



Fences and the Law



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This information is a general guide to the law. It is not a substitute for legal advice. Contact the Legal Services Commission, a community legal centre or a private lawyer for detailed advice.

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FENCES AND THE LAW

Talk to your neighbour first!

This booklet answers common questions about dividing fences and explains the legal procedure you need to follow when you want to erect, replace or repair a boundary fence. While the legal procedure is important, so are good neighbourly relations. So, before starting the legal procedure, talk to your neighbour first. Whatever you do about a fence will affect them also. A friendly approach may help you to reach an agreement quickly and easily and avoid unnecessary conflict.

Do I need my neighbour's consent?

Fences should be regarded as a joint asset between neighbours. Even if your neighbour has not paid for the fence they are still a joint owner. This is because a fence on the boundary is legally considered to be part of the land on each side.

If you intend to remove or alter an existing fence, you should have your neighbour's permission or a court order. If you want to put up a fence where there has not been one before, your neighbour has a right to object. It makes no difference if you intend to pay the total cost. It is therefore sensible to talk to your neighbour first.

Also, your neighbour does not have to pay anything towards the fencing work unless:

- they have agreed to, or
- the proper procedure has been followed, or
- a court orders them to.

Getting their consent is the quickest and easiest way.

If there is a problem in getting your neighbour's consent, consider mediation. Your local community mediation service may be able to arrange a meeting for you both to discuss the options with a mediator who can help you to reach agreement. See page 20 for more details.

Must we have a fence?

There is no general law requiring a fence between neighbours; most people simply agree to have one. However, the courts generally consider it reasonable to have a fence and to keep it in good condition.

In particular cases, a fence can be legally required. Some examples are:

- some housing developments have restrictive covenants controlling fencing
- swimming pools must be fenced
- dog owners have a duty to prevent their dogs wandering at large, so if the dog goes outside, the yard must be fenced
- fencing may be required as a condition of council planning approval.

The wall of a building is not legally defined as a fence, though if it is on a boundary it may make one unnecessary. If the building is removed, the owner is not necessarily obliged to fence the gap.

What is fencing work?

Fencing work is defined as the erection of a new dividing fence, or replacement, repair or maintenance work in relation to an existing dividing fence. The cost can include any work reasonably required to facilitate fencing work such as a survey or clearing vegetation. If you do any of the fencing work yourself, you can include a reasonable amount for your labour.

What kind of fence?

The courts decide what kind of fence is needed by looking at what is an "adequate fence". This means a fence that is typical of good fencing in your area and is adequate for the purposes of the owner against whom contribution is sought (*Fences Act 1975*, s12 (8)(a)). In rural areas, post and wire fencing may be adequate, but in residential areas, a steel (Zincalume or Colorbond) fence is usually considered adequate.

Where residential blocks adjoin rural blocks of more than 0.8 hectares, an adequate fence is the cheaper of the rural and residential fencing options. If a residential type fence is proposed, the rural land owner does not have to contribute more than their fair share of a cheaper rural fence.

Obviously, neighbours may disagree about what sort of fence is adequate for them. There may be several adequate options. Talk to your neighbour and try to agree on a fence that suits you both.

Where should the fence be?

The fence should be on the boundary, but in practice, many fences are not precisely on the boundary. This does not change who really owns the land and need not matter if both neighbours can accept it.

Whether or not it is precisely on the boundary, a dividing fence is still the legal responsibility of both neighbours. However, if there is a dispute about where a fence should go, get a survey done which will show exactly where the boundary is. If you both want the survey, you can agree to share the cost, but if not, the person who arranges the survey will have to pay for it. Under a Fences Act notice, a survey can be included as a cost of the proposed fencing work. However, your neighbour may object to paying for a survey if they believe it is not necessary. If they object and it goes to court, a Magistrate will have to decide if a survey is reasonably required.

If necessary, a court can order the removal of a fence that is not located on the proper boundary and this can be expensive. However, a court is unlikely to order the relocation of a fence if the diversion from the boundary is minor.

A court can order that compensation be paid to a person for the loss of occupation of land as a result of the erection of a fence not on the boundary.

Generally, a fence should straddle the boundary line, but a masonry fence, which may be wider, should usually be on the land of the person who wants it, with the outer face on the boundary.

How is the cost of fencing work shared?

