedule.

226 SLRC Report, op. cit., p. 6.

> present position is that if a man makes an agreement concerning his property and then relinquishes or loses his interest in that property, negotiations must begin afresh, and the Committee believes it desirable to leave this position stand, rather than to force a new purchaser to fulfil obligations he may not have agreed to in the first place. However, it could be an advantage to the new owner to be aware of agreements made by the vendor *re* fences, and it may do no harm to require such agreements to be declared at time of sale, without including any liability for the purchaser to take over the agreement.

3.58 The present Committee agrees that persons purchasing property should be made aware of unsatisfied fencing works notices affecting the subject property. An appropriate mechanism to achieve this would be to include details of any fencing works notice affecting land subject to a contract of sale in the 'statement of matters affecting land being sold' which is required to be served by a vendor pursuant to section 32 of the *Sale of Land Act 1962* (Vic.).

Recommendation 27

The Dividing Fences and Boundaries Act should provide that where an owner of land the subject of a contract of sale has notice that a fencing works notice has been received, but the fence has not been constructed or fully paid for, details of the fencing works notice and any debt outstanding in respect thereof, should be included in the statement of matters affecting land being sold required to be served by a vendor pursuant to section 32 of the* Sale of Land Act 1962 *(Vic.).

Fencing Standards

3.59 Fencing is not a recognised building trade and the industry is virtually unregulated.[227] While the HIA / Master Fencers' Association of Victoria and Tasmania (MFA) has published a *Guide to Better Fencing* and a *Guide to Paling Fences*, the guides are produced from within the industry and are merely advisory. The Committee was informed that the MFA represents only about ten per cent of fencers in Victoria and ten to fifteen per cent of the fencers in Melbourne.[228] This means that control over industry conduct is difficult to achieve.

3.60 Conflicting views were expressed at the public hearings concerning the desirability of specifying standards of materials and design. A fencing consultant expressed concern at the quality of some fencing work and felt that the industry would benefit from the establishment of enforceable consumer standards. He also expressed concern regarding the quality and durability of materials used in the

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227 S. Mitchell, op. cit., p. 17. The evidence of R. Day & T. Nikolson, op. cit., pp.135–136 supported this view.

228 R. Day, loc. cit.

construction of fences today as compared with the recent past. He cautioned that consumers should be aware of the use of lesser quality materials and should be more astute in their contractual arrangements. They should not count on an unreasonable life expectancy for a fence given the nature of the materials used in its construction and the cost of the fence.[229]

3.61 The MFA informed the Committee that it received five or six calls per day from consumers and that the major source of complaint was 'the quality of the fencing itself or the materials used'.[230] Nonetheless, it did not support the inclusion of consumer standards in a schedule to the Fences Act, expressing the opinion that the industry should be left to regulate itself. The MFA gave evidence that it guarantees the quality of workmanship and the materials used in fences constructed by its members and it is usually in a position to arrange for rectification of any defects where necessary.

3.62 Despite the attraction of attempting to incorporate a Victorian standard into the Act, the Committee has decided not to fix minimum standards for materials to be used in fence construction. The sheer variety of fences would make this an extremely difficult task. Even the specification of a standard paling fence would be a complex exercise. Issues of cost and affordability will often mean that a fence is constructed which will have a shorter life than a more expensive option. Provided consumers are able to make informed choices regarding the type and quality of fence to be constructed, the Committee believes that these matters are best left to private negotiation. Accordingly, the Committee recommends that the guides produced by the MFA should discuss the strengths and weaknesses of the various materials used in fence construction, so that consumers can make informed choices regarding these matters. The Committee further recommends that the information provided in the detailed guide to resolving dividing fence disputes referred to in Recommendation 1 of this report should include a reference to the MFA guides on fencing.

Positioning Fences in Relation to Boundaries

3.63 Several submissions requested guidance from the Fences Act on where the boundary should fall relative to various kinds of fence construction.[231] For example, where should the components of a paling fence or a post and wire fence be positioned in relation to the title boundary between properties? Whilst the

229 S. Mitchell, op. cit., p. 21.
230 R. Day, op. cit., p. 122.
231 Submission nos. 3, 4, 16, 19, 27, 40 & 62.

conventions accepted by various witnesses suggest there is some consistency of practice in the fencing industry regarding this issue,[232] the industry has sought to formalise this practice by the inclusion of provisions in the proposed Dividing Fences and Boundaries Act.

3.64 The Master Fencers' Association raised the matter unsuccessfully with the Statute Law Revision Committee in 1965. That Committee concluded:[233]

> No evidence was forthcoming to suggest that this problem was causing any real concern. It is significant that the courts have never ruled on the question, and any attempt to define by legislation which side of a fence or wall should rest on a title boundary would almost certainly have far-reaching repercussions. It is possible that any such provision would force neighbours to meet the expense of a survey before a new fence was built or an existing one replaced, and the Committee believes that it would generally make for unwarranted complexity. Doubtless over the years certain practices have grown and been accepted as to the position of fences, and the Committee believes that these have worked satisfactorily. It is of the opinion that it would be both difficult and undesirable to attempt to lay down rules by statute.

3.65 This Committee concurs in this conclusion, but believes that current industry practice should be formalised in some manner in order that the public might be better informed concerning these matters. The Master Fencers' Association may well be the appropriate industry body to promulgate and publicise such industry standards. The industry standards should be to the effect that:

> Where a fence is constructed over a boundary, for the purposes of determining any encroachment or otherwise—
>
> (a) All fences, except those with rails or framing on one side, should be positioned so that the boundary between owners falls at the median of the fence.
>
> (b) Fences with rails or framing on one side should be positioned so that the boundary between owners falls at the point of intersection of the rails or framing and the materials appended to them.

Recommendation 28

The Master Fencers' Association should be encouraged to publish and promote industry standards providing guidance to fence-builders on how various types of fences should be positioned relative to property boundaries.

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232 S. Mitchell, op. cit., pp. 25–26; T. Nicholson, op. cit., pp. 128–129, 137; D. Monahan, *Minutes of Evidence*, 2 Apr. 1998, pp. 105–106.

233 SLRC Report, op.cit., p. 7.

3.66 From the evidence received, the Committee concluded that disputes sometimes arise concerning the side on which the rails or framing of a fence should be placed.[234] The Committee accepts that a private residential property adjoining an area to which the public has general access should be protected as far as possible from unwanted intrusion. Consequently, rails or framing which could be used for climbing should be located on the inside face of the fence. Apart from this specific situation, the Committee considers that, as a matter of fairness and ordinary expectation, a replacement fence should be constructed on the same basis as the fence being replaced. Where there was previously no such fence, a dispute might be resolved in the parties' mutual interest by locating the rails or framing on the side of the fence least exposed to weathering.

Recommendation 29

The proposed Dividing Fences and Boundaries Act should provide that where there is a dispute concerning the side of a fence upon which rails or framing should be placed, the following principles shall apply:

- ***(a) where a private residential property adjoins an area to which there is general public access, such as commercial or municipal premises or a right of way, the rails or framing shall be placed on the side of the fence facing into the residential property;***
- ***(b) in all other cases where a fence is being replaced, the rails or framing shall be placed on the same side as they were located on the previous fence;***
- ***(c) in all other cases where there was previously no fence or no fence of the type in question, the rails or framing shall be placed on the side least subject to weathering.***

Location of Fences

3.67 A fence is generally placed on the actual or perceived boundary line between two properties by agreement. Section 7(1)(c) of the Fences Act empowers the Magistrates' Court to determine not only the kind of fence to be constructed and the contribution to cost by each party, but 'where such further order is necessary' the position (that is, location) of the fence. This appears to contemplate that an order in relation to location would be made only as an ancillary order to other orders.

3.68 As noted earlier,[235] section 5 of the Act provides that occupiers whose lands are divided by a waterway may agree upon a line of fence that does not accord with the

234 S. Mitchell, op. cit., p. 23 & submission no. 40.

235 *infra*, para. 3.51.

boundary, in order to secure the fence from the action of floods. If the occupiers fail to agree upon the line of fence, they may 'call in the nearest magistrate' who shall 'determine the line of fence' and decide whether and what compensation for loss of occupation shall be paid to either occupier.[236] Section 5(4) provides that the occupation of lands on either side of such a fence, contrary to general principles, 'shall not be deemed to be adverse possession and shall not affect title to or possession of any of the adjoining lands', except for the purposes of the Fences Act.

3.69 The Committee considers that in order to promote flexibility and to protect contractual agreements regarding the location of dividing fences, there should be a broader provision encompassing all agreements and orders under the Act where fences are located elsewhere than on the title boundary. Such fencing, which is commonly known as 'give and take' fencing, gives effect to agreements and circumstances; for example, where natural obstacles prevent or make difficult the construction of a fence on the boundary line. Such fences effectively licence a neighbour to use some land that is not his or her own, without prejudice to the other's title. Section 17 of the *Fences Act 1975* (SA) offers such protection and is suggested as a model for this provision.

3.70 A Victorian Land Registry representative indicated in evidence that there would be no objection in principle to the annotation of such agreements on title.[237] Such registration will inform any prospective purchaser of the existence of the agreement.

Recommendation 30

The proposed Dividing Fences and Boundaries Act should contain a provision authorising annotations to be made on the titles to properties affected by any private agreement between neighbouring owners or any order of the Tribunal, which results in a dividing fence being located other than on the boundary to contiguous land.

3.71 The power of the Tribunal to determine the location of a fence, other than in the circumstances of section 5 of the Fences Act, also requires clarification. The Committee recommends that the words 'where such further order is necessary'[238] should not appear in the proposed Dividing Fences and Boundaries Act, so that it is clear that the Tribunal may prescribe any or all of the matters provided for in section

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236 *Fences Act 1968* (Vic.), s. 5 (2).

237 R. Jefferson, *Minutes of Evidence*, 16 Mar. 1998, p. 13.

238 See *Fences Act 1968* (Vic.), s. 7(1)(c).

7(1) of the present Act. The Committee notes that section 9 of the present Act, which deals with the situation where a notice to fence should be served but the occupier of the adjoining property is absent from Victoria or cannot be found, permits the other occupier to proceed *ex parte* in the Magistrates' Court and obtain certain orders. These include an order (without limitation) 'specifying the position of the fence'. It seems odd that a court on an *ex parte* hearing has more powers than it would have if both parties were present or represented before it. The Committee believes that this anomaly should be removed. The Committee considers also that it should be made clear in the proposed Dividing Fences and Boundaries Act that the order of the Tribunal regarding 'the position of the fence' should not give rise to a claim in adverse possession or affect any title to land.

Recommendation 31

The proposed Dividing Fences and Boundaries Act should omit the words 'where such further order is necessary' which presently appear in section 7(1)(c) of the* Fences Act 1968 *(Vic.), and the proposed Act should provide to the effect that the order of the Tribunal regarding 'the position of the fence' should not give rise to a claim in adverse possession or affect any title to land.

Fencing Works Notices

Pro Forma Fencing Works Notice

3.72 Several submissions called for a standard proforma notice to fence to be provided as a schedule to the Fences Act.[239]

3.73 Section 6 of the Act requires that a notice to fence shall:

(a) be in writing or in print, or partly in writing and partly in print;

(b) specify the boundary to be fenced;

(c) contain a proposal for fencing the boundary; and

(d) specify the kind of fence proposed to be constructed.

These requirements have serious shortcomings. There is no express reference to the cost of the proposed fence, although this may be implied within the 'proposal for fencing', nor is there any requirement that the notice contain a demand for contribution. Likewise, there is no necessity to obtain competitive quotations or include these as part of the notice.

[239] Submission nos. 20, 31 & 64.

3.74 Moreover, there also appears to be some confusion and uncertainty as to the legal effect of a notice to fence when received.[240] A letter containing the information required by section 6 might not indicate that it is a notice under the Act and may be read as an informal approach to which no statutory deadline attaches. Once the statutory deadline after service of a notice has expired and agreement has not been reached, either party is entitled to take legal action to have contentious aspects of the fencing notice determined.[241] However, this is a costly step relative to the sums at issue in most fencing cases and may be unnecessary, if the person served has simply misunderstood the legal import of the notice.

3.75 Whilst the Committee considers that parties should be encouraged to make informal approaches prior to issuing a fencing works notice, it acknowledges that it is imperative that any notice having effect as a fencing works notice advise the recipient of the status of the notice, and that legal proceedings may ensue if agreement is not reached within the statutory deadline.

3.76 Accordingly, the Committee recommends that there should be a pro forma fencing works notice containing, in addition to the matters currently provided for in section 6 of the Fences Act, the following:

(a) An express reference to the cost of the proposed fence, together with a demand for the amount of contribution sought from the adjoining owner.

(b) Details of at least three competitive quotations, copies of which should be attached to the notice.

(c) A statement as to the legal effect of the document and the consequence of a failure to respond.

(d) Sections headed 'Notice of Assent' and 'Notice of Dispute' in which the recipient must give written notification of his or her intentions in the matter to the owner serving the notice.[242]

(e) The proposed positioning of the fence; for example, the existing fence line.

3.77 The Committee notes that section 53 of the *Interpretation of Legislation Act 1984* (Vic.) provides that where a form is prescribed by an Act, 'any form in or to the effect

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240 Submission no. 20, p. 9. This confusion was also evident in telephone calls from members of the public received by the Committee during the Inquiry.

241 Fences Act, s. 7(1).

242 The procedure recommended in para. (d) is similar to that under s. 6 of the *Fences Act 1975* (SA), except that there a cross-notice is served.

of the prescribed form shall, unless the contrary intention appears, be sufficient in law'. Accordingly, there should be no need for strict compliance with the pro forma notice, but any notice served should contain all the content of the pro forma notice.

3.78 A signed notice of assent would permit the server of the notice to proceed on the basis that a legally enforceable agreement is created and that contribution as agreed is recoverable as a money debt. A notice of dispute would prompt negotiation which, if unsuccessful, would lead to mediation and ultimately litigation. If the recipient failed to return either notice within thirty days of service, the server of the notice should be entitled to obtain *ex parte* orders 'on the papers' (subject to proof of service) allowing him or her to proceed to construct or repair the fence in accordance with the fencing works notice. A copy of the orders obtained in this way should be served on the other owner at least five days before works commence, so as to afford that owner an opportunity to seek a rehearing of the matter on its merits.

3.79 The Committee considers that a person who disregards a notice of dispute and effects fencing works should be at risk of being ordered to pay the full cost of the works, and risk being ordered to remove the fence.

Recommendation 32

A pro forma fencing works notice should be developed and the proposed Dividing Fences and Boundaries Act should prescribe its use.

Recommendation 33

The proposed Dividing Fences and Boundaries Act should provide that a signed fencing works notice and a signed notice of assent constitute a legally enforceable agreement and that the server of a fencing works notice is entitled to proceed to effect fencing works in accordance with the details contained in the fencing works notice and to recover from the other party the contribution sought in the fencing works notice in the Tribunal as a money debt.

Recommendation 34

The proposed Dividing Fences and Boundaries Act should contain provisions allowing the server of a fencing works notice, who has not been served with a notice of dispute, to obtain* ex parte *orders—without the need for any appearance, but subject to proof of service of the fencing works notice—allowing him or her to effect fencing works in accordance with the said notice.

Recommendation 35

The proposed Dividing Fences and Boundaries Act should provide that where an owner or occupier proceeds with fencing works despite the service on him or her of a notice of dispute, he or she may lose any right to contribution and may be ordered to remove the fencing works so undertaken.

Service Requirements

3.80 Section 6 of the Fences Act requires merely that a notice to fence be 'served' on the other occupier. Neither the Fences Act nor the *Interpretation of Legislation Act 1984* (Vic.) defines the meaning attached to the word 'service' when it appears without further specification. One commentator has said that personal service seems to be required.[243] While sections 34 and 139 of the *Magistrates' Court Act 1989* (Vic.) contain provisions specifying the requirements for service of documents under that Act,[244] a notice to fence is served under the Fences Act. Accordingly, the service requirements for a notice to fence are unclear.

3.81 Since one main thrust of the Committee's recommendations is to reduce opportunities for misunderstanding between adjoining owners of land, it recommends that the service requirements under the proposed Dividing Fences and Boundaries Act be made clear, and that notices be required to be served personally (in the sense that that expression is used in Order 5.03 of the Magistrates' Court Civil Procedure Rules 1989 (Vic.)) or by registered mail.[245]

3.82 The Committee considers further that for convenience of service the person seeking to serve the notice should be able to serve the occupier of the property, who should be under an obligation to notify the owner. However, the service of orders or awards, to be effective, should be upon the owner.

3.83 Where an occupier receives a fencing works notice and fails to notify the owner, the occupier should be liable to contribute to the cost of the fencing works in the same proportion to which the owner would have been liable. A similar provision is contained in section 10(3) of the Fences Act, which provides:

> Where a tenant is served with a notice order award or certificate under this Act relating to the construction of a fence, he shall within fourteen days serve a copy of the notice order award or certificate by registered post on—
>
> (a) his landlord at his last known address;
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> (b) the person to whom he pays his rent: or

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243 L. J. Guymer, 'Understanding the Fences Act', *Housing*, December 1991, p. 9.

244 See also Magistrates' Court Civil Procedure Rules 1989 (Vic.), Order 5.

245 See *Interpretation of Legislation Act 1984* (Vic.), s. 49.

(c) any person who he has reason to believe is authorized to accept service of notices on behalf of his landlord.

Section 10(4) provides that where a tenant fails to comply with sub-section (3), 'the whole cost of the construction of the fence shall be payable by the tenant'.

3.84 As previously recommended[246] the proposed Dividing Fences and Boundaries Act should provide for the service of notices by the occupier of land in appropriate circumstances; for example, where repairs are needed to a fence and the owner is unable or unwilling to serve a fencing works notice, and where the occupier with the consent of the owner is prepared, or required by the Act, to assume the owner's liability for the cost of the fencing works.

Recommendation 36

The proposed Dividing Fences and Boundaries Act should provide that service of notices, orders or awards must be effected either by personal service (as that expression is used in Order 5.03 of the Magistrates' Court Civil Procedure Rules 1989 (Vic.)) or by registered post, and that the formal requirements of both forms of service be defined in the Act.

Recommendation 37

The proposed Dividing Fences and Boundaries Act should provide that the person seeking to serve a fencing works notice should be able to serve the notice upon either the owner or the occupier of the property.

Recommendation 38

The proposed Dividing Fences and Boundaries Act should contain provisions similar to sections 10(3) and 10(4) of the* Fences Act 1968 *(Vic.) where an occupier of property receives any notice under the Act, and the pro forma fencing works notice should contain a clear warning to the occupier of the effect of these provisions.

Procedures Relating to Bodies Corporate

3.85 The difficulty and inefficiency of serving notices under the Fences Act was one of several issues raised in respect of bodies corporate.[247] A witness from the Department of Infrastructure, which administers the Subdivision (Body Corporate)

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246 See *supra*, recommendation 22.

247 Submission nos. 12, 16, 19, 37, 54; G. Code, *Minutes of Evidence*, 4 Jun. 1998, p. 239; B. Forby, *Minutes of Evidence*, 20 Apr. 1998, pp. 142–143; R. Campagna, *Minutes of Evidence*, 27 Mar. 1998, p. 44.

Regulations 1989[248] (the Body Corporate Regulations), said that the Department receives many inquiries from body corporate members concerning fencing and he described a number of situations that can cause problems. The requirements for the service of notices and entitlement to contribution will differ depending upon whether the fence is to be built on a boundary between two lots in the one body corporate subdivision, between a lot and common property within the one body corporate subdivision, between two lots in different body corporate subdivisions (for example, where there are two adjoining blocks of flats), and between a lot in a body corporate subdivision and another property, which is not part of a body corporate subdivision.[249]

> Along the side boundary there may be driveways, which may be common property, or a series of backyards of individual lots. It is extremely complex when deciding where responsibilities lie for the maintenance of fences of considerable length, which vary through different sorts of tenures. One of my difficult tasks is giving people advice on those sorts of issues. The body corporate regulations and the *Subdivision Act* really do not provide any more guidance on the question of fencing responsibilities, because they have no special provisions.

3.86 The same witness highlighted the technical problem under the present Act of defining who the 'occupier' of land in common ownership is. Is it the members of the body corporate or a combination of the owners in occupation and tenants in occupation of the body corporate estate?[250] Regulation 301(f) of the Body Corporate Regulations requires a body corporate to manage and administer the common property and regulation 301(c) requires it to keep both the common property and 'all chattels, fixtures and fittings...related to the common property **or its enjoyment**' (emphasis added) in a state of good and serviceable repair. Unless the Body Corporate is the owner of common property for the purposes of the proposed Dividing Fences and Boundaries Act, there may be a conflict between the obligations of the body corporate under that Act and under the Body Corporate Regulations.

3.87 The change to owner under the proposed Dividing Fences and Boundaries Act will help to clarify the situation with respect to bodies corporate because membership of a body corporate is predicated on the basis of ownership and not occupation.[251] However, further complications arise from the relationship of members of the body corporate *inter se*. Regulation 401(g) of the Body Corporate Regulations enables a body corporate to:

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248 Made under the *Subdivision Act 1988* (Vic.).

249 G. Code, op. cit., p. 235.

250 ibid.

251 See e.g. *Subdivision Act 1988*, ss. 27(1) & 28.

> Recover the cost of repairs or other work undertaken substantially for the benefit of some of the lots from the owners of those lots, but the amount payable by those lots is to be calculated on the basis that the lot which benefits more, pays more.

For example, perimeter fencing may be for the benefit of all lot owners, but the owners of lots on the perimeter will usually derive a greater benefit than those in the middle of the subdivision, and therefore pay more. Moreover, the existence of a perimeter fence and its good repair will presumably enhance the enjoyment of the common property in terms of regulation 301(c).

3.88 Consequently, it can become extremely difficult and complicated for an owner of land adjoining a subdivision with a body corporate to know upon whom to serve a fencing works notice. Is it the adjoining 'owner' as defined in the Act, the actual owner of the adjoining lot (who would be a member of the body corporate and thus subject to regulation 401(g)), or the body corporate itself (which has the obligation under regulation 301(c) to keep fixtures which relate to the enjoyment of the common property in good repair)? For a lengthy fence there may be different answers to this question depending upon which section of the fence is being considered. This raises the possibility that an adjoining owner may have the difficulty of negotiating a fencing agreement separately with a number of persons.

3.89 Regulations in other Australian jurisdictions make it clear that the boundary fence is a body corporate responsibility, regardless of whether it is on common property.[252] The Committee was advised that body corporate managers in Victoria frequently adopt such an approach in practice and divide the cost of perimeter fencing equally between lots.[253] However, the witness expressed the view that as the Act presently stands, the occupier of each lot is liable to contribute equally with an adjoining occupier to the section of fence abutting his or her property, with the result that lots not directly affected, including any upstairs lots, will escape liability[254] despite the fact that those lots may benefit from the security and privacy the fence provides to the body corporate as a whole.[255]

3.90 A further problem arises because of the increasing prevalence of multiple bodies corporate on the one site; for example, where, to isolate costs associated with different activities, one body corporate is formed for a commercial use on a ground floor and another for residential development on the upper floors, with perhaps a

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252 B. Forby, op. cit., p. 143.
253 ibid., p. 144.
254 ibid.
255 ibid., p. 146.

third body corporate formed for common purposes such as insurance.[256] The existence of the layered occupancy, which is becoming increasingly characteristic of many bodies corporate, may render the concept of 'occupier', on which the present Fences Act relies, simplistic and obsolete.

3.91 To address these uncertainties, the Committee recommends that where fencing works are proposed between land occupied by a person and land on which a body corporate operates, the 'owner' for purposes of the proposed Dividing Fences and Boundaries Act is the body corporate. Where there are multiple bodies corporate on the one site, the 'owner' should be the body corporate responsible for the common property pursuant to sections 27(2) and 28 of the *Subdivision Act 1988* (Vic.) and the regulations made thereunder.

Recommendation 39

Where only one body corporate is responsible for land under the* Subdivision Act 1988 *(Vic.), that body corporate should be deemed to be the 'owner' of that land for the purposes of the proposed Dividing Fences and Boundaries Act.

Recommendation 40

Where multiple bodies corporate operate on the one site, the body corporate responsible for the common property pursuant to sections 27(2) and 28 of the* Subdivision Act 1988 *(Vic.) and the regulations made thereunder should be deemed to be the 'owner' for the purposes of the proposed Divided Fences and Boundaries Act.

3.92 So far as internal fencing on a body corporate estate is concerned, the Committee considers that, where fencing works relate exclusively to the boundary between two lots, the usual provisions of the present Fences Act should apply.

Recommendation 41

Where proposed fencing works relate exclusively to the boundary between two lots in a body corporate subdivision, the procedures existing under the* Fences Act 1968 *(Vic.) should continue to apply under the proposed Divided Fences and Boundaries Act.

3.93 Where proposed fencing works relate to more than two lots within a body corporate or to one or more lots adjoining common property, the Committee

[256] ibid., p. 147.

considers that the nature of the works and the relative contributions as between members of the body corporate should be determined under the Regulations made under the *Subdivision Act 1988* and the rules of the body corporate. It therefore recommends that fences in these categories should be excluded from the definition of 'dividing fence' in the proposed Dividing Fences and Boundaries Act.

