

NORTHERN TERRITORY OF AUSTRALIA

FENCES ACT

As in force at 21 September 2011

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NORTHERN TERRITORY OF AUSTRALIA

As in force at 21 September 2011

FENCES ACT

An Act relating to fences

1 Short title

This Act may be cited as the *Fences Act*.

2 State laws not to apply

- (1) The *Fences Act 1892* of the State of South Australia and the *Fences Act Amendment Act 1903* of the State of South Australia cease to have effect in the Territory as laws of the Territory.
- (2) Section 8 of the *Acts Interpretation Act 1901-1966*, in its application to Ordinances by virtue of section 4 of the *Interpretation Ordinance*, has effect as if the *Fences Act 1892* of the State of South Australia and the *Fences Act Amendment Act 1903* of the State of South Australia were Ordinances and had been repealed by this Act.

3 Act not to bind Crown

This Act does not bind the Crown.

4 Saving of related Acts

This Act does not affect the operation or application of the *Water Act* or *Livestock Act*.

5 Definitions

- (1) In this Act:

adjoining lands includes lands separated by a watercourse, lake or other natural feature of such a character as to be insufficient to prevent at all times the passage of stock, even if the bed and banks of that water-course, lake or natural feature are Crown land, and with respect to lands so separated the term ***common boundary*** includes the bed and banks of the watercourse, lake or other natural feature by which those lands are separated.

court means the Local Court.

Crown land means land of the Crown which is not leased.

dividing fence means a fence separating the adjoining lands of different owners whether the adjoining lands are wholly or only partly separated thereby and whether the fence is on the line of or, in an appropriate case, on a line on the common boundary of the adjoining lands or on a line other than the line of or a line on the common boundary or partly on any one of those lines and partly on the other or others.

fence means a structure of posts and board, palings, rails, galvanised iron, metal or wire or a wall, ditch or embankment or a combination of any of these, enclosing or bounding land and includes any foundation, foundation wall or support reasonably necessary for the support and maintenance of a building but does not include a wall which is part of a building.

lease includes a lease, a sub-lease, an under-lease and an agreement for a lease but does not include a Crown lease and **lessee** has a corresponding meaning.

notice to fence means a notice served under section 7.

notice to repair means a notice served under section 15.

order to fence means an order to fence made under section 8 or 10.

order to repair means an order made under section 8(3) or 15.

owner includes every person who, whether jointly or severally at law or in equity:

- (a) is entitled to land for any estate of freehold in possession; or
- (b) is a lessee of Crown land within the meaning of that expression under any law for the time being in force in the Territory relating to the leasing of Crown land;

but does not include trustees or other persons having the control and management of land which is a public reserve or park or is used for any public purpose which may be prescribed.

- (2) Where, in any proceedings under this Act, the court has to determine what is a sufficient fence for this Act the court must have regard to:
 - (a) the nature of the neighbourhood in which the fence is to be erected; and

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- (b) the purpose for which the fence is to be erected; and
 - (c) whether any and if so what fences are usual in the neighbourhood; and
 - (d) the need for the protection of persons or the containment of stock in the neighbourhood;

and the court may determine that no fence is, in the circumstances, required.

6 Liability to contribute to cost of fence

- (1) Subject to this Act and to any agreement between the parties concerned, the owners of adjoining lands not divided by a sufficient fence are liable to join in or contribute to the construction of a sufficient fence dividing their lands in equal proportions whether the adjoining lands are to be wholly or only partly separated by the proposed fence.
- (2) The court may, where it considers that there are special circumstances that justify it in so doing, order that the owners of adjoining lands not divided by a sufficient fence must join in or contribute to the construction of a sufficient fence dividing their lands otherwise than in equal proportions, whether the adjoining lands are to be wholly or only partly separated by the proposed fence.

