



NEIGHBOURS AND ENCROACHMENTS

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This article discusses encroachments and details what they are. Additionally, it addresses how an owner may determine whether there is an encroachment and how to deal with one.



A. WHAT IS AN ENCROACHMENT?

An encroachment relates to a building or structure that intrudes on or crosses over another person's property. The *Encroachment of Buildings Act 1922* (NSW) deals with situations in which a building or structure impinges upon a boundary. This includes but is not limited to walls, overhangs and part of a building/structure that is above or below the ground. An example of an encroachment is when an individual decides to build a garage and its roof ends up overhanging across the neighbour's property.

Under section 2 of the *Encroachment of Buildings Act 1922* (NSW) an:

1. Encroaching owner refers to an owner of a property that encroaches upon another person's land; and
2. Adjacent owner refers to an owner of land upon which an encroachment extends to.

B. HOW TO FIND OUT IF THERE IS AN ENCROACHMENT

Under section 135B of the *Real Property Act 1900*, an owner of a property can make an application to the Registrar General for a 'Boundary Determination'. By applying for a boundary determination, an individual will be able to ascertain whether a building or structure encroaches onto the adjoining land.

It may also be useful for an owner to obtain a boundary determination prior to any construction of a building that may encroach onto the neighbouring land. This is because through a boundary determination the owner can determine whether the proposed construction will encroach onto the neighbour's property. By finding out this information prior to creating any establishment, peace between the neighbours can be maintained and no legal action regarding the encroachment can be taken.

C. WHAT TO DO WHEN THERE IS AN ENCROACHMENT

Under section 3(1) of the *Encroachment of Buildings Act 1922* (NSW) ("the Act") either of the owners (the adjacent or encroaching owner) may apply to the Land and Environment Court for relief of an encroachment. An application to the court will generally result in orders being made that the court deems as reasonable. Section 3(2) of the Act states that orders for relief of an encroachment may include the following:

1. Compensation to the adjacent owner – that is compensation to the owner of the property affected by the encroachment;



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2. The conveyance transfer or lease of the subject land to the encroaching owner (subject land being the land in which the encroachment crosses over); and/or
3. The removal of the encroachment.

In determining the orders that should be made, the court will take into account several considerations. As per section 3(3) of the Act these considerations may include (but are not limited to) the following:

1. The person who made the application (encroaching owner or adjacent owner);
2. The circumstances and value of the subject land;
3. The character and purpose of the encroaching building;
4. The loss and damage that has or will be incurred by both the adjacent and encroaching owner; and
5. The circumstances in which the encroachment was made.

C.1. COMPENSATION

The court orders compensation depending upon the circumstances of the encroachment such as whether it was intentional or the result of negligence. Under section 4 of the *Encroachment of Buildings Act 1922* (NSW), the value of the subject land is the minimum amount that a court can order for compensation in the event that the encroaching owner can prove that the encroachment was not intentional nor the result of negligence. In any other case, however, compensation can be awarded up to three times the value of the land.

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D. WHAT IF THE ENCROACHMENT IS NOT A BOTHER?

Many encroachments may go unnoticed and many noticeable encroachments may not be a bother to the adjacent owner. If this is the case, the adjacent owner may decide to forego any legal action and preserve a good relationship with the neighbour by letting the encroachment stay in place.

It should, however, be noted that if the adjacent owner decides to sell in the future, he or she should disclose the encroachment to any potential buyers. This is so that all potential buyers are aware of the encroachment when deciding whether to purchase the property or not. Letting an encroachment stay in place may also negatively affect the adjacent owner (despite it not being a bother) as it may reduce the market value of the property/land.

E. CONCLUSION

In conclusion, under the *Encroachment of Buildings Act 1922* (NSW), both the adjacent and encroaching owner are able to seek relief from the court.

Comasters is able to accept instructions from clients in either commencing a claim for relief or in responding to one.

Comasters Law Firm can advise and assist clients with matters relating to encroachments.