Recommendation 42

Where proposed fencing works relate to more than two lots within a body corporate or to one or more lots adjoining common property, such situations should be excluded from the definition of 'dividing fence' in the proposed Dividing Fences and Boundaries Act. All issues relating to fencing works in these circumstances within the perimeters of land upon which a body corporate operates should be excluded from the operation of the Act and should be matters for determination by the body corporate in the exercise of its powers.

Guidance on Kind of Fence

3.94 The guidance given to a court or arbitrator in the Fences Act as to the kind of fence to be constructed is minimal.[257] The Committee recommends that the following factors be considered by the Tribunal in exercising its powers under the proposed Dividing Fences and Boundaries Act:

(a) the existing dividing fence (if any);

(b) the purposes for which the adjoining lands are used or intended to be used;

(c) the privacy or other concerns of the adjoining land owners;

(d) the kind of dividing fence usual in the locality; and

(e) any policy, code or guidelines published or prescribed relating to dividing fences by the council of the municipality in which the adjoining lands are situated.[258]

Enforcement Procedures

3.95 Concern was expressed to the Committee regarding recovery of any contribution ordered in proceedings under the Fences Act.[259] Enforcement

[257] See Fences Act, s. 7(6).
[258] See *Dividing Fences Act 1991* (NSW), s. 4.
[259] Submission nos. 6, 17 & 28.

proceedings may entail the further cost of a warrant of execution, and this may prove fruitless where the other party is impecunious. While this is a difficulty faced by all litigants, a fence once constructed becomes part of the land[260] and inures to the benefit of both owners, and thus there is a tempting case for allowing the registration of a charge upon the land of a defaulting owner for any unpaid fencing contribution.

3.96 A precedent for such a charge exists in the provisions of the present Act that deal with vermin-proof fences. Section 24 provides for an unpaid debt in respect of vermin-proof fencing to become a charge upon the land occupied by a person whom the Magistrates' Court has determined is presently unable to pay, and imposes interest at the rate of six per cent per annum upon the owner of the land until the sum is paid. A detailed account of the operation of these provisions has been provided previously in paragraph 3.18.

3.97 The Committee notes that a proposal to apply this principle generally to occupiers who fail to meet their contribution was rejected by the Statute Law Revision Committee in 1966 on the basis that unsatisfied fencing creditors were in no different position from other unsatisfied creditors and that 'to create a statutory charge in respect of fences is unwarranted for a debt of this nature'.[261] This Committee does not agree with this view, as the fence is a benefit to both properties.

3.98 The Committee has concluded that any undischarged fencing debt resulting from Tribunal orders, including accruing interest, should be registrable as a charge upon land in terms similar to those currently provided for in section 24 of the Fences Act, except that there should be no requirement that the person liable to contribute is **unable** to contribute his or her proportion of the cost. While the procedure will undoubtedly benefit those who are unable to pay, it is proposed more particularly to enforce the debt against those who can pay but choose to default. The Committee notes that in most cases where an owner of land is not the occupier section 10(2) of the present Act in effect allows the owner to pay the whole of the outstanding contribution and recover 'the excess before the Magistrates' Court from his…tenant'. Thus, an owner in these circumstances can avoid a charge being registered by paying the outstanding amount.

Recommendation 43

The proposed Dividing Fences and Boundaries Act should contain a provision similar to section 24 of the* Fences Act 1968 *(Vic.) which should be extended to

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260 See *Interpretation of Legislation Act 1984* (Vic.), s. 38 discussed *infra*, paras. 3.103–3.104.

261 SLRC Report, op.cit., p. 6.

provide that unpaid fencing debts pursuant to Tribunal orders should be registrable as a charge upon land, with interest payable annually at the interest rate prescribed from time to time by the* Penalty Interest Rates Act 1983 *(Vic.) until the debt is discharged.

Power to Contract Out of the Act

3.99 Section 4(2) of the Act provides that, save as otherwise expressly provided, the provisions of Part I—concerning the construction of dividing fences—apply notwithstanding any stipulation to the contrary and that:

> no contract or agreement made or entered into either before or after the commencement of this Act shall operate to annul or vary or exclude any of the provisions of this Part, or to indemnify any person against any claims made under this Part.

In his Second Reading Speech in 1968 Attorney-General Reid indicated that this provision was introduced by the *Statutes Amendment Act 1953*[262]

> with the object of ensuring that a person who sells part of his land cannot contract out of liability to contribute to the cost of a dividing fence between the land he sells and the land he retains.

3.100 While the Statute Law Revision Committee in 1966 took the view that there was no conflict between that provision and what was then section 31, which deemed nothing in the Act to affect any covenant, contract or agreement made or later made relative to fencing between landlord and tenant or adjoining occupiers of adjoining land,[263] the Parliament in 1968 sought to resolve the potential conflict by inserting the words 'except as in this Act otherwise provided' into what became section 30. It was clearly Parliament's intention that section 4(2) would thereby be sustained.[264]

3.101 Notwithstanding this amendment, there is still considerable confusion as to whether or not a party may contract out of his or her obligations under the Act. The Committee was informed of the continuing practice of developers purporting to limit their liability under Part I of the Act to five dollars, or to defer liability to the first owner of a property in a subdivision other than the developer.[265]

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262 Victoria, Legislative Assembly, *Debates*, 22 Oct. 1968, p. 1104.

263 SLRC Report, op.cit., p. 5.

264 Victoria, Legislative Assembly, *Debates*, 12 Nov. 1968, pp. 1571–1572 per G. O. Reid (Attorney-General).

265 Submission no. 40.

3.102 The Committee notes that fencing statutes in each of New South Wales, Queensland, Tasmania and Western Australia all give unqualified priority to the power to contract[266] and that such priority is consistent with the philosophy underlying the Victorian Act, which is to facilitate agreement rather than promote external regulation.

Recommendation 44

Section 4(2) of the* Fences Act 1968 *(Vic.) should be omitted from the proposed Dividing Fences and Boundaries Act. The words that presently appear in section 30 of the* Fences Act 1968 *(Vic.) 'except as in this Act provided' should be omitted likewise.

Ownership of Fences

3.103 Submissions drew attention to the lack of guidance in the Fences Act as to who owns a dividing fence and what rights and obligations the owners have, for example, in attaching items to fences.[267] The *Interpretation of Legislation Act 1984* (Vic.)[268] defines the word 'land'—where it appears in all Acts and subordinate instruments—to include 'buildings and other structures permanently affixed to land', unless the contrary intention appears. Therefore, on the assumption that a dividing fence is a structure permanently affixed to land, it is owned jointly by the registered proprietors of the land it divides, and not by the occupiers who, under existing and past legislation, may have contributed towards the cost of its construction.

3.104 The Committee considers that the Act should provide that all dividing fences are jointly owned by the owners of the adjoining land, except where a fence is wholly located within one owner's property and has been paid for solely by that owner.

Recommendation 45

The proposed Dividing Fences and Boundaries Act should contain a provision clarifying the ownership of dividing fences by providing that ownership vests jointly in the owners of the adjoining land, except where a fence is wholly located within one owner's property and has been paid for solely by that owner.

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266 See *Dividing Fences Act 1958* (Qld), s. 5; *Dividing Fences Act 1991* (Qld), s. 26; *Boundary Fences Act* 1908 (Tas.), s. 43; *Dividing Fences Act 1961* (WA), s. 6.

267 e.g., submission no. 20, p. 11.

268 s. 38.

3.105 With respect to the uses made of fences as raised in the submissions,[269] the Committee considers that each owner should have the right to use his or her side of the fence as he or she sees fit, subject to the rights of the other owner to object where such use is unreasonable or significantly prejudices the amenity of his or her property. It is considered that the use of fences to support creeper or as a surface for affixing trellis or gateposts are not prima facie unreasonable uses, and that any adverse effect on the life of a fence can be taken into account in apportioning contribution when the time comes for the fence to be replaced.

3.106 However, the Committee considers that where it is agreed or registered that ownership of a dividing fence vests in one property owner, that owner may compel the adjoining owner to refrain from using the fence for any unreasonable purpose.

Recommendation 46

The proposed Dividing Fences and Boundaries Act should provide that an owner of a dividing fence is entitled to make such use of his or her side of the fence as he or she thinks fit, subject to the rights of any co-owner to object to any use that is unreasonable or significantly prejudices the amenity of his or her property.

Recommendation 47

The proposed Dividing Fences and Boundaries Act should provide that, where it is agreed or registered that ownership of a dividing fence vests in one property owner, that owner may compel the adjoining owner to refrain from using the fence for any unreasonable purpose.

Specific Rural Issues

Provisions Relating to Vermin-Proof Fencing

3.107 The separation between Parts I and II of the *Fences Act 1968* (which deal with the construction, maintenance and repair of dividing fences in general) and Part III of the Act (which concerns vermin-proof fencing) is historical. Part III largely reproduces the provisions of the *Fences Act Amendment Act 1908*, which in 1915 was consolidated with the provisions of the *Fences Act 1890*.[270] However, no attempt was made to integrate the provisions relating to vermin-proof fencing with the other

[269] Submission nos. 14, 18, 20 & 55.

[270] See the discussion *supra*, at paras. 1.11 & 1.12.

provisions of the 1915 Act. This gives the present Victorian Act a unique structure, since no other fencing statute in Australia contains separate provisions relating to vermin-proof fencing. The Tasmanian *Boundary Fences Act 1908*, which is still in force, provides for owners of land to contribute to the erection of a 'sufficient fence or a rabbit-proof fence' (the latter not being defined), with the effect that many of the other provisions of that Act apply to all types of fences. In other States, no express reference is made to vermin-proof fences, although their land management statutes may permit a Minister or his or her agent to compel the erection of a particular type of fence under State coordinated vermin-control strategies.[271]

3.108 The Committee can see no good reason why the general provisions of the *Fences Act 1968* relating to fencing works should not apply to vermin-proof fencing, and therefore why Part III should remain separate from the rest of the Act. What constitutes a 'vermin-proof fence' could be defined in section 3 of the proposed Dividing Fences and Boundaries Act and the general provisions relating to the construction, maintenance and repair of dividing fences could be amended to include vermin-proof fences within their scope.

Recommendation 48

The proposed Dividing Fences and Boundaries Act should integrate the provisions of Part III of the* Fences Act 1968 *(Vic.) with the general provisions of that Act. What constitutes a 'vermin-proof fence' should be defined in section 3 of the proposed Act and the general provisions relating to the construction, maintenance and repair of dividing fences should be amended to include vermin-proof fences within their scope.

3.109 It may be that some of the provisions in Part III of the *Fences Act 1968* are obsolete. The Committee has been advised that there have been no prosecutions in Victoria in the last 10 years under sections 26 and 27 of the Act.[272] Section 26 makes it an offence to wilfully destroy, break down, injure or remove another person's vermin-proof fence. Presumably, this provision was inserted in order to give special protection to vermin-proof fences in the context of the rabbit plague in the early part of this century.[273] The conduct proscribed by the section would be covered by the summary offence of wilful damage to property[274] or the indictable offence of criminal damage under the *Crimes Act 1958* (Vic.).[275] Moreover, such conduct would amount to

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271 See e.g., *Rural Lands Protection Act 1985*, (Qld).

272 Advice received from B. Johnston, Manager, Caseflow Analysis, Victorian Department of Justice.

273 See *supra*, para. 1.11.

274 *Summary Offences Act 1966* (Vic.), s. 9.

275 s. 197.

a civil trespass to goods and/or land. The Committee can see no useful purpose in retaining this provision.

3.110 Section 27 of the Fences Act makes it an offence for any person (other than the owner or occupier of the relevant land) to set or use a 'snare, trap, engine or contrivance for the taking of hares or rabbits' within 11 metres of any vermin-proof fence or on any road. The purpose of this provision is obscure, but it appears to have a public safety objective. The Committee notes that section 15 of the *Prevention of Cruelty to Animals Act 1986* (Vic.) controls the use of leghold traps.

3.111 The Committee is unable to form a concluded view regarding the continuing utility of these provisions, and consequently considers it appropriate that the Redundant Legislation Subcommittee of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament consider whether these provisions should be retained.[276]

Recommendation 49

The Attorney-General should recommend to the Governor in Council that the question of whether sections 26 and 27 of the* Fences Act 1968 *(Vic.) should be retained be referred to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.

Signage of Electric Fencing

3.112 The issue of proper warning of the existence of electric fencing was raised during the Inquiry.[277] The Committee believes that warning signs should be placed on electric fences in locations where the public may come in contact with them—as, for example, bounding road reserves or Crown land—and that such signs should be at sufficient intervals to convey adequate warning of the presence of an electric fence.

Recommendation 50

The proposed Dividing Fences and Boundaries Act should contain a provision that warning signs should be placed on electric fences in locations where the public may come in contact with them and that such signs should be at sufficient intervals to convey adequate warning of the presence of an electric fence.

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276 See *Parliamentary Committees Act 1968* (Vic.), s. 4D(d).

277 Submission no. 24.

Damage to Unfenced Land from Passing Stock

3.113 One submission received by the Committee raised the issue of whether a landowner should be entitled to damages if stock passing along a public roadway cause damage to unfenced property. The submission argued that section 8(f) of the *Summary Offences Act 1966*, by which it is an offence to 'obstruct or prevent the driving of cattle along over or across a public road or thoroughfare' and the Road Safety (Road Rules – Give Way to Stock) Regulations 1997 imply the existence of a right to drove cattle along a public roadway. Section 8(e) of the *Summary Offences Act* imposes penalties on any person who by any 'ill usage or negligence in driving cattle causes any mischief to be done by such cattle'.

3.114 It was submitted that the Fences Act should include a clause to the effect that:[278]

> A property owner in a rural zone has a responsibility to ensure that his/her property is adequately fenced to protect it against accidental damage caused by livestock straying onto that property, when such livestock are being driven on a public road in accordance with the relevant local law, as part of a normal farming operation.

The purpose of such a clause would be to provide those droving stock with some form of indemnity from prosecution under section 8(e) of the *Summary Offences Act* and from civil claims for damages if damaged land or crops were unfenced. A copy of the Model Livestock Local Law prepared by the Municipal Association of Victoria in November 1997 was provided with the submission.[279]

3.115 The Committee does not accept that the proposed Dividing Fences and Boundaries Act should effectively mandate the fencing of land or be used to protect the interests of drovers, when the use of a roadway for droving stock may be infrequent and the risk of damage small. The Committee considers that any person moving stock along a public roadway should take reasonable steps to ensure that stock is kept off unfenced land. The Committee believes that the common law principles of negligence are sufficient to control civil liability in these circumstances. So far as any prosecution under section 8(e) is concerned, the *Summary Offences Act* requires the proof of ill-usage or negligence before an offence can be held to have been committed. In any event, the Committee notes that this Inquiry is not concerned

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278 Submission no. 30, p. 3. See also D. Evans, *Minutes of Evidence*, 4 May 1998, pp. 168ff.

279 Submission no. 30.

with fences along road frontages, which are not dividing fences in the sense intended by the Fences Act in that they do not divide the properties of adjoining occupiers.

4 CROWN IMMUNITY

Introduction

4.1 The exemption of the Crown in its many guises from liability under the *Fences Act 1968* (Vic.) was the subject of numerous submissions.[280] Whilst most of those submissions focused on fences along boundaries between State forest and private land, the Committee also received submissions concerning Crown occupied land in urban residential areas.[281] Many of these submissions expressed the view that the Crown and other public bodies ought to be bound by the Act in the same way as the rest of the community.

4.2 Section 31 of the Fences Act provides:

> This Act except as is in sections 12 and 23 otherwise provided shall not apply to any unalienated Crown lands; nor shall the Crown the Governor the Minister for Conservation, Forests and Lands nor any public officer appointed by the Governor or by the Governor in Council for the administration management or control of the Crown lands or public works or who by virtue of his office however styled has any such management or control be liable under this Act to make any contribution towards the construction or repairing of any dividing fence between the land of any occupier and any Crown land.

Effectively, this provision exempts the Crown fully from the obligation to contribute to fencing costs.[282] While sections 12 and 23 of the Act enable adjoining occupiers who have constructed a dividing fence along their boundary with unalienated Crown land to recover contribution from the person who afterwards becomes the first occupier of the land, the Crown itself has no financial liability under the Act.

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280 Submission nos. 11, 15, 22, 29, 33, 36, 39, 41, 42, 45, 50, 56, 60, 64, 65 & 67.

281 See especially submission no. 11.

282 The *Crown Land (Reserves) Act 1978* (Vic.), s. 21 deems the 'trustees or persons having the care, control or management of any land whether permanently reserved or not' to be 'occupiers' for the purposes of s. 5 of the Fences Act, so that they can enter into agreements with adjoining occupiers regarding the line of fences along waterways. However, this does not entail an obligation to contribute to the cost of fencing works.

4.3 At least as early as 1908 it was recognised that the cost to the Crown is the main motive for its exemption from the operation of the Act.[283] Given Australia's vast size and the amount of unalienated Crown land, governments have understandably taken the view that liability to contribute to fencing all boundaries with private land would unreasonably drain public resources and is therefore impractical.[284]

4.4 This Chapter examines Crown immunity under the Fences Act and its effect in urban, provincial and rural Victoria and the applicability of Crown immunity to State-owned commercial enterprises, government departments and municipal councils.

Basis of Crown Immunity

4.5 It is a common law rule of statutory construction that the Crown is not bound by statute except by express words or necessary implication.[285] In the absence of express reference, the general words of a statute bind the Crown only where such a legislative intention is manifest from the very terms of the statute,[286] or where

> at the time the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound.[287]

As advised by the Privy Council in *Province of Bombay v. Municipal Corporation of Bombay*[288] this rule applies regardless of whether functions unique to the State and essential for effective governance would actually be affected if the Crown were bound and regardless of the purpose of the statute.

4.6 In Australia a stringent and rigid test for determining whether the general words of a statute should bind the Crown has been held to be unacceptable by the High Court. In *Bropho v. Western Australia*[289] the Court considered that such an

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283 See Victoria, Legislative Council, *Debates*, 7 Oct. 1908, p. 1072 per Hon. J. M. Davies (Attorney-General) & p. 1073 per Hon. T. C. Harwood in debate on the Fences Amendment Bill 1908, which introduced vermin-proof fence provisions.

284 The New South Wales Law Reform Commission also identified this as the major reason New South Wales Parliaments have had for exempting the Crown from liability in respect of fences, see New South Wales, Law Reform Commission, *Dividing Fences*, Community Law Reform Program, Report LRC 59, the Commission, Sydney, 1988 (hereafter cited as 'NSWLRC Report'), p. 61.

285 *Commonwealth v. Rhind* (1966) 119 C.L.R. 584, 598 per Barwick C.J.

286 *Province of Bombay v. Municipal Corporation of Bombay* (hereafter cited as '*Bombay* case') [1947] A.C. 58, 61; *Brisbane City Council v. Group Projects Pty. Ltd.* (hereafter cited as '*Brisbane City Council* case') (1979) 145 C.L.R. 143, 167.

287 *Bombay* case at p. 61. See also *Brisbane City Council* case at p. 169.

288 [1947] A.C. 58 (PC, India).

289 (1990) 64 A.L.J.R. 374, especially at p. 380.

'inflexible rule' of statutory construction was precluded by 'considerations of principle'[290] and was inappropriate to modern government:[291]

> the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour.

4.7 In a unanimous decision, the Court placed a much narrower construction on the presumption of Crown immunity and held that:[292]

> the strength of the presumption that the Crown is not bound by the general words of statutory provisions will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises.
>
> Always, the ultimate questions must be whether the presumption against the Crown being bound has, in all the circumstances, been rebutted, and, if it has, the extent to which it was the legislative intent that the particular Act should bind the Crown and/or those covered by the prima facie immunity of the Crown.

4.8 While this is the situation where an Act is silent on the question of Crown immunity, there can be no doubt that the legislative arm of government has power to exempt the Crown from liability under an Act, as the Victorian Parliament has done in section 31 of the Fences Act. Nonetheless, at a policy level it remains for this Committee to consider whether continued Crown exemption from the provisions of the Fences Act is justified, particularly in the light of any changes in circumstances since the Act was last reviewed in 1966.

Liability of State Owned Enterprises

4.9 Under the *State Owned Enterprises Act 1992* (Vic.) (SOE Act), certain statutory organisations in Victoria were reorganised into 'State bodies', 'State business corporations', and 'State owned companies'. A 'State body' is a body corporate established under section 14 of the SOE Act. A 'State business corporation' is a statutory corporation declared by Order in Council under section 17 of the SOE Act to be a State business corporation. A 'State owned company' is a company declared by Order in Council under section 66 of the SOE Act to be a State owned company.[293]

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290 (1990) 64 A.L.J.R. 374, 380.

291 (1990) 64 A.L.J.R. 374, p. 379.

292 (1990) 64 A.L.J.R. 374, pp. 380–381.

293 *State Owned Enterprises Act 1992* (Vic.) (hereafter cited as 'SOE Act'), s. 3.

4.10 The purpose for which a State body is established, its functions and powers, and the constitution of its board must be specified in the Order in Council creating the body. If it is to have a share capital this must be particularised in the Order. The Order may also include provision for the appointment of directors by the Governor in Council and may designate a Minister as the relevant Minister for the purposes of the SOE Act.[294] Although a State body has some of the features of a body corporate,[295] it has restricted borrowing and investment powers[296] and it must comply with any written directions given to its board by the Treasurer and / or the relevant Minister.[297] Shares in a State body must not be issued or dealt with except in accordance with an Order in Council[298] and its capital is repayable to the State at such times, and in such amounts, as the Treasurer directs in writing.[299] Each State body must pay to the State such dividend, at such times and in such manner, as is determined by the Treasurer.[300]

4.11 Given the nature and degree of ministerial control, it is clear that a court would have little hesitation in holding that a State body was an agent of the Crown and entitled to Crown immunity.[301] Such a body could take advantage of the exemption of the Crown from the operation of the Fences Act.[302] Indeed, the Committee has received evidence that the Victorian Plantations Corporation—a State business corporation created under Order in Council dated 4 May 1992 and — considers itself so exempt.[303]

4.12 The SOE Act draws a clear distinction between the degree of ministerial control exercisable over a State business corporation and that exercisable over a State owned company. The principal objective of a each type of State owned enterprise is to 'perform its functions for the public benefit' by:[304]

> (a) operating its business or pursuing its undertaking as efficiently as possible consistent with prudent commercial practice; and
>
> (b) maximising its contribution to the economy and well being of the State.

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294 ibid., s. 14(2).

295 See ibid., ss. 14(3) & 14(4).

296 See ibid., s. 14A.

297 ibid., s. 16C.

298 ibid., s. 15.

299 ibid., s. 16A.

300 ibid., s. 16B.

301 See P. W. Hogg, *Liability of the Crown*, Law Book Co., Toronto, 1989, pp. 250–252.

302 *Fences Act 1968* (Vic.), s. 31.

303 See submission no. 39 and the material provided therewith. See also *Victoria Government Gazette*, G18, 13 May 1993, pp. 1087–1088 as amended by *Victoria Government Gazette*, G25, 1 Jul. 1993, p. 1771 & *Victorian Plantations Corporation Act 1993* (Vic.).

304 SOE Act, ss. 18 & 69 respectively.

However, in the case of a State business corporation the Governor in Council, on the recommendation of the Treasurer after consultation with the relevant Minister, by Order published in the Government Gazette, may alter or vary the functions of a State business corporation from those originally conferred upon it.[305] Since the powers of a State business corporation are dependent upon its functions,[306] an Order in Council can be used to limit a State business corporation's powers.

4.13 Moreover, the relevant Minister, with the approval of the Treasurer, may in writing **direct** the board of a State business corporation:[307]

> (a) to perform certain functions that the relevant Minister considers in the public interest but that may cause the State business corporation to suffer financial detriment; or
>
> (b) to cease to perform functions of a kind referred to in paragraph (a); or
>
> (c) to cease to perform certain functions that the relevant Minister considers not to be in the public interest.

No comparable provision applies to State owned companies. On the contrary, section 72(1) of the SOE Act permits the relevant Minister and a State owned company to enter into an **agreement** under which the company, **in accordance with its memorandum and articles**, agrees to perform, or to cease to perform, activities in circumstances where **the company's board**, considers that it is not in the commercial interests of the company to do so. The terms and conditions of such an agreement may include provision for reimbursement to the company by the Government for 'the net cost to the company of complying with the agreement'.[308] The differences between these two provisions is highly significant in terms of the degree of control a Minister of the Crown can exercise over the operations of these two kinds of State owned enterprises.

4.14 Other indicia of a greater degree of ministerial control over State business corporations vis-à-vis State owned companies are:

> (a) power in the relevant Minister and the Treasurer to determine the number of directors,[309] which must be not less than four or more than nine;[310]

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305 ibid., s. 19.
306 ibid., s. 20.
307 ibid., s. 45.
308 ibid., s. 72(2).
309 ibid., s. 24.
310 ibid., s. 23.