7 Notice to fence

An owner desiring to compel an owner of adjoining land to join in or contribute to the construction of a dividing fence under this Act (including the demolition of an existing fence and the erection of a new fence) may serve that owner of adjoining land with a notice to fence which must be in writing and must:

- (a) specify the common boundary the line of which is to be fenced or, where, on account of physical features of the land, it is impracticable to construct a fence wholly on the line of the common boundary of such adjoining lands or where the adjoining lands are separated by a watercourse, lake or other natural feature insufficient to prevent at all times the passage of stock, the line on which it is proposed to construct such fence, and if part of the line of a common boundary is to be fenced, that part; and
- (b) contain a proposal for fencing on the proposed line; and
- (c) specify the kind of fence to be constructed.

8 Orders to fence

- (1) If, within one month after the service of a notice to fence, the owner served with the notice to fence and the owner who served that notice do not agree as to the construction of the proposed fence, the line of the proposed fence or the kind of fence proposed, either of those owners may apply to a court for an order determining:
 - (a) whether the construction of the proposed fence or a part of it or of any fence between the adjoining lands is reasonably required; or
 - (b) what part of any dividing fence is to be constructed by each of such owners or that the whole of the fence shall be constructed by one owner and what proportion of the cost of the construction of the fence shall be borne by each of the owners respectively; or
 - (c) the time within which the fence shall be constructed; or
 - (d) the line upon which the fence the subject of the order shall be constructed; or
 - (e) the amount of compensation or annual compensation to be paid by one owner to the other owner in consideration of the loss of occupation of any land as a result of the construction of the fence the subject of the order; or
 - (f) the kind of fence to be constructed; or
 - (g) the nature of any other relief to which the applicant is justly entitled.
- (2) Upon an application made under subsection (1) the court may make all or any of the orders sought in the application or such of the orders described in that subsection as either party to the application, at the hearing, requests the court to make.
- (3) Where the demolition of an existing dividing fence and the erection of a new fence in place of the existing fence was proposed by the notice to fence, the court to which application is made under subsection (1) may, instead of making an order for the demolition of the existing fence and the erection of a new fence, make an order to repair the existing fence, specifying:
 - (a) the nature of the repairs; and
 - (b) which of the adjoining owners must effect the repairs; and

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- (c) the proportions in which the cost of the repairs must be borne;
and
 - (d) the period of time during which no further order to fence may be served with respect to the fence to be repaired unless the consent of the court is first obtained.
- (4) Where there are 2 or more owners of adjoining land any one of those owners who has not been served with a notice to fence is entitled to be joined as a party to any proceedings under this section.
- (5) Where, by agreement or under an order to fence, a fence is constructed otherwise than wholly on the line of the common boundary of adjoining lands, the occupation by a person of any land adjoining that fence which he or she was not entitled to occupy immediately before the fence was erected must not be taken to be adverse possession of the land so occupied nor affect the title of any person to the land so occupied.
- (6) In determining the kind of fence to be erected under an order made under this section, the court must take into account the kind of fence usually erected in the locality where the fence is to be constructed and whether it is usual to erect dividing fences in that locality.

9 Enforcement of agreements and orders

Where an agreement is made between owners of adjoining lands as to the construction of a dividing fence or an order is made by the court as to any such fence and a person bound by that agreement or order fails to observe any liability placed on him or her by that agreement or order within the time specified in the agreement or order or, if no such time is specified, within 6 months after the making of the agreement or order, the other party to the agreement or the proceedings in which the order was made may carry out the work of constructing the fence the subject of the agreement or of the provisions of the order and recover from the first-mentioned person the extra cost incurred by him or her because of the default of the first person.

10 Application for order ex parte

- (1) An owner may apply to the court for an order to construct a dividing fence even if a notice to fence has not been served on the owner of the adjoining land.
- (2) Upon an application made under subsection (1) the court, if it is satisfied that the applicant has made reasonable enquiries and has been unable to ascertain the whereabouts of the owner of the

adjoining land, may make an order ex parte authorising the applicant to construct a dividing fence of the kind and on the line specified in the order.

- (3) Where a fence is constructed under an order made under this section and the successful applicant ascertains the whereabouts of a person who was liable to be served with a notice to fence at the time the application was made, the successful applicant may serve on that person a copy of the order to fence.
- (4) Upon service of a copy of an order to fence made under this section:
 - (a) the person so served may apply to set aside the order on the grounds that the order was not, at the time it was made, in accordance with the justice of the case; or
 - (b) unless an order under paragraph (a) has been made, the successful applicant is entitled to recover from the person so served one half of the cost of the construction of the fence or one half of the value of the fence at the date of service (whichever is the lesser amount).