Usually, the cost is shared half each, though you can agree on some other arrangement. It really depends on the benefit that each owner will obtain from the fence. Where one neighbour wants a better than adequate fence, for example if they want a high fence where a lower fence would do, or a brush fence where steel sheeting is adequate, they should pay the extra cost. This might be adjusted a bit for any benefit the other neighbour gains, for example, extra privacy. If the case goes to court, the court will normally order that the objecting neighbour pay half the cost of a fence that is adequate.

Where two blocks of land abut a public road, the owner of land across the road can be asked to contribute to the cost of a fence if it also benefits them. For example, if the owner has stock animals and their neighbour's fence saves them the expense of erecting a fence on their side of the road.

Of course, the cost of a fence between neighbours is only shared if you have agreed on this, or followed the proper procedure. If you have gone ahead without doing this, you pay the whole cost.

What if we agree?

If you and your neighbour agree on the work and the cost-sharing, you do not have to follow the procedure under the Fences Act. However, even if you do not follow the procedure, it is wise to make a written agreement, signed by both of you. It should state clearly what work is to be done, what materials will be used, what quotes have been accepted, and how the cost will be shared. An example of an agreement is on page 18. Attach copies of quotes for all work. A clear, signed agreement should spell out what was agreed to - without it you could still end up in court.

What if we can't agree?

If you can't agree, try mediation first. This can be cheaper and quicker than court, and can help preserve a good neighbourly relationship. However, if this does not work, or your neighbour will not take part, you will need to follow the Fences Act procedure, unless you decide to abandon the fencing work, or to pay for it all yourself. Even if you pay the whole cost you should still get their permission before doing the work. A court may order a person who removes a fence without permission to restore the original fence or alter the new fence if it does not suit the neighbour.



If you and your neighbour agree on the work and the cost-sharing, you do not have to follow the procedure under the Fences Act. However, even if you do not follow the procedure, it is wise to make a written agreement, signed by both of you.

The Fences Act procedure

Much of the law about fences is in the *Fences Act 1975*. It applies to the fencing of all land, including vacant land, developed land, and rural properties, except for government or council land more than one hectare in size, or land forming a road or road reserve. It applies to all kinds of fences, but not to retaining walls or the walls of buildings.

However, the Fences Act does not contain all the law about fences. Common law, private contracts, planning regulations and other laws may apply. It also does not deal with encroachments, where one person’s building is partly on another person’s land – these are dealt with under the *Encroachments Act 1944*. Legal advice should be sought in this situation.

How do I get my neighbour to pay?

If you and your neighbour don’t agree, you must use the Fences Act notice procedure. It is the only legal method if you want to build, repair or replace a boundary fence and you want your neighbour to contribute to the cost, but they don’t agree. The process involves filling in a form (called a notice) with details of the work you propose and serving it on (legally delivering it to) your neighbour for response. This booklet contains notice forms which you can use. Your neighbour does not have to contribute unless you follow the procedure correctly.

Notices

If you want to put up a new fence and want your neighbour to contribute, you must serve on the adjoining owner a 'Notice of Intention to Erect a Fence' using Form 1 on page 15.

If you want to repair, replace or carry out maintenance work on the fence and want your neighbour to contribute, you must serve a 'Notice of Intention to Replace or Repair a Fence' using Form 2 on page 16.

All notices must be served on the adjoining owner either by handing them to the owner personally or by sending them by Registered Post.

Leaving it in their mailbox, putting it under the door or sending it by ordinary post does not count, even if your neighbour actually gets it. Similarly, giving it to someone else who lives there, or a family member or tenant of your neighbour does not count. If you are not sure who the legal owner is, you can ask your local council or search at the Lands Titles Office. If there is more than one owner, you should serve all of them. Keep a copy of any notice you serve, and also a record of the date, time and method of service, in case your neighbour later says they did not get it.

Once the Form 1 or 2 notice has been served on the other owner, you must wait 30 days before starting any work. In this time the other owner may object with a cross-notice, which may include counterproposals. This cross-notice should be the Form 3 on page 17.

If the adjoining owner agrees with the proposal, work can commence immediately, but you should get their agreement in writing or else wait for the 30 day notice period to expire. See the sample agreement on page 18.