(b) power in the Governor in Council to appoint and remove the corporation's directors[311] and to determine their terms and conditions of appointment;[312]

(c) power in the relevant Minister to bring proceedings in the name of the corporation against a director of the corporation seeking compensation for breach of duty;[313]

(d) power in the relevant Minister on the recommendation of the board of a State business corporation to appoint a chief executive officer or deputy chief executive officer and to determine the terms and conditions of such appointments;[314]

(e) power in the Treasurer, in consultation with the corporation's board, to determine the amount of initial capital of the corporation;[315]

(f) power in the Treasurer, in consultation with the relevant Minister, to direct the repayment to the State of a specified amount of the corporation's capital;[316]

(g) power in the Treasurer, in consultation with the corporation's board and the relevant Minister, to determine the amount and time for payment to the State of dividends;[317] and

(h) power in the Treasurer to require the board of a corporation to give to him or her such information as he or she considers necessary.[318]

4.15 Nonetheless, a State business corporation appears to have a greater degree of autonomy and control over its operations than that accorded to a State body under the SOE Act. Although the board of a State business corporation must prepare a corporate plan each year in an approved form and submit it to the relevant Minister (being a Minister of the Crown) and the Treasurer, the board only has a duty to 'consult in good faith' with these Ministers and, in general, any changes required by them must be agreed to by the board.[319] The board with the agreement of the relevant Minister and the Treasurer may modify the corporate plan.[320] However, the Treasurer

311 ibid., ss. 25 & 30(3).
312 ibid., ss. 26(1) & 26(2).
313 ibid., ss. 36 & 37.
314 ibid., ss. 40(1).
315 ibid., s. 46.
316 ibid., s. 48.
317 ibid., s. 49.
318 ibid., s. 53. See also s. 55.
319 ibid., s. 41.
320 ibid., s. 41(7).

or the relevant Minister may in writing **direct** the board to include in, or omit from, a statement of corporate intent, a business plan or a prescribed financial statement (which comprise the elements of a 'corporate plan' under the Act)[321] any specified matters.[322] Before giving such a direction the Treasurer and the relevant Minister must consult with the corporation's board;[323] nonetheless, the State business corporation **must comply** with such a direction.[324] Moreover, a State business corporation must act only in accordance with its corporate plan, unless it first obtains the written approval of the relevant Minister and the Treasurer to do otherwise,[325] and the corporation is under a statutory duty to advise the relevant Minister and the Treasurer immediately it forms the opinion that matters have arisen that may prevent or significantly affect the achievement of the objectives and/or targets under the corporate plan.[326]

4.16 Consequently, the appearance of autonomy is somewhat illusory. On the face of the Act, there remains a high degree of Ministerial control over the operations of State business corporations. For the purpose of the 'control test' in determining whether a public body is an agent of the Crown, 'control means de jure control, not de facto control'.[327] It is the degree of control that a Minister is legally entitled to exercise that is relevant, not the degree of control that is in fact exercised.[328]

4.17 The question whether a State business corporation is an agent of the Crown such as to attract the benefits of Crown immunity is not as clear as in the case of State bodies. As one textbook writer has observed:[329]

> Between the extremes of full control and no control lies a continuum in which the courts have ranged without clear rules, often simply repeating that it is the 'nature and degree of control' that has to be assessed…However, the tendency of the decisions is to require a high degree of control; in other words, the tendency of the decisions is against the finding of Crown-agent status. The reason, without doubt, is a justified reluctance on the part of the courts to extend the special privileges of the Crown any further than necessary...The result is that the status of Crown-agent (at common law) will only be extended to public bodies that are fairly closely controlled by the executive.

4.18 Although the matter is equivocal, the Committee is of the opinion that the degree of ministerial control exercised over State business corporations under the

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321 ibid., ss. 41(3) & 42.
322 ibid., s. 41(9).
323 ibid., s. 41(10).
324 ibid., s. 41(11).
325 ibid., s. 43.
326 ibid., s. 54.
327 P. W. Hogg, op. cit., p. 252.
328 ibid.
329 ibid., p. 251.

SOE Act is sufficient to make them agents of the Crown and therefore not liable to contribute to the cost of fencing works under the Fences Act.

4.19 In the case of State owned companies it is reasonably clear that they are not agents of the Crown and therefore not entitled to Crown immunity. This is because the SOE Act is quite explicit concerning their status. Section 70 of the Act provides that:

> A State owned company or a subsidiary of a State owned company—
>
> (a) is not, and does not represent, the State;
>
> (b) is not exempt from any rate, tax, duty or other impost imposed by or under any law of the State, merely because it is a State owned company or a subsidiary of a State owned company;
>
> (c) cannot render the State liable for any debts, liabilities or obligations of the company or a subsidiary of a State owned company—
>
> unless this or any other Act expressly so provides.

This provision is consistent with the requirement that they be registered under Division 3 of Part 2.2 of the Corporations Law of Victoria.[330] Moreover, under the 'Provisions to be included in Memorandum and Articles of Association of State Owned Companies' contained in Schedule 1 of the SOE Act[331] the business of a State owned company must be managed by its directors,[332] who are answerable to the company's shareholders in the usual way.[333]

4.20 Given their corporate and separate identity from other organs of government, it is clear that State owned companies are not agents of the Crown unless there is express provision to the contrary and therefore they do not fall within the exemption contained in section 31 of the Fences Act. The constituting Act of a statutory corporation that is declared to be a converting body under section 59 of the SOE Act may have included such a provision, which would continue to apply by virtue of section 65(2) of the SOE Act.

4.21 The absence of a provision equivalent to section 70 of the SOE Act in relation to State business corporations strengthens the Committee's view that the Act manifests a legislative intent that they are Crown agents entitled to Crown immunity.

4.22 In summary, the Committee has concluded that a State body under the SOE Act is entitled to Crown immunity, a State business corporation is almost certainly

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330 ibid., ss. 64 & 65.

331 See ibid., s. 64(2)(a).

332 ibid., Schedule 1, art. 2.

333 See ibid., Schedule 1, *passim*.

entitled likewise and a State owned company is not so entitled, unless it is a converting body and the constituting Act of the former statutory corporation provides otherwise. Thus, a person who owns and/or occupies land adjoining Crown land which is administered, managed or controlled by a State owned enterprise is faced with an arbitrary and complex legal situation when determining whether he or she is entitled to contribution under the Fences Act. In the Committee's opinion, this is a most unsatisfactory situation.

4.23 In its submission to the Committee[334] the Victorian Farmers Federation highlighted these problems in relation to the Victorian Plantations Corporation (VPC),[335] which is a State business corporation under the SOE Act.[336] However, in so far as issues regarding the VPC are concerned, the Committee notes that the Corporation is presently in the process of selling its forestry business to private enterprise by granting perpetual licences to conduct forestry operations over its vested land.[337] It is the Committee's view that the holders of such licences fall within the present definition of 'occupier' under the Fences Act,[338] and that they should remain liable as deemed 'owners' under the Committee's proposed Dividing Fences and Boundaries Act.[339]

4.24 The Victorian Farmers Federation also drew the Committee's attention to the fact that exemptions from liability under the Fences Act available to government business enterprises operating on Crown land may confer a competitive advantage on those enterprises contrary to National Competition Policy.[340] National Competition Policy embraces the principle of competitive neutrality, which essentially seeks to ensure that government businesses do not enjoy any net competitive advantage simply as a result of their public sector ownership.[341] This is achieved by requiring government businesses to set the prices of the goods and services they provide in a manner that will reflect full attribution of the costs of producing those goods and services in the private sector.

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334 Submission no. 39 and the attachments thereto.

335 The Committee notes advice received from the Victorian Plantations Corporation (VPC) that it considers itself not liable under the Fences Act to contribute towards the cost of fencing works on boundaries between Crown land it occupies and private property, but in many cases contributed to such costs nevertheless. (Advice received from T. Manderson, Manager Resources, VPC on 17 Sept. 1998.)

336 *Victoria Government Gazette*, G18, 13 May 1993, pp. 1087–1088 as amended by *Victoria Government Gazette*, G25, 1 Jul. 1993, p. 1771. See also *Victorian Plantations Corporation Act 1993* (Vic.).

337 See *Victorian Plantations Corporation (Amendment) Act 1998* (Vic.).

338 See *Kahn v. Fawaz* [1919] V.L.R. 670, 674.

339 See *supra*, para. 3.22 & Recommendation 11.

340 See submission no. 39 and the attachments thereto.

341 See Council of Australian Governments, *Competition Principles Agreement 1995*; *Competition Policy Reform Act 1995* (Cth).

4.25 In the context of the Fences Act, to be competitively neutral a government business operating on Crown land, in pricing its goods and services, must neutralise the cost advantage derived from the legislative exemption under section 31. This does not mean that National Competition Policy requires a government business operating on Crown land to pay to the owners and/or occupiers of adjacent land the cost of fifty per cent of boundary fencing. Rather, the government business must set prices to include a component for the cost advantage it derives. The effect of this is that the government business receives a windfall by selling its goods at an artificially inflated price without any corresponding increase in its costs of production. It is the Committee's view that this situation is inequitable and points strongly to the need for State owned enterprises that compete with private enterprise to be subject to the provisions of the proposed Dividing Fences and Boundaries Act. However, since this would add a further complexity to an already complex situation, the Committee has concluded that all 'State owned enterprises' as defined in the SOE Act should be so liable.

Recommendation 51

The proposed Dividing Fences and Boundaries Act should include within it operation 'State owned enterprises' as defined in* the State Owned Enterprises Act 1992 *(Vic.).

Government Departments and Public Authorities under the Crown

Victorian Government Departments and Public Authorities

4.26 Government departments, headed by a Minister and staffed by Crown servants, possess the attributes of the Crown.[342] Many public authorities shelter under the umbrella of the Crown. The majority of major property-owning Victorian Government departments and public authorities, with the significant exception of the Department of Natural Resources and the Environment,[343] do not invoke the Crown immunity granted under the Fences Act.

4.27 In particular, the Committee acknowledges that the policy of the Victorian Government Office of Housing within the Department of Human Services is to treat with adjoining occupiers of private land in accordance with the present section 4 of the Fences Act.[344] The Committee was advised that the Department generally accepts

342 P. W. Hogg, op. cit., p. 247.
343 See *infra*., para. 4.34.
344 Victoria, Department of Human Services, *Housing Standards Policy Manual*, p. 31.

liability to contribute fifty per cent of the cost of a dividing fence with an adjoining private occupier, except where such neighbour wishes to erect something other than an 'ordinary' fence, in which case the neighbour pays the difference. The Committee was also advised that the Department accepts full liability for fencing boundaries between tenanted properties where both are owned by it.[345] A similar policy is applied operationally by the Department's Capital Management Branch in respect of private land adjoining public hospitals.[346]

4.28 The Department of Education advised the Committee that it was a long-standing operational policy of that Department to contribute fifty per cent of the cost of a reasonable fence between Department land and adjoining private land. While relevant decision-making has been delegated to school councils under section 15C of the *Education Act 1958* (Vic.), the property and legal sections of the Department provide advice in accordance with the above principle, and apply the principle in respect of vacant sites, closed schools and other sites falling under Head Office control.[347]

4.29 Contribution of fifty per cent of the reasonable cost of constructing or replacing a dividing fence, on approach by an adjoining private occupier, is also ordinary practice in respect of Magistrates' Court buildings,[348] Ambulance Services Victoria,[349] police stations,[350] country fire stations and State Emergency Services premises.[351] These fall within the general umbrella of the Portfolio and Infrastructure Branch of the Department of Justice. No doubt other government departments and public authorities under the umbrella of the Crown do likewise.

4.30 Given that contributions to fencing are in practice being made by a number of government departments and public authorities, the economic consequences that would flow from limited Crown liability may not be highly significant. The question is whether the present system of **voluntary** payments is sufficient and gives a desirable flexibility to government departments and public authorities, or whether

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345 Advice provided by D. Meehan, Department Officer, Department of Human Services on 10 Sept. 1998.

346 Advice provided by B. Gelnay, Manager Standards, Department of Human Services, Corporate Services Division, Capital Management Branch on 11 Sept. 1998.

347 Advice provided by G. Drossinos, Legal Officer, Department of Education on 10 Sept. 1998.

348 Advice provided by B. Dobson, Manager for Operations, Magistrates' Court of Victoria, on 18 Sept. 1998.

349 Advice provided by M. Varenti, Fleet and Property Manager, Ambulance Services Victoria on 18 Sept. 1998.

350 Advice provided by B. Pumpa, Maintenance Manager, Victoria Police Properties Branch on 18 Sept. 1998.

351 Advice provided by B. Robie, Property Officer, Country Fire Authority on 18 Sept. 1998.

fencing contributions from Government to citizens should be regularised by creating a positive legal obligation in the Act, albeit a liability limited by public policy considerations.

4.31 Such an approach is consistent with a form of limited Crown liability recommended by the Law Reform Commission of Western Australia in its as yet unimplemented *Report on Dividing Fences*.[352] Under the proposal the Crown would be bound to contribute towards the cost of construction and repair of a dividing fence 'wherever the land (not being a street, road or public right of way)…adjoins land in a residential locality on which a dwelling house is erected or being constructed'.[353]

4.32 So far as the position in other States and Territories is concerned, limited Crown liability currently applies only in South Australia and the Australian Capital Territory. Section 20 of the *Fences Act 1975* (SA) provides that:

> (1) Subject to subsection (2) of this section, this Act applies in respect of land of the Crown, an instrumentality or agency of the Crown, or a council.
>
> (2) This act does not apply in respect of any such land where:
>
> (a) the land comprises, or is comprised in, a single parcel of land of more than one hectare in area; or
>
> (b) the land comprises, or is comprised in, a public road or a road reserve; or
>
> (c) the land is exempted by regulation from the provisions of this Act.
>
> (3) The Governor may, by regulation, exempt specified land, or land of a specified class, from the provisions of this Act.

4.33 Section 2 of the *Common Boundaries Act 1981* (ACT) expressly includes Commonwealth and Territory Governments within the definition of 'occupier', but exempts public parks, sports grounds and reserved areas under the *Nature Conservation Act 1980* (ACT) from the provisions relating to contribution to fencing. However, given the unique nature of landholding in the Australian Capital Territory, such a broad provision may not be appropriate in Victoria. The Committee notes that all States (other than South Australia) and the Northern Territory effectively provide full immunity for the Crown.[354]

4.34 The Committee recognises that making the Crown liable to contribute to the cost of fencing Crown land in rural areas, including coastal land, national parks and

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352 Western Australia, Law Reform Commission, *Report on Dividing Fences*, Project no. 33, the Commission, Perth, 1975.

353 ibid., p. 21. See also NSWLRC Report, op. cit., pp. 64–66.

354 *Fences Act 1968* (Vic.), s. 31; *Boundary Fences Act 1908* (Tas.), s. 6; *Dividing Fences Act 1961* (WA), s. 4; *Dividing Fences Act 1991* (NSW), s. 25; *Dividing Fences Act 1953* (Qld), s. 4; *Fences Act* (NT), s. 3.

reserves and State forests, would constitute a significant financial burden and one which the Government would need to consider as part of its overall budget strategy. It is understandable that the Department of Natural Resources and the Environment, which oversees Victoria's public land management and has thirty-four per cent of the land within the State under its control,[355] is one of the few government departments to invoke Crown immunity. Nonetheless, it may be unreasonable to expect private landowners and occupiers to meet the whole cost of fencing in all circumstances. This is apparently recognised in the departmental policies discussed above. One has to consider the particular circumstances and identify the correct balance between the liability of government departments and public authorities and the legitimate expectations of private landholders.

4.35 The Committee has concluded that an approach based on location and usage is an appropriate and acceptable means of limiting Crown liability for fencing, if Crown liability is accepted in principle. The Committee believes that for the purpose of better defining the circumstances in which government departments and public authorities under the umbrella of the Crown should contribute to the cost of constructing, maintaining and repairing dividing fences, it is desirable that existing departmental policies should be formalised. Rather than an adjoining owner having to depend upon the exercise of an administrative discretion on an ad hoc basis, albeit in accordance with an established policy, it would be better that the recognition by government departments and public authorities of their responsibilities in respect of fencing works be made explicit.

Recommendation 52

The proposed Dividing Fences and Boundaries Act should contain a provision that makes the Crown liable under the Act to the same extent as a private person, where land owned by the Crown adjoins privately owned land in an urban area and the land owned by the Crown is used for any of the following purposes:

(a) a government school;

(b) a public hospital;

(c) the provision of public housing;

(d) ambulance, fire, police or other emergency services;

(e) a courthouse; and

(f) such other purposes as are prescribed by regulation as subject to the Act.

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[355] Victoria, *Victorian Government Directory 1998–99*, 26th ed., Information Victoria, Melbourne, 1998, p. 242.

Federal Government Housing Authorities

4.36 One submission received by the Committee contained advice that the Commonwealth Defence Housing Authority (DHA) had refused to contribute to the cost of erecting a fence between two residences, one of which the DHA had sold to the complainant while retaining the other.[356] The DHA is constituted under the *Defence Housing Authority Act 1987* (Cth) to provide housing for members of the Defence Force and their families, employees of the Department of Defence and others.[357] It is required under its constituting statute to perform its functions in accordance with Commonwealth Government policies and 'sound commercial practice'.[358] Its powers include: powers of acquisition and disposal of land, interests in land and houses; power to develop land, build, demolish, alter, renovate etc. houses and convert buildings and other structures into houses; and power to rent out and generally manage and control land and houses acquired by it or owned and leased by the Commonwealth Government.[359] From this description it is difficult to find grounds upon which to distinguish the DHA from private property owners and managers. The matters raised earlier in relation to the effect of National Competition Policy seem apposite here.[360]

4.37 While the Committee is cognisant that the Victorian legislature cannot bind the Crown in right of the Commonwealth, it urges the Victorian Attorney-General to approach the Commonwealth Minister responsible for the Defence Housing Authority requesting the Commonwealth Government's cooperation in waving the Defence Housing Authority's immunity from the provisions of the proposed Dividing Fences and Boundaries Act.

Recommendation 53

The Victorian Attorney-General should approach the Commonwealth Minister responsible for the Defence Housing Authority requesting the Commonwealth Government's cooperation in waving the Defence Housing Authority's immunity from the provisions of the proposed Dividing Fences and Boundaries Act.

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356 Submission no. 11.

357 *Defence Housing Authority Act 1987* (Cth), s. 5.

358 ibid., s. 6.

359 ibid., s. 7.

360 *supra*, paras. 4.24 & 4.25.

Liability of Municipal Councils

4.38 Municipal councils do not fall within the shield of the Crown.[361] In the absence of provisions either in the Fences Act or the *Local Government Act 1989* (Vic.) exempting municipal councils from liability, they are liable under the Fences Act, provided they satisfy the present definition of 'occupier'. By section 3 of the Act, 'occupier' is defined to include 'any person...entitled as owner to occupy any land purchased from the Crown under a contract of sale or alienated from the Crown by grant lease or licence', and any person 'in the actual occupation of' such land.

4.39 Municipal councils own and occupy land in different ways, some of which differ significantly from private ownership and occupation. There is little doubt that councils are owners of land housing municipal offices, municipal depots or council-run facilities or businesses such as indoor sports complexes or kindergartens and are acknowledged as occupiers and therefore as subject to the Act.

4.40 However, a more complex situation arises from the appointment of councils as committees of management of reserved Crown Land under the *Crown Land Reserves Act 1978* (Vic.)[362] and the vesting of reserved Crown land in municipal councils 'on trust for the purposes for which the land has been reserved' for which provision is made in the same Act.[363] In the case of management of reserved land by a municipal council appointed as a committee of management, continuing Crown ownership would bring the situation within the section 31 exemption applying to unalienated Crown land. The recommended change in liability from occupier to owner would also exempt committees of management from liability in that they do not fall within the proposed definition of 'owner'. But where reserved Crown land has been **vested** in (and therefore is legally owned by) a council on trust, not for the Crown but for the purposes for which the land is reserved, the position is more ambiguous. The Committee therefore agrees that the position of municipal councils in respect of such land needs clarification.[364]

4.41 The question, under the present Fences Act, is whether statutory vesting of land makes a council 'entitled as owner to occupy...land...alienated from the Crown by grant lease or licence' as provided in the present definition of 'occupier' in section

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361 See *Federated Municipal & Shire Council Employees' Union of Australia v. City of Melbourne* (1919) 26 C.L.R. 508; *Taylor v. Town & Country Planning Board* [1974] V.R. 173; *Soil Conservation Authority v. Read* [1979] V.R. 557.

362 *Crown Land Reserves Act 1978* (Vic.), s. 14.

363 ibid., s. 16.

364 Submission no. 31, p. 3.

3, bearing in mind also that the definition is inclusive only. In *Noarlunga v. Coventry*,[365] the South Australian Supreme Court held that the Noralunga municipal council was not an 'occupier' within the meaning of section 4 of the *Fences Act 1924* (SA) because the Act was intended to apply only to persons having actual or potential physical use and enjoyment of the land, whereas the council was acting as custodian or trustee for the public. The Court held that:[366]

> a local governing body [cannot] be said to be an 'occupier' of land merely because it becomes the registered proprietor...in order to give effect to the provisions of a statute enacted to control town planning and to promote the proper and beneficial subdivision of land.

This reasoning may be applicable to the interpretation of the Victorian Fences Act. Such reasoning is consistent with the view expressed by Lord Halsbury L.C. in *Lambeth Overseers v. London County Council*[367] that 'the fact that [a] park is vested in the County Council does not make them the occupiers'. It is probable therefore that a municipal council is not presently liable under the Fences Act for costs of fencing boundaries of parks and reserves, on the basis that it is not an occupier. Nor are they occupiers of roadways, because roads are required under statute for public use for traffic and other purposes as of right.[368]

4.42 However, the liability of councils could change with the proposed transfer of liability from occupiers to owners. The question is therefore one of principle as to whether municipal councils should or should not be bound by the Act, where properties are vested in them to preserve the public amenity, but from which no benefit to councils is derived.

4.43 The Committee notes that the Public Transport Corporation and Roads Corporation are expressly exempted under statute from liability to contribute to fencing along roads, railways and tramways.[369] One submission suggested that it was anomalous that 'municipal Councils as public statutory authorities which share similar characteristics and statutory obligations...do not similarly enjoy an express statutory exemption from the Act'.[370]

4.44 With respect to parklands and particularly to land forming the balance of subdivisions set aside to meet open space obligations under the Victorian planning provisions or pursuant to sections 18 and 20 of the *Subdivision Act 1988* (Vic.), the

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365 [1967] S.A.S.R. 71.
366 [1967] S.A.S.R. 71, 77.
367 (1897) A.C. 625, 630.
368 *Local Government Act 1989* (Vic.), s. 205.
369 *Transport Act 1983* (Vic.), s. 249.
370 Submission no. 9, p. 2.

view was put to the Committee that the benefit of these neighbourhood parks accrues directly to the occupants of neighbouring properties, whose amenity they were designed to improve and that councils are effectively only trustees of open space on behalf of the public.[371]

4.45 A contrary view put to the Committee was that, since municipal parkland is managed chiefly for the benefit of local ratepayers, municipal councils as rate-collectors are the proper agent through which the ratepayers should meet a share of the cost of fencing park boundaries.[372] The Committee considers that this is not a tenable view. There is a significant difference between open parkland which the public at large can use and facilities provided by municipal councils for their ratepayer's exclusive use, such a municipal libraries, recycle depots, waste collection and the like.

4.46 In considering these different views, the Committee has had regard to the fact that property owners adjoining parks are the most immediate beneficiaries of the parkland amenity in terms of use or potential use, which generally results in increased property values. Accordingly, the Committee considers that a requirement that owners of properties adjacent to public open space meet the full costs of fencing their boundary with such land is reasonable in all the circumstances, particularly when it is appropriate to average the cost of a fence over its lifetime. This situation is considered preferable to spreading the costs through the local community by making municipal councils liable to contribute. The Committee notes that the cost of maintaining the parkland in good order and providing leisure facilities is met from the municipal purse.

4.47 The Committee also notes that the law in nearly every other State in Australia effectively exempts municipal councils from liability to fence land vested in it for the purpose of a public reserve and for other public purposes. The Queensland legislation gives only limited exemption by confining immunity to the State and any person or authority 'having the administration, management or control of the Crown land' or 'vested with Crown land'.[373] The South Australian *Fences Act 1975* applies in respect of land of the Crown, an instrumentality or agency of the Crown, or a municipal council,[374] but does not apply in respect of any such land which is more than one hectare in area, land comprising a public road or road reserve, or land

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371 Submission no. 31, p. 4.

372 T. Nikolson, *Minutes of Evidence*, 3 Apr. 1998, pp. 126–127.

373 *Dividing Fences Act 1953* (Qld), s. 4(3)(b).

374 *Fences Act 1975* (SA), s. 20(1).

exempted by regulation.[375] In New South Wales, Tasmania, Western Australia and the Northern Territory, fencing statutes provide express exemptions for municipal councils or any trustees or other persons in whom land is vested for public purposes.[376]

4.48 The Committee considers that with some modification sub-section (b) of section 25(1) of the *Dividing Fences Act 1991* (NSW) is a suitable model for a provision clarifying the position of municipal councils. It provides as follows:

> This Act does not operate to impose any liability, or to confer any rights, with respect to dividing fences on:
>
> …
>
> (b) a council of a local government area, or any trustee or other person or body, in respect of land vested in (or under the care, control and management of) the council, trustee, person or body for the purposes of a public reserve, public park or such other public purposes as may be prescribed.

The Committee would add to the list public roads, railways and tramways and drainage reserves.

4.49 In recommending this clarification of the legal obligations of municipal councils under the proposed Dividing Fences and Boundaries Act, the Committee notes and applauds the practice of many municipal councils which make voluntary payments to assist with fencing costs.[377]

Recommendation 54

The proposed Dividing Fences and Boundaries Act should make municipal councils liable under the Act to the same extent as a private person, where land owned by them is used for the purposes of the municipality or a council-owned or managed business, except where the land is used as a public reserve, public park, public road, railway or tramway or a drainage reserve, or for such other like public purposes.

