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Schedule 1

Boundary Fences Act 1908

Version current from 1 December 2017 to date (accessed 28 April 2023 at 13:26)

Boundary Fences Act 1908

An Act to consolidate and amend the law relating to boundary fences

[Royal Assent 14 December 1908]

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART I - Preliminary

1. Short title

This Act may be cited as the Boundary Fences Act 1908 .

2. Commencement

This Act shall come into operation on 1st January 1909.

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4. Interpretation

In this Act, unless the contrary intention appears –

a sufficient fence means a fence which is ordinarily capable of resisting the trespass of cattle and sheep, except where such fence is in a city or town or adjacent to a dwelling-house, when the expression means a fence of the description and quality agreed or awarded;

fence means 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;

occupier, used in relation to land, means the person entitled to the immediate possession and occupation thereof;

owner, used in relation to any land, includes –

- (a) the person for the time being in the actual receipt of or entitled to receive, or who if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise;
- (b) in the case of any Crown land purchased on credit, the purchaser thereof upon credit and every person deriving title through him; and
- (c) the person entitled to any leasehold estate in land under the Crown Lands Act 1935 , Crown Lands Act 1976 , or the Closer Settlement Act 1929 –

but shall not include the occupier of Crown land for mining purposes under the provisions of any Act relating to the leasing or occupation of Crown land for mining purposes;

road includes any public highway, street, by-way, cross-way, or public place, whether it be a carriage-way, horse-way, or foot-way;

to repair includes to trim, keep, and maintain a live fence or part thereof.

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6. Act not to apply to unalienated Crown lands

This Act shall not apply to any–

- (a) unoccupied Crown lands; or
- (b) public reserves–

nor shall the Crown, the Governor, the Director-General of Lands, nor any public officer appointed by the Governor for the administration, management, or control of Crown lands or public reserves, or who may, by virtue of his office, however styled, have any such administration, management, or control, be liable under the authority of this Act to make any contribution towards the erection or repair of any fence between the land of any occupier and any Crown lands.

6A. Act not to apply to land owned by Forestry corporation

(1) In this section, *Forestry corporation* means the Forestry corporation continued by section 6 of the Forest Management Act 2013 .

(2) The Forestry corporation is not liable to make any contribution towards the erection or repair of any dividing fence between any land owned by the Forestry corporation and any adjoining land but the Forestry corporation may, in any case, make such a contribution if it considers it appropriate to do so.

7. Act not to apply to roads

No local body having the administration, management, or control of any road shall be liable to make any contribution towards the erection or repair of any dividing fence between any road and the land of any occupier of land adjoining such road.

7A. Act not to apply to rail corridors

(1) In this section –

Rail Infrastructure Manager has the same meaning as in the Rail Infrastructure Act 2007 ;

Rail Infrastructure Owner has the same meaning as in the Rail Infrastructure Act 2007 ;

rail network has the same meaning as in the Rail Infrastructure Act 2007 .

(2) Except as provided by or under the Rail Infrastructure Act 2007 or the Rail Safety National Law (Tasmania) Act 2012 , neither a Rail Infrastructure Owner nor a Rail Infrastructure Manager is liable to make any contribution towards the erection or repair of any dividing fence between any part of the rail network and the land of any occupier of land adjoining that part of the rail network.

PART II - Erection of Fences

8. Adjoining owners to share cost of fencing

(1) Subject to the provisions of this Act, the owners of adjoining lands not divided by a sufficient fence or a rabbit-proof fence shall be liable to join in or contribute to the erection of a sufficient fence or a rabbit-proof fence, as the case may be, between such lands in such proportion as may be –

- (a) agreed upon; or
- (b) awarded under the provisions of this Act.

(2) The owners of adjoining lands divided by a fence which is not a rabbit-proof fence shall be liable to join in or contribute to the erection of a rabbit-proof fence between such lands, or the conversion of any existing fence into a rabbit-proof fence, in such proportions as may be –

- (a) agreed upon; or
- (b) awarded under the provisions of this Act.

9. Notice to fence to be given

(1) Any owner of land desiring to compel the owner of any adjoining land to contribute to the erection of a sufficient fence or a rabbit-proof fence, or to the conversion of any existing fence into a rabbit-proof fence under the provisions of this Act, may serve on such last-mentioned owner a notice to join in erecting a sufficient or rabbit-proof fence, or to join in making any existing fence rabbit-proof; and such notice shall be according to the prescribed form and contain the prescribed particulars.

