

IMPORTANT

The purpose of this document is to provide a **general guide** about the civil process that applies to fencing disputes under the *Fences Act 1968* in the Magistrates' Court of Victoria. It does **not** cover all situations. It is not a substitute for legal advice, which may be obtained from a solicitor (who may charge a fee). Court staff may only advise on what **can be done**, not what should be done.

Fences Act 1968

The *Fences Act* contains rules about who pays for a dividing fence, the type of fence to be built, notices that neighbours need to give one another and how to resolve disputes that come up between parties when negotiating fencing works and any subsidiary works.

What is a 'dividing fence'?

A dividing fence is a fence between two pieces of adjoining land. It might be located on the common boundary between the pieces of land, or it might not be. Its purpose is to separate adjoining pieces of land.

It does not include a retaining wall or any wall that is part of a house, garage or other building.

Who pays for the dividing fence?

Generally, owners of adjoining land must contribute in equal shares to fencing works and any subsidiary works required for a dividing fence. The standard of fence that you must contribute to is a 'sufficient dividing fence'.

Contributions may cover more than just building or repairing the dividing fence. Depending on the circumstances, this may include clearing the land, removing the existing dividing fence, having the land surveyed and using temporary barriers.

In some cases, a long-term tenant may be liable to cover part or all of the owners required contribution to fencing works and any subsidiary works. In these cases, certain notices under the *Fences Act* need to be given to the tenant.

What is a 'sufficient dividing fence'?

A number of factors are taken into account when determining what a sufficient dividing fence is for your properties. For example, the existing dividing fence (if any), the purposes for which the owners of the adjoining land use or intend to use the land, reasonable privacy concerns and the types of fences used in the local area.

For some residential properties, a sufficient dividing fence might be a 1.8 metre paling fence. For some rural properties, a sufficient dividing fence might be a wire and post fence.

If an owner wants a dividing fence that is of a higher standard, like a higher fence or one made of more expensive materials, the person who wants this pays the difference in cost between a sufficient dividing fence and the higher standard.

Dispute Settlement Centre of Victoria

Before taking any court action, it is strongly recommended that parties seek advice and/or mediation through the Dispute Settlement Centre of Victoria (DSCV) (see 'Contact Details' below).

This is a free service that parties can use to help resolve fencing disputes. If the dispute is not resolved following mediation, the matter can still be taken to court.

Fact sheets outlining owners' responsibilities under the *Fences Act* and templates for fencing notices are located on the DSCV website.

Fencing Notice

In the majority of fencing disputes, before a person can file a complaint in the Magistrates' Court, a 'Fencing Notice' is required to be given to or received by the owner of the adjoining land (or where applicable, the tenant).

A fencing notice must be in writing and contain certain information. A template 'Fencing Notice' and 'Urgent Fencing Notice' is available on the DSCV website.

If no agreement is reached between the parties after a certain time (usually 30 days) then a complaint may be filed.

Before commencing a Civil Proceeding

Before you complete a complaint, you must agree to conduct your proceeding in a certain way. This means that you must understand certain obligations. You must certify that you will act honestly, cooperate and make a genuine attempt to resolve the dispute as well as meeting other obligations.

This is achieved by completing an 'Overarching Obligations Certification' (Form 4A) and a 'Proper Basis Certification' (Form 4B). Templates of these forms are located on the court website.

These forms are then filed with the Court along with the complaint.

Filing a Complaint

This section provides a guide to commencing a proceeding, completing, filing and serving a complaint for a fencing dispute in the Magistrates' Court.

Complete the complaint

You must complete a 'Complaint (Fencing Dispute) Form 5A' (template on court website).

Attached is an example complaint, which sets out where each of the following numbers is located in the document.

1. Court number

Court staff will supply the court number (or case number) to you after you file your complaint. Record this number on any other copies once you receive it from the Court.

2. Court location

This is the location of the court where your claim will be filed, and may eventually be heard. For example, 'Melbourne'. The location should be the court closest to:

- The place where the claim arose; or
- The defendant's address

To assist you to determine where your complaint should be filed, refer to 'Proper Venue' option under the 'Practice and Procedure' tab on the court website.

3. Plaintiff's name and address

The plaintiff is the person who brings the claim and commences proceedings (i.e. the person seeking an order).