11 Liability of new owner for existing fence

Where an owner of land has constructed a dividing fence between his or her land and adjoining Crown land and that adjoining Crown land is subsequently alienated from the Crown then the owner of the first-mentioned land may recover from the person to whom the adjoining Crown land has been alienated half the value of that dividing fence assessed as at the date of the alienation of the adjoining Crown land to that person.

12 Proceedings for defining boundary line by registered surveyor

- (1) Where the owners of adjoining lands do not agree as to the position of the common boundary between their respective lands upon which a dividing fence is proposed to be constructed, either one may give notice to the other of his or her intention to have the common boundary line defined by a licensed surveyor.
- (2) The owner to whom notice is given must, within 30 days after the service of the notice:
 - (a) if satisfied of the position of the common boundary line, define it by pegs; or
 - (b) employ a licensed surveyor to define the common boundary line;

and in either case must notify the adjoining owner in writing of what he or she has done.

- (3) If within 2 months from the service of the notice provided for in subsection (1) the owner to whom the notice was given has failed to have the common boundary line defined by a licensed surveyor, then the owner who gave such notice may have the common boundary line defined by a licensed surveyor.
- (4) If the common boundary line when defined by a licensed surveyor is ascertained to be in substantially the same position as defined by pegs placed there by the owner receiving the notice given under subsection (1), that owner is entitled to recover the costs incurred by him or her in placing the pegs from the owner giving such notice, but where a licensed surveyor has been employed by either such owner all reasonable expenses actually incurred and not reimbursed by the Territory must be borne in equal shares by the adjoining owners.

13 Action in default of compliance with agreement or order

Where:

- (a) an agreement is made between owners of adjoining lands as to the repair of a dividing fence or an order to repair a dividing fence is made by the court under section 8(3) or 15; and
- (b) a person bound by that agreement or order fails, within the time specified in the agreement or order or, if no time is specified, within 3 months after the making of the agreement or order, to observe a liability placed on him or her by that agreement or to comply with that order;

the owner of the land separated by the dividing fence the subject of the agreement or order from the land of the person in default may:

- (c) repair the whole fence the subject of the agreement or order; and
- (d) recover from the person in default:
 - (i) the part of the cost of the repair that the owner of the adjoining land was liable to pay under the agreement or order or otherwise under this Act; or
 - (ii) if the whole of the repair was by the agreement or order required to be carried out by the person in default, the whole of the cost of the repair.

14 Repair of fences

- (1) Subject to this Act and to any agreement between the parties concerned, the owners of land on either side of an existing dividing fence are liable to contribute equally to the cost of the repair of the dividing fence between their adjoining lands.
- (2) The court may, where it considers that there are special circumstances that justify it in so doing, order that the owners of land on either side of an existing fence must contribute otherwise than equally to the cost of the repair of the dividing fence.

15 Notice to repair

- (1) The owner of land separated from adjoining land by an existing dividing fence may serve a notice to repair on the owner of the adjoining land requiring that owner to contribute to the repairing of the fence.
- (2) Such a notice must specify the part of the dividing fence to be repaired, the nature of the repair proposed but must not specify any method or materials for the repair of the fence which would make the repaired fence a fence of a different kind from the fence which was in existence at the date of the notice.
- (3) If no agreement as to the sharing of the cost of the repair of a fence the subject of a notice under subsection (2) is reached within one month of the notice the owner serving such notice may repair the fence and recover half the cost of that repair from the person on whom a notice complying with this section was served.
- (4) If a dividing fence is damaged or destroyed by flood, storm, lightning or tempest, or by fire or accident where the damage or destruction by fire or by accident is not attributable in whole or in part to the intention or negligence of the owner of the land on either side of the fence or of a servant of such owner the owner of the land on either side of the fence may immediately repair the fence without serving a notice to repair on the owner of the adjoining land and following the repair is entitled to recover half the cost of the repair from the owner of the adjoining land.
- (5) Where a dividing fence has been damaged or destroyed by an act done or commenced or an event, other than an event described in subsection (4), happening on land on one side of that dividing fence, the owner of the land on which the act was done or commenced or on which the event happened is liable to repair the damage so caused or to reinstate the fence so destroyed and if that owner does not do so within one month of the doing of the act or the occurrence of the event, the owner of the adjoining land may

repair the damage or reinstate the fence and recover the reasonable cost of doing so from the first-mentioned owner.