If you get no reply from the other owner after 30 days, they are taken to have agreed and you can go ahead with the work described in the notice and claim their share of the cost from them. If you sent the notice by Registered Post, check with the post office to see when your neighbour actually collected the notice. You should allow 30 days from that date and also give at least two days notice of intention to commence fencing work.

Objections and counter proposals

If you receive a Form 1 or 2 notice and you object to the proposal, you should complete a Form 3 cross-notice (see page 17). This cross-notice must be served on the adjoining owner within 30 days of receiving the fencing notice. The same rules of service apply as above.

You do not have to give reasons for objecting - you may simply state "I object to your proposal". Nor do you have to make a counter-proposal. However, if the case goes to court you will be required to tell the court your objections to the proposed work, and if you do not have good reasons, the court may order the work, and may also order you to pay court costs. So, if you have good reasons, it makes sense to state them in your cross-notice. If you

want to suggest something different from what your neighbour has proposed, you should do so, giving details of the work and the cost. Your neighbour then has 30 days to answer your notice.

It is not a sufficient objection for a cross-notice that you are about to sell your land and will not get the benefit of the proposed work. As long as you are the owner, the Fences Act procedure binds you. However, you may wish to let your neighbours know that you are selling, as they may agree to wait and deal with the new owner. Nor is it reasonable to object to fencing simply because you are not living at the place where the fence is to be built.

An inability to afford the work is sometimes the reason for an objection, but this will not stand up in court, particularly if the fence is in a poor state and the work is obviously needed. If you agree that the work is required but you cannot afford to pay for it at this time, you should discuss terms of payment with your neighbour. If you cannot agree on a solution, consider using a mediation service. See 'Paying for fencing work' on page 9.

Other reasons that are not acceptable in court include that you don't care about the state of the fence, or don't think a fence is needed. The court normally considers it reasonable for neighbours to have a boundary fence and for the fence to be kept in a good state of repair. However, it may be proper to object if the proposed fence is quite different to other fences in your area.

If you have served a Form 1 or 2 and you receive a Form 3 cross-notice in reply, the same rules apply to you. If there are any counter-proposals with which you disagree, you must serve a written objection (the Form 3 notice can be used) within 30 days. If necessary you can make a counter-counter proposal if you think it will help to resolve the matter. If there are no counter-proposals in the cross-notice (that is, it contains an objection only) you do not have to reply – the notice procedure is finished without agreement or right to proceed.

If you receive a Form 1, 2 or 3 and do not object within 30 days, you will be legally bound to contribute to the proposal described on the form. This is true even if you have told your neighbour that you do not agree, or you are sure that they already know this. Serving a Form 3 or a written objection is the only legally effective way of saying that you disagree.



Whoever orders the fence is responsible to pay the contractor or supplier in full. This person then collects the agreed contribution from their neighbour.

No agreement

If the procedure does not result in agreement, then you can:

1. Negotiate with the other owner to see if you can find a fence or cost arrangement that you both accept.
2. Contact a Community Mediation Service for help to settle the dispute. (See page 20), or
3. Apply to your local Magistrates Court for a decision, or
4. Not proceed with the fencing work.

Taking the case to court

If a fencing dispute remains unresolved, either neighbour can apply to the local Magistrates Court, or to any other Magistrates Court if the other person agrees, see page 20. The case is started by filling in a form at the court counter, and arranging for it to be sent to the other person. Copies of all Fences Act notices should be attached to the court form. The court will set a date for both parties to attend for hearing.

Normally, each owner attends court in person. Lawyers do not usually appear in court unless both owners agree or there are special circumstances. However, you can get legal help to prepare the court forms. On the hearing day, be prepared to argue your case and bring any letters, quotes, photographs, surveys etc., relevant to the matter. In some cases, the magistrate may visit the fence site or ask a building expert for a report. He or she will decide what should happen and can make a wide variety of orders to end the dispute. They will also normally order the loser to pay the winner's costs.

Failure to proceed

If you reach agreement using the procedure, or a court order is made, and you do not start the work within 28 days, the other owner may do it and require you to pay your share. Similarly, if you stop work for more than 28 days, the other owner may complete it. The work must be completed within the time agreed upon or set by the court, or if no time was agreed or set, within four months. If nothing has been done after 4 months, the permission for the work lapses and the person who wants it done must start again with a Form 1 or 2, page 15 and 16.