Crown Immunity in a Rural Context

4.50 In the eighteen written submissions received from farmers and in evidence given at public hearings held in rural Victoria, the Committee was presented with a

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375 ibid., s. 20(2).

376 *Dividing Fences Act 1991* (NSW), s. 25; *Boundary Fences Act 1908* (Tas.); *Dividing Fences Act 1961* (WA), s. 4. The definition of 'owner' in the *Fences Act* (NT), s. 5 excludes 'trustees or other persons having the control and management of land which is a public reserve or park or is used for any public purpose which may be prescribed'.

377 J. O'Donoghue, *Minutes of Evidence*, 2 Apr. 1998, p. 88 and T. Nikolson, op. cit., p.127.

range of concerns regarding the fencing of rural land. The majority of these related to the Crown as neighbour and sought in particular to challenge the Crown exemption from liability under the Fences Act.[378] One of these submissions contained twenty-five signatures, and other submissions were made on behalf of families or neighbourhoods. Two landowners from the vicinity of the Buangor State Forest submitted videotaped evidence, which graphically illustrates the fencing problems and the associated difficulty of pest animals faced by some members of the rural community. Evidence was taken also from the Victorian Farmers Federation during the public hearings in Echuca.

4.51 This evidence, the straightforward manner in which it was presented, and the pragmatism with which possible solutions were canvassed impressed the Committee. The consistency with which particular matters were raised clearly delineated the issues of prime importance in rural Victoria and the strength of feeling with which they were articulated was hard to ignore.

4.52 Evidence given by representatives of the Victorian Farmers' Federation (VFF) highlighted major concerns regarding the fencing of land bordering Crown land.[379]

> The major issue raised by our membership concerned the application of the Fences Act to Crown land. Many of our members have land bordering Crown land, either national parks, forest reserves or general reserves. It is a real issue among the farming community that the Crown makes no contribution to the cost of fencing Crown reserves…Because [of this], farmers incur significant expense by having to maintain the fences themselves.

Considerable damage to rural fences is caused by wildlife inhabiting Crown reserves and fires, which often travel through Crown land. The VFF said that it 'would like the provisions in the Fencing Act that apply to boundary fencing to be formally extended to also apply to Crown land.'[380] It does not expect the Crown to immediately contribute fifty per cent to the cost of fencing along Crown land, but believes that:[381]

> it should be formalised so that where fences shared by the government and neighbouring landowners have been damaged by fire, or whatever, the Crown has a responsibility to contribute to the cost of maintaining or replacing those fences. That makes good sense and is simply a good neighbour gesture.

4.53 The case for the Crown to be made liable for a share of fencing costs along Crown boundaries with private land has been argued since fencing statutes were first enacted. During parliamentary debate of the 1908 Fences Act Amendment Bill, in

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378 Submission nos. 15, 29, 33, 36, 39, 41, 42, 45, 50, 56, 60 & 67.

379 C. Manners, *Minutes of Evidence*, 4 May 1998, p. 152. See also submission no. 39.

380 ibid.

381 ibid.

which the vermin-proof fencing provisions were introduced, there were similar complaints:[382]

> I would like to say that I have had several letters from the country in which persons complain in the bitterest manner of the position in which they are placed by having to destroy vermin which come straight on to their property from Crown lands. The severest measures are adopted to compel them to keep vermin off their property, yet the Government keeps this breeding place adjoining...If the Government place on the owner or occupier of land the burden of keeping it clear of vermin, they should share the expense where Crown lands adjoin.

4.54 Whereas in 1908 the 'vermin' in contemplation were rabbits, farmers giving evidence to the Committee spoke of damage to fences from kangaroos, emus, wild deer, dingoes, foxes, or feral animals such as wild dogs. There was a near unanimous perception among farmers that conservation policies in recent years, combined with cut-backs in funding for land management in State reserves, had resulted in increased numbers of pest animals causing very significant damage to property, fences and livestock. The Committee was advised that, particularly in dry seasons, such animals are attracted by the waterholes on cleared farmland and the prospect of better pasture.[383] Although higher and more elaborate fences could be erected to discourage them, farmers would have to bear the full cost. Electric fencing is the cheapest form of fencing for such purposes, but the Committee was advised that there are difficulties in maintaining electric fences in the environs of State forests, such as where shade from overhanging trees encourages moisture-retention, which in turn causes electric fences to short-circuit.[384]

4.55 The Committee viewed videotaped evidence of damage to fences caused by falling branches and unchecked forest encroachment, and the accumulation of fire-hazardous debris against fences on uncleared Crown land boundaries.[385] It was apparent to the Committee that the task of continually repairing fences is onerous and taxing on the farmer's personal and economic resources.

4.56 The Committee obtained estimates of the cost of rural fencing. The Committee was advised that the cost is between $7000 and $9000 per kilometre for a rabbit-proof netting fence and between $6000 and $7000 per kilometre for a general fabricated boundary fence of three plain strands and one barbed.[386] A 1994 article estimated the

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382 Victoria, Legislative Council, *Debates*, 6 Aug.1908, p. 545, per Mr. McCutcheon.

383 Submission nos. 15, 39 & 67.

384 T. Mannion, *Minutes of Evidence,* 4 May 1998, p. 188.

385 This videotape formed the major part of Submission no. 33.

386 Letter from the Victorian Farmers Federation dated 28 Jul. 1998.

cost of an electric fence at $1800 per kilometre, but noted that electric fences require greater maintenance.[387]

4.57 Farmers who gave evidence to the Committee placed some emphasis on the restoration of fences after their destruction by fire; however, their main concern was not focussed on fence construction, but on maintenance and repair.[388] The evidence given to the Committee was that fencing already exists on most boundaries between Crown land and private land, because it was a condition of the original Crown Grants that the grantee fence the property.[389] However, the time that has elapsed since the Crown Grants were made means that the fencing stock is becoming aged and in many cases fences on Crown boundaries are in need of replacement.

4.58 Farmers disputed the proposition that fences along Crown boundaries are of no benefit to the Crown and that the Crown is merely a passive occupier.[390] They noted that annual licensees of Crown land are not liable under the Act,[391] but that licensees make use of the boundary fences. They also claimed that boundary fences preserve Crown land from trespass and, by preventing the incursion of stock, conserve Crown land and help to isolate habitat for indigenous plant and animal species.[392] More significantly, farmers insisted that their obligations with respect to fence repair and replacement were made very much more onerous by damage from pest-animals and encroaching vegetation, whose presence on Crown land the State either encouraged or failed to check.[393] It was also put to the Committee that the rural community, many of whom are in financial difficulty, should not be asked to meet the whole cost of fencing their boundaries with Crown land.[394]

Economic Implications of Crown Liability for Fencing Rural Boundaries

4.59 The Department of Natural Resources and Environment submitted to the Committee that there are some 60,000 kilometres of Crown boundaries with private

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387 I. Patrick, 'Fencing is vital for farm viability', *Wires and Pliers*, Kondinin group, 1994, pp. 16–17.

388 Submission nos. 15, 29, 33, 36, 42 & 45.

389 D. Evans, *Minutes of Evidence*, 4 May 1998, p. 174.

390 Submission no. 15.

391 Although unused road licensees, even if only annual licensees, are obliged under *Land Act 1958* (Vic.), s. 402(1) to contribute half the cost of repair of fencing between such road and adjoining private land.

392 Submission no. 15.

393 Submission nos. 15, 29, 33, 39, 45, 56, 60 & 67; C. Manners, op. cit., p. 158; P. Meagher, *Minutes of Evidence*, 4 May 1998, p. 180; B. Brereton, *Minutes of Evidence*, 4 May 1998, p. 200; K. Wilde, *Minutes of Evidence*, 5 May 1998, p. 209; W. Ower, *Minutes of Evidence*, 5 May 1998, p. 221.

394 ibid.; submission nos. 36 & 50; C. Manners, op. cit., p. 160; and P. Meagher, op. cit., p.178.

land in Victoria.[395] Using a mean figure of $7000 per kilometre of fencing, derived from the figures cited earlier,[396] the estimated cost of replacing the whole of the existing fencing stock along Crown boundaries is $420 million. However, as there is already fencing in existence on most boundaries, the cost could be spread over a number of years. Based on the Australian Taxation Office's taxation depreciation estimate of a 33-year life expectancy for a rural fence,[397] the annual cost would be of the order of $13 million (at present day prices), of which the Crown would be liable to pay half. The Committee does not believe that a $6.5 million per year budget allocation for this purpose is unreasonable. However, the Committee recognises that under current fencing practices the life expectancy for rural fences could be considerably less than 33 years.

4.60 It should be borne in mind also that, as the Fences Act stands, it cannot be used by the Crown to obtain a contribution to fencing costs from the private landholder when the Crown wishes to erect a fence. Such fences are currently erected wholly at the State's expense, although the Committee notes that the Land Victoria *Guidelines 13—Fencing of Crown Land Boundaries* refer to the Crown 'negotiating with the occupier of the private land as regards the payment of costs'.[398] To make the Crown liable would not therefore universally benefit private landowners. In some cases they would be faced with a liability for fencing erected at the instigation of the Crown, for which they would now not be liable.

4.61 While the Committee accepts that removing the immunity of the Crown from liability under the proposed Dividing Fences and Boundaries Act would have significant resource implications for the Government, it believes that more could be done for Victoria's rural community regarding the fencing of boundaries between private and Crown land. Consequently, the Committee has considered a number of alternatives to unlimited Crown liability in this context. These alternatives are:

(1) *Ex gratia* payments

(2) Contribution of materials

(3) Grants under specific programs

(4) Limited Crown liability

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395 Background notes provided by the Department of Natural Resources and Environment to assist the Committee, enclosed with correspondence from the Minister for Conservation and Land Management received 30 Apr. 1998.

396 See *supra*, para. 4.55.

397 *1998 Master Tax Guide*, CCH Ltd, Sydney, 1998, Depreciation Schedule, p. 1693.

398 Apr. 1997 Guidelines, para. 3.1.1, p. 5.

Alternatives to Crown Liability

1. Ex gratia Payments

4.62 The 1988 report of the Law Reform Commission of New South Wales on Dividing Fences noted the frequency with which government departments and agencies in that State made *ex gratia* payments to assist with fencing, notwithstanding the exemption in the New South Wales Act. The Departments of Agriculture, Education and Family and Community Services were cited as generally contributing to fencing, as were the State Rail Authority and the Forestry Commission.[399] In the latter case it was noted that the Forestry Commission[400]

> often bears the cost of fencing boundaries between state forests and private land where it considers the work to be in its interests, and may also allow adjoining landowners to cut timber from a state forest for fencing purposes.

The Committee has noted previously that a number of Victorian Government departments and public authorities under the umbrella of the Crown do likewise.[401] However, as the New South Wales Law Reform Commission observed: 'There is always the possibility that a system of *ex gratia* payments will be administered arbitrarily or inconsistently'.[402]

4.63 The Committee believes that, as is the case in New South Wales, it would not be unreasonable to have an expanded system of *ex gratia* payments towards the cost of dividing fences between land occupied by the Crown in rural areas and land occupied by private landholders. Farmers seem to be willing to provide their labour in maintaining boundary fences in good repair, but need some assistance with the cost of fencing materials.[403] Putting in place a formal mechanism to assist in this regard would advance the Government's standing as a 'good neighbour'.[404]

Recommendation 55

Government departments, public authorities under the Crown and other government agencies responsible for the administration, management or control of Crown land should put in place formal mechanisms for making payments towards the cost of

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399 NSWLRC, op. cit., pp. 62–3.

400 ibid.

401 *supra*, paras. 4.26–4.29.

402 NSWLRC, op. cit., p. 64.

403 See in particular submission nos. 15 & 33 (videotaped evidence); K Wilde, op. cit., p. 210.

404 See e.g. Victoria, Department of Natural Resources and Environment, *Good Neighbour Program: 1998/9 Operations Manual*, Natural Resources and Environment, Melbourne, Mar. 1998. The program is discussed *infra*, para. 4.67.

fencing materials used in the repair of dividing fences between Crown land in rural areas and private property.

2. Contribution of Materials

4.64 Under the now repealed *Wire Netting Act 1958* (Vic.) the responsible Minister was able to supply up to half of the netting for a common boundary fence between unoccupied Crown land and private land, or to pay half the cost of netting acquired for that purpose by an adjoining owner.[405] This included land where Crown and private land were separated by a road. Where such an amount had been paid to an adjoining owner, an in-coming lessee of the Crown land had to repay to the Crown the amount paid, or the value of the netting supplied. The Wire Netting Act was repealed by the *Statute Law Revision Act 1995* (Vic.), although the 1997 publication *Guidelines 13—Fencing of Crown Land Boundaries* issued by Land Victoria continues to make reference to it.[406]

4.65 Farmers appearing before the Committee saw the repeal of this legislation and the loss of this level of practical assistance as a retrograde step and sought to have such assistance reinstated.[407]

4.66 The Committee considers that the provisions of the Wire Netting Act would have been of considerable practical assistance to those who could take advantage of them. Consequently, the Committee recommends that, where it is not considered appropriate to make an *ex gratia* payment towards the cost of fencing, government departments, public authorities under the Crown and other government agencies responsible for the administration, management or control of Crown land in rural areas should be encouraged to provide access to timber on Crown land and/or facilitate the provision of other fencing materials.

Recommendation 56

Where it is considered inappropriate to make an* ex gratia *payment towards the cost of fencing, government departments, public authorities under the Crown and other government agencies responsible for the administration, management or control of Crown land should be encouraged to provide access to timber on Crown land and/or facilitate the provision of other fencing materials.

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405 *Wire Netting Act 1958*, s. 6.

406 Victoria, Department of Natural Resources and Environment, Land Victoria, Crown Land Management, Guideline no. 13.9, *Fencing of Crown Land Boundaries*, Apr. 1997, para. 2.4.

407 Submission no. 15; B. Brereton, op. cit., p. 199; N. Atwell, *Minutes of Evidence*, 5 May 1998, p. 217.

3. Grants under Specific Programs

4.67 The Department of Natural Resources and Environment supplied the Committee with details of special programs under which applications could be made for assistance with rural fencing. One of these is the 'Good Neighbour Program' which aims, among other things, to 'enhance the productivity of agricultural enterprises through the control of pest plants and animals on adjoining public land' and 'promote the Government as a "Good Neighbour" when it comes to pest control on public land'.[408] Treatment methods for pest infestation control include fencing and electrified fencing.[409] However, one of the project selection criteria is that the proposed treatment program 'generate public good as opposed to private benefit'[410] and projects within each region are prioritised with major input from other departmental businesses, Parks Victoria and catchment management authorities.[411]

4.68 Another program is the 'Land Protection Incentive Scheme', which provides grants and other assistance for approved land and water management works under section 68(1), (2) and (3) of the *Conservation Forests and Lands Act 1987* (Vic.). Again, while protective fencing falls within the purview of the scheme, and control of pest animals is one of its objects, the works in question must yield 'substantial community benefit' and cannot be made where no community benefit can be demonstrated.[412] Schedule 2 of the policy entitled 'Protective Fencing' provides that 'fences used solely for subdivision or boundary purpose are ineligible for assistance'.[413] Since the program is framed in terms of 'fencing incentives', assistance is unlikely to be given where there is an existing fence in need of repair. Depending on the level of priority accorded to the project, and provided fencing is used in conjunction with other approved land protection activities, assistance is provided in the form of a contribution to the cost of approved materials: in the case of standard and electric fencing, up to thirty per cent for low priority projects; up to sixty per cent for medium priority projects; and up to one hundred per cent for high priority projects. For fencing for wild dog control, assistance is provided up to sixty per cent of the cost of approved fence materials, and for fencing for rabbit control to up to one hundred

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408 Victoria, DNRE Guideline no. 13.9, op. cit., p. 2.

409 ibid., Appendix 8, p. vi.

410 ibid., p. 4.

411 ibid., p. 6.

412 Victoria, Department of Conservation and Natural Resources, *Land Protection Incentive Scheme (LPIS) Policy* [CNR No. 02-20-0333-2], Mar. 1993, Sect. 3, p. 1.

413 ibid., Sect. 7, p. 5 (General condition (e)).

per cent of the cost of the netting (only). According to the policy document, the total budget allocation for netting statewide is $2000.[414]

4.69 It seems, therefore, that neither special program within the Department of Environment and Natural Resources nor ad hoc *ex gratia* payments are addressing the fencing needs of the rural community to any significant extent.

4. Limited Crown Liability

4.70 The Committee is mindful of the fact that farm enterprises are eligible for taxation deductions in respect of expenditure on fencing, which are generally not available to ordinary home-owners. Repairs to fences fall within operating expenses and are fully tax deductible in the year of expenditure.[415] This can include an estimate of the value of the farmer's labour if he or she performed the repairs. The cost of erecting or modifying fences to prevent land degradation or to exclude livestock or vermin to prevent aggravation of degradation or assist reclamation is also fully deductible in the year of expenditure.[416] Expenditure on the erection or modification of fences in other circumstances is not deductible, but falls within the depreciation allowance for plant used in producing assessable income,[417] which in the case of farm fences is calculated over an effective life of 33 years[418] or 20 years in the case of electric fences.[419] It is relevant in this regard that the depreciation allowance is intended to assist in meeting the replacement cost of the asset. However, the Committee recognises that the allowance may be of little real benefit for farmers with low incomes who have to meet the cost of replacing a fence that is 33 years old.

4.71 There was evidence before the Committee that purchasers of properties with borders adjoining Crown land usually 'factor in' their full liability for fencing and obtain such properties at a discount from the normal market price.[420] However, this means that vendors or those who have resided on their farms for a considerable period are having the values of their properties reduced—perhaps by $40,000–$50,000—because the property shares a boundary with Crown land.[421]

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414 ibid, para 2.6.1 condition (ii).

415 See *Income Tax Assessment Act 1997*(Cth), s. 25.

416 *Income Tax Assessment Act 1997*(Cth), s. 387.

417 See *Income Tax Assessment Act 1997*(Cth), s. 42.

418 Or 33.33% for pre 13 Mar. 1991 plant.

419 *1998 Master Tax Guide*, CCH Ltd, Sydney, 1998, Depreciation Schedule, p. 1693.

420 H. Davies, *Minutes of Evidence*, 4 May 1998, p. 184; W. Ower, op. cit., p.223; and N. Atwell, op. cit., p. 219.

421 ibid.

4.72 The Committee considers that it is not unreasonable to require the Crown to contribute half the cost of replacing or repairing a dividing fence between Crown land and private property which is destroyed or damaged by a natural disaster, where the cost of replacement or repair is not otherwise recoverable.

Recommendation 57

The proposed Dividing Fences and Boundaries Act should require the Crown to contribute half the cost of replacing or repairing a dividing fence between Crown land and private property which is destroyed or damaged by a natural disaster, where the cost of replacement or repair is not otherwise recoverable.

Relationship between Crown and Private Landowners

4.73 The Committee believes that certain steps could usefully be taken to improve the relationship between the Crown and its neighbours and to alleviate the practical difficulties being experienced by farmers. These relate to the clearance of land for the protection of fences, the appointment of a rural ombudsman, access to Crown land to recover stock, and problems arising from the agistment of stock on Crown land.

Clearance of Land for Fence Protection

4.74 Having regard to the evidence received by the Committee concerning the damage caused to rural fences by trees and branches situated on Crown land,[422] the Committee believes that departmental policies in relation to forest clearance along fence lines requires review.

4.75 The Victorian Department of Natural Resources and Environment's guidelines on *Fencing of Crown Land Boundaries* provide:[423]

> Where an occupier of private land wishes to construct a fence on the common boundary of that land and unoccupied Crown land or reserved forest, permission may be given to the occupier to remove a strip of timber along the fence line of Crown land or reserved forest. The strip should be of the minimum width for construction of the fencing and the removal should be subject to:
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> - payment of royalty for any merchantable trees;
> - satisfactory removal of debris;
> - an agreement that no costs will attach to the Department; and
> - the Department being indemnified against damages of any sort arising from the removal.

422 See e.g. submission nos. 29, 33, 36, 42, 46, 50 & 56.

423 Victoria, DNRE Guideline no. 13.9, op. cit., p. 11.

4.76 For parks under the *National Parks Act 1975* (Vic.), Parks Victoria[424] guideline no. 15.9 in its present form[425] sets out the procedure to be followed in the establishment or maintenance of fencing by owners or managers of land abutting park boundaries where this involves clearing land within a park or reserve.[426] The procedure requires neighbouring land managers to seek written permission from Parks Victoria to clear inside a park or reserve for fencing, fire protection or removal of dangerous trees, and requires Parks Victoria to inspect the area to identify any features in need of protection before permission is given.[427] The Chief Ranger, who must ensure that specified conditions are met, may give authority to clear land up to five metres inside the boundary.[428] One of these conditions is that 'work is at the neighbouring land manager's expense', although 'the Chief Ranger may consider authorising a departmental contribution or other co-operative arrangement if the work is of benefit to the park or reserve'.[429]

4.77 These guidelines appear to attempt to balance Parks Victoria's responsibility under the *National Parks Act 1975* (Vic.) to protect and preserve natural and cultural features and its responsibility as a neighbour. The Committee notes that section 3 of the guideline, which speaks of this balance, accepts that 'clearing along boundaries for fencing and fire protection is an important aspect of [both] responsibilities'. Section 2 concludes:

> Clearing for fencing can provide a firebreak or control line which will benefit both the park or reserve and the neighbouring land manager. This will also protect the fence.

4.78 Where the clearance of vegetation (including tree limbs) along the boundaries of Crown land is of benefit to the Crown, the Committee considers that it is reasonable that the Crown assume responsibility for half of the cost. Moreover, to assist those who are financially unable to meet a half-share of the cost of such vegetation clearance, but whose fences are demonstrably being damaged through forest encroachment or by trees or branches falling from Crown land, the Committee recommends that either the Good Neighbour Program or the Land Protection

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424 Formerly the National Parks Service.

425 The guideline is currently under departmental review.

426 Victoria, Department of Natural Resources and Environment, Parks Victoria, *NPS Guidelines and Procedures Manual*, no. 15.9R, 'Clearing along park and reserve boundaries by neighbouring land managers', [NRE No.05-20-0005-2], p. 1.

427 ibid.

428 If the width of the proposed clearing is to exceed this, permission must be obtained from the Manager, National Parks and Reserves Branch and in some cases the Director of National Parks (ibid, p. 2).

429 ibid.

Incentive Scheme be extended, or a new program established, to provide assistance with the clearance of vegetation.

Recommendation 58

The Good Neighbour Program or the Land Protection Incentive Scheme should be extended, or a new program established, to provide financial assistance with the clearance of vegetation (including tree limbs) for an owner of land adjoining Crown land who is unable to meet his or her share of the cost of such tree clearance, where a boundary fence is demonstrably being damaged through forest encroachment or by trees or branches falling from trees situated on Crown land.

Rural Ombudsman

4.79 The Committee heard evidence that there are limited opportunities for private landowners to have departmental decisions under the policies and programs discussed above reviewed.[430] The Committee considers that a Rural Ombudsman (who should report annually to Parliament) should be appointed to act as an intermediary between the rural community and government departments so as to facilitate the prompt, effective and economical resolution of these issues. The Rural Ombudsman should be empowered to review the decisions of departmental officers concerning vegetation clearance for fence construction and clearance along Crown boundaries with private land.

Recommendation 59

A Rural Ombudsman should be appointed to investigate complaints by owners of private land concerning the decisions of departmental officers in respect of disputed vegetation clearance for fence construction and clearance along Crown boundaries with private land.

Access to Crown Land to Recover Livestock

4.80 The Committee heard evidence of the difficulties faced by farmers in recovering livestock that have strayed through damaged fencing onto Crown land.[431] Under guidelines published by the Department of Natural Resources and Environment, permission has to be sought before livestock that has strayed onto

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430 Submission no. 33 & K. Wilde and K. Allender, *Minutes of Evidence*, 5 May 1998, pp. 211–212 & 214.

431 Submission nos. 29, 33 & 42 and K. Wilde and K. Allender, ibid., p. 212.

Crown land can be recovered.[432] Moreover, because dogs are not permitted to enter Crown land except on a leash, farm dogs cannot be used to round up stock. According to evidence before the Committee, when stock escape as a result of fence damage, the practicalities of the situation are that this law is frequently breached.[433]

4.81 Presumably, the prohibition on unleashed dogs reflects a concern that escaping dogs may turn feral and cause damage to animals (including livestock) and indigenous plants. However, the risks associated with the temporary presence of working dogs needed to recover stock are inconsequential compared with the convenience to farmers. While the Committee accepts that this matter does not properly fall within its Terms of Reference for this Inquiry, it draws the matter to the attention of the Government, as the concern arises as a result of damage to fences.

