

Notes Regarding Boundary Fences Act (Tas) 1908

The *Boundary Fences Act (Tas) 1908*, ('the Act'), consolidates the law in relation to boundary fences in Tasmania, in particular the repair and erection of boundary fences.

The Act applies to all land with the exception of unoccupied Crown land, public reserves, any roads which remain the responsibility of a local council, [section 6 & 7], or land owned by the Forestry corporation [section 6A]. Further, the provisions of the Act **do not** apply to any unsold land which adjoins land already owned by one person [section 71B(a) *Conveyancing and Law of Property Act 1884*]; for example, separate parcels of land contained in a subdivision, which have not yet been sold to individual purchasers.

Who is liable for the cost of erecting or repairing a boundary fence?

- **Erecting a Boundary Fence**

Owners of adjoining land not divided by a sufficient fence shall be liable to either join in or contribute to the erection of a sufficient or rabbit-proof fence between those adjoining lands. The proportion of the contribution shall be as agreed upon or as awarded by an arbitrator, [section 8].

- **Repairing a Boundary Fence**

If a boundary fence is in need of repair or becomes insufficient, the landowners on either side of the fence are equally liable for the cost of repairing the fence. [section 22]

What is meant by the terms 'fence' and 'sufficient fence'?

The term 'sufficient fence' means a fence of the description and quality agreed upon or awarded by an arbitrator where such fence is in a city or town or adjacent to a dwelling house, [section 4] or otherwise, a fence which is ordinarily capable of resisting the trespass of sheep and cattle.

"Fence" is defined as a fence separating the lands of different owners, or any fence used or accepted by adjoining occupiers as a boundary line between their respective lands, [section 4].

How do I compel my neighbour to contribute to the cost of erection or repair?

You need to serve on the owner of the adjoining land either a Notice to Fence [section 9] or a Notice to Assist in Repairing a Fence [section 23]. The forms for these Notices are contained within the Regulations of the Act. The Notice can be served either personally on the owner or sent by post [section 47]. Copies of each of the Notices are included in these notes.

If the fence has been erected without a formal Notice having been served on the adjoining landowner, or any written or oral agreement made between the landowners, the adjoining landowner is not liable to pay any contribution towards the cost of the fence [section 9(2)].

What if I am served with a Notice to Fence and I do not agree with what is proposed?

A neighbouring landowner may object to any proposal contained in a Notice To Fence within 21 days of the date the Notice was served. The objection must be in writing stating the grounds for objection and must be served on the person who gave the Notice [section 10]. If agreement cannot be reached at the objection stage then all disputes, questions and differences must be determined by arbitration, [section 10]. This right of objection also applies to any proposal or Notice to Repair Existing Fence

What happens if I do not formally object and I still do not agree with the proposal?

If no formal objection has been received and the parties have not agreed within 30 days from the date of service of the Notice to Fence, the person serving the Notice may recover from the other person half the cost of erecting the fence within a period of 2 years from the date the fence was completed, together with interest at the rate of 6% per annum, [section 12].

This provision also applies to any person who, neglects or fails for the space of three months to comply with their part of an agreement or to carry out an award made under the Act, [section 13].

What do I do if my neighbour and I fail to come to an agreement in relation to any issue concerning the boundary fence?

In this situation, the arbitration provisions of the Act apply.

Arbitration is a form of alternative dispute resolution and is conducted prior to the parties taking their dispute to a court. An arbitrator is an independent person who determines a dispute between parties. The arbitrator is chosen by the parties, or at least, accepted by them. The decision of an arbitrator is called an award. The parties going to arbitration agree to be bound by this award.

Section 26 of the Act provides that if a matter, dispute, question or difference arises between any adjoining owners, the matter shall be referred to, and decided by arbitration in accordance with the *Commercial Arbitration Act 2011*.

Mediation may assist the parties to the dispute to come to their own resolution. Any agreement resulting should be put in writing and signed by all interested

parties. Such an agreement may not necessarily be legally binding. However, the decision or award of an arbitrator is legally binding. If you wish to obtain details of arbitrators and/or mediators, please call the Legal Aid Telephone Advice Service on: 1300 366 611.

As a tenant of the premises, am I liable for the costs?

Generally not, although a tenant should check the provisions of their lease. Under section 37(1) of the Act the owner (not the tenant in possession of the property) is the party against whom an award is made and who is liable to erect or repair any fence.

What if an award has been made in my favour and still my neighbour refuses to pay?

You are entitled to sue the neighbour in court. Section 42 of the Act provides that all moneys recoverable under the Act may be recovered in a court of competent jurisdiction from the person liable to contribute to the cost. Choosing the appropriate court will depend upon whether you are simply enforcing an award, the amount you are seeking and whether there is a dispute. Please seek further legal advice.

In erecting or repairing a boundary fence, am I able to enter my neighbour's property?

Yes, but only where access to the area where the fence is to be erected or repaired over the owner's own land does not provide access. Thus, the adjoining owner, or their servants or agents (ie. tradesmen or labourers) may enter upon the neighbour's land for the purpose of repairing or erecting a sufficient fence. Entry on to the neighbour's land must be at reasonable times whilst the work is being completed, [section 44(1) of the Act]. However, consent must first be obtained from the neighbour for entry onto land which is in crop, gardens, orchards, shrubberies, plantation or pleasure-ground, [section 44(2) of the Act].

The neighbour is entitled to compensation if damage is caused to their property by the adjoining owner as a result of that person acting wilfully and contrary to these provisions, [section 45 of the Act].