(2) If any person erects any fence, or converts any existing fence into a rabbit-proof fence, without giving notice as aforesaid, the owner of such adjoining land shall not, in the absence of an agreement written or oral by him to do so, be liable to pay any portion of the value of such fence.

10. Objection to proposed fence

If any person upon whom any notice as aforesaid is served shall object to any proposal contained in the notice in relation to fencing, he may, within 21 days after the notice has been served, signify such objection, in writing, to the person giving the notice, stating the grounds of the objection; and thereupon (unless the parties can come to an agreement upon the matters in dispute) all disputes, questions, and differences shall be determined by arbitration in the manner provided by Part IV .

11. Provision in cases where notices vary

If the owners of adjoining lands shall have served each other with notices to fence, and in such notices any of the particulars therein contained shall vary, then, unless the parties can agree upon the matters in dispute, such matters shall be determined by arbitration in the manner provided by Part IV .

12. If parties cannot agree and no objection made, fence may be erected

If within 30 days after the service of any notice as aforesaid the persons giving and receiving the notice do not enter into an agreement for the erection of a fence, and the mode and time of erecting the same and the cost thereof, and if the person receiving the notice shall not serve on the person giving the notice an objection as specified in the manner provided by section 10 , then the person giving the notice may proceed to –

- (a) erect a sufficient or rabbit-proof fence, as the case may be; or
- (b) convert any existing fence into a rabbit-proof fence –

in accordance with the terms of the notice, and may within two years after the completion of the fence or such conversion recover from the person to whom notice was given in any court of competent jurisdiction one-half of the actual cost of the construction or conversion of the fence, together with interest thereon at the rate of 6 per cent per annum from the date of the completion or conversion.

13. If default made by one party, other may fence and recover

If either party neglects or fails for the space of 3 months –

- (a) to perform his part of any agreement; or
- (b) to carry out any award made under the provisions of this Act –

the other party may thereupon, or at any time within 12 months thereafter, erect a fence of the kind or description, or convert the existing fence into a rabbit-proof fence as may have been agreed or awarded, and may, within two years after the completion of the fence or the conversion thereof, recover in any court of competent jurisdiction from the defaulting party such proportion of the actual cost of erecting or converting such fence as has been agreed upon or awarded, together with interest thereon at the rate of 6 per cent per annum from the date of the completion or conversion.

14. Contribution towards cost of fence recoverable from owner for time being

The owner of the adjoining land to whom a notice to fence shall have been given, or, when such proportion of the cost has not been previously paid, any person who during the continuance of a boundary fence shall become the owner of such adjoining land, shall be liable for and shall pay to the person who erected the fence, or his assigns, the proportion of the value of the boundary fence as agreed upon or awarded within 3 months after a demand made upon him for the purpose by due notice.

15. Where adjoining land is Crown land

(1) When a fence is erected on the boundary of any land, and the Crown land adjoining such boundary is not at the time of the erection of such fence subject to the provisions of this Act, then any person who may thereafter become the owner of such adjoining Crown land shall, upon demand made upon him by notice given within 6 months from the time of his becoming the owner, pay to the person entitled to the fence one-half of the then value of the fence, and in the event of any dispute arising in relation to the fence or the then value thereof, the dispute shall be determined by arbitration in the manner provided by Part IV .

(2) The provisions of this section apply to any fence, whether erected before or after the commencement of this Act.

16. Bush to be cleared along line of fence

Where any fence is to be erected on land covered with standing bush or scrub, and the required notices as hereinbefore provided have been given, the person erecting the fence shall clear the bush and scrub and remove fallen timber for a width of not less than 2 metres on each side along the entire length of the fence, and may fell any tree standing in the immediate line of the fence, and may fell and remove any tree standing on either side of the fence which in the opinion of the said person may be likely to injure the fence; and the cost of such clearing, felling, and removing shall be added to the cost of the erection of the fence, and be apportioned and recoverable accordingly.

17. Where river, &c., natural boundary, power to agree on line of fence

(1) When a river, creek, natural watercourse, or rocky or impracticable land forms the boundary of contiguous lands, the owners of such contiguous lands may agree upon a line of fence on either side of, or partly on one side and partly on the other side of, and across such river, creek, or natural watercourse, or rocky or impracticable land; and in the event of their not making any such agreement either party may refer the matter to arbitration in the manner provided by Part IV , and the arbitrators shall determine –

- (a) whether any fence is necessary;
- (b) the line of fence to be erected; and
- (c) whether any and what compensation in the shape of an annual payment shall be paid to either of the parties occupying such contiguous lands in consideration of loss of occupation of land.