- (6) A person on whom a notice to repair has been served may, within one month after the date of the service of that notice, apply to the court for an order determining any of the following:
- (a) that the fence is not in need of repair;
 - (b) what repair to the fence is reasonable in the circumstances;
 - (c) in the appropriate case, that the existing fence should be demolished and a new fence constructed and in that case the kind of new fence to be constructed;
 - (d) the proportion of the cost of the repair or of the erection of a new fence which should be borne by each owner of the adjoining lands;
 - (e) whether both or which of the owners of the adjoining lands should effect the repairs.
- (7) The court has jurisdiction to make any order sought upon an application under subsection (6) and any other orders as to fencing on the line of the existing fence as to it may seem just.

16 Fences bounding roads

If the owner of land bounded by a road constructs a sufficient fence on the boundary of his or her land which is contiguous with the road and another owner subsequently adopts any means by which his or her land is enclosed by that fence or makes use of that fence in any way, that other person is liable to pay to the owner who constructed the fence one half of the value of that fence at the date on which that other person first had or took some step to have any use or benefit from the existence of that fence.

17 Jurisdiction of courts

The court has jurisdiction to hear and determine an application made under this Act as an action under the *Local Court Act*, and an order made under this Act may be enforced accordingly as a judgment of that court.

18 Court may vary an order

The court may vary or cancel an order made under section 8, 10 or 15.

19 Recovery of money

- (1) Any moneys (including costs ordered to be paid by a party to proceedings under this Act) which a person is required or is liable to pay under this Act may be sued for and recovered in the court.
- (2) In any proceedings for the recovery of moneys payable under an order of a court a certificate under the hand of the clerk of the court certifying that the order was made and the terms of the order is evidence of the matters to which it certifies.

20 Apportionment as between owner and lessee

Where a fence is constructed or repaired and the fence divides any land held by a person as a lessee from any adjoining lands, the contribution payable in respect of the fence as between the lessee and the owner of the leased land is payable, subject to this Act and to any agreement between the lessee and the owner, according to the unexpired term of the lease at the time of the construction or repair of the fence, as follows:

- (a) where the term had less than 5 years to run the contribution is payable by the owner;
- (b) where the term had not less than 5 but less than 10 years to run the lessee must pay one quarter and the owner must pay three quarters of the contribution;
- (c) where the term had not less than 10 but less than 15 years to run the owner and the lessee must each pay half of the contribution;
- (d) where the term had not less than 15 years to run the lessee must pay the whole of the contribution.

21 Liability where option to purchase exists

Where any land in respect of which a contribution has been paid by the owner in respect of the construction or repair of a dividing fence is at the time of the payment subject to an option to purchase, the purchaser if the purchase is completed, must pay to the owner the amount of the contribution so paid.

22 Entry onto other land

A person engaged in the construction or repair of a dividing fence and the person's employees and agents may at all reasonable times enter upon the land adjoining the fence for the purpose of carrying out the construction or repair of the fence and, where that land is Aboriginal land as defined in section 3 of the *Aboriginal Land*

Act, may do so even if he or she or any of them does not hold a permit under that Act to enter or remain on that land.

23 Form of service of notices

- (1) A notice under this Act may be served personally or by post.
- (2) Service of a notice may be proved by affidavit.
- (3) The description in a notice under this Act of any land, fence, line or boundary need not particularly define the land, fence, line or boundary if:
 - (a) it reasonably identifies the land, fence, line or boundary; or
 - (b) it is proved that the person served knew that land, fence, line or boundary.
- (4) A person serving a notice under this Act is excused from serving more than one of a number of joint owners of land if the person proves that, after making reasonable enquiry the name or whereabouts of the other owner or owners was unknown to the person.