Stock Agisted on Crown Land

4.82 Concern was also expressed at the exemption of annual licensees[434] from liability under the Fences Act and the benefit such licensees may derive from fences constructed at another's expense.[435] It was commented that agisted cattle tend to break into farmland, because of the superior pasture, and that this placed pressure on fences for which the farmer alone was liable.[436] It was also noted that during the non-irrigation season cattle agisted in the forest are able to stray along the dry channels

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[432] Section 48(1)(o) of the *National Parks Act 1975* (Vic.) provides for the making of regulations prohibiting or allowing the entry into parks of animals or classes of animals. Regulations 7(2)(g), 20(2) and (3), 21 and 23 of the Park Regulations 1992 (Vic.) provide the framework by which access to parks by dogs is prohibited or restricted. The effect of these regulations is summarised in Table 1 of the Department of Natural Resources and Environment, *NPS Guidelines and Procedures Manual*—issued Dec. 1995, section 2.4.6P [CNR NO. 05-20-0009-4], p. 2. According to this table, dogs are not permitted in wilderness parks; are not permitted in National Parks, unless in areas specifically set aside to provide for dogs or if the dog is confined to a vehicle or vessel in transit through the park by a route which is usually open to the public for that purpose; and are permitted in State and other Parks, except in specifically set aside areas where they are not permitted. However, para.4.2.2 notes that exemption may be granted for working dogs where authority is given under the Act. The issue of access to State parks by dogs is addressed in individual park management plans. In the case of Mount Buangor State Park, the Management Plan made in Dec. 1996 provides at para. 5.2.8 that dogs are not compatible with the conservation and recreation values of the park and are prohibited from entry. Local landowners must therefore seek a permit from the Area Parks and Reserves Manager in accordance with para. 5.2 of the *NPS Guidelines*, for one-off or occasional access to the park for the purpose of recovering stock, subject to such conditions as the Area Parks and Reserves Manager may impose.

[433] K. Wilde and K. Allender, op. cit., p. 212.

[434] Except unused road licensees who are liable to contribute to fencing costs under the *Land Act 1958* (Vic.), s. 401(1).

[435] T. Mannion, *Minutes of Evidence,* 4 May 1998, p. 187.

[436] B. Brereton, op. cit., p. 200.

and wander onto neighbouring paddocks, because neither their owners nor the State Rivers and Water Supply Commission take responsibility for fencing off the channels.[437]

4.83 The Committee notes that Department of Natural Resources and Environment guidelines point out that, although most annual licensees are not obliged to contribute to the costs of construction or repair of fences bounding adjoining private land, 'it is common enough for them to do so as, for example, to contain stock or satisfy licence conditions'.[438]

4.84 The Committee considers that the terms of licences are a matter for private negotiation between the licensor and licensee and that no change should be made to the status quo with respect to the fencing obligations of annual licensees of Crown land.

[437] T. Mannion, op. cit., p. 189.

[438] Victoria, Department of Natural Resources and the Environment, Land Victoria, op. cit., p. 7.

Regulation of Fences

The Fences Act 1968

5.1 The *Fences Act 1968* (Vic.) deals with the liability of adjoining occupiers to contribute to the cost of any fence dividing them and provides mechanisms through which contribution can be demanded and recovered. It is primarily designed to facilitate private contract. The Act does not regulate the composition, siting, height or construction of fences other than in standards for rural specific vermin-proof fences. The provisions enabling a Magistrate to determine the kind of fence to be constructed, the contribution of parties and the position of a fence are not activated unless a fencing notice requesting contribution to the cost of fencing is served by one occupier on another and the parties fail to agree upon either the cost or the nature of the proposed fence. Planning and building controls over fences, such as they are, are to be found in the *Building Act 1993* (Vic.) and the *Planning and Environment Act 1987* (Vic.).

The Building Act 1993 and Building Regulations 1994

5.2 While the Building Act does not contain a definition of 'fence', fences are impliedly included in the definition of 'buildings' which is defined to include 'structure, temporary building, temporary structure and any part of a building or structure'.[439] The word 'structure' is not defined in the Act, but the ordinary meaning of the word includes 'any framework or fabric of assembled material parts'.[440] This definition appears to comprehend a fence. Moreover, the Building Regulations 1994 clearly comprehend a fence as being a building for the purposes of the exemptions from the Regulations contained in regulation 1.6.[441] 'Building work' is defined in the

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439 Building Act *1993* (Vic.), s. 3(1).

440 L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles*, Clarendon Press, Oxford, 1993, p. 3104.

441 See K. Adler, *Minutes of Evidence*, 4 Jun. 1998, p. 243—244.

Building Act to mean: 'work for or in connection with the construction, demolition or removal of a building',[442] and the word 'construct' is defined to include repairs to a building.[443]

5.3 Section 16(1) of the Building Act provides that:

> A person must not carry out building work unless a building permit in respect of the work has been issued and is in force under this Act and the work is carried out in accordance with this Act, the building regulations and the permit.

Section 16(2) provides that sub-section (1) 'does not apply to building work exempted by or under this Act or the regulations'.

5.4 Regulation 1.6(1) of the Building Regulations 1994 made pursuant to the Act provides that certain buildings and building works do not require a building permit and exempts them from all or part of the Regulations. By sub-regulation 1.6(1)(c) certain fences (other than those forming part of the safety barrier for a swimming pool constructed on or after 8 April 1991 or forming part of a children's service outdoor play space) do not require a building permit and are exempted from the whole of the regulations. The exemption applies to fences:

(i) not exceeding 2 m in height; and

(ii) not exceeding 1.2 m in height when within 3 m of a street alignment and located on, or facing, that street alignment; and

(iii) not having barbed wire or the like within 150 mm of a street alignment.

'Street alignment' is defined to mean 'the line between a street and an allotment'.[444]

5.5 Although the Regulations generally apply to fences over 2 m high, the regulations which apply specifically to fences outside the above categories are regulations 2.2, 4.2(2), 4.2(3), 4.4(4) and 4.4(4A). Regulations 2.2, 4.2(2) and 4.2(3) concern fences exceeding 1.2 m within 9 m of a point of intersection of street alignments where Council's consent to and report on the building permit application is required, and regulation 4.2(3) relates to fences with barbed wire or other sharp protrusions. The more important regulations, from the point of view of dividing fences generally, are regulations 4.4(4)(a), 4.4(4)(c) and 4.4(4A), which apply the *Victorian Code for Residential Development—Subdivision and Single Dwellings (*VicCode

442 ibid.
443 ibid.
444 Building Regulations 1994, reg. 1.5.

1)[445] siting and design requirements to certain dividing fences over 2 m high. These regulations provide as follows:

> 4.4(4) Fences must comply with the following Elements and Performance Measures—
>
> (a) a fence exceeding 2 m in height (except a fence to which paragraph (b) or (c) applies) must comply with Element 2 Building siting and design, Performance Measures 2, 8, 9 and 10 of VicCode 1;
>
> ....
>
> (c) a fence located on a side or rear boundary and which divides abutting lots must comply with Element 2 Building siting and design, Performance Measures 2, 8, 9 and 10 of VicCode 1 if it exceeds 2 m in height.
>
> 4.4(4A) The consent and report of the relevant Council must be obtained to an application for a building permit for the construction of a fence which does not comply with sub-regulation (4)(a), (b) or (c). In giving this consent, the relevant Council must be satisfied that the design of the fence meets the appropriate objectives and criteria set out in VicCode 1 for the elements listed in sub-regulations 4(a), (b) or (c).

5.6 The Performance Measures to which regulations 4.4(a) and 4.4(c) refer are:[446]

> **PM2.** Where a *habitable room* window of an existing dwelling on an adjacent lot is in a wall less than 1m from a boundary, or where eaves above the window project to within 1m of the boundary, the new building to be set back a minimum of 1m from the boundary for a minimum length of 3m (or the length of the window, whichever is the larger) opposite the window. (original emphasis)
>
> **PM8.** Buildings with a maximum *height* of 12m (except where a lesser height has been specified in the Local Section of a planning scheme), and external *wall height* complying with the following setbacks from side or rear boundaries:
>
> - 1m minimum setback for walls up to 3.6m in *height* unless the wall is built to the boundary
> - for that part of the wall over 3.6m in *height* a minimum setback of 1m plus 0.3m for each 1m of *height* over 3.6m up to a *height* of 6.9m
> - for that part of the wall over 6.9m in *height* a minimum setback of 1m for every 1m of height. (original emphasis)
>
> **PM9.** Dwellings and outbuildings on lots over 450m^2 may be built to boundary* under the following conditions:
>
> - maximum building *height* of 3.6m on and within 1m of the boundary
> - a maximum of 20m total wall length (including carports) along a side or rear boundary. (original emphasis)
>
> * a setback of up to 150 mm from the boundary is deemed to be on the boundary.
>
> **PM10.** Dwellings and outbuildings on lots between 300m^2 and 450m^2 or less may be built to the boundary:

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445 Victoria, Department of Planning and Housing, *Victorian Code for Residential Development: Subdivision and single dwellings*, the Department, Melbourne, 1992.

446 ibid., pp. 25–27.

- as specified in PM9 along boundaries nominated on a two dimensional *building envelope* plan; or
- in accordance with a nominated three dimensional *building envelope* which may provide for built to boundary or party *wall heights* of up to 8m. (original emphasis)

5.7 The practical effect of these provisions is as follows. If a dividing fence is under 2 m high no building permit is required. For dividing fences over 2 m high the Building Regulations 1994 apply and a building permit is required. Dividing fences over 2 m high which do not comply with PM 2, 8 9 and 10 require the consent of the relevant municipal council as part of the building permit approval process. Although a fence higher than 3.6 m may be permitted, it must either meet the objectives and performance criteria of Element 2 of VicCode 1 to the satisfaction of the municipal council, or be set back more than a metre from the boundary, with additional set-backs for every metre increment in height. A substantial set back is impractical for most dividing fences because of the loss of occupancy of land entailed by the setback requirements.

5.8 The Committee's attention was drawn to the fact that the Building Regulations do not refer to the structural stability of fences. It was suggested that this was a matter of concern when fences are more than 2 m high, particularly given the fact that fence-builders are not required to be qualified or registered and fences can be constructed by anyone.[447]

5.9 However, an application for a building permit—which is required when a dividing fence exceeds 2 m in height[448]—'must contain sufficient information to show that the building work would comply with [the] regulations'[449] and must be accompanied by 'drawings showing [*inter alia*]…the sizes and locations of structural members' and 'specifications describing materials and methods to be used in the construction'.[450] The Building Code of Australia (BCA) 'is adopted and forms part of' the Victorian Building Regulations.[451] A fence is a Class 10b building under the BCA.[452]

5.10 Under Part 2.1 'Structure' of the BCA (which applies to Class 10 buildings)[453] 'a building or structure is to withstand the combination of loads and other actions to

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447 Submission no. 62.
448 See Building Act *1993* (Vic.), s. 16.
449 ibid., s. 18, Schedule 2, cl. 1(b); Building Regulations 1994 (Vic.), reg. 2.1(1)(b).
450 Building Regulations 1994, regs. 2.1(2)(a) & 2.1(2)(b).
451 ibid., reg. 1.7.
452 *Building Code of Australia 1996*, vol. 2, cl. 1.3.2, p. 2,401.
453 ibid., cl. 2.0, p. 3,021.

which it may be reasonably subjected'.[454] The 'objective' of this requirement is to safeguard people from 'injury caused by structural failure' and from 'loss of amenity caused by structural behaviour' and also to 'protect other property from physical damage caused by structural failure'.[455] The 'Performance Requirement' for the structural integrity of Class 10 buildings is established to achieve these objectives and is satisfied by building in a manner consistent with 'acceptable construction practice'.[456] 'Acceptable construction practice' in relation to 'timber framing' is laid down in Part 3.4.3 of the BCA.[457]

5.11 A building surveyor must not issue a building permit unless he or she is satisfied that 'the building work and the building permit will comply with [the] Act and the building regulations', including the BCA as incorporated into the Regulations. Consequently, the Committee is of the opinion that adequate safeguards are in place to ensure that fences over 2 m in height are structurally sound.

Interface between the Building Act and Regulations and the Planning and Environment Act and Victoria Planning Provisions

5.12 Section 11 of the Building Act deals with the effect of planning schemes upon the Act. It provides that any building regulation that is not inconsistent with any applicable provision of a planning scheme under the Planning and Environment Act must be complied with, in addition to the provision.[458] If inconsistent with the provision, a building regulation must as far as possible be read so as to resolve the inconsistency,[459] but to the extent of any remaining inconsistency, the building regulation ceases to have effect in the municipal area to which the planning provision applies for as long as the provision is in force.[460] The planning scheme—now the *Victoria Planning Provisions*—therefore takes priority over the Building Regulations. At the same time, the Planning and Environment Act has been amended consequentially to provide that:[461]

> The responsible authority must not include in a permit a condition which is inconsistent—
>
> (a) with the **Building Act 1993**; or
>
> (b) the building regulations under that Act; or

454 ibid., F2.1, p. 3,031.
455 ibid., O2.1, p. 3,031.
456 ibid., P2.1, p. 3,031.
457 ibid., p. 11,601.
458 Building Act, s. 11(1)(a).
459 ibid., s.11(1)(b)(i).
460 ibid., s. 11(1)(b)(ii).
461 *Planning and Environment Act 1987* (Vic.), s. 62(4).

(c) a relevant determination of the Building Appeals Board under that Act in respect of the land to which a permit applies.

Section 87(2) of the Planning and Environment Act has also been amended to permit the Administrative Appeals Tribunal[462] to amend any permit to comply with the Building Regulations if a building permit for a permitted planning development could not be issued because of non-compliance with the Building Regulations.

5.13 In fact, the Planning and Environment Act and the *Victoria Planning Provisions* (VPP) approved pursuant to section 4A of that Act have comparatively little bearing on fences. Clause 62.02 of the *State Planning Policy Framework* (SPPF), which forms part of the VPP and applies to all land in Victoria, lists fences among buildings and works not requiring a planning permit,[463] thereby removing fences in general from planning jurisdiction.

5.14 This exemption, however, does not apply if a permit is specifically required,[464] which is the case in areas subject to a Heritage overlay (HO) and a Land Subject to Inundation (LSIO) overlay.[465] The former excepts repairs undertaken to the same details, specifications and materials,[466] and the latter excepts 'post and wire and rural type' fencing.[467] Planning applications for fences in LSIO areas must be referred to the relevant floodplain management authority and are considered by the responsible authority in relation to a broad range of water-management criteria. Planning applications for fences in HO areas are determined in relation to the effect of the structure on the significance, character or appearance of the heritage place. By clause 43.01–4, such applications are exempt from the notice requirements of section 52(1)(a), (b) and (d), the decision requirements of section 64(1), (2) and (3) and the appeal rights of section 82(1) of the Planning and Environment Act, which means that neighbouring occupiers and any other person detrimentally affected are not required to be given notice of the application, and neither the owner nor any other person is able to appeal the decision of the responsible authority in respect of a planning permit application for a fence in an HO area.

5.15 There are three notable aspects of this interaction between the Fences Act, the Building Act and the Planning and Environment Act.

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462 Now the Victorian Civil and Administrative Tribunal.

463 Victoria Planning Provisions consolidated as at 23 Jul. 1998, State Planning Policy Framework (SPPF), cl. 62.02.

464 ibid.

465 ibid., cl. 43.01 & cl. 44.04 respectively.

466 ibid., cl. 43.01–2.

467 ibid., cl. 44.04–1.

1. The planning and building controls over fences are minimal.
2. Unless a person wishing to erect or replace a fence seeks contribution to the cost of the fence from an adjoining occupier, an affected neighbour may not be notified that construction or replacement of a fence is to occur and has no rights to object to the fence as proposed or to have the kind of fence determined by an independent arbitrator.
3. As none of the statutes, or the VPP, contains a definition of 'fence', disputes may occur as to whether a structure is or is not a 'fence' and therefore which legislation applies in a given case.

5.16 The third of these aspects is exemplified in the Victorian Supreme Court case of *City of Greater Geelong v. Herd*,[468] which concerned a structure consisting of a series of tubular steel poles more than 5 m high, to which spaced planks were bolted horizontally, commencing 3 m above ground. The structure was located 200 mm inside the boundary of the property and did not extend along the entire boundary. There were other fences beside the structure at different points, ranging from a section of 3.6 m high paling and trellis fence to a tennis court cyclone fence. The issue to be determined was whether a permit was required for the structure. Under planning law as in force at the time the structure was erected, that determination depended on whether the structure was a fence or something else. At first instance, on an enforcement application by the City of Greater Geelong to have the structure demolished as having been constructed unlawfully without a permit, the Administrative Appeals Tribunal determined that the structure was a fence. In allowing an Appeal against the Tribunal's determination, Batt J. in the Supreme Court held that it was not open to the Tribunal, on the evidence before it, to find that the structure was a fence. His Honour's comments reflect the difficulties that may attend distinguishing a fence from other structures:[469]

> It clearly has a function and purpose of screening. Now, it is true that a screen may be a fence and a fence may frequently serve as or be a screen or visual barrier. But not every screen is a fence. Contrary to the first and second respondents' submission, not every barrier on a boundary is a fence. One needs only to think of a shed or garage built with a wall along a boundary.

5.17 The elements to which his Honour referred in defining the ordinary meaning of 'fence' are incorporated in the Committee's proposed definition of 'fence' in Recommendation 7.[470]

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468 (1997) 11 V.A.R. 424.
469 (1997) 11 V.A.R. 424, 451.
470 *supra*, paras. 3.7–3.8.

Planning Policy in Victoria

5.18 A key element of Victorian planning policy is the pursuit of urban consolidation. Clause 14.01–2 of the SPPF, under the heading 'Planning for Urban Settlement', requires planning authorities to plan to accommodate projected population growth over at least a ten year period 'taking account of opportunities for...intensification of existing urban areas' and indicates that planning authorities 'should encourage consolidation of existing urban areas and especially higher density and mixed use development near public transport routes'. Clause 16 of the SPPF, which deals with 'Housing', includes among its objectives the encouragement of 'opportunities for increased residential densities to help consolidate urban areas'. Clause 16.01–2 provides that maximum use should be made of VicCode 1 to plan subdivisions for the development of single houses on lots between 300 sq m and 400 sq m. Clause 16.02 refers to the encouragement of well-designed medium density housing and provides in clause 16.02–2 that planning authorities should use the *Good Design Guide for Medium Density Housing, Revision 2, April 1998* (Good Design Guide) and any local variation incorporated into the scheme to implement that objective. By clause 81, VicCode 1 and the Good Design Guide are formally incorporated into the VPP pursuant to section 6(2)(j) of the Planning and Environment Act.

Objectives of the Planning and Environment Act

5.19 The Committee was asked to consider in particular whether the Fences Act meets the objectives of planning schemes in Victoria as defined in section 4(1) of the Planning and Environment Act, especially having regard to the need to encourage the development of well-designed medium-density housing, and whether the Act otherwise adequately deals with all situations associated with separating the lands of different occupiers, such as where buildings form part of the common boundary between properties.

5.20 The objectives of planning in Victoria as provided in section 4(1) of the Planning and Environment Act are:

(a) to provide for the fair, orderly, economic and sustainable use, and development of land;

(b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;

(c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

(d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;

(e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;

(f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);

(g) to balance the present and future interests of all Victorians.

5.21 The effect of both VicCode 1 and the Good Design Guide has been to permit the location of dwellings on title boundaries.[471] Where such dwellings are permitted 'as of right' (that is, no planning permit is required),[472] matters such as the character, colour or finish of the building wall facing into a neighbouring property and the demolition and partial restoration of an existing fence are not dealt with as part of any planning approval process and may not even be notified to a neighbour.[473] Planning permits are generally not required for single dwellings on lots above 300 square metres in an appropriate zone.[474]

5.22 The Advisory Committee for the Review of VicCode 1 in its report in December 1996 to the Minister for Planning and Local Government noted that while VicCode 1 was promoting greater diversity in lot sizes, primarily by introducing smaller lots into the range of lot sizes within subdivisions, the amount of housing floorspace was increasing, which was resulting in a greater use of two-storey buildings.[475] The Advisory Committee suggested that the introduction of greater two-storey development into suburbs that had previously been dominated by single-storey development was the source of 'most of the difficulties with the application of VicCode1',[476] which included 'houses being built very close to property boundaries with, under VicCode 1, no avenues for consultation or negotiated outcomes'.[477] The Advisory Committee noted that:[478]

> It is claimed that houses being built in conformity with this performance measure are adversely affecting residential amenity and allowing radical changes to neighbourhood character in some areas.

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471 VicCode 1, PM 9 & PM 10, p. 27; Good Design Guide, E6.T3.

472 By cl. 31 of the SPPF no planning permit is required for Section 1 Uses. For Residential 1 & 2 Zones and Mixed Use Zones under cl. 32, dwellings are Section 1 Uses.

473 M. Quigley, *Minutes of Evidence*, 2 Apr. 1998, pp. 57–59. If the building works require a neighbour's property to be protected during the construction phase, notice of the proposed protection work must be given to the neighbour under s. 84 of the Building Act. There may be informal opportunities for negotiation concerning building finish as part of this process, but formally the subject of the notice and of the neighbour's consent or objection is the **protection works**. In the absence of any requirement for protection works, notice need not be given.

474 See Victoria, Advisory Committee for the Review of the Victorian Code for Residential Development—Subdivision and Single Dwellings (Apr. 1992), *Final Report*, 1996, p. 21.

475 ibid., pp. 11–12.

476 ibid., p. 12.

477 ibid., p. 40.

478 ibid.

Following its report, the Advisory Committee is currently undertaking a review of the performance measures in VicCode 1 relating to building on or near side and rear boundaries.

5.23 The present Committee has also received submissions, both oral and written,[479] alleging adverse effects on residential amenity arising from neighbouring 'as of right' developments and the impact of walls built to boundary. If these allegations are accepted, changes to avert or deal with conflicts over developments on or near boundaries, especially in settled neighbourhoods, may be necessary for the fair and orderly use and development of land as provided in objective (a) of section 4(1) of the Planning and Environment Act, and maintenance of pleasant living environments provided for in objective (c). The implications for the proposed Dividing Fences and Boundaries Act are discussed below.

5.24 The increasing incidence of buildings on boundaries also raises questions as to:

(a) The uses to which the faces of building walls may be put by adjoining owners.

(b) Whether and how to confer rights of access to neighbouring properties, to enable building owners to maintain and repair walls which can be accessed only by that means.

(c) The power of neighbours to compel necessary repairs.

(d) How encroachments, whether by building walls or footings, are to be dealt with.

These are all relevant matters to objectives (a), (b), (c) and (d) of the *Planning and Environment* and are addressed below.

5.25 Representations from the farming community, including the Victorian Farmers Federation, that rural resources—in the form of cleared pasture, farm fences and livestock—are being jeopardised by land management practices on Crown land[480] suggest that action may also be necessary to ensure that objective (b) of section 4(1) of the Planning and Environment Act is met.

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479 Submission nos. 8, 10, 47, 51 & 59 and M. Quigley, loc. cit. In addition, the Committee was provided with materials submitted to the Boundary Issues Review being conducted by the Department of Infrastructure, where the matters raised involved dividing fences or walls built to boundary.

480 Submission nos. 15 & 24.

'As of Right' Development and Fences

5.26 As noted earlier, an 'as of right' development is one which requires no planning permit.[481] In the submissions and evidence received by the Committee one source of complaint concerning 'as of right' developments was the lack of notice of what was to occur, and the lack of any opportunity to negotiate an outcome sensitive to the needs of the neighbour.[482] In the fencing context, this could mean the unanticipated destruction of a serviceable fence and its replacement—or, more often, part replacement—with a building wall, the colour and finish of which in practice had greater impact on the neighbour than the owner, but to which the neighbour had no input. There was comment also on difficulties experienced in getting fencing reinstated to the satisfaction of the affected neighbour after the building works had been completed.[483] The impact on privacy and aesthetic values, creating a need for higher fences to screen out the unwanted development, was also raised.[484]

5.27 This Committee accepts that a degree of disquiet on the part of settled residents is an inevitable consequence of the policy of urban consolidation. The Committee therefore supports the view taken by the Advisory Committee that to re-introduce full notification, objection and appeals procedures for all VicCode 1 matters, is not desirable and 'would cause significant delays in what is now a very efficient approvals process'.[485] However, the Committee believes that, while neighbouring owners may not be permitted to object to the development itself, they ought to be given the opportunity to negotiate with respect to the external colour and finish of a wall, the face of which will constitute their boundary, and be permitted to finish the wall where necessary. Neighbouring owners ought to be able to negotiate with respect to the nature, height and colour of any fence or part of a fence reinstated by a developer, regardless of whether the reinstatement is at the developer's cost. Recommendations in respect of building walls that are erected in place of fences are made at paragraph 5.41 of this report.

5.28 So far as fences are concerned, the Committee considers that the notice provisions of the proposed Dividing Fences and Boundaries Act should be broadened to provide for notice of all fencing works within one metre of a boundary

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481 By cl. 31 of the SPPF no planning permit is required for Section 1 Uses. For Residential 1 & 2 Zones and Mixed Use Zones under cl. 32, dwellings are Section 1 Uses.

482 Submission nos. 8 & 15; M. Quigley, op. cit., pp. 57 & 59.

483 Submission no. 8; M. Quigley, op. cit., pp. 57–58.

484 Submission no. 10; M. Quigley, op. cit., p. 59.

485 Victoria, Advisory Committee for the Review of the Victorian Code for Residential Development, op. cit., pp. 26–7.

(excluding urgent repairs as provided in Recommendation 15)[486] to be given to a neighbouring owner, irrespective of any request for contribution and that the person receiving such notice should be entitled to have the Victorian Civil and Administrative Tribunal determine any matter in dispute. This measure should prevent a situation arising (as under the existing Act) whereby one owner imposes an unacceptable dividing fence upon a neighbouring owner by the simple expedient either of paying the full cost of the fence or of locating the fence inside the boundary. As the definition of 'fencing works 'includes demolition, it would also serve to give a neighbour notice of an impending 'as of right' development involving building to the boundary, and confer certain rights at the point of impact—that is, the fence—without conferring rights to object to the development.