The Court will send all correspondence to the address written here. It cannot be a P.O Box address.

4. Defendant's name and address

This is the person or company that is having a claim brought against them (i.e. is being sued).

If the defendant is a company, you must give the proper company name and its registered address. You can do a company search at www.asic.gov.au to confirm the company's name and registered address.

If the defendant is an individual operating as a business, you should name the person and indicate that they are trading under a business name. For example, Joe Bloggs trading as Bloggs Constructions.

5. Document details

This is where to include basic details of who files the complaint with the Court. If you have a lawyer, this is where they will record their details. If you do not have a lawyer then you should include your own details here, including:

- **'Date of Document'** - The date you are completing the document.
- **'Filed on behalf of'** - The person the claim was filed on behalf of. If you are representing yourself, the answer to this question will be 'plaintiff'.
- **'Australian lawyer name'** - If you do not have a lawyer simply write 'N/A'.
- **'Code'** - If you do not have a lawyer simply write 'N/A'.
- **'Address'** - If you do not have a lawyer, this will be your address (same as in number 3).
- **'Telephone'** - If you do not have a lawyer, this will be your telephone number.
- **'Reference'** - If you do not have a lawyer simply write 'N/A'.

6. Address for service of the plaintiff

This is the address that the Court and other parties will use to send all correspondence to you. If you are representing yourself, this address must be in Victoria and cannot be a PO Box address.

7. Details of lawyer

If you do not have a lawyer simply write 'N/A'.

8. Parties acting in a representative capacity

In most cases, the parties act for themselves. If this applies to you, then simply write 'N/A'.

However, in some cases, an individual or a company may need to be a party to proceedings in a representative capacity. For example:

- The administrator of an estate on behalf of the estate.
- A litigation guardian on behalf of someone who does not have the capacity to act for themselves.

For the purposes of this question 'representative' does not mean your lawyer (if you have one).

9. Notice to the defendant

This section includes important information for the defendant and must be included in the complaint.

10. Court location

Insert the same location as per number 2, above.

11. "If you pay..."

In this section you can specify an amount (and any costs incurred) that you would be willing to

accept to end the matter without proceeding any further.

If your claim is only for monetary amount, complete this section. If all matters are in dispute or if the claim is a non-monetary one, do not complete this section.

12. Statement of claim

This is a description of the facts that form the basis of your claim. Your statement of claim should be set out in **numbered paragraphs** and **must be signed**.



Your statement of claim is very important in establishing your case. You may want to seek legal advice when completing this part.

The statement of claim must include the following details:

- That your claim arises under the *Fences Act 1968*.
- The correct addresses of the properties involved in the fencing dispute (this is the place where your claim arose).
- The date a fencing notice was given to the defendant or received by the plaintiff (this is the date your claim arose).
- State that there has been no agreement between the plaintiff and defendant regarding the fencing works and any subsidiary works.
- A full description of the event(s) that form the basis of your claim. You should include as much detail as possible.
- The remedy or relief you are seeking and any court costs you have incurred.

To support your statement of claim, you should attach a copy of the 'Fencing Notice' and any quote/receipt from a fencing contractor regarding the cost of the fencing works and any subsidiary works.

13. Date of Filing

For the complaint you file with the court, leave blank. In the copies, write the date of filing stated in the cover sheet sent by the court when the complaint is processed.

14. Dated and Signed

Sign the complaint and include date of signing.

File the Complaint with the Court

Before filing the complaint with the Court, ensure you have photocopied the complaint and any attached documents at least twice (one for your record and one for service on the defendant).

The original complaint needs to be filed with the Court, which can be done in person or by post. A complaint **cannot** be filed by fax or email.

A filing fee will be payable when you file the complaint (see 'Fees' for further information).

When the complaint has been processed, a cover sheet is sent to you, which states the court number allocated to the complaint.



It is your responsibility to endorse the copies of the complaint (including the one for service on the defendant) and any further document filed, with the court number.

Serve the Complaint on the Defendant

A complaint needs to be served on the defendant together with two copies of 'Notice of Defence' (Form 8A). Once service is carried out, an 'Affidavit of Service (Complaint)' (Form 6A) must be completed. The affidavit needs to be filed with the Court to proceed the complaint. Templates of these forms are located on the court website.