23A Dividing fences between Aboriginal community living areas and lease from which excised

- (1) In this section:

pastoral lease, see section 3(1) of the *Pastoral Land Act*.
- (2) The lessee of a pastoral lease or a Crown lease of another kind from which has been excised an area of land under Part IV of the *Crown Lands Act* (as in force before the commencement of the *Pastoral Land Act*) or Part 8 of the *Pastoral Land Act* for an Aboriginal community living area is not liable to join in or contribute to the construction or, subject to subsection (3) and sections 14(2) and 15(2) and (5), the repair of a dividing fence between the lease and the excised land but otherwise has the same rights and duties under this Act as an owner of the lease, and this Act must be read, where the context so requires, as if a reference to contribution were a reference to provision or repair of the dividing fence or the full cost involved.
- (3) Where a boundary of an excised area of land mentioned in subsection (2) was, immediately before that excision, a boundary of the lease from which it was excised, the lessee of the lease is liable under this Act to contribute equally to the cost of the repair of so much of the dividing fence between the excised land and the lease as is equal to the length of the boundary of the excised land that,

immediately before the excision, formed the boundary of the lease.

24 Regulations

The Administrator may make regulations, not inconsistent with this Act, prescribing all matters which are required or permitted to be prescribed by this Act or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

ENDNOTES

1

KEY

Key to abbreviations

amd = amended
app = appendix
bl = by-law
ch = Chapter
cl = clause
div = Division
exp = expires/expired
f = forms
Gaz = Gazette
hdg = heading
ins = inserted
lt = long title
nc = not commenced

od = order
om = omitted
pt = Part
r = regulation/rule
rem = remainder
renum = renumbered
rep = repealed
s = section
sch = Schedule
sdiv = Subdivision
SL = Subordinate Legislation
sub = substituted

2

LIST OF LEGISLATION

Fences Ordinance 1972 (Act No. 34, 1972)

Assent date 31 July 1972
Commenced 31 July 1972

Ordinances Revision Ordinance 1973 (Act No. 87, 1973)

Assent date 11 December 1973
Commenced 11 December 1973 (s 12(2))

Amending Legislation

Ordinances Revision Ordinance 1974 (Act No. 34, 1974)

Assent date 26 August 1974
Commenced 11 December 1973 (s 3(2))

Ordinances Revision Ordinance (No. 2) 1974 (Act No. 69, 1974)

Assent date 24 October 1974
Commenced 11 December 1973 (s 3)

Ordinances Revision Ordinance 1976 (Act No. 27, 1976)

Assent date 28 June 1976
Commenced ss 1, 2 and 6: 28 June 1976 (s 6(2));
ss 3 and 4: 11 December 1973; s 5: 24 October 1974

Fences Ordinance 1974 (Act No. 25, 1974)

Assent date 19 August 1974
Commenced 19 August 1974

Statute Law Revision Act 1978 (Act No. 95, 1978)

Assent date 5 September 1978
Commenced 5 September 1978

Statute Law Revision Act (No. 2) 1978 (Act No. 19, 1979)

Assent date 2 February 1979
Commenced 2 February 1979

Statute Law Revision Act 1983 (Act No. 58, 1983)

Assent date 28 November 1983
Commenced 28 November 1983

Fences Amendment Act 1988 (Act No. 26, 1988)

Assent date 1 September 1988
Commenced 1 September 1988

Local Court (Consequential Amendments) Act 1989 (Act No. 14, 1989)

Assent date 5 June 1989
Commenced s 6: 5 June 1989; rem: 1 January 1991 (s 2, s 2 *Small Claims Amendment Act 1988* (Act No. 43, 1988), *Gaz G17*, 3 May 1989, p 2, s 2 *Local Court Act 1989* (Act No. 31, 1989) and *Gaz G49*, 12 December 1990, p 2)

Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989 (Act No. 78, 1989)

Assent date 22 December 1989
Commenced 1 March 1990 (*Gaz S12*, 28 February 1990)