(2) The occupation of lands on either side of such line of fence shall not be deemed adverse possession, and shall not affect the title to or possession of any such lands, save for the purposes of this Act.

18. Fence to be on boundary line

A boundary fence shall, as nearly as may be, be placed on the boundary line.

19. Person using fence on further side of road liable to pay interest on half cost

If the owner of any land bounded by a road shall have erected or shall hereafter erect a fence between his land and such road, and any other person shall hereafter adopt any means by which such fence shall be rendered of beneficial use to himself, and shall avail himself of such fence, such person shall be liable to pay to the person who erected such fence, or to the owner of the land whereon such fence is erected, interest on half the then value of such fence, at the rate of 10 per cent per annum for so long as he shall continue to avail himself of such fence, and shall also, as long as aforesaid, be further liable for half the cost of the repairs of such fence.

20. Gorse, &c., not to be planted without consent of owner and occupier

(1) No person shall plant gorse, briar, or bramble upon or alongside –

(a) any boundary line or boundary fence without the consent of both the owner and the occupier of the adjoining land;

(b) any boundary line or fence abutting upon any public reserve, Crown lands, or road without the consent first obtained of the proper authority having control over such reserve, Crown lands, or road.

Penalty: Fine not exceeding 10 penalty units.

(2) The owner or occupier of the adjoining land, or such proper authority as aforesaid, may take up and destroy such gorse, briar, or bramble, and recover in any court of competent jurisdiction the cost of such work from the person contravening the provisions of this section.

21. Power to construct a fence on road to protect live fence

(1) If the owner or occupier of any land bounded by a road desires to plant a live fence between his land and such road, and for that purpose to construct a fence upon such road until such live fence shall have grown up, he may at any time, with the consent of the proper authority having control of the road and on conditions to be prescribed by it, proceed to erect a fence on such road, so that no part of the fence shall be more than 2 metres distant from the nearest point on the boundary of his land, and that the width of the road available for traffic after the erection of the fence be in no place where the same is reduced by the construction of the fence less than 9 metres.

(2) If such owner or occupier forthwith after such erection of the fence proceeds to plant a live fence between his land and the road, and constantly and with all proper diligence keeps, maintains, and protects from injury the live fence, he may maintain on the road the fence so erected for such time not exceeding 6 years, or such longer time as the proper authority having the control of the road may in writing allow, until the live fence becomes a sufficient fence within the meaning of this Act.

PART III - Repairs of Fences

22. Owners liable to repair fences

- (1) When any fence or part thereof which before the passing of this Act has been or hereafter shall be made is out of repair or becomes insufficient, the owners of land on either side thereof shall be liable to the cost of repairing such fence in equal proportions.
- (2) When any fence or part thereof which before the passing of this Act has been or hereafter shall be made a rabbit-proof fence is out of repair or ceases to be rabbit-proof, the owners of land on either side thereof shall be liable to the cost of repairing such fence or making the same rabbit-proof in equal proportions.

23. Procedure to compel contribution to the repair, &c., of fences

- (1) The owner of any land separated from any adjoining land by a fence may serve a notice upon the owner of such adjoining land requiring him to assist in repairing or making sufficient such fence or part thereof; and if such owner refuses or neglects for the space of 21 days after the service of such notice to assist in repairing or making sufficient such fence or part thereof, the owner serving the notice may repair or make sufficient the fence or part thereof, and demand of and from the other owner half the cost of repairing or making sufficient the fence or part thereof, and may within 12 months recover the same in any court of competent jurisdiction.
- (2) The owner of any land separated from any adjoining land by a rabbit-proof fence may serve a notice upon the owner of such adjoining land requiring him to assist in repairing or making rabbit-proof the fence or part thereof; and if such owner shall refuse or neglect for the space of 21 days after the service of the notice to assist in repairing or making rabbit-proof the fence or part thereof, the owner serving the notice may repair or make rabbit-proof the fence or part thereof, and demand of and from the other owner half the cost of repairing or making rabbit-proof the fence or part thereof, and may within 12 months recover the same in any court of competent jurisdiction.