Service

The person who carries out service can be any person; it does not have to be you. You can also pay a 'process server' to do this for you. You may be able to find a process server online or in the phone book.

If the defendant is an individual, the complaint must be served personally. Personal service can be achieved by

- handing the complaint to the defendant, or, if the person does not accept the complaint, by putting it down in the persons presence and telling them the nature of the document;
- delivering the complaint to the residence of the defendant, and leaving it with a person over the age of 16 years, who resides at that residence; or
- if the defendant conducts a business, by delivering the complaint to that business address, and leaving it with a person over the age of 16 years, who works at that business.

If the defendant is a company, you may serve the complaint by delivering or posting the complaint to the company's registered address. You can find out the registered address of a company by purchasing a full company search at www.asic.gov.au.



A complaint is only valid for service if it states the court number and the date of filing.

Affidavit of Service (Complaint) Form 6A

After service, the server must show the Court that the documents were served correctly by completing an 'Affidavit of Service'. It must include details of how and when service was completed.

The server must swear the content of the affidavit is true and correct, and only sign it in the presence of a person authorised to witness an affidavit. This person may be:

- a registrar of the Magistrates' Court;
- a member of the police force of or above the rank of sergeant or for the time being in charge of a police station;
- a justice of the peace;
- a lawyer

For a full list of authorised persons, read the 'Who can receive Affidavits FAQ' under the FAQ Menu on the court website.

What happens next?

This will depend on whether the defendant files a Notice of Defence (also known as a 'defence').

Defence filed

If the defendant wants to file a notice of defence, they must serve the document on the plaintiff (you) and file it with the Court. This may be done within 21 days of service of the complaint, but at any time before the plaintiff obtains an order.

Defence not filed

If no defence is received after 21 days from the service of the complaint, you may apply for an order against the defendant in the terms of the complaint. If the complaint was served by post, the day of service is the day of delivery in the usual course of post.

The following process is recommended:

- Complete an 'Application for Order in Default of Defence' (Form 21A) (template on court website).
- File the application with the court the complaint was filed in and pay the required fee (see 'Fees' for further information).
- If the claim is for a non-monetary amount, you must also complete and file an 'Affidavit in Support of Application' (template on court website) verifying the circumstances and claim sought set out in your complaint.



You need to ensure the 'Affidavit of Service' is filed with the court before an order may be made. This may be filed at the same time as the Application for Default Order and Affidavit in Support.

The application for default order will be referred to a magistrate, who will then determine the application or list it for a court hearing.

If the application is listed for a court hearing, you will need to **attend court** on the day of the hearing to support your application for an order.

Fees

There are fees that apply when filing a complaint and seeking an order through the Court. The fees are listed in the 'Costs and Fees Ready Reckoner' located on the Court website.

In the majority of fencing dispute complaints, the filing fee for the complaint will depend on the amount of the claim. If no amount is specified, then the fee is based on the complaint being a 'non-monetary claim'.

The fee for filing a default order is the same regardless of the amount claimed or not claimed.

Your checklist

- Complete an 'Overarching Obligations Certification'
- Complete a 'Proper Basis Certification'
- Complete a 'Complaint'
- Attach a copy of the 'Fencing Notice' and any quote/receipt from a fencing contractor to the complaint
- Photocopy the complaint and documents
- File the certifications and complaint with the Court
- Endorse the copies of the complaint with the court number
- Serve the complaint on each defendant
- Complete an 'Affidavit of Service'

If defence not filed

- File the affidavit of service with the Court
- Complete an 'Application for Order in Default of Defence'
- Complete an 'Affidavit in Support of Application' (if need)
- File the summons and affidavit in support (if completed) with the Court

Contact Details

Dispute Settlement Centre of Victoria

Level 4

456 Lonsdale Street

Melbourne, Victoria, 3000

☎ 1300 372 888

✉ dscv@justice.vic.gov.au

🌐 www.disputes.vic.gov.au

See the website for contact details of other DSCV locations

Magistrates' Court of Victoria

🌐 www.magistratescourt.vic.gov.au

Select the 'Contact Us' menu option for contact details for each court location.