Power of entry

You cannot go onto your neighbour's land without legal authority. The simplest way is to ask their permission. However, if they say no, and you have followed the procedure under the Fences Act or have a court order, you can obtain a legal right to enter their land with the vehicles or equipment needed for the work, by giving 2 days written notice. (Less notice may be permissible in an emergency). Again, you must serve the notice either by handing it to them in person or by registered post.

You can only go on the land to the extent necessary for the work. Take care not to do any harm or go beyond what is reasonably necessary, or legal action for trespass or negligence could result.

Paying for fencing work

Whoever orders the fence is responsible to pay the contractor or supplier in full. This person then collects the agreed contribution from their neighbour.

If the other owner cannot afford their share of the fence immediately, you can negotiate acceptable terms of repayment. If you cannot agree, a court can order regular payments according to what the other owner can reasonably afford. If an owner does not pay after all proper procedures are followed, debt enforcement proceedings through the Magistrates Court may be necessary and legal advice should be sought.

OTHER CONSIDERATIONS

Railings

There is no law saying which side of the fence the railings should be. If neither neighbour is willing to have the railings on their side, consider a style of fence that conceals the railings, such as “good neighbour” fencing.

Council approval

You normally need council approval to build any kind of fence higher than 2.1 metres, a masonry fence higher than 1 metre, or a fence over 1 metre in height within 6 metres of a road intersection (except where a 4 x 4 metre corner cut off has been provided). The height is measured from the lower side. Some areas have special regulations, so check with your Council before starting any work.

Brush fencing

Special fire safety regulations apply to buildings less than 3 metres from brush fencing. A Minister’s Specification SA 76C Nov 2007 applies to new brush fences and new dwellings near brush fences. Council approval is required for a brush fence within 3 metres of a building.

Land under contract

The seller of land is required to inform potential buyers of any Fences Act notice, but problems can arise if a notice is not passed on. If a contract of sale has been signed, it may be better to postpone serving the notice until the new owner takes possession of the property.

New housing developments

In some housing developments, the contract of sale may provide that an owner cannot collect a contribution for fencing from the developer if the neighbouring block is unsold. A contract may also state that the buyer of the land has to pay the developer or the neighbour for existing fencing.

Absent or unknown owners

If you do not know who owns the land, contact the local council or the Lands Titles Office to find out who and where they are. If, after making reasonable enquiries, you cannot identify or find the other owner, your Form 1 or 2 notice must be prominently displayed on their land. If no objection or cross-notice is received after 30 days, you may proceed with the fencing work. When the other owner or the new owner later becomes known, you can require payment, and take legal action if they fail to pay. In court, you will have to prove that you made reasonable enquiries to find them and that the notice was prominently displayed. A photograph may help. Alternatively, to avoid a future dispute about whether the notice was adequately



Any owner of a dog may be prosecuted if their dog escapes through a hole in the fence and wanders at large, regardless of who has caused the hole in the fence, because dog owners have a legal duty to keep their dogs under control.

displayed, you should, before doing the work, apply to the court for approval of the proposal and for an order that the other owner pay a share.

Rental properties

A landlord cannot recover fencing work costs from a residential tenant except where the work was required as a result of an act or fault of the tenant.

Dogs

Any owner of a dog may be prosecuted if their dog escapes through a hole in the fence and wanders at large, regardless of who has caused the hole in the fence, because dog owners have a legal duty to keep their dogs under control.

Emergency repairs

Where an emergency has occurred and the situation is so urgent that notice cannot practicably be given, for example, where a storm damaged fence allows animals to escape, an owner may carry out necessary repairs without giving notice to the neighbour and still recover part of the cost. They should use a type of fencing similar to what was already there.

Even in an emergency, where it is possible to give notice, you should do so. Even where 30 days notice cannot be given it is best to give as much notice as possible, explaining the urgency and what needs to be done.

Damage

Either party may use the fence to support a trellis, grow a creeper or provide shelter for plants etc, provided they do not damage the fence. If your fence requires repair or replacement because of things your neighbour has done, for example, damage by a car or animals, or soil build up, your neighbour should pay for this fencing work. If they refuse to pay, you can arrange for the work to be done using the Fences Act procedure.

If one neighbour wrongfully damages or pulls down the fence without the agreement of the adjoining owner, or without following the procedure under the Fences Act, they may be liable to compensate the other owner. It is therefore a good idea to obtain the agreement of the adjoining owner beforehand.