24. Contribution where fence destroyed by accident

- (1) If any fence or any part thereof is damaged or destroyed by accident or wilfully, the owner of land on either side may, after having given the owner of the adjoining land 7 days' notice, repair the damage or renew any fence so destroyed, and may within 12 months recover half the cost of so doing from the owner of the adjoining land in any court of competent jurisdiction.
- (2) In case any fence is damaged or destroyed by fire or by the falling of any tree, or by stock, the owner through whose neglect, if any, such fire shall have originated or have caused damage or destruction to the fence, or such tree shall have fallen, or by whose stock the fence shall have been damaged or destroyed, shall be the party bound to repair any damage or to renew any fence so destroyed as aforesaid.
- (3) If such party neglects to repair or renew the fence immediately, the adjoining owner may repair or renew the same, and may within 12 months recover the cost of so doing from such party in any court of competent jurisdiction.

25. Liability for reckless use of fire

Nothing herein contained shall be deemed to take away or interfere with the right of any person to sue for and recover compensation for or in respect of any damage or injury occasioned by the reckless or negligent use of fire.

PART IV - Arbitration

26. All disputes to be decided by arbitration

If any matter, dispute, question, or difference arises between any–

- (a) adjoining owners; or
- (b) between any owner and occupier of the same property–

the same shall, unless otherwise specially provided for, be referred to and decided by arbitration in accordance with the Commercial Arbitration Act 2011 .

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35. Powers of arbitrators

In addition to any powers conferred upon arbitral tribunals by the Commercial Arbitration Act 2011 , they shall have power to decide and determine upon the following matters:

- (a) The erection of any fence;
- (b) The conversion of any fence into a rabbit-proof fence;
- (c) The description or kind of fence;
- (d) The necessity or otherwise for the erection of any fence, or for the conversion of any existing fence into a rabbit-proof fence;
- (e) The time and manner in which any fence should be erected or converted, and by whom it should be erected or converted; and
- (f) The cost of erecting or converting any fence, and the proportion of such cost to be borne and paid by any party.

36. Arbitrators to consider benefit likely to accrue

In estimating the proportion of the cost to be borne and paid by each adjoining owner for or in respect of –

- (a) the construction of any rabbit-proof fence; or
- (b) the conversion of any existing fence into a rabbit-proof fence –

under the provisions of this Act, the arbitrators or umpire shall take into consideration the benefit that is likely to accrue to each of such owners by reason of the construction or conversion of such fence.

37. Provision for contribution by tenant

(1) Where at the time of the making of an award any land in respect of which a boundary fence or fencing is required under this Act to be erected is under lease, the owner of the land, and not the tenant in possession thereof, shall be the party against whom the award shall be made, and who shall be liable thereunder to erect any such fence or fencing.

(2) In a case to which subsection (1) relates, it shall be lawful for the arbitrators, at the request of the owner, and after notice and opportunity of a hearing given to the tenant and any sub-tenant in possession, to award and determine whether any and what proportion of the expense of erecting the fence or fencing shall be contributed to by the tenant or sub-tenant in possession; and if in any case any such contribution shall, by reason of any increased value or benefit accrued or to accrue thereby to the tenant or sub-tenant, be deemed fair and proper, it shall be lawful for the arbitrators to fix and determine a stated yearly sum in respect thereof, to be payable to the owner by the tenant or sub-tenant quarterly or otherwise during the continuance of his lease or possession of the land, as and by way of rent, and any such yearly sum shall be recoverable by the owner from the tenant or sub-tenant in the same manner as rent in arrear is or may be recoverable in this State.

38. Award to be delivered to the party first appointing arbitrator

The award shall be delivered in writing to the party who first made the appointment of an arbitrator, and he shall retain the same, and forthwith at his own expense furnish a copy thereof to the other party, and shall at all times, on demand, produce the award, and allow it to be inspected or examined by the other party, or any person appointed by him for that purpose.

39. Costs of arbitration

All the costs and expenses of any arbitration and incident thereto shall be settled by the arbitrators or umpire, and shall be borne by the parties in such proportions as the arbitrators or umpire may determine.

40. Submission may be made a Rule of Court

The submission to any arbitration may be made a Rule of the Supreme Court on the application of either of the parties.

41. Award not void through error in form

No award shall be set aside for irregularity or error in matter or form.