Example Complaint (Fencing) Form 5A

MAGISTRATES' COURT GENERAL CIVIL PROCEDURE RULES 2010

Rule 5.02(1)

FORM 5A

COMPLAINT

2 IN THE MAGISTRATES' COURT
OF VICTORIA
AT

Court Number:

1

3 BETWEEN

Plaintiff

OF

And

Defendant

4 OF

5 Date of Document:

Filed on behalf of:

Australian lawyer name:

Address:

Code:

Telephone:

Reference:

6 1. The address for service of the plaintiff is– (*address must be within Victoria if the plaintiff sues in person*)

7 *2. Name and business address within Victoria of the Australian lawyer for the plaintiff– (*if the Australian lawyer is acting as agent for another Australian lawyer, state the name and business address of the principal lawyer*)

8 *3. The plaintiff sues (*or the defendant is sued*) in the following representative capacity– (*e.g. as administrator of the estate of*)

9 NOTICE TO THE DEFENDANT

If you need an interpreter to help you read this document contact details for most languages are listed at www.magistratescourt.vic.gov.au.

The plaintiff's claim against you is set out in the Statement of Claim.

You **MUST READ** the Statement of Claim.

IF YOU INTEND TO DEFEND this Complaint, YOU MUST GIVE NOTICE OF DEFENCE within 21 days of the day you were served with this Complaint, to–

(a) the plaintiff (at the address for service of the plaintiff as stated above); and

(b) the registrar of the Magistrates' Court of Victoria at *(insert proper venue and address)*;

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NOTICE OF DEFENCE must be given in the proper form (Form 8A, 2 copies of which have been served with this Complaint) and you must read and comply with the notes attached to that document. You may attach additional pages, if needed.

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IF YOU PAY the Plaintiff **within 21 days** of service of this Complaint the amount of \$ and the costs of \$ to the plaintiff or to the plaintiff's Australian lawyer without giving notice of defence and the plaintiff accepts that payment in full satisfaction of the claim (including any interest and costs), the proceeding ends on that acceptance.

IF YOU DO NOT GIVE NOTICE OF DEFENCE WITHIN 21 DAYS of service of this Complaint and have not paid the claim and the costs, the plaintiff may, **without there being a hearing of this claim by the Court and without giving you any further notice**, apply to the Court for an **ORDER (JUDGMENT) AGAINST YOU** for the amount of the claim and interest and costs **AND** take steps to enforce the order (judgment) and obtain payment.

The Court's registrars do NOT provide legal or financial advice but may provide some information to you about the actions and processes you must undertake in order to defend this claim.

If **before** giving **NOTICE OF DEFENCE**, you wish to get **FREE LEGAL or FINANCIAL ADVICE** you may be able to do so from free legal advice services and free financial counselling services.

Those services are not employed by or under the control of the Court and therefore the Court cannot recommend any of them, but contact details for such services together with some practical assistance can be obtained from the Magistrates' Court of Victoria's website at www.magistratescourt.vic.gov.au.

Your local municipal council may also be able to provide contact details for community services in your area that may be able to assist you.

Payment of Judgment Debt by Instalments

IF YOU DO NOT defend this claim and do not reach agreement with the plaintiff relating to the time for payment after an order (judgment) against you, you may apply to the Court for an order permitting you to pay that order (judgment) by instalments. The Court will consider your application and advise you of the outcome.

The Court's registrars will be able to provide you with information about the process to apply for an order for payment of the judgment debt by instalments.

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STATEMENT OF CLAIM

1. This complaint is brought pursuant to the **Fences Act 1968**
 2. The plaintiff is the *owner / *tenant of the property known as
 3. The defendant is the *owner / *tenant of the property known as
 4. A **Fencing Notice** was *given to / *received by the *defendant / *plaintiff on
/ / and the defendant has not agreed, within *30 days* of that
date, with the plaintiff as to the fencing works and any subsidiary works to be
undertaken. A copy of the fencing notice is attached.
 5. *(From here, set out in numbered paragraphs any material facts, not covered above, relied on
for the claim against the defendant, including particulars of every fact or matter.
Also, state specifically the amount or other relief or remedy sought.)*
-

13

DATE OF FILING

THIS COMPLAINT IS VALID IF IT BEARS THE COURT NUMBER AND THE DATE
OF FILING

14

Dated:

*(To be signed by the plaintiff
or the plaintiff's Australian lawyer)*

*Delete if not applicable