Pastoral Land (Consequential Amendments) Act 1992 (Act No. 39, 1992)

Assent date 25 June 1992
Commenced 26 June 1992 (s 2, s 2 *Pastoral Land Act 1992* (Act No. 17, 1992) and *Gaz S33*, 26 June 1992)

Water (Consequential Amendments) Act 1992 (Act No. 27, 1992)

Assent date 5 June 1992
Commenced 1 July 1992 (s 2, s 2 *Water Act 1992* (Act No. 19, 1992) and *Gaz S35*, 30 June 1992)

Fences Amendment Act 1993 (Act No. 66, 1993)

Assent date 9 November 1993
Commenced 1 December 1993 (s 2, s 2 *Pastoral Land Amendment Act (No. 2) 1993* (Act No. 68, 1993) and *Gaz S95*, 1 December 1993)

Statute Law Revision Act 2005 (Act No. 44, 2005)

Assent date 14 December 2005
Commenced 14 December 2005

Livestock Act 2008 (Act No. 36, 2008)

Assent date 8 December 2008
Commenced 1 September 2009 (*Gaz G34*, 26 August 2009, p 3)

Statute Law Revision Act 2011 (Act No. 30, 2011)

Assent date 31 August 2011
Commenced 21 September 2011 (*Gaz G38*, 21 September 2011, p 5)

3 GENERAL AMENDMENTS

General amendments of a formal nature (which are not referred to in the table of amendments to this reprint) are made by the *Ordinances Revision Ordinance 1973* (Act No. 87, 1973) (as amended) to the following provisions: ss 5, 8, 9, 10, 12, 15, 18 and 20.

4

LIST OF AMENDMENTS

| | |
|------------|--|
| It | amd No. 58, 1983, s 3 |
| ss 1 – 3 | amd No. 58, 1983, s 3 |
| s 4 | amd No. 25, 1974, s 3 sub No. 58, 1983, s 3 amd No. 27, 1992, s 3; No. 36, 2008, s 150 |
| s 5 | amd No. 19, 1979, s 11; No. 58, 1983, s 3, No. 14, 1989, s 7; No. 30, 2011, s 3 |
| s 6 | amd No. 58, 1983, s 3; No. 14, 1989, s 7; No. 30, 2011, s 3 |
| s 7 | amd No. 30, 2011, s 3 |
| s 8 | amd No. 25, 1974, s 4; No. 14, 1989, s 7; No. 30, 2011, s 3 |
| ss 9 – 10 | amd No. 14, 1989, s 7; No. 30, 2011, s 3 |
| ss 11 – 12 | amd No. 19, 1979, s 11; No. 30, 2011, s 3 |
| s 13 | sub No. 25, 1974, s 5 amd No. 58, 1983, s 3; No. 14, 1989, s 7; No. 30, 2011, s 3 |
| s 14 | amd No. 58, 1983, s 3; No. 14, 1989, s 7; No. 30, 2011, s 3 |
| s 15 | amd No. 14, 1989, s 7; No. 30, 2011, s 3 |
| s 16 | amd No. 30, 2011, s 3 |
| s 17 | amd No. 58, 1983, s 3; No. 14, 1989, s 7; No. 44, 2005, s 35 |
| s 18 | amd No. 58, 1983, s 3; No. 14, 1989, s 7 |
| s 19 | amd No. 58, 1983, s 3; No. 14, 1989, s 7; No. 30, 2011, s 3 |
| s 20 | amd No. 25, 1974, s 6; No. 58, 1983, s 3; No. 30, 2011, s 3 |
| s 21 | amd No. 30, 2011, s 3 |
| s 22 | amd No. 26, 1988, s 2; No. 30, 2011, s 3 |
| s 23 | amd No. 58, 1983, s 3; No. 30, 2011, s 3 |
| s 23A | ins No. 78, 1989, s 13 amd No. 39, 1992, s 3; No. 66, 1993, s 3; No. 30, 2011, s 3 |
| s 24 | amd No. 95, 1978, s 14; No. 19, 1979, s 11; No. 58, 1983, s 3 |