PART V - Miscellaneous

42. How moneys recoverable under this Act may be recovered

(1) All moneys recoverable under this Act in respect of constructing, repairing, restoring, or making rabbit-proof any fence by any person serving any notice to fence, repair, restore, or make sufficient or rabbit-proof may be recovered in any court of competent jurisdiction from the person liable to contribute to the cost of constructing, repairing, restoring, or making rabbit-proof such fence who is served with notice to fence, or to repair, restore, or make sufficient or rabbit-proof any fence, or from any person who may come in and defend under the provisions of this Act any arbitration or proceedings consequent on such notice.

(2) All moneys recoverable under this Act by any person served with any notice to fence, or to repair, restore, or make sufficient or rabbit-proof any fence, may be recovered in any court of competent jurisdiction from the person serving the same, or from any person liable to contribute towards constructing, repairing, restoring, or making sufficient or rabbit-proof such fence.

43. Act not to interfere with agreements

Nothing in this Act contained shall be deemed or taken to alter, vary, or affect any covenant, contract, or agreement made, or hereafter to be made, relative to fencing, between landlord and tenant, or between owners of adjoining land, or between any other persons whomsoever.

44. Power of persons constructing fences to enter upon contiguous lands

(1) Any person constructing, repairing, restoring or making sufficient or rabbit-proof a fence under this Act, his agent and servants may, if there be no available access thereto over his own land, with or without horses, cattle, carts, or carriages, at all reasonable times during such work, enter upon any portion of the contiguous lands for the purpose of carrying such work into effect.

(2) Nothing herein contained shall authorize the entry, for the purpose aforesaid, upon any land in crop, or upon any garden, orchard, plantation, shrubbery, or pleasure-ground, without the consent of the owner and the occupier thereof.

45. When garden, orchard, or crop, &c., damaged, owner or occupier entitled to compensation

Every owner or occupier of any land who shall incur or suffer any loss or damage by any act or thing done by any person wilfully acting contrary to the provisions of section 44 shall be entitled to compensation for the same.

46. Power of tenant to come in and defend proceedings against his landlord

Any person may come in and defend any proceeding under this Act against any landlord of such person in consequence of which such person may ultimately incur any liability; and any defence which the person originally proceeded against might set up shall be available to the person so coming in to defend, and any such person may be present and heard at any arbitration.

47. Service of notices, &c.

(1) Any notice or demand to be given or made under this Act shall be in writing and signed by the person giving or making the same, or by his attorney or agent, and may be served on the owner or owners or one of them, or his or their attorney or agent, either personally or by post.

(2) Where the owner is unknown or absent from this State without any known attorney or agent in this State, the notice shall be inserted once a week for two consecutive weeks in a newspaper, and the production of such newspaper shall be proof of the due service of such notice.

48. Notice to cut live fences and to clear adjoining land

(1) The occupier of any land may, by notice in writing under his hand, require the occupier of any adjoining land –

(a) to cut and keep cut any live boundary fence to a distance of not more than one metre from the boundary line of such adjoining lands or to a height of 1.8 metres, or both; and

(b) to clear and keep clear of all gorse, briar, bramble, bracken fern, fireweed, undergrowth, or declared weed, within the meaning of the Weed Management Act 1999 , any land adjoining any boundary fence, to a distance of not less than 5 metres from such boundary fence.

(2) In the event of any such occupier neglecting or refusing for the space of one month after the receipt of any such notice—

(a) to cut and keep cut any such boundary fence as aforesaid; or

(b) to clear and keep clear as aforesaid the land adjoining any boundary fence—

the occupier giving such notice as aforesaid may enter upon such adjoining land and cut such boundary fence to such width, or height, or both, as aforesaid, and may clear the land adjoining any boundary fence to such distance as aforesaid, and recover the cost of so doing from the occupier of such adjoining land in any court of competent jurisdiction.

(3)

49. Property in fence in criminal proceedings

In any complaint before justices or any indictment in respect of any offence committed in or upon a fence erected between the lands of adjoining owners, it shall be sufficient to name one of such owners, and to state such fence to be the property of such owner and another or others, as the case may be.

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51. Regulations

The Governor may make regulations for the purposes of this Act.

SCHEDULE 1

Section 3

No. of Act.	Title of Act.	Extent of repeal.
17 Vict. No. 12	<i>Boundary Fences Act 1853</i>	The whole Act
47 Vict. No. 13	<i>Boundary Fences Act 1884</i>	The whole Act
60 Vict. No. 46	<i>Boundary Fences Act 1896</i>	The whole Act