

GOVERNMENT RESPONSE TO THE VICTORIAN LAW REFORM COMMITTEE REVIEW OF THE FENCES ACT 1968

Introduction

The Government commends the work of the Law Reform Committee in preparing the Report on the Review of the Fences Act 1968.

Despite the apparently benign nature of this Act, the review raised many complex issues to which the Committee had to give careful consideration. The Committee encountered significant depth of feeling in respect of fencing issues from Victorians making submissions to the Committee. This reflects the fundamental nature of these issues for Victorian communities at a metropolitan, regional and rural level.

The Report is comprehensive, and the Government is pleased to note that the Committee consulted broadly on the references and travelled throughout Victoria to hear submissions. The Committee considered a total of 67 submissions, from a diverse range of community representatives. The Report makes 69 considered recommendations in five detailed chapters. The substance of these recommendations and the Government's response to them are as follows.

Chapter One - Public Awareness and the Scope of the Act

Recommendation

Chapter One recommends the provision of information to the community in respect of the resolution of fencing disputes, through support of the Committee's electronic 'Quickguide', and through the development of a detailed guide to be published and distributed through a variety of mediums. It also recommends the expansion of the scope of the legislation to contemplate the breadth of issues associated with the separation of land.

Government Response

The government supports the promotion of efficient and effective resolution of fencing disputes and the provision of comprehensive information to the community. This is consistent with the Government's commitment to access to justice and open government. It recognises the significance of fencing issues to people across the breadth of the Victorian community, particularly those in regional and rural Victoria, and the desirability of accessible and clear information in respect of these disputes.

The Government also supports the need for clarity in respect of the scope of the Act and acknowledges the diversity of issues arising from the fencing disputes. In drafting new legislation it proposes to adopt clear and contemporary drafting and linguistic techniques, so that the legislation is as accessible as possible to the community.

Chapter Two - Jurisdiction

Recommendations

This Chapter recommends the vesting of jurisdiction in respect of fencing and boundary disputes in the Victorian Civil and Administrative Tribunal ("VCAT") and

nominates a series of powers of the Tribunal to be included in any new legislation. It also recommends the establishment of a 'Neighbour Disputes' Division at the VCAT.

Government Response

The Government supports the recommendation in principle, but notes that there are complex issues to be considered in the relocation of any jurisdiction. In particular, the Government is concerned that regional and rural Victoria remain services in the comprehensive manner in which they are currently serviced by local Magistrates' courts. It proposes to consider further the necessity of an entirely new Division at the Tribunal, and whether broader disputes would be better resolved in another arena.

The Government will also give serious consideration to the powers which would be necessary and appropriate to be exercised by the Tribunal if the fencing jurisdiction were vested in VCAT. The Government notes that the powers would not be a large but limited to determination of disputes on defined matters under that Act, ensuring that there was no overlap with building or planing legislation.

Chapter Three - Resolving Confusion

Recommendations

This Chapter proposes numerous clarifications of the legislation to resolve anomalies which presently exist. The proposals include the clarification of definitions; clear procedures and provisions in relation to contribution in respect of fencing works, and clarification of provisions for the service of notices to fence, as well as any appropriate exemptions from service. In addition the chapter recommends a number of mechanism for the assessment of contribution to fencing costs by the parties.

Government Response

The Government supports these proposals in principle and will carefully review existing definitions in the drafting of any new legislation. It notes that issues requiring careful evaluation include:

- the service of notices on owners and occupiers;
- whether tenants on long lease should be considered 'owners' under the Act;
- what constitutes a 'sufficient fence';
- the limits of various licences in providing exclusive rights of occupation;
- the position of persons with potential adverse possession claims;
- the varying purposes of owners and occupiers;
- apportionment of contributions between landlords and tenants;
- provision of forms of notice and cross-notice;
- whether ex parte proceedings are appropriate.

The implications of these issues are complex and will be given careful consideration in drafting new legislation.

Chapter Four - Crown Immunity

Recommendations

This Chapter concerns the liability of the Crown for fencing costs. It proposes that state owned enterprises be included within the operation of the Act. It also proposes

that the Crown and Municipal Councils should be liable to the same extent as a private person where land owned by the Crown or Council adjoins private land and is used for purposes such as school, a public hospital, or public housing.

In rural areas, it is proposed that the Crown contribute to the costs associated with the repair of fences dividing Crown and private land, and should contribute half the cost of damage to such fences that are destroyed or damaged by natural disasters. As an alternative to this liability the recommendations propose mechanisms which would provide for contributions by the Crown towards the cost of fencing materials in rural areas, particularly in the event of natural disasters, or which would facilitate the provision of fencing materials such as allowing access to timber on Crown land. Finally, it recommends the extension of the existing Good Neighbour Program and the establishment of a Rural Ombudsman.

Government Response

The Government has considered the recommendations relating to Crown Immunity and decided, because of the significant budget implications, not to agree at this stage.

Further more, it is not proposed to override any immunity that applies by virtue of governing statutes to infrastructure operators such as public transport and road operators. Liability for this component of Crown land alone could potentially apply to 7,000kms of boundary and would have a profound effect on current licensing arrangements.

It is not proposed to establish a Rural Ombudsman. The existing Ombudsman has jurisdiction over fencing and other property related matters and operates a Country Access Program which provides opportunities for rural residents to access officers in regional locations. Instead this Program will be more widely promoted in conjunction with the considerations contained in Chapter One, and in accordance with the Government's priority of access to justice and accountability across the spectrum of the community.

Chapter Six - Adverse Possession

Recommendations

This Chapter makes a number of recommendations in respect of adverse possession, including the provision of an accessible explanation of the law of adverse possession in any guide developed further to the recommendations in Chapter One. It proposes that the *Magistrates' Court Act* be amended to give the Court power to determine matters affecting interests in real property and that the *Transfer of Land Act* also be amended accordingly.

Additionally, it proposes certain amendments to the *Transfer of Land Act* in respect of efficient dealing with portions of land subject to adverse possession claims. It suggests that these final proposals be referred to the relevant Minister, and the Attorney has referred these proposals to the Minister for Environment and Conservation for consideration.

Government Response

In respect of the other recommendations contained in Chapter Six, the Government

notes that the Magistrates' Court already has the power to hear and determine the kind of dispute referred to by the Committee, as contained in s 100(1)(b) of the Act. However, it notes that the Court does not currently have power to direct the Registrar of Titles to amend a title in respect of an adverse possession claim. The Government therefore proposes to consider the powers of the Registrar of Titles further, in consultation with the Minister for Conservation and Environment.

Conclusion

In summary, it is the view of the Government that most of these recommendations should be considered and developed in the context of a new Act to replace the Fences Act 1968.

In developing new legislation, the Government will consider the recommendations in respect of any overlap in the building and planning systems, and in respect of the Government's priority of promoting community awareness and access to justice across the breadth of the Victorian community.

The Government is committed to consultation on law reform and will continue to consult the community on the proposed legislation to replace the *Fences Act 1968*.

(The above Government Response was tabled in the Legislative Assembly on Tuesday 27th March 2001)