Recommendation 60

The proposed Dividing Fences and Boundaries Act should provide that notice of 'fencing works' (as defined) within one metre of any side or rear boundary must be given to the adjoining owner, regardless of whether contribution to the cost of such works is being sought, and that the recipient of such notice is entitled to have any matter determined in accordance with the Victorian Civil and Administrative Tribunal's powers under the proposed Dividing Fences and Boundaries Act.

5.29 The Committee also considers that where an otherwise serviceable fence is removed or destroyed as part of a neighbouring development, an affected owner should be entitled to a 100 per cent contribution in respect of the cost of reinstating the fence or any part of it.

Recommendation 61

The proposed Dividing Fences and Boundaries Act should provide that, where part or the whole of an otherwise serviceable dividing fence is demolished as part of the development of neighbouring land or the construction of buildings on or near the boundary, the cost of such demolition and of reinstating a fence along any unfenced portion remaining after the development or construction, is to be borne wholly by the person for whose benefit the development or construction has been undertaken.

Access to Neighbouring Land

5.30 The Fences Act does not presently define a 'fence' and relies on the ordinary meaning of that term.[487] The Committee accepts the view of Batt J. in *City of Greater*

[486] *supra*, p. 41.

[487] See *supra*, para. 3.3.

Geelong v. Herd,[488] that not every barrier on a boundary is a fence and that the wall of a shed, garage or building, even if located on a boundary and substituting for a fence, is not within the ordinary meaning of 'fence'.[489] The wall of a building is therefore not a 'fence' for the purposes of the Fences Act.

5.31 A person has no statutory rights or common law rights to enter an adjoining property to carry out inspections of, or repairs to, existing boundary walls, unless some easement or other formal right of access exists.[490] Where one property is subdivided from another an easement may sometimes be implied, but the legal position is complicated. In one case in the Supreme Court of Victoria to which the Attorney-General alerted the Committee in recommending this Reference,[491] a coach house classified by the National Trust had the whole of one external wall and part of two other external walls facing into a neighbouring property. The owner of the coach house sought a declaration from the Court of an implied easement to enable repairs to be undertaken. The Court held that, while such an easement might be implied for the benefit of a servient tenement in a subdivision, where the parties' intention to create such an easement might be presumed from the rights of enjoyment conferred by the grant of land, only an express reservation would suffice in the case of a dominant tenement, which was the situation in the case in question.[492] This reflected the rule that a grantor cannot derogate from his grant, except by express reservation.[493] Although an exception was recognised for 'ways of necessity' without which there could be no enjoyment of the land, the easement claimed by the Plaintiffs was 'not one without which the Plaintiffs' land cannot be used at all'.[494] Accordingly, the Plaintiffs failed in their very costly bid to gain access to a neighbour's property to effect repairs.

5.32 It was suggested to the Committee that this situation could be rectified if a building wall standing in place of a fence were defined as a 'fence' for the purposes of the Fences Act.[495] Section 32 of the Act, which gives rights of entry to a neighbour's

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488 (1997) 11 V.A.R. 424.

489 See *supra*, paras. 3.7–3.8 & 5.16–5.17.

490 See *Plenty v. Dillon* (1991) 171 C.L.R. 635 in which the High Court reaffirmed the principle that, without the consent of the person in possession or the person entitled to possession, or any implied leave or licence, a person is not entitled at common law to enter another person's land.

491 *Abrahams & Anor. v. Flynn & Anor.*, unreported, Vic. Supreme Court., Mandie J., 8 Mar. 1995 (hereafter cited as '*Abrahams* case'). See also submission no. 20.

492 ibid., 5–7.

493 *Wheeldon v. Burrows* (1879) 12 Ch. D. 31, 49–50.

494 *Abrahams* case, p. 10, citing *Union Lighterage Co. v. London Graving Dock Co.* [1902] 2 Ch. 557, 572–573; *Ray v. Hazeldine* [1904] 2 Ch. 17, 21; *Botlon v. Clutterbuck* [1955] S.A.S.R. 253, 269–70.

495 See submission no. 26.

property for the purpose of erecting and repairing fences, would then apply to building walls.

5.33 Having considered the matter, including other submissions which cautioned against too great a readiness to erode property-owner's rights to exclusive and quiet enjoyment,[496] the Committee does not favour including building walls in the definition of what constitutes a 'fence'. To do so, in the overall context of the proposed Dividing Fences and Boundaries Act, would create liabilities in a neighbour for contribution towards construction and maintenance which are clearly neither appropriate nor desirable when a building wall is located wholly within one property and owned by the owners of that property. It would also confer on the owners of boundary walls, under section 32, an automatic right of entry to a neighbour's property whenever a building wall allegedly required repair, which the Committee considers exposes property-owners too broadly to the whims of a neighbour, particularly if the relationship is hostile and the right is open to abuse.

5.34 The Committee does consider however that there is a need for some statutory provision to enable a person to obtain entry to adjoining property for particular purposes and on reasonable terms which, failing agreement, could be determined by the Victorian Civil and Administrative Tribunal. With the increase in housing densities and in the incidence of building on boundaries, the need of property-owners to enter neighbouring property to maintain walls or rectify problems with roofs, spouting, eaves, windows and the like will increase. There may also be a need to access utility services that pass through neighbouring property. The Fences Act[497] and the Building Act[498] contain precedents for statutory rights of entry made necessary by modern living conditions.

5.35 In the ordinary course of events, neighbours can be expected to reach agreement themselves as to the terms on which access is granted. However, the case described above indicates the magnitude of the difficulty if access is refused, and the Committee is aware that hostilities arising from unwanted 'as of right' development next door may lead to retaliation by the neighbour by denying access to perform works or effect repairs.[499] If access is persistently denied, deterioration of the unrepaired structure may result in its becoming a risk to the safety of both owners. Even then access to perform the works can be denied, since the power of entry in section 228 of the Building Act is limited to entry by Crown agents to inspect

496 M. Quigley, op.cit., p. 59.
497 s. 32.
498 s. 95.
499 M. Quigley, op. cit., p. 60.

rectification works at the property and does not extend to performance of works on an adjoining property.

5.36 Other jurisdictions, including the United Kingdom,[500] New Zealand[501] and some Canadian provinces,[502] have introduced provisions enabling persons to obtain access to neighbouring land for the purpose of carrying out works on their own land. Section 180 of the *Property Law Act 1974* (Qld) enables a court to grant a person a 'statutory right of user' in such circumstances. In Tasmania, the *Access to Neighbouring Land Act 1992* enables a tribunal to grant an access order taking account of all the relevant circumstances and considerations, and on such conditions as it determines. The type of work for which access may be sought is not limited, but expressly includes[503] the repair and renewal of buildings, ascertaining the requirements of such works, ascertaining the course of drains, sewers and pipes and repairing or clearing them, ascertaining whether any hedge, tree or shrub is dangerous, dead, diseased, damaged or insecurely rooted, and removing, felling cutting back or replacing any tree or shrub, clearing or filling in ditches, and carrying out any work necessary for or incidental to the above. This is similar in scope to the United Kingdom Act,[504] except that in the latter works in each category are restricted to 'basic preservation works' and do not include improving works and an order can be made only if the work cannot be carried out, or would be 'substantially more difficult' to carry out, without access to an adjoining property. The more open discretion granted to the tribunal in the Tasmanian legislation was favoured by the New South Wales Law Reform Commission,[505] which recommended the introduction of similar legislation in New South Wales.[506]

5.37 The English, Tasmanian and New South Wales Law Reform Commissions in their respective reports all favoured a discretionary scheme over an automatic statutory right of access.[507] The Tasmanian Commission did so having regard to the difficulty of formulating all of the circumstances giving rise to an automatic right.[508]

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500 Access to Neighbouring Land Act 1992 (UK).

501 Property Law Act 1952 (NZ), s. 128.

502 British Columbia, Property Law Act, RSBC 1979, c. 340, s. 30; Manitoba, Law of Property Act, RSM 1987, c. L90, s. 39(2).

503 s. 5(3)(a)–(h).

504 s. 1(4).

505 New South Wales, Law Reform Commission, *Right of Access to Neighbouring Land*, Report LRC 71, the Commission, Sydney, 1994, pp. 29, 34–42.

506 ibid. A Model Bill entitled the 'Access to Neighbouring Land Bill 1994' appears as Appendix A.

507 See England and Wales, The Law Commission, *Rights of Access to Neighbouring Land*, Report 151, 1985; Tasmania, Law Reform Commission, *On Private Rights of Access to Neighbouring Land*, Report 42, 1985; New South Wales, Law Reform Commission, *Right of Access to Neighbouring Land*, op.cit.

508 Tasmania, Law Reform Commission, op.cit., p. 12.

The English[509] and New South Wales Commissions[510] were attracted by the flexibility and safeguards of the discretionary scheme, which enables a court to impose conditions appropriate to a particular case, and to refuse to make an order if it considers that entry would cause unreasonable hardship to any person affected by the proposed order.

5.38 It was suggested to the Committee that a statutory regime granting access to neighbouring property to inspect or repair an existing boundary wall, if implemented, should be incorporated into the Building Act rather than the Fences Act.[511] There is much to be said for this view, especially if a building wall is not to be included in the definition of 'fence'. Repairs to building walls are within the definition of 'building work' in the Building Act.[512] Such repairs may be of structural significance and more than mere maintenance, in which case the Building Act and Building Regulations may apply to the works. The Building Act deals with a similar situation in the case of protection works. It requires the owner of an adjacent property that is the subject of the works to be notified in writing.[513] The adjacent owner then has an opportunity to consent or otherwise to the proposed works,[514] and may ultimately appeal to the Building Appeals Board[515] against a decision by the relevant building surveyor[516] to proceed with the works. The Building Act also addresses associated issues such as dilapidation surveys[517] and insurance in respect of adjoining owners' property,[518] and includes a compensation provision providing for compensation to be paid to an adjoining owner or occupier for inconvenience, loss or damage arising from protection works.[519] In addition, the Building Appeals Board has existing jurisdiction in respect of disputes affecting party walls.[520]

5.39 If, however, the circumstances in which an access order could be granted were not to be limited to the inspection and repair of walls, but were to have the scope of the Tasmanian Access to Neighbouring Land Act and the New South Wales Model Bill, the virtue of locating access provisions within the Building Act diminishes. The New South Wales Law Reform Commission took the view that jurisdiction in this

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509 England and Wales, Law Commission, op.cit., paras. 3.35 & 3.42.
510 New South Wales, Law Reform Commission, op.cit., para. 4.18.
511 Submission no. 38.
512 See *supra*, para. 5.2.
513 Building Act *1993* (Vic.), s. 84; Building Regulations, reg. 5.2(2).
514 ibid., s. 85; reg. 5.2(3).
515 ibid., s. 144; regs 5.2(4) & 12.1.
516 ibid., s. 87; reg. 5.2(4).
517 ibid., s. 94.
518 ibid., s. 93.
519 ibid., s. 98.
520 ibid., s. 158.

matter should be vested in a forum dealing with neighbour disputes, with provision for transfer if the quantum of compensation or damages made transfer appropriate.[521] It saw the proposed reforms as 'remedies of last resort' after avenues of negotiation and mediation had been thoroughly exhausted.[522] It recognised both that complex issues of property law may be involved[523] and that the intractability of such disputes arise from long-standing antipathies between neighbours which have little to do with legal issues and everything to do with the proximity in which the parties are forced to live.[524] In either case an expert tribunal such as the Building Appeals Board, whose expertise lies in the area of building, may not be the best forum for resolving matters.

5.40 It is in this context that the Committee believes that a discretionary scheme enabling the Tribunal to grant access to neighbouring land after considering all the facts and for such purpose and on such terms as it may decide should be included in an expanded Dividing Fences and Boundaries Act,[525] which would then encompass both fencing disputes and other disputes between adjoining owners in so far as these relate to buildings and trees on boundaries and access to neighbouring property to effect necessary works.

5.41 The alternative of introducing separate Access to Neighbouring Land legislation of the kind in force in Tasmania and recommended for New South Wales appears to the Committee to have little to recommend it. This is in view of the public expectation in Victoria that the Fences Act addresses boundaries issues at large and in view of the relationship between fences and buildings, where each forms part of a boundary, and the degree to which felling of trees and removal of vines and shrubs arises in conjunction with fencing. The Committee notes too that there is a precedent for an Act encompassing both dividing fences and building walls, although not in the terms being proposed. The *Common Boundaries Act 1981* (ACT) deals with dividing fences in Part II and party walls in Part III. It is the Committee's intention that the Part of the proposed Victorian Dividing Fences and Boundaries Act dealing with access to neighbouring land not apply to the construction of new buildings or protection works falling within the provisions of the Building Act and not impact on the present jurisdiction with respect to party walls.

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521 New South Wales, Law Reform Commission, op. cit., pp. ix & 41. The Commission did not favour the concept of a specialised 'Neighbour Tribunal' on the basis that such a tribunal would merely duplicate the service already provided by the Local Court, which had established jurisdiction in neighbourhood matters (see para. 1.15).

522 ibid., para. 1.11.

523 ibid., para. 1.13.

524 ibid., para. 1.12.

525 See *supra*, recommendation 3 at p. 11.

Recommendation 62

Building walls which act in lieu of a fence should not be included in the definition of 'fence' in the proposed Dividing Fences and Boundaries Act, but the Act should include a Part dealing with access to neighbouring land, which provides a procedure similar to that under the* Access to Neighbouring Land Act 1992 *(Tas.). There should be a further Part in the proposed Act that deals with building walls on boundaries.

Recommendation 63

The proposed Dividing Fences and Boundaries Act should include provisions requiring notice to be given to an adjacent owner when a building wall is to replace the whole or part of a dividing fence or otherwise to stand in lieu of a dividing fence, and should grant adjacent owners a right to negotiate as to the colour, finish and/or workmanship of the wall, and to have the Victorian Civil and Administrative Tribunal determine any dispute.

5.42 Recommendation 63 refers to the rights of an adjoining owner when a building wall is being constructed and is without prejudice to that person's rights subsequently to paint or otherwise embellish the face of the wall that is exposed to his property, provided no structural damage is occasioned to the wall. The Committee believes, however, that the adjoining owner should enjoy an on-going right to have the wall reasonably maintained, and should be able to apply to the Tribunal for an order for maintenance at the expense of the building owner if the wall exhibits structural damage or deterioration. If the adjoining owner causes any damage to the wall, the common law principles making a person liable for such damage should apply.

Recommendation 64

The proposed Dividing Fences and Boundaries Act should include a provision enabling an adjoining owner to apply to the Victorian Civil and Administrative Tribunal for an order for reasonable maintenance of a building wall at the expense of the building owner, if the wall exhibits structural damage or deterioration. If the adjoining owner causes structural damage to a wall, the common law principles of negligence, nuisance and trespass making a person liable for such damage should apply.

Building Encroachments

5.43 The Committee received one submission[526] concerning a garage wall encroaching onto a neighbouring property. The submission highlighted the issue of building encroachments, which also drew some comment at the Committee's public hearings in relation to encroachments by footings.[527] This was a corollary of the Committee's inquiry into buildings on boundaries and arose logically and predicably in discussions of that matter.

5.44 As building encroachments are not within the Committee's Terms of Reference, they have not been the subject of any systematic inquiry. However, the Committee was advised in passing that the tendency in multi-density subdivisions is now to create titles before buildings are erected, so that developers can sell the lots for cash flow and purchasers can buy and settle the lots while they are saving to build.[528] While this makes sense for both parties, it increases the risk of encroachments, because both the walls and the footings must then be contained within the lot and the building of the wall must be exact.[529] If an encroachment occurs, the remedy under the Planning and Environment Act is an enforcement order to have the building pulled down, as being in breach of the Act, the planning scheme and the planning permit, all of which require buildings to be within title.[530]

5.45 In the context of the encouragement of multi-density housing in Victoria and the increasing risk that building encroachments may occur, the Committee considers that an investigation of this issue, and the related issue of the right to support from adjoining land, is warranted.[531] The Committee notes that the right to support from adjoining land has recently been the subject of a formal inquiry in New South Wales[532] in the context of needs created by modern urban development. The Committee is also aware of the provisions of the *Encroachment of Buildings Act 1922* (NSW) which enable parties who cannot reach agreement to transfer land or to create an easement in order to regularise a building encroachment, to apply to the court for such orders as the court deems just with respect to:

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526 Submission no. 5.

527 D. Monahan, *Minutes of Evidence*, 2 Apr. 1998, p. 98.

528 ibid.

529 ibid.

530 G. Code, *Minutes of Evidence*, 4 Jun. 1998, p. 242.

531 Whilst certain rights both of access and of support are implied by s. 12(2) of the *Subdivision Act 1988* (Vic.), these may not apply in all circumstances. See e.g., s. 12(3A).

532 New South Wales, Law Reform Commission, *The Right to Support from Adjoining Land*, Report LRC 84, the Commission, Sydney, 1997.

(a) payment of compensation to the adjoining owner;

(b) conveyance, transfer or lease of the affected land to the encroaching owner, or the grant of an estate or interest in the land or an easement, right or privilege in relation to it;

(c) removal of the encroachment.[533]

5.46 The Committee acknowledges that the New South Wales Encroachment of Buildings Act operates in the context of New South Wales law limiting adverse possession to whole titles. After fifteen years, a building encroachment in Victoria may be able to be regularised through adverse possession. There is at present no mechanism in Victoria for other than a court-determined outcome, if an owner whose land has been encroached is determined to pursue enforcement against a developer, even when the encroachment is minor and the cost of demolition and re-building may be great. As the law stands, responsible authorities charged with administering the planning provisions may also have a legal obligation under the Planning and Environment Act to take action in relation to an encroachment, rather than countenancing a more economical and equitable solution where a mistake has occurred.

5.47 Having regard to objective 4(1)(a) of the Planning and Environment Act, concerning the fair and economic development of land, the Committee recommends that the desirability of introducing encroachment of buildings provisions into Victorian law should be further investigated. If considered desirable, such provisions could be incorporated into that Part of the proposed Dividing Fences and Boundaries Act which the Committee has recommended deal with building walls on boundaries. Alternatively, they could be embodied in a separate Act, as in New South Wales.

Recommendation 65

The Committee should be given terms of reference to conduct an inquiry into the law relating to the encroachment of buildings in Victoria and the right to support from adjoining land.

[533] *Encroachment of Buildings Act 1922* (NSW), s. 3(1)(a), (b) & (c).

6 ADVERSE POSSESSION

6.1 A number of submissions received by the Committee related directly or in part to the difficulties and complications that can arise when fences are located on incorrect boundaries.[534] It is clear from the vehement tone of some of these submissions that this is one of the 'situations associated with separating the lands of different occupiers'[535] with which there is a degree of dissatisfaction. The specific context in which most objections were raised was where a fence erected in the wrong place enabled one occupier to claim title to part of the adjoining occupier's land. This raises the operation of the law of adverse possession in the context of fencing disputes. Although an examination of this issue is not encompassed expressly by the Committee's Terms of Reference, the number of submissions received, the high cost of litigating these claims in the Supreme and County Courts, and public concern regarding a law that allows a person to claim part of his or her neighbour's land, have persuaded the Committee to report on these matters. Consequently, the material contained in this Chapter is offered for the information and consideration of the Government and those who may be affected by mislocated fences.

6.2 Following a discussion of the context in which the law of adverse possession arises in the Committee's Inquiry, this Chapter examines the principles of law which apply and addresses the issue of whether a change to the existing law is warranted. After considering the historical background to landholding in Victoria and the paramountcy of adverse possession under the Torrens system as it operates in this State, the situation in other States, particularly in New South Wales, is compared with Victoria. Although the Committee concludes that no change to the existing law is justified, it does make some suggestions for improvement in the current position.

Context

6.3 Disagreements over the position of fences form a significant category of neighbourhood disputes. Of these, possibly the most acrimonious and certainly the most conducive to protracted litigation are cases where one party wants a fence

534 Submission nos. 2, 6, 7, 13, 31, 32, 42, 43 & 47.

535 Item (a) of the Terms of Reference for Review of the Fences Act dated 23 Sept. 1997.

moved onto a boundary surveyed to accord with the certificate of title, and the other argues that the boundary has moved because title has been acquired through adverse possession. On occasions these disputes travel the path to the Supreme Court and beyond,[536] and bear an alarming likeness to *Jarndyce v. Jarndyce* in Dickens' *Bleak House* in their capacity to consume financial and emotional resources. One unsuccessful litigant claimed to the Committee to have spent $150,000 in a dispute determining ownership of land valued at $16,000.[537]

6.4 Highly charged emotions may be generated in some fencing disputes by the perception that one neighbour has 'deliberately' or 'fraudulently' positioned the fence to his neighbour's disadvantage and ought not to benefit from such conduct.[538] Conversely, anger may arise from the fact that a mistake in the location of a fence, of which neither party was aware, should become the basis for a claim to ownership of land that forms part of one party's title.[539]

6.5 It became apparent to the Committee in the course of its Inquiry, not only that members of the public felt threatened by the law of adverse possession and the potentially high costs of contesting a neighbour's claim, but that there is considerable confusion as to how the law applies in certain common situations involving off-boundary fences. This is understandable given that the legal principles that are relevant in such cases are complex and highly technical and not always easy to apply to the facts of a given case.

6.6 The Committee's Inquiry led it to believe that there is a perception amongst the community that the certificate of title guarantees both ownership and description.[540] As discussed below, ownership is qualified by any claim in adverse possession. With respect to the description of the dimensions of the land, the true position is stated in correspondence to the Committee from the Registrar of Titles:[541]

> The Courts have consistently held that the dimensions and bearings shown on a title serve only to identify the land vis a vis adjoining parcels. They are not certified as the measurements occupied by the title holder. The extent of actual holding can only be determined by reference to survey and other physical marks.

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536 See e.g. *Chillemi v. Ladno* Vic. Supreme Court no. 3372 of 1982 and *Barton & Barton v. Chhibber*, Vic Supreme Court no. 3580 of 1984.

537 R. Chibber, *Minutes of Evidence*, 2 Apr. 1998, p. 115.

538 See especially submission nos. 2 & 6.

539 Several telephone callers expressed this view to the Committee, where both neighbours had recently discovered a boundary irregularity apparently of long standing.

540 Written submission forming part of oral evidence of W. Edwards given on 2 Apr. 1998.

541 Letter from R. Hunt dated 16 Mar. 1998.

Victorian courts have dismissed claims under section 110(1)(b) or (c) of the *Transfer of Land Act 1958* (Vic.) for damages where the 'misdescription in the Register' relates to the dimensions of the parcel appearing on title on the basis that the title does not guarantee the accuracy of survey plans.[542] High Court authority supports this position.[543]

The Law of Adverse Possession

6.7 English law as introduced into Australia by the *Australian Courts Act* of 1828[544] accepts as a premise that all land is owned by the Crown and that there is no absolute title to land: only a hierarchy of titles in which the title of a legal owner—unless and until extinguished—prevails over the rights of a trespasser in occupation. Limitation statutes preventing a legal owner from recovering land and extinguishing title after a specified period of dispossession date from the reign of Charles II.[545] Once the title of the dispossessed owner is extinguished, the person in occupation obtains title by virtue of the fact that no other person has better title to the land.[546] Such a person has a right to evict any further trespasser, including the former legal owner.

6.8 Where title to land is in dispute, the courts are concerned only with the relative strengths of the titles asserted by the rival claimants. The fundamental principle in such cases is that the person in possession of the land has good title against the entire world, subject to the rights of the dispossessed legal owner to recover the land.[547]

6.9 So far as actions to recover land are concerned, section 8 of the *Limitation of Actions Act 1958* (Vic.) provides:

> No action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to him or, if it first accrued to some other person through whom he claims, that person.

Subject to certain irrelevant exceptions, section 18 of the Act provides that 'at the expiration of the period prescribed by this Act for any person to bring an action to

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542 *National Trustees Co. v. Hassett* [1907] V.L.R. 404.
543 *Dempster v. Richardson* (1930) 44 C.L.R. 576.
544 9 Geo. IV, c. 83.
545 A. G. Brown, *Law Relating to Land Boundaries and Surveying,* Association of Consulting Surveyors Queensland, Brisbane, 1980, p. 34.
546 *Jacobs v. Revell* (1900) 2 Ch. 858, 869.
547 See generally submission no. 21.

recover land…the title of that person to the land shall be extinguished'. The possessor then has an estate in fee simple in absolute possession.[548]

6.10 Sections 9 to 17 of the Act contain provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned. Section 9 relates to present interests in land and provides:

> (1) where the person bringing an action to recover land or some person through whom he claims—
>
> (a) has been in possession thereof; and
>
> (b) has while entitled thereto been dispossessed or discontinued his possession—
>
> the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

6.11 The public policy that underpins these provisions was explained by Sir Thomas Plumer MR in *Maquis of Chomondeley v. Lord Clinton* as follows:[549]

> The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses to the facts are dead, and the evidence of the title is lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which, the plans in life, habits and experiences of himself and his family may have been…unalterably formed and established.