Retaining walls

Retaining walls are not legally considered to be fences, although they may serve as footings for fences. The law about retaining walls is principally found under the common law of nuisance and the *Development Act 1993*.

An owner who proposes to excavate or fill near a boundary, (work which may be considered to affect the stability of neighbouring land), may need to give the neighbour 28 days notice setting out the nature of the work [*Development Act 1993* s 60]. The *Development Act 1993* (Schedule 15) and Development Regulations (Reg 75) describe when notice must be given to a neighbour. It will also be necessary to obtain development approval from council for a retaining wall if the difference in height of soil either side is more than 1 metre. People who are filling in for landscaping or gardening (less than 200 millimetres deep), do not have to give notice. If an excavation is proposed, the neighbour may be able to ask the proposer to pay for a report and specifications from a professional engineer [Development Regulations Reg.75]. The neighbour can then require that the proposer complete the work specified by the engineer. This may include building a properly designed retaining wall or even underpinning the neighbour's home [*Development Act 1993* s 60(1)(b)].

A proposer who fails to serve a notice or who fails to carry out work specified after a notice faces a fine of up to \$2000 [*Development Act 1993* s 60(2)]. However, a proposer may be able to obtain some payment from the neighbour towards the work, either by negotiation or by application to the Environment, Resources and Development Court. This may occur, for example, where the neighbour will obtain some additional benefit from the performance of the work specified by the engineer.

The common law can apply in these situations even if the *Development Act 1993* does not. Under the common law liability arises for nuisance if a person excavates near a boundary causing the neighbour's land to subside, or if fill collapses onto the neighbour's land, provided this is foreseeable. Liability can be avoided by taking reasonable precautions. This will often involve building a retaining wall, but in some cases a graduated slope with stable batter may be sufficient. If one neighbour fills and the other excavates, both may be obliged to take appropriate precautions and share the cost of retaining work in proportion to the extent to which they each altered the natural lie of the land. Failure to take reasonable precautions may result in liability if the soil collapses and causes damage, even many years later.

Subsequent owners take on the responsibility for retaining soil that a previous owner has built up or undermined. This means they are responsible for the repair or replacement of the retaining wall even though they did not do the alterations or build the retaining wall. The previous owners can also be responsible. If a retaining wall becomes dangerous the local council may order the owner responsible to repair it [*Development Act 1993* s 69].

GUIDE TO FORMS

There are three forms under the Fences Act which are used to negotiate financial contributions towards fencing work.

Form 1: To erect a fence where there is none.

Form 2: To repair or replace an existing fence.

Form 3: To object to proposals put to you by the adjoining owner, or to make counter proposals.

Special note: all notices must be delivered in person to your neighbour or sent by Registered Post. You should keep a copy of any notices you give to your neighbour.

Blank copies of these forms are attached with numbers on the left hand side. When filling in the spaces on the appropriate form, you should first look at the form and note the number on the left, and then refer to the numbered instruction below.

Note No. Instructions

1. Name(s) of owner(s) of neighbouring land.
2. Addresses or description of neighbouring land.
3. Address or description of your land.
4. Length and position of proposed fence.
5. Type of fence (eg. 1.8 metre Heritage Red Colorbond with steel posts and rails).
6. Cost of work as quoted (attach quote).
7. Amount claimed from adjoining owner (usually half the cost of work as quoted).
8. Name and address of proposed contractor.
9. Full details of day, month, year (eg. 23rd day of March, 2008).
10. Your signature.
11. Your name(s) and postal address.
12. Put the date as it appears on your neighbour's notice to you.
13. State your objection to the neighbour's proposal (eg. The type of fence proposed is higher than the surrounding fences). Read this booklet carefully for your options.
14. If you want to suggest an alternative to your neighbour's proposal, state the type of fence or fencing work you would be happy with, including the cost you propose that your neighbour contributes. If appropriate, attach a quote.

Notice of intention to erect a fence

Form 1

1 To _____

2 Owner(s) of _____

Take notice that I propose that a fence be erected between your land described above and my land at:

3 _____

The particulars of my proposal are as follows:

4 _____

5 _____

6 Total cost of fencing work \$ _____

7 Amount claimed from you \$ _____

8 Name and address of proposed fencing contractor:

N.B.—If you do not within thirty days after service of this notice serve upon me a cross notice in accordance with the Fences Act, you will be deemed to have agreed to these proposals and will be bound thereby.

