FENCED OUT:BOUNDARY ISSUES FOR NEIGHBOURS

Boundary fence issues rarely result in violence although a recent court case involving such a dispute was determined as a shooting murder. The Boundary Fences Act 1908(Tas) provides a simple, inexpensive solution to boundary fence disputes between neighbours.

Before 2011 a neighbour requiring such a dispute to be resolved could refer the matter for arbitration under the Commercial arbitration Act. At that point the other neighbour, if they failed to object or seek their own arbitrator within a reasonable time (in practice about a month), the original arbitrator nominated by the first neighbour became what was termed ‘the default arbitrator’ then took charge of the dispute and could make an award on the nature of the fence and its cost shared by the neighbours under the Boundary Fences Act.

After 2011 the Commercial Arbitration Act in common with all Australian jurisdictions was changed.. The ‘default arbitrator’ was deleted and now the neighbours in dispute (if there is no agreement to appoint an arbitrator) have to go to the Supreme Court to have an arbitrator appointed. Under s11(3) (b) where there is a sole arbitrator and the parties are unable to agree on the arbitrator a party can request the appointment to be made by The Supreme Court. In making that appointment the Court under s11(6) is to have due regard to any qualifications of the arbitrator and to considerations likely to secure the appointment of an independent and impartial arbitrator.

In two cases I know where the new requirement applied the applicant neighbour the results did not appear to meet the aims or requirements of the Boundary Fences Act. In one case an arbitrator was asked to act for a Hobart law firm’s client in October 2013.The Supreme Court judge, in March the following year, struck out the application and did not appoint an arbitrator. In a recent instance where a suburban Hobart boundary dispute was referred by the applicants to the Supreme Court the judge took the view that the dispute was a contentious matter arguably not amenable to resolution under the Boundary Fences Act. Instead the judge advised the applicant, if they wished to apply to appoint an arbitrator, to file an application to the Supreme Court to initiate formal court proceedings

The Boundary Fences Act has a generally logical system for managing obligations between neighbours. It somewhat outdatedly refers to rabbit proof fences. The Act could be made more helpful by making clear minimum standards for suburban areas and minimum agricultural standards by reference to the land usage class.

The Supreme Court is required on application to appoint an arbitrator in a boundary fence dispute under s11(3) of the Commercial Arbitration Act 2011.The judge has no discretion under the Commercial Arbitration Act 2011 not to make that appointment. Arbitrators are sufficiently trained and capable to deal with complex issues arising from boundary fence disputes.

Neighbours in disputes of this kind deserve an inexpensive decision under an arbitral award and not the cost of what may be protracted and much more costly court proceedings. Other jurisdictions deal with boundary fence disputes in their magistrates’ courts . Under the Fences Act 1968(Vic) (as amended) if an agreement is not reached after 30 days following a notice to fence then either party can take the matter to the Magistrates Court.

The former Tasmanian Attorney General Vanessa Goodwin last year received the concerns raised above and representations from a senior legal practitioner. These need to be addressed by the post election holder of that office. Minister for Justice

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