6.12 The same policy has been translated into the system of title registration in Victoria, which since the *Real Property Act 1861* has recognised these common law rights in adverse possession and given them priority over the title of the proprietor on the register. The present manifestation of this priority is section 42(2)(b) of the Transfer of Land Act,[550] which provides that land which is included in any folio of the register or registered instrument 'shall be subject to…any rights subsisting under adverse possession of the land'. This modifies Torrens's concept of land registration, which was intended to give a purchaser immunity from unregistered interests.[551] Rights in possession are protected also in respect of 'general law' land under the *Property Law Act 1958* (Vic.).[552]

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548 ibid.

549 (1820) 2 Jac. & W.1, 139–140; 37 E.R. 527, 577.

550 See submission no. 21.

551 T. B. F. Ruoff, *An Englishman Looks at the Torrens System*, Sydney, 1957, p. 6.

552 s. 25.

6.13 It is clear that, under the *Limitation of Actions Act 1958* as under the previous law, the person claiming a possessory title must show either (1) discontinuance by the actual owner[553] followed by possession, or (2) dispossession (or, as it is sometimes called 'ouster') of the actual owner. The difference between dispossession and discontinuance of possession has been expressed in this way:[554]

> the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by the other person.

Both situations can occur in the context of mislocated fences.

6.14 The law has traditionally given special protection to proprietary rights in land. This is reflected in the fifteen-year limitation period for an action to recover land as opposed to six years for actions in contract and tort.[555] It is reflected also in reluctance on the part of courts to find that the actual owner's title has been extinguished through adverse possession except in the clearest case.[556] This in turn has given rise to a complex and highly technical body of law and to a large number of cases that are not always easily reconciled.

> The overall impression created by the authorities is that the courts have always been reluctant to allow an incroacher or squatter to acquire a good title to land against the true owner and have interpreted the word 'possession' in this context very narrowly. It is said to be a question of fact depending on all the particular circumstances of the case (*Bligh* v. *Martin* [1968] 1 WLR 804) but, to the relatively untutored eye, it has acquired all the appearances of a difficult question of law.[557]

6.15 Nonetheless, the general principles of the law of adverse possession are reasonably clear, although their application in the circumstances of particular cases can cause difficulty. It is important to note that the passage of time does not of itself prevent the bringing of an action to recover land.[558] If the law is to attribute possession of land to a person who can establish no paper title to possession, he or she must be shown to have both factual possession and the requisite intention to possess. A person claiming to have dispossessed another must similarly fulfil both these requirements. However, a further requirement that the alleged dispossessor claiming the benefit of the Limitation of Actions Act must satisfy is to show that his

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553 Sometimes referred to as the 'paper' owner.

554 *Rains v. Buxton* (1880) 14 Ch. D. 537, 539–540 per Fry J. See also *Buckingham County Council v. Moran* [1990] 1 Ch. 623, 644 per Nourse L.J.

555 *Limitation of Actions Act 1958* (Vic.), s. 5.

556 See *Buckingham Shire Council v. Moran* [1990] Ch. 623, 644 per Nourse L.J.

557 *Wallis's Holiday Camp v. Shell-Mex and B.P. Ltd.* [1975] 1 Q.B. 94, 114 per Ormrod L.J.

558 See D. Elvin & J. Karas, *Unlawful Interference with Land*, Sweet & Maxwell, London, 1995, p. 82.

or her possession has been 'adverse' within the meaning of the Act. Section 14(1) of the Act provides:

> No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession'); and where under the forgoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date the right of action shall not be deemed to accrue until adverse possession is taken of the land.

6.16 The principles that apply in a case of adverse possession were conveniently stated in the judgment of Slade J. in *Powell v. McFarlane*:[559]

> It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
>
> (1) In the absence of evidence to the contrary, the owner of the land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (animus possidendi).
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed…It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession…Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.
>
> (4) The animus possidendi, which is also necessary to constitute possession…involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the process of the law will allow…the courts will, in my judgement, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.

6.17 When possession of land is to be inferred from equivocal acts, the intention with which they are done is all-important.[560] Murray J. observed in *Petkov v. Lucerne*

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559 (1979) 38 P. & C. R. 452, 470–472. See also *Murnane v. Findlay* [1926] V.L.R. 80, 86-88 per Cussen J.; *Riley v. Pentilla* [1974] V.R. 547, 561–562 per Gillard J.

560 *Littledale .v Liverpool College* [1900] 1 Ch. 19, 23; *Clement v. Jones* (1909) 8 C.L.R. 133, 140 per Griffith C.J.; *Murnane v. Findlay* [1926] V.L.R. 80, 81 per Cussen J.

Nominees Pty. Ltd.[561] that it is important to understand the mental element in the requisite intention to possess.[562]

> When the law speaks of an intention to exclude the world at large, including the true owner, it does not mean that there must be a conscious intention to exclude the true owner. What is required is an intention to exercise exclusive control…And on that basis an intention to control the land, the adverse possessor believing himself or herself to be the true owner, is quite sufficient.

6.18 There are a number of statements in cases on the subject that appear to suggest that a conscious intention, demonstrated by knowledge on the part of the squatter that he or she is acting contrary to the interests of the paper owner, may be important in certain circumstances.[563] Thus, in the leading English case of *Leigh v. Jack* Cockburn C.J. said:[564]

> I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not think he was a trespasser, or to infringe upon another's rights.

Similar observations were made by Hobson L.J. in *William Brother's Direct Supply Ltd. v. Raftery* where His Lordship thought that it was relevant that the squatter 'never thought he was dispossessing the plaintiffs',[565] and by Hannan L.J. in *Hughes v. Griffin* where His Lordship observed that the person through whom the squatter was claiming 'never thought he was acquiring any right; he never intended to acquire any right'.[566]

6.19 However, when properly understood these statements appear to have been made in the context of weighing the whole of the evidence in the particular cases relating to the issue of whether the squatter's possession was contrary to the interests of the actual owner and inconsistent with it. They were not intended to be decisive of the question whether the squatter had the requisite intent or to suggest that the law requires a conscious intent on the part of the squatter to **own** the land. In *Buckinghamshire County Council v. Moran* Slade L.J. said:[567]

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561 (1992) 7 W.A. R. 163.

562 ibid., 168. See also *Ocean Estates Ltd. v. Pinder* [1969] 2 A.C. 19, 24 (PC) per Lord Diplock; *Bligh v. Martin* [1968] 1 W.L.R. 804, 813 per Pennycuick J.

563 See e.g. *Clement v. Jones* (1909) 8 C.L.R. 133, 139–140 per Griffith C.J.; *Murnane v. Findlay* [1926] V.L.R. 80, 88 per Cussen J.; *Williams Brothers Direct Supply Ltd. v. Raftery* [1958] 1 Q.B. 159, 169 per Hodson L.J.; *Riley v. Penttila* [1974] V.R. 547, 561–562 per Gillard J.

564 (1879) 5 Ex. D. 264264, 271

565 [1958] 1 Q.B. 159, 169.

566 [1969] 1 W.L.R. 23, 31. See also, *Clement v. Jones* (1909) 8 C.L.R. 133, 142 per Griffith C.J.

567 [1990] Ch. 623, 643 and see *R. v. Secretary of State for the Environment ex. p. Davis* (1990) 61 P. & C.R. 487, 495.

> There are some dicta in the authorities which might be read as suggesting that an intention to *own* the land is required…Nevertheless, I agree with the [trial] Judge that 'what is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess'—that is to say, an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title.

6.20 On the other hand, the intention of the actual owner is, with one exception, of no importance. If he or she intends to use the land for a particular purpose at some future date and the squatter knows this, the squatter's knowledge 'may affect the quality of his own intention, reducing it below that which is required to constitute adverse possession'.[568]

6.21 A further complication arises from the fact that a 'successor' squatter can rely upon his or her own period of adverse possession together with that of previous squatters provided the land has continued to be in adverse possession.[569] This is because, the combined effect of sections 9 and 14(1) of the Limitation of Actions Act is that a landowner's cause of action accrues as soon as he or she is dispossessed and adverse possession begins.[570] Moreover, a squatter may assign or devise the right which has accrued to him or her by means of adverse possession even before the full limitation period has run and, provided that there is no break in the adverse possession, the assignee or devisee can aggregate his or her own period of adverse possession with that of his or her predecessor.[571] The Committee was advised that Victorian Land Registry procedures require persons who are relying on rights derived from predecessor squatters to obtain an assignment or chain of assignments of the possessory rights of the person or persons through whom the adverse possessor claims, except in cases where a contract of sale (referable to the squatter's property) has specifically included those rights.[572] This can create difficulties where such predecessors have died or cannot be located.

6.22 The fact that the law requires no conscious intention by the squatter to deprive the actual owner of his or her proprietary rights highlights a particular difficulty that can arise where a dividing fence is mislocated from the true boundary and the adjoining property owners discover this by chance. Where neither party knows the true situation it is often difficult for the person whose title has been extinguished to accept the situation.

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568 *Buckingham Shire Council v. Moran* [1990] Ch. 623, 645 per Nourse L.J. See also *Richardson v. Greentree*, unreported, NSW SC, Einstein J., 1 Dec. 1997, at p. 21.

569 Willis v. Earl Howe [1893] 2 Ch. 545.

570 See D. Elvin & J. Karas, op. cit., p. 88.

571 ibid. See also *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1.

572 Victoria, Registrar of Titles, *Adverse Possession Applications*, Circular 8, issued Sept. 1993, p. 5.

6.23 Although acts of possession in many cases may be equivocal, the courts have held that 'the enclosure of an area of land is about as unequivocal a demonstration of adverse possession and the requisite intent to exclude the world at large as may be had'.[573] But, whilst it may be very strong evidence in some cases, it is by no means decisive.[574] In *Techild Ltd. v. Chamberlain* Sachs L.J. stated:

> even all-round fencing is not unequivocal if other explanations exist as to why it may well have been placed round the land in question, as, for instance, to protect the ground from the incursions of others.

As a Land Titles Office memorandum on adverse possession points out:[575]

> The fencing of a parcel [of land] along particular boundaries for a long period of time may not indicate that there is even the most inchoate beginnings of a claim for adverse possession. Evidence of fencing alone does not give assistance to an applicant. It merely proves that a parcel was fenced in a particular fashion. Evidence of fencing must be combined with evidence that the fencing was part of a possession adverse to the registered proprietor.

6.24 Thus, in addition to the enclosure of land by a mislocated fence, the prospective adverse possessor must show acts of user that are contrary to the actual owner's interest and inconsistent with it. The fact that a person has had exclusive and uninterrupted use of the land may be sufficient evidence of possession necessarily adverse to the registered proprietor.

> Whether or not there is adverse possession in a particular case must, of course, be decided by a careful consideration of the facts including not only the acts of the squatter, but also the character of the property, how it is normally used, what acts demonstrating ownership might be expected from the actual owner in the circumstances and also the relationship (if any) between the owner and the trespasser.[576]

6.25 Applying these principles to a typical case that might arise where, in a suburban area, a paling fence has been mislocated in relation to the true boundary

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573 See *George Wimpey & Co. Ltd. v. Sohn* [1967] 1 Ch. 487, 511, 512; *Petkov v. Lucerne Nominees Pty. Ltd.* (1992) 7 W.A.R. 163, 168.

574 e.g. *Littledale v. Liverpool College* [1900] 1 Ch. 19 (fencing and securing of land consistent not with exclusion of owner but with exclusion of general public); *George Wimpey & Co. v. Sohn* [1967] Ch. 487 (fencing garden square for 30 years equivocal since it might have been done to protect the common rights to use the garden); *Riley v. Pentilla* [1974] V.R. 547 (partial fencing of common property for 40 years and construction of garden beds, children's playground etc. equivocal because it was a 'special enjoyment' of the common area); *Basildon D.C. v. Manning* (1975) 237 E.G. 878 (enclosure by chicken-wire too trivial in the circumstances); *Boosey v. Davis* (1987) 55 P. &. C.R. 83, 87 (wire fence to reinforce existing fence which did not in any event enclose the land) & *Marsden v. Miller* (1992) 64 P. & C.R. 119 (fence did not give trespasser effective control of land). See generally, Elvin & Karas, op. cit., p. 86, fn. 71. See also, *Hughes v. Griffin* [1969] 1 W.L.R. 23.

575 Victoria, Land Titles Office, Memorandum from J. Barry dated 3 Dec. 1993.

576 Elvin & Karas, op. cit., p. 85.

between adjoining properties for a period in excess of fifteen years, if there have been other acts of user that are contrary to the actual owner's interest and inconsistent with it—such as, establishing garden beds and the like—it is highly probable that a claim in adverse possession would be successful.[577] In light of the submissions and evidence received, this position caused the Committee to consider whether a change to the existing law of adverse possession was warranted.

6.26 In the course of its Inquiry, the Committee became aware of significant differences in the manner in which New South Wales and Victorian law treats adverse possession under the Torrens system of title. Until the enactment of the *Real Property (Possessory Titles) Amendment Act 1979* (NSW), New South Wales had a long-standing policy against any recognition of possessory titles in relation to Torrens system land. While that position has been modified, the policy against recognition still applies in respect of part-titles. Part 6A of the *Real Property Act 1900* (NSW) provides for applications for title on the basis of possession to be made in respect of whole parcels of land as comprised in a folio of the register.[578] Where the boundary of occupation differs to some degree from the title boundary the person in possession may claim title to the land as described in the folio notwithstanding the discrepancy.[579] In other words, even if the area occupied does not correspond completely with the parcel on the register (and may be slightly more or less) the person may claim the parcel, but no more than the parcel. The combined effect of these provisions is to preserve the parcels as disclosed on the register and to preclude claims in adverse possession from being made in relation to small slivers of land, which complicate the cadastre.

6.27 It is clear that in Victoria, Torrens title does not guarantee the registered proprietor's interest in land as described in the register in so far as boundaries and dimensions are concerned. Moreover, Torrens title in Victoria is vulnerable to possessory claims. The question for the Committee is whether the present situation should be changed. Having regard to the number of submissions and evidence presented on this issue, its intensity as a subject of litigation and its implications for meeting the objectives of the *Planning and Environment Act 1987* (Vic.), the Committee has spent some time reviewing this area of law and canvassing evidence on the comparative merits of competing approaches.

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577 See e.g. *Chillemi v. Ladno*, unreported, Vic. Supreme Court, King J., 19 May 1986.

578 *Real Property Act 1900* (NSW), s. 45D(1).

579 ibid., s. 45D(2) & (6).

Historical Background

6.28 When land in early Victoria was marked out the science of surveying was inexact and it could be assumed that over time title based on occupancy would formalise the situation on the ground. Professor Ian Williamson in his evidence before the Committee described the process as follows:[580]

> When Victoria was laid out quite often [surveyors] added another link in the chain. To put it simply, they laid out more land—they always made sure you got your land. If you got 100 acres you probably ended up with 101 acres. You always got a bit extra. They had a measuring tape and they added a little bit on the end. Every time they measured 100 feet they added more to make sure they were not short-changing you. You can imagine how this has complicated things now.

6.29 Since 1843 when the New South Wales legislature introduced a Registration of Deeds Act with respect to transactions in land, a deeds registration system prevailed in each State, which required the production of a chain of documents to prove title. The preamble to the first Torrens statute in Australia, the *Real Property Act 1858* (SA), referred to the 'losses, heavy costs and [great] perplexity' associated with this system—now known as the 'old system' or 'general law system'—and sought to replace it with a system of registration of title that was reliable, simple, cheap, speedy and suited to the social needs of the community.[581]

6.30 Torrens title was introduced through *Real Property Acts* in Queensland in 1861 and in Victoria, Tasmania and New South Wales in 1862, and by the *Transfer of Land Act* in Western Australia in 1874. The *Real Property Ordinance 1925* (ACT) established the Torrens system there. Today in Victoria approximately one per cent of all parcels of land (or between three and four per cent in area) remains under general law title.[582]

Paramountcy of Possessory Title in Victoria

6.31 Section 42(2)(b) makes it quite clear both that Torrens title land in Victoria is subject to adverse possession and that registration does not guarantee a registered proprietor title as against an adverse possessor. This paramountcy of rights of adverse possession over registered title is consistent with the common law position that there is no absolute title. The fact that section 42(2) refers to '**any** rights under

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580 I. Williamson, *Minutes of Evidence*, 30 Jun. 1998, p. 259.

581 See T. B. F. Ruoff, op. cit., p. 6.

582 Advice from P. Burns, Deputy Registrar-General on 22 Sept. 1998.

any adverse possession of land' (emphasis added) also makes it clear that that paramountcy is not confined to claims against whole titles.

6.32 Accordingly, it cannot be the case that Torrens title in Victoria guarantees the dimensions of a parcel as disclosed on the certificate of title, because such description is always potentially subverted by the paramount claim of an adverse possessor. Moreover, as noted above,[583] even without adverse possession, there is no guarantee of the accuracy of the description on title.

6.33 Evidence from representatives of the Victorian Land Registry to the Committee was that:

> Victoria's position has always been that we have sufficient description to identify the parcel, but where the guarantee applies, it is [only] to the interests that are held in relation to that parcel.

Thus, certificates of title 'qualified as to dimensions'[584] are currently issued for conversion from 'general law' title without the requirement of survey or exactness of measurements, provided there is sufficient description to identify the parcel. This may simply require particularity as to the abutments.

6.34 Accepted surveying practice in Victoria when title parcels are being re-established is likewise to accept 'monuments over measurements'; that is, where there is an old peg, or an old remnant fence, the 'monument' prevails over the dimensions appearing on title.[585]

Digital Cadastral Database for Victoria

6.35 A key context for a consideration of the role of the law of adverse possession in Victoria is the development of a digital cadastral database. The 'cadastre' is the 'inventory of land parcels in any state or jurisdiction containing information about the parcels regarding ownership, valuation, location, area, land use and any buildings or structures thereon'.[586] A fully coordinated cadastre is one where 'all parcels have been reconciled and dimensions made perfect...for the whole State'.[587] To

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583 *supra* para. 6.5.

584 See *Transfer of Land Act 1958* (Vic.), s. 26D & 5th Schedule Part IV. The Transfer of Land (Single Register) Bill presently before the Victorian Parliament changes this nomenclature to 'provisional as to dimensions', see cl. 6 (s. 26).

585 I. Williamson, op. cit., p. 261. See *Stevens v. Williams* (1886) 12 V.L.R. 152*; Kirkham v. Carpenter* (1886) 12 V.L.R. 144.

586 I .P. Williamson, 'Cadastres and land information systems in common law jurisdictions', (1985) 28 *Survey Review* 114, 115.

587 R. Hunt, *Minutes of Evidence*, 16 Mar. 1998, p. 4.

achieve this, modern cadastral surveys make use of digital coordinates marking exact points on the ground, which are then contextualised mathematically throughout the jurisdiction to create a digitised record of the contiguous portions of land. This mathematically coordinated cadastre provides the most authoritative record available not only of the internal dimensions of parcels but their absolute location within the general land area. The coordinated cadastre in turn may become the central reference for a database of legal, fiscal and other information relevant to contemporary land management and has been deemed essential for implementing effective strategies for land (and sea) administration.[588]

6.36 If and when such databases are created in Victoria, rights in adverse possession clearly have the capacity to compromise the reliability of such databases in that the boundaries of occupancy and possessory ownership may differ from the information on the database. In the Australian Capital Territory, where there is a coordinated cadastral database, the *Real Property Ordinance 1925* expressly prohibits the acquisition of an interest in land by adverse possession.[589] In South Australia, where a coordinated cadastre is in the process of being implemented, the process has caused rights in adverse possession to be modified (see below).

6.37 While computerisation of records is proceeding in Victoria to convert the land register into electronic form, it 'only automates what we presently have';[590] that is, it is a non-automated, single-purpose juridical cadastre that records legal interests to aid the transfer of land. Essentially, it is not concerned with boundary definition. The Registrar of Titles in Victoria estimates that a fully ordinated cadastral database for Victoria would cost between $100 million and $500 million. There is currently no proposal to implement a coordinated cadastre in this State; however, it is likely to occur within the next twenty to thirty years when 'the digital cadastral database for the State will become the legal boundary definition',[591] as in South Australia.

The Situation in other States

6.38 The Committee has reached the view that as a general proposition acquisition of title by adverse position persists in most States, although each State may have

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588 L. Ting, 'Lessons from the Evolution of Western Societies' Land Administration Systems', citing C. C. Hoohgsteden & W. A. Robertson, *On Land-Off Shore: Strategic Issues in Building a Seamless Cadastre for New Zealand*, Proceedings of Commission 7, International Federation of Surveyors Congress, Brighton, 19–25 Jul. 1998.

589 s. 69.

590 R. Hunt, loc. cit.

591 I. Williamson, *Minutes of Evidence*, op. cit., p. 283.

taken different approaches to the implementation of the Torrens system. Every State has accepted the fundamentals of the Torrens system, but they have developed the principles that Torrens proposed in different ways.

6.39 Western Australian has adverse possession with a twelve-year limitation period.[592] Tasmania has a novel provision whereby, in cases of adverse possession of Torrens system land, the registered proprietor's title is not extinguished and the registered proprietor is deemed to hold the land on trust for the person who has acquired possessory title.[593] As previously noted, in New South Wales since 1979 claims in adverse possession can be made after twelve years to whole parcels of land, but not to sub-parcels.[594] The Queensland legislation provides for applications for title by adverse possession to the whole or part of a lot after twelve years.[595] The South Australian *Real Property Act 1886* prevents a person acquiring any right or title to land under the Act by any length of adverse possession.[596]

Victorian and New South Wales Systems Compared

6.40 The Committee was initially very attracted by the New South Wales system as a means of reducing boundary disputes between neighbouring owners. In the event of a dispute over the location of a fence, the correct location could be ascertained by survey and the fence restored to that line, leaving each owner's parcel intact. Provided a registered proprietor was prepared to accept his or her loss of enjoyment of the affected land, there would be no need to press for the fence to be relocated in order to assert title.

6.41 On its face, the New South Wales law is also convenient for implementing a coordinated cadastre, because it maintains whole-parcel boundaries. If an adverse possessor occupies the major part of a parcel, his or her failure to occupy the precise area of the land described in the title is no bar to the conferral of the land as described in the title. Additionally, by debarring claims to part-parcels, the New South Wales system appeared to avoid the evidentiary complexities that can arise where agreements for a 'give and take' fence are alleged.

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592 *Transfer of land Act 1893* (WA), s. 68.

593 *Land Titles Act 1980* (Tas.), s. 117.

594 *Real Property Act 1900* (NSW), Part IVA.

595 *Land Title Act 1994* (Qld), ss. 98–108; *Limitation of Actions Act 1974* (Qld), ss. 13, 24(1).

596 s. 251. However, s. 80(a) provides that a person who would have obtained title by possession to any land under the Act if the land had not been brought under the Act is entitled to apply to the Registrar-General for the issue of a title.

6.42 In reaching its conclusions on the question of change to the current law on possessory title, the Committee notes the conclusion of the Law Reform Commission of Victoria when this matter was last considered in 1987:[597]

> The fact that the [*Transfer of Land Act*] allows adverse possessory interests to override the title requires intending purchasers to identify the land physically but relieves them from making a survey of land except where the inspection reveals difficulties, or where connecting points or boundaries are not identifiable from the title documents. This minimises the cost of conveyancing and enables the title description to be adjusted to conform to established boundaries as required.

6.43 Paradoxically, the New South Wales system, which should make survey unnecessary, has become survey-prone as purchasers need to reassure themselves that what they are purchasing is what they see:[598]

> When you go to buy a property in New South Wales, what you see is not necessarily what you get because the occupations bear no relationship necessarily to the boundaries and the only way you can determine what that relationship is is to survey.

6.44 Experts in cadastre and land management appearing before the Committee described the New South Wales system as 'inflexible' in comparison with that in Victoria: 'There is a lot less flexibility and a lot more examination of surveyor's plans and [there is] a lot more work in land title offices'.[599] They gave evidence that the New South Wales system, when adopted in Malaysia, had caused economic difficulties and that a system more along the lines of that in Victoria had since been developed.[600]

6.45 The Committee was advised that a system that permitted a 'natural process of adjustment of title to reflect actual occupation'[601] was more in tune with the dynamic nature of the relationship between people and land and of ambulatory boundaries arising from land processes of accretion and erosion. It ensured that people bought what they saw, and it corrected anomalies in past survey, given that:[602]

> if we did put all the parcels together in the size they are [on title], they would fall outside the bounds of the State. That is just the reality of the way it has been done.

6.46 The Committee was referred to a study benchmarking the performance of cadastral systems over 1995 to 1997, in which the annual number of boundary

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597 Law Reform Commission of Victoria, *The Torrens Register Book*, Report no. 12, the Commission, Melbourne, 1987, p. 10.

598 I. Williamson, op. cit., p. 258.

599 ibid., p. 256.

600 ibid.

601 The phrase is drawn from submission no. 21, p. 2.

602 L. Ting, *Minutes of Evidence*, 30 Jun. 1998, p. 270.

disputes per one million parcels of land—as one of several performance indicators—was greater in New South Wales than in Victoria. In all categories except time taken to transfer land, the performance of the Victorian cadastral system appeared to be more efficient than that of New South Wales.[603]

Assessment of the Situation in Victoria

6.47 The submission of the Registrar of Titles sets out the Victorian Land Registry's experience in assessing claims for vesting orders under section 42(2)(b) of the Transfer of Land Act:[604]

> Upon assessing the applications for vesting orders based on title by possession which are lodged in my office, very few could be described as 'fencing disputes'. Those applications which involve small areas of 'excess' land resulting from mis-positioning of fences, possibly decades ago, are rarely contentious. Although notice is given to the affected registered proprietor, very few cases result in that proprietor objecting to the application. This…it is submitted, is due primarily to the acceptance that the land as fenced is the land acquired by the registered proprietor and that the land 'lost' is insignificant to the proprietor's use and enjoyment of the land. Such applications are the natural process of adjustment of title to reflect actual occupation.