This Notice is given pursuant to the *Fences Act 1975*.

9 Dated / /

10 Signed _____

11 Name and address for service

**Notice of intention to perform replacement,
repair or maintenance work**

Form 2

1 To _____

2 Owner(s) of _____

Take notice that I propose that work be performed in relation to a fence dividing your
land and my land at:

3 _____

The particulars of my proposal are as follows:—

4 _____

5 _____

6 Total cost of fencing work \$ _____

7 Amount claimed from you \$ _____

8 Name and address of proposed fencing contractor:

**N.B.—If you do not within thirty days after service of this notice serve upon me
a cross notice in accordance with the Fences Act, you will be deemed to have
agreed to these proposals and will be bound thereby.**

This Notice is given pursuant to the *Fences Act 1975*.

9 Dated / /

10 Signed _____

11 Name and address for service of a cross notice

Cross notice

Form 3

1 To _____

12 **Take notice** that I object to the notice given by you pursuant to the *Fences Act 1975* and dated the _____ day of _____

13 The particulars of my objection are as follows:

14 *I make the following counter proposals:

N.B.—If you do not within thirty days after service of this notice serve upon me a written notice of objection in accordance with the Fences Act, you will be deemed to have agreed to the above counter proposals and will be bound thereby.

This Notice is given pursuant to the *Fences Act 1975*.

9 Dated / /

10 Signed _____

11 Name and address

*These items are to be omitted where no counter proposals are made.

Fencing work agreement

Between _____
owner(s) of land at _____

and _____
owner(s) of land at _____

We agree to proceed with fencing work along the boundary between our properties described above. The particulars of the fencing work are as follows:

Total cost of fencing work \$ _____ as per attached quote from _____ dated / / .

_____ will pay for the fencing work and will be paid the sum of \$ by the adjoining owner on completion OR by regular payments of \$ commencing on / / and continuing weekly\fortnightly\monthly until the contribution is paid in full.

Signed by _____ Date / /

Signed by _____ Date / /

CONTACTS

Legal Services Commission

www.lsc.sa.gov.au
Legal Help Line **1300 366 424**
(TTY 8463 3691)

Adelaide Office

82-98 Wakefield Street
Adelaide 5000
Tel: **8463 3555**

Elizabeth Office

Windsor Building
Elizabeth Shopping Centre
Elizabeth 5112
Tel: **8207 9292**

Holden Hill

Tenancy 7, 560 North East Road
Holden Hill 5088
Tel: **8369 1044**

Mt Barker

18 Walker Street
Mt Barker 5251
Tel: **8226 8722**

Noarlunga

Noarlunga House
Colonnades Shopping Centre
Noarlunga Centre 5168
Tel: **8207 3877**

Port Adelaide

306 St Vincent Street
Port Adelaide 5015
Tel: **8207 6276**

Port Augusta

13 Flinders Terrace
Port Augusta SA 5700
Tel: **8648 5180**

Whyalla

Tenancy 7, 169 Nicolson Ave
Whyalla Norrie 5608
Tel: **8648 8940**

Community Mediation Centres

Statewide Service
For an appointment telephone
Tel: **8350 0376**
1300 850 650

Magistrates Courts

Central Switchboard for all courts
Tel: **8204 2444**
Magistrates Courts are located in most metropolitan and regional centres.

Community Legal Centres

Central Community Legal Service

Shop 2/59 Main North Road
Medindie Gardens 5081
Tel: 8342 1800

Northern Community Legal Service

26 John Street
Salisbury SA 5108
Tel: 8281 6911

Riverland Community Legal Service

8 Wilson Street
Berri 5343
Tel: 8582 2255

South East Community Legal Service

9 Penola Street
Mount Gambier 5290
Tel: 8723 6236 / 1300 369 236

Southern Community Justice Centre

40 Beach Road
Christies Beach SA 5168
Tel: 8384 5222

Westside Community Lawyers Inc

Parks Community Centre
Trafford Street
Angle Park SA 5010
Tel: 8243 5521

Port Pirie Office
60 Florence Street
Port Pirie 5540
Tel: 1800 114 442

