

PROPERTY, LAW AND EQUITY REFORM COMMITTEE  
OF NEW ZEALAND

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FENCING ACT 1908

Working Paper No. 2

1. In response to the working paper issued by the Committee twentyeight replies containing comment and criticism were received. The Committee has been gratified by the interest shown and has been greatly assisted by the detailed replies. The number of papers received make it impossible to deal in detail with the suggestions. Many have been adopted, all have been considered.

2. The comments indicate a general acceptance of the tentative views of the Committee as contained in the first working paper. The Committee has now redrafted the bill which was annexed to the first working paper. The new draft is attached as an appendix to this paper. Except as regards clauses 20 and 21 the enumeration of clauses in the first draft has been retained for convenience of reference.

3. The present draft bill (appendix) differs in a number of respects from that first circulated. The major changes are summarised as follows:

- (1) The long title. This has been amended with a view to the interpretation the bill will receive in the Courts. The Committee is anxious that the interpretation of the bill be not unduly affected by precedent under the Fencing Act 1908.
- (2) Clause 2 - Interpretation. The definition of "occupier" has been altered and is to be read along with the expanded definition of "Crown Land". The general effect is that an occupier means the owner except where some other person, including the Crown, is in occupation or has a right to occupy by virtue of a tenancy for a term of not less than 12 months certain. There is a proviso that in the case of Crown land occupiers under lease etc. with a term of not less than 12 months are not to be occupiers unless there is an exclusive right to occupy the land or the lease etc. is for agricultural purposes.

- (3) Clause 3 - The application of the Act. The short provision in the previous bill has been amended and clarified in clause 3. The general tenor of the section is similar to that of the existing exemptions read in the light of the definition of Crown land. The sections burdening the Crown are expressly referred to.
- (4) Part II, clauses 4-6. The provisions of Part II have been redrafted. A definition of "fencing covenant" has been inserted in section 2. Clause 5 provides that a fencing covenant may be created by the inclusion of certain words or words to a like effect in a transfer or by the inclusion of a covenant in full provided it is a fencing covenant within the definition of that term. Where such a fencing covenant is included in a transfer, it is registrable and runs with the land for a term expiring 12 years from the date of registration of the transfer. The Committee has been encouraged by the submissions made to it to delete the provisions about renewal of registration so that a covenant in the appropriate form will now last only 12 years. Clause 6 provides that the registration and effect of a covenant in existence at the commencement of this Act shall cease 12 years thereafter.
- (5) Part III clauses 7-24. This Part relates generally to the obligations of adjoining occupiers.
- (a) Clause 8 has been redrawn to clarify what is required in a notice and cross-notice. As a result of suggestions made, it is proposed to provide a Schedule (Second Schedule) setting out certain types of fence. These are in no way to be taken as sufficient fences, as is the case under the 1908 Act. Clause 8 refers to a notice containing a reference to a scheduled fence. The sole purpose of the scheduled fence is to enable a notice to be shortened by omitting detail other than a reference to the numbered fence in that Schedule.

- (b) Clause 10 has been elaborated to set out clearly the manner of service of a notice.
- (c) Clause 12 has been redrawn to clarify the obligations of parties where notices are given.
- (d) Clause 15 which related to liability of succeeding occupiers has been omitted.
- (e) Clause 16 has been redrawn. This relates to a person availing himself of a fence.
- (f) Clause 17 is substantially to the same effect but has undergone some drafting changes. Clause 17(1)(c) has been omitted - see now Clause 27(n).
- (g) Clause 19 relating to give and take fences has been redrafted. The Committee considered whether any restriction on removal of a give and take fence should be imposed. It has reached the tentative view that it should not. Where there is such a fence a person claiming under his general right to erect a fence on his boundary would doubtless be obliged to pay for the fencing himself. The Committee also considered whether compensation should be allowed for improvements effected. It was thought that the person effecting improvements should himself take steps to secure his tenure before undertaking expenditure.
- (h) Clause 20 relating to ditch and bank fences has been redrawn and is now clause 21, the previous clause 21 being renumbered to clause 20.
- (i) Clause 22 relating to the right to erect a fence on a road to protect a live fence, and clause 23 relating to swing gates across roads and bridges have both been deleted. They did not relate to rights of occupiers inter se and if required at all can more appropriately be placed in Part XV of the Municipal Corporations Act 1954 and Part XV of the Counties Act 1956.

(j) Clause 24 relating to fences on Crown lands with requirements as to gates has also been omitted. It does not affect rights inter se and the Department of Lands and Survey regard its retention as unnecessary.

(6) Part IV - Procedure.

(a) Clause 26 has been redrafted so as to make it clear that not only has a Magistrate's Court jurisdiction to determine questions of title, but it has the power to enter judgements for sums of money and make other consequential orders.

(b) Clause 27 has been varied in several aspects to extend the power of, and to clarify the jurisdiction of a Magistrate's Court. Attention is particularly drawn to paragraphs (e)(i)(l)(m) and (n).

(7) Part V - Miscellaneous.

(a) Clause 29(3) has been omitted. There are provisions in the same section as to compensation.

(b) Clause 30 relating to damage or to destruction of rabbit proof fences has been omitted. If required the Agricultural Pests Destruction Act 1967 seems the appropriate place for this provision.

(c) Clause 32(2) has been omitted, the matter being covered by the Acts Interpretation Act 1924.

(8) Schedules.

(a) The First Schedule is to contain Forms of Notice and Cross Notice.

(b) The Second Schedule is to contain descriptions of more common types of fence.

(c) The Third Schedule will contain a reference to enactments repealed.

(9) Throughout the draft bill there are minor changes made in an effort to improve the draftsmanship.

SUBMISSIONS

The Committee will be grateful for further suggestions and criticisms of the draft bill. It requests submissions be sent to:

The Secretary,  
Property Law & Equity Reform Committee,  
Private Bag 1,  
Government Buildings,  
Wellington,

on or before 30th November 1971.