6.48 Statistics provided by the Registrar of Titles show that disputes concerning mislocated fences are fairly rare.[605] The Transfer of Land Act contains four provisions relating to correction of title, namely sections 26E, 60, 99 and 103. Section 60 is the adverse possession provision. Section 26E relates to the conversion of 'general law' land to Torrens title and includes freehold and/or possessory title. Section 99 allows application for boundary realignment resulting from occupation or survey or other misdescription. Section 103 is a general provision for the correction of errors.

6.49 A very small proportion of the 570,000 transactions processed annually by the Land Registry relates to correction of title under these provisions— 405 in 1996–97 and 255 from 1 July 1997 to 28 February 1998.[606] Of these it appears that 'only a very small portion of the applications lodged' in correction of title cases relate to fencing disputes which arise from erroneously located fences.[607] In relation to adverse possession applications under section 60 of the Transfer of Land Act there were 198 applications in 1996–1997 and 115 between 1 July 1997 and 28 February 1998.

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603 D. Steudler, I. Williamson, J. Kaufmann & D. Grant, 'Benchmarking Cadastral Systems', *The Australian Surveyor*, vol. 42, no. 3, Sept. 1997.

604 Submission no. 21.

605 Letter from R. Hunt dated 16 Mar. 1998.

606 ibid.

607 ibid. Identified as 'encroachment cases'.

6.50 According to the Victorian Land Registry, very few cases result in the proprietor objecting to the application. As at April 1998, of the fifty most recently completed applications under section 60, thirty were for whole of title, nineteen were for part of a title and one related to a hiatus of land.[608] Thirty-one were from rural areas and nineteen from urban areas. Only three involved encroachments into the area of a neighbour's title.[609]

6.51 The Committee perused applications pending in the Victorian Land Registry, including eight cases where applications had been 'stopped' as a result of court proceedings issued to determine the matters in dispute. These eight cases are the remnant of 'stopped' cases from the period 1981–1998. Of these, three were claims for part of a title; one was for the whole of the title; one concerned the 'splay' on a corner of a parcel of land, which marginally reduced the frontage of a site and due to existing planning restrictions severely restricted the use to which the substantial allotment could be put. The remainder concerned rights over former laneways and rights of way. Four involved encroachments into neighbouring title. Of the eight 'stopped' cases only one involved a dispute concerning a misplaced fence.

6.52 These figures indicate the scale of litigation, compared with the value of adverse possession as a tool for rationalising title to accord with occupancy and for bringing land back into productive use, including development use. Although some of the part-parcels being claimed may be small, their significance in development terms may be great; for example, a two metre increase in street frontage may enable a subdivision to take place which could otherwise not occur.

6.53 The Committee heard that the Victorian system suits the land market in that purchasers buy what they see and any anomaly vis-à-vis paper title is accommodated either through the boundary tolerance provided for in section 272 of the Property Law Act or by way of adverse possession, or both. One expert who gave evidence to the Committee thought that adopting the New South Wales system would cause 'large expense and disruption'.[610]

6.54 The counterpart of the sense of grievance felt by some people on discovering after fifteen years that they have lost a sliver of land to which they were previously legally entitled—perhaps without ever being aware of their entitlement—is the sense of injustice which would be felt if people were required to re-locate fences to the title

608 A hiatus of land occurs where a number of parcels of land are surveyed from different starting points and the boundaries do not meet, leaving a gap which is not on any title.

609 Letter from R. Hunt, dated 16 Mar. 1998.

610 M. Park, *Minutes of Evidence*, 30 Jun. 1998, p. 266.

boundary after fifteen or even fifty years' active enjoyment of a different occupational boundary. In these circumstances a change to the New South Wales system would be inconsistent with the policy that underlies the law of adverse possession.[611]

6.55 So far as the development of a digital cadastral database is concerned, it was acknowledged in evidence that information on a Victorian database could be fifteen or more years out of date in that boundaries of occupation differing from the title boundary will not appear until registration of the interest is sought.[612] However, it was felt that the proportion of parcels to which this would apply was comparatively insignificant.[613] The expert witnesses also felt very strongly that there should be a capacity to amend cadastral boundaries on the database as boundaries shifted as a result of land being acquired by adverse possession.[614]

6.56 Accordingly, after an exhaustive examination, the Committee is satisfied that to amend the law in the manner proposed in a number of submissions, in the hope of averting boundary disputes, would cause more problems than it solves and on balance is not desirable. However, the Committee believes that the community needs to be made more aware of the affect of the law of adverse possession on landowners in this State. Greater public awareness of the law may go some way towards reducing the number and intensity of disputes over mislocated dividing fences. Consequently, the Committee recommends that the detailed guide to resolving dividing fence disputes (the subject of Recommendation 1 of this Report)[615] should contain a simplified plain English statement of the law of adverse possession as it relates to dividing fences.

Recommendation 66

The detailed guide to resolving dividing fence disputes (the subject of Recommendation 1 of this Report) should contain a simplified plain English statement of the law of adverse possession as it relates to dividing fences.

Court Jurisdiction in Adverse Possession Cases

6.57 Under existing law, any dispute relating to the acquisition of land by adverse possession under the Transfer of Land Act must be heard in either the Supreme

611 See *supra* para. 6.11.
612 I. Williamson, op. cit., p. 284.
613 ibid.
614 ibid. p. 283.
615 See *supra* p. 9.

Court or the County Court. Under section 37(2)(b) of the *County Court Act 1958* (Vic.) the County Court can determine any proceeding with the potential to affect title to property where the value of the property at the time the proceeding is commenced is within the jurisdictional limit of the Court, or the parties consent in writing to jurisdiction in that Court.[616] It is clear from section 37(2)(b) of the Act that jurisdiction is determined by the value of the whole property which is the subject of the affected title, not the value of the particular piece of land in dispute. In practice, therefore, many disputes involving adverse possession can only be heard in the Supreme Court, despite what may be a trivial monetary value of the piece of land in question.

6.58 Disputes over adverse possession in the County Court are likely to attract Scale D under the County Court Scale of Costs. Scale D applies where the value of the property is over $50,000 but less than $200,000. Party-party costs allowable in respect of a case of average complexity, based on a court hearing time of one day only, are likely to be in the range of $10,000 to $12,000. In practice, solicitor-client costs will in most cases be substantially higher than these figures, so that a losing party might expect to pay his or her own costs in the region of $15,000 and party-party costs to the winning party in the region of a further $10,000. It is not possible to estimate Supreme Court costs with any level of precision. However, they would be significantly higher than the above figures. One case which was brought to the Committee's attention resulted in a Legal Aid liability of $60,000 in own costs and $50,000 in party-party costs of the other party. While this may be somewhat exceptional, a losing party could readily expect to incur between $30,000 and $40,000 in overall legal costs.

6.59 The Committee considers that in most cases such costs are likely to be out of all proportion to the value and significance of the land in dispute. The exception may be where a developer mounts a claim in order to secure a minimum area for subdivision. For most people, however, the prospect of a hearing in the Supreme or County Court and the attendant costs are too daunting to contemplate. If people cannot have a dispute determined at a reasonable cost, their only option is to abandon their land or their claim. Grievance over legal costs may be added to anger at the loss of land.

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[616] The Committee notes that s. 4 of the *Transfer of Land Act* defines 'Court' to mean 'the Supreme Court and, in relation to land the value of which does not exceed the jurisdictional limit of the County Court, the Supreme Court and the County Court'. This definition does not appear to permit the parties to consent to jurisdiction in the County Court beyond its jurisdictional limit, with the result that any dispute concerning a vesting order under the Act, which affects title to a property valued at more than $200,000, must be litigated in the Supreme Court.

6.60 In this context, the Committee considers that there is a need to provide a less expensive forum in which disputes relating to adverse possession can be heard. The President of the Victorian Civil and Administrative Tribunal (VCAT) indicated to the Committee that VCAT, as an administrative tribunal, might not be the appropriate forum for hearing matters affecting interests in real property, which have traditionally been the province of the courts. On this basis, the Committee considers that the parties to a dispute involving adverse possession of land should be able to consent to jurisdiction in any court, including the Magistrates' Court, notwithstanding that the value of the property affected by the dispute exceeds the jurisdictional limit of the court in question.

6.61 The Committee is aware that the Magistrates' Court does not at present enjoy powers with respect to the determination of interests in real property.[617] Section 100(1)(d) of the *Magistrates' Court Act 1989* (Vic.) grants the Court jurisdiction 'to hear and determine any...cause of action if the Court is given jurisdiction to do so by or under any Act'. However, the Committee believes that it is inappropriate to confer jurisdiction on the Court under the proposed Dividing Fences and Boundaries Act to determine property rights, where a dividing fence is mislocated. However, in the Committee's view, given recent increases in the jurisdictional limit of the Magistrates' Court and the high costs of litigation in the superior courts, it is now appropriate for disputes involving claims in adverse possession to be able to be determined in the Magistrates' Court, where the land affected by the claim is within the jurisdictional limit of the Court or the parties agree to such jurisdiction. This would bring the Magistrates' Court into line with the County Court and would be subject to the power of the Magistrates' Court under the *Courts (Case Transfer) Act 1991* (Vic.) to transfer a matter to a superior court if the significance or complexity of the matters in dispute make such transfer appropriate.[618]

Recommendation 67

Section 100 of the* Magistrates' Court Act 1989 *(Vic.) should be amended to permit the Magistrates' Court to determine matters affecting interests in real property where the value of the property affected by the claim at the time the proceeding is commenced is within the jurisdictional limit of the Court, or the parties consent in writing to jurisdiction in that Court.

Recommendation 68

617 See *Magistrates' Court Act 1989* (Vic.), s. 100.

618 *Courts (Case Transfer) Act 1991* (Vic.), particularly ss. 15, 16 & 21.

Section 4 of the* Transfer of Land Act 1958 *(Vic.) should be amended to provide that, for the purposes of sections 9, 26E, 60 and 99, 'Court' includes the Magistrates' Court, where the value of the land affected does not exceed the jurisdictional limit of the Magistrates' Court, or, notwithstanding that the value of the land affected exceeds the jurisdictional limit, where all parties consent in writing to such jurisdiction.

Matters Arising

6.62 While the Committee does not recommend a change to the law of possessory title, it recommends the adoption of several measures to improve the situation of persons who find that their fences are not on boundary and are faced with possible claims against their title. During meetings held with the Registrar of Titles and her staff in the course of this Inquiry, these suggestions were canvassed and met with approval in principle.

6.63 The first of these concerns the difficulties that arise when two registered proprietors agree to erect a 'give and take fence', which is not intended to impact on the proprietary rights of either party. If there is no formal record of the agreement, and the parties sell their land or die or leave the area, a successor in title may be ignorant of the fact of the agreement or its terms, and may believe that his or her land has been lost through adverse possession. Often there will be a vague oral history to the effect that a 'handshake agreement' took place, but this is generally difficult to prove. To address this difficulty, the Committee has recommended elsewhere (Recommendation 30) that provision be made for agreements of this kind—or any arbitrated resolution to like effect—to be notified on the titles of the affected parcels. As one witness who gave evidence to the Committee said:[619]

> Therefore, anyone who comes along to deal with either of the owners or is interested in either piece of land would be on notice that either an agreement exists between the owners concerning the land or there has been an arbitrated resolution.

6.64 The second difficulty arises from the inability of persons whose land has been encroached upon to take action to 'shake off' the portion to which their title is debarred under the Limitation of Actions Act, which would allow them to give clear title to a purchaser.[620] Amendment of the register occurs only when an adverse

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619 R. Jefferson, *Minutes of Evidence*, 16 Mar. 1998, p. 13.

620 Two or three telephone callers, including F. De Angelis, raised this matter. There is little present incentive to an adverse possessor to lay claim to title, as the process of title amendment is costly and he or she already has title as against the world. The party who feels at a disadvantage is the person whose land has been encroached, who has not only lost land but cannot 'clear' his or her

possessor applies to have his or her possessory title registered pursuant to section 60 of the Transfer of Land Act and is able to satisfy the associated statutory, evidentiary and procedural requirements.

6.65 Whilst section 102 of the *Transfer of Land Act* allows the Registrar of Titles to adjust discrepancies in boundaries where land 'is found by reason of erroneous measurements in the original survey to exceed or fall short of dimensions given in the Register',[621] it does not permit amendment to reflect occupancy. Section 99 permits a proprietor to apply to amend the folio of his own land or that of any other proprietor, but is restricted to situations of bona fide (that is, not adverse) occupation of land, where the boundaries, area or land occupied do not accord with the title description or there has been an error of survey or the folio is erroneous or imperfect on its face.

6.66 It would appear that if the words 'bona fide' were removed from section 99(1) of the Transfer of Land Act, title amendment to reflect occupancy where fences have been located off boundary for the statutory period could be implemented more simply and at less cost than is currently the case when application has to be made under section 60. An owner dispossessed of a part of the land of which he or she is registered proprietor could then make application under section 99(1)(a) to have the affected part excised from the title and 'quarantined', pending any claim to possession of that part that may later be made. Care would of course need to be exercised to ensure that the amended provision was not abused to effect subdivisions not authorised by the *Subdivision Act 1988* (Vic.).

6.67 The third matter arose in the course of expert evidence taken by the Committee and concerns differences in the way Crown and freehold boundaries are treated when boundaries change through occupation. These differences arise from the recommendations of the 1885 Royal Commission into land boundaries, which were opposed by the Titles Office at that time.[622] In the case of unalienated Crown land, the paper boundary is simply adjusted to incorporate the additional land, whereas, in the case of freehold land, a separate title must issue. This title is then either consolidated with the principal title at additional cost, or remains separate, which contributes to an unnecessarily complex cadastral map. It was suggested to the Committee that the Transfer of Land Act should be amended to permit adversely possessed land adjoining land of which the applicant is already the registered

title. This is felt by such persons to be a barrier to transacting their land and maximising its price.

621 Transfer of Land Act, s. 102(1).

622 I. Williamson, op.cit., pp. 257–258.

proprietor to be incorporated into the applicant's certificate of title by amendment, rather than form a separate title.[623]

6.68 The Committee is aware that the Victorian Land Registry has done much in recent years to reduce costs for clients by streamlining processes and reducing evidentiary and survey requirements in respect of adverse possession applications under sections 9 and 60 of the Transfer of Land Act, and sees the above matters as extending that process. If Victoria's laws relating to adverse possession are not to change, it is desirable that title amendments to reflect occupancy be as procedurally simple and inexpensive as possible, so that there is no cost disincentive frustrating accord between the paper or electronic record and the situation on the ground.

6.69 The Committee acknowledges that its Terms of Reference do not extend to matters concerning title amendment and accordingly, has not made recommendations regarding the above matters. However, it considers that these are matters deserving attention and are sufficiently important to be brought to the attention of the Parliament and the Minister for Conservation and Land Management through this Report, in the hope that they will receive further consideration.

Recommendation 69

The following suggestions for reform should be referred to the Minister for Conservation and Land Management so that they can be considered by officers of her Department and form part of a general review by the Land Registry of the law and procedure relating to boundary adjustments:

(1) A dispossessed owner should be able to make application under the* Transfer of Land Act 1958 *(Vic.) to have the affected part of his or her land excised from the title and 'quarantined', pending any claim to possession of that part.

(2) The* Transfer of Land Act 1958 *(Vic.) should be amended to permit adversely possessed land adjoining land of which the applicant is already the registered proprietor to be incorporated into the applicant's certificate of title by amendment, rather than form a separate title.

[623] ibid.

APPENDIX A LIST OF SUBMISSIONS

No.	*Date of Submission*	*Name*	*Affiliation*
1	23 December 1997	Mr R. Pugh	Private citizen
2	20 January 1998	Mr J. Sanders	Private citizen
3	3 February 1998	Mr S. Mitchell	STM Fencing Consultants
4	3 February 1998	Mr S. Mitchell	Fencing School of Australia
5	10 February 1998	Mr G. Madden	Solicitor
6	13 February 1998	Mrs R. Chhibber	Private citizen
7	16 February 1998	Mr L. Priedulais	Retired fencer
8	16 February 1998	Confidential	
9	16 February 1998	Ms L. Schween	Coltmans Price Brent, Solicitors
10	16 February 1998	Ms J. Lovell	Private citizen
11	5 January 1998	Mr L. Wright	Private citizen
12	24 February 1998	Mr R. Rowe	Private citizen
13	9 February 1998	Ms D. McArthur	Private citizen
14	26 February 1998	Mr R. McCormack	Private citizen
15	26 February 1998	Mr M. Holmes	Private citizen
16	27 February 1998	Mr A. Cummins	Association of Consulting Surveyors (Victoria) Inc.
17	2 March 1998	Mrs J. Seymour	Private citizen
18	27 February 1998	Mr J. Callow	Private citizen
19	10 March 1998	Mr L. Perry	The Institution of Surveyors, Victoria
20	12 March 1998	Ms J. Wade, MP	Attorney-General

No.	*Date of Submission*	*Name*	*Affiliation*
21	13 March 1998	Ms R. Hunt	Land Registry, Department of Environment & Natural Resources
22	16 March 1998	Mr F. Crooke	Private citizen
23	17 March 1998	Mr S. Page	Private citizen
24	18 March 1998	Mr K. Coogan	Private citizen
25	18 March 1998	Mr D. Kay	Private citizen
26	20 March 1998	Mr A. & Mrs K. Abrahams	Private citizens
27	20 March 1998	Esler & Asssociates	Surveyors, Engineers, Planners, Property Consultants
28	20 March 1998	Mrs S. Charter	Private citizen
29	20 March 1998	Mr E. Waller	Private citizen
30	20 March 1998	Mr D. Evans	Private citizen
31	27 March 1998	Mr R. Spence	Municipal Association of Victoria
32	23 March 1998	Mrs H. Bishop	Private citizen
33	23 March 1998	Mr K. Wilde	Private citizen
34	23 March 1998	D. Alstin	Alstin's Antiques
35	25 March 1998	A. Hocking	Private citizen
36	24 March 1998	L. & B. Lewis	Private citizens
37	17 March 1998		The Property Owners' Association of Victoria Inc.
38	23 March 1998	Mr M. Croxford	Building Control Commission
39	24 March 1998	Mr W. Shaw	Victorian Farmers Federation
40	23 March 1998	Mr W. Stretton	Master Fencers Association
41	27 March 1998	Mr P. McLoughlin	Private citizen

No.	*Date of Submission*	*Name*	*Affiliation*
42	27 March 1998	Mr K. Allender	Private citizen
43	27 March 1998	Mr G. Grant	Private citizen
44	27 March 1998	Mr P. Ingwerson	Carnegie Fencing & Gates Pty Ltd
45	27 March 1998	Mr K. Shea	Private citizen
46	31 March 1998	Ms S. Calvert	Private citizen
47	30 March 1998	Mrs A. Bow & J. Price	Macleod Progress Association Inc.
48	31 March 1998	Ms R. Cooper	Private citizen
49	1 April 1998	Mr J. Crockart	Private citizen
50	2 April 1998	Mr R. Leishman	Private citizen
51	2 April 1998	Ms M. Quigley	Save our Suburbs Inc.
52	2 April 1998	Mr L. Cunningham	The Institute of Arbitrators & Mediators
53	6 April	R. Oakes	Private citizen
54	13 April 1998	Mr H. Robinson	Private citizen
55	5 March 1998	Mr L. Cicchelli	Private citizen
56	13 April 1998	A.J., J. and A.D. Mallon	Private citizens
57	30 April 1998	Mr A. Trumble	Royal Victorian Association of Honorary Justices
58	4 May 1998	Mr E. Crossman	Private citizen
59	5 May 1998	Mr H. Lubansky	Private citizen
60	12 May 1998	B. and J. Berendsen	Private citizens
61	12 May 1998	Ms S. McInnes	Private citizen
62	20 May 1998	F. Seidel	Private citizen
63	14 May 1998	Professor I. Williamson	Department of Geomatics The University of Melbourne
64	26 May 1998	Mr K. Shade	Horsham Rural City Council

No.	*Date of Submission*	*Name*	*Affiliation*
65	12 June 1998	Miss R. Curnow	Nolch and Associates, Solicitors
66	30 July 1998	Mr P. Collina	Brimbank City Council
67	28 July 1998	Mr W. Tickell and others	Private citizens

APPENDIX B LIST OF WITNESSES

No.	*Date of Hearing*	*Witness*	*Affiliation*
1	16 March 1998	Ms R. Hunt	Registrar of Titles
		Mr R. Jefferson	Legal Officer, Land Titles Office
		Mr P. Burns	Manager, Registrar-General's Office
		Mr S. Mitchell	STM Fencing Contractors and the Fencing School of Australia
2	27 March 1998	Mrs T. Zerella	Acting Manager, Dispute Settlement Centre of Victoria
		Mr D. Leonard	Dispute Assessment Officer, Dispute Settlement Centre of Victoria
		Mr R. Campagna	Dispute Assessment Officer, Dispute Settlement Centre of Victoria
3	2 April 1998	Ms M. Quigley	Representative, Save our Suburbs Inc.
		Mr A. Abrahams and Mrs K. Abrahams	Private citizens
		Ms L. Cunningham	Executive Officer, Institute of Arbitrators Australia
		Mr J. O'Donoghue	Legal Consultant, Municipal Association of Victoria

No.	*Date of Hearing*	*Witness*	*Affiliation*
		Mr D. Rae	Planning Consultant, Municipal Association of Victoria
		Mr D. Monahan	Licensed surveyor, member of Association of Consulting Surveyors and Institution of Surveyors Victoria
		Mr R. Bortoli	Licensed surveyor, member of Association of Consulting Surveyors and Institution of Surveyors Victoria
		Mrs R. Chhibber	Private citizen
		Mr W. Edwards	Private citizen
4	3 April 1998	Mr D. Hodge	Assistant Director, Planning and Development, Housing Industry Association
		Mr T. Wishart	Senior Technical Adviser, Housing Industry Association
		Mr R. Day	Executive Officer, Master Fencers Association
		Mr T. Nicholson	Chairman, Master Fencers Association
		Mr W. Stretton	Representative, Master Fencers Association
5	20 April 1998	Mr B. Forby	Vice President, Institute of Body Corporate Managers
6	4 May 1998	Mr P. Walsh	Vice President, Victorian Farmers Federation
		Mr C. Manners	Policy Director, Victorian Farmers Federation
		Mr E. Crossman	Farmer

No.	*Date of Hearing*	*Witness*	*Affiliation*
		Mr D. Evans	Farmer
		Mr P. Meagher	Farmer
		Mr H. Davies	Real Estate Agent
		Mr T. Mannion	Farmer
		Mr J. Trevillian	Private citizen
		Ms D. Ferrand	Private citizen
		Mr B. Brereton	Farmer
		Mr D. Oberin	Property owner
7	5 May 1998	Mr K. Wilde	Farmer
		Mr K. Allender	Farmer
		Mr E. Waller	Farmer
		Mr N. Attwell	Farmer
		Mrs V. Attwell	Farmer
		Mr W. Ower	Real Estate Agent
		Mr G. Armstrong	Farmer
8	4 June 1998	Ms K. Adler	Senior Policy Officer, Department of Infrastructure
		Mr G. Code	Senior Policy Officer, Department of Infrastructure
		Ms A. Lewis	Policy Officer, Department of Infrastructure
		Mr T. Blythe	Senior Statutory Planner, Department of Infrastructure
9	30 June 1998	Professor Williamson	Head of the Department of Geomatics, The University of Melbourne
		Mr M. Park	Postgraduate student, Department of Geomatics, The University of Melbourne

No.	*Date of Hearing*	*Witness*	*Affiliation*
		Ms L. Ting	Postgraduate student, Department of Geomatics, The University of Melbourne

APPENDIX C STATISTICS

Data provided by the Department of Justice indicates that between 3 June 1995 and 3 June 1998 there were 372 proceedings under the *Fences Act 1968* (Vic.) issued in the Magistrates' Court of Victoria. Only 166 of these proceedings were defended. The remainder were either withdrawn following settlement or orders were made in default of a defence being lodged.

While the Committee was unable to obtain information as to the outcomes of all 166 defended matters, it obtained copy orders in respect of a total of 120 proceedings issued across the Western Suburbs Region of Melbourne, Southern Suburbs Region, Northern and Eastern Suburbs Region, Western Districts Region, Gippsland Region, Wimmera / Mallee Region and Upper Murray Region.

Only 26 of the 120 proceedings for which details were provided required a full hearing. The remainder were the subject of consent orders at the door of the court or, more often, settled at or before the pre-hearing conference stage.

In approximately half of those 26 cases the orders were made in terms of the monetary sum as sought. In the balance of cases, the orders were expressed as a requirement that each party pay half of the cost of the fence. In two cases, the defendant was ordered to pay half of the cost of a 5 foot 4 inch paling fence, with the balance of a more expensive fence to be paid by the plaintiff. Nearly all of the consent orders filed were based on equal contributions by the parties, with adjustments to reflect any particular need of one party.

In no court was the ratio of hearings to proceedings greater than one-third, and in a number of courts no case went to hearing.