

[Act 2000 No 2]



New South Wales

Access to Neighbouring Land Bill 2000

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to enable a person to gain access to another person's land to carry out work on the person's own land or to carry out work on a utility service situated on that other person's land. The person will be able to apply to a Local Court for a neighbouring land access order or a utility service access order. At present, unless consent is obtained from the owner of the land, or there is some other legal right to access, access cannot be gained for these purposes.

The orders are to be subject to statutory conditions, including an obligation to restore the land, so far as is practicable, and are to be of limited duration.

The Bill also provides for the liability of joint users of utility services for maintenance and repair of such services.

The Bill gives substantial effect to the recommendations made by the New South Wales Law Reform Commission in its report entitled *Right of Access to Neighbouring Land*.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 provides that the proposed Act is to bind the Crown.

Clause 5 provides that the proposed Act does not enable a person to carry out any work or activity for which a consent or other authority is required under another Act or that is prohibited under another Act. A person may not apply for access under the proposed Act if access for the required purposes may be obtained or granted under another Act or is prohibited by or under another Act.

Clause 6 provides that the proposed Act does not apply to certain land under the *National Parks and Wildlife Act 1974*.

Part 2 Access orders

Division 1 Applications for access orders and making of orders

The proposed Division specifies the persons who may apply for the access orders and confers jurisdiction on the Local Court to make the orders.

Clause 7 enables a person who requires access to land adjoining or adjacent to the person's land in order to carry out work on the person's land to apply for a neighbouring land access order. The clause also enables a person who is not the owner of the land on which the work is to be carried out to apply for a neighbouring land access order with the consent of the person on whose behalf the work is to be carried out.

Clause 8 enables a person who requires access to land to carry out work on a utility service (for example, a sewerage service) which the person is entitled to use but which is situated on land that the person does not own to apply for a utility service access order. The order may be applied for even if there is an easement or other right of access to the land concerned.

Clause 9 provides that a person who requires both kinds of order may apply for both orders.

Clause 10 requires at least 21 days notice to be given of an application for an access order to the owner of the land to which access is sought, any other person entitled to use a utility service affected by the order sought and any other person the applicant believes will be affected by the order.

Clause 11 confers jurisdiction on the Local Court to grant a neighbouring land access order if it is satisfied that access is required for the specified purpose and that it is appropriate in the circumstances of the case. However, orders may not be made unless the Local Court is satisfied that a reasonable effort has been made to reach agreement by the relevant parties and that the required notice of the application has been given.

Clause 12 sets out purposes for which a neighbouring land access order may be made but does not limit those purposes.

Clause 13 confers jurisdiction on the Local Court to grant a utility service access order if it is satisfied that access to land is required for the purpose of carrying out work on or in connection with a utility service situated on the land and that it is appropriate in the circumstances of the case. However, orders may not be made unless the Local Court is satisfied that a reasonable effort has been made to reach agreement by the relevant parties and that the required notice of the application has been given.

Clause 14 sets out purposes for which a utility service access order may be made but does not limit those purposes.

Clause 15 provides that, before determining an application for an access order, the Local Court must consider the purpose and type of work proposed, whether the work cannot be carried out or would be substantially more difficult or expensive to carry out without the access and whether the access would cause unreasonable hardship to a person affected by the order.

Clause 16 enables the Local Court to impose conditions on an access order, including conditions relating to minimising inconvenience or loss of privacy, regulating access to buildings and parts of buildings and requiring the applicant to take out insurance and conditions varying or dispensing with any or all of the provisions of Division 2 of the proposed Part.

Clause 17 sets out matters to be included in access orders, such as the work to be carried out and the duration of the order.

Division 2 Effect of access orders

The proposed Division sets out the activities authorised by access orders and the obligations of persons who obtain orders as well as those of the owners and occupiers of land subject to the orders.

Clause 18 provides that a neighbouring land access order authorises, for the purpose of carrying out work on land, a person to have access to adjoining or adjacent land to that land, in accordance with the order.

Clause 19 provides that a utility service access order authorises a person to have access to land to carry out work on or in connection with a utility service on that land in accordance with the order.

Clause 20 provides that both kinds of access order authorise the applicant to move materials on and from land and remove waste from the land and also authorise such persons as are reasonably necessary to carry out the work to have access to the land.

Clause 21 requires the applicant to restore the land, as far as practicable, to the condition it was in before the access and to indemnify the owner against damage to the property arising from the access.

Clause 22 requires the owner to give access in accordance with the order.

Clause 23 provides that an access order does not bind anyone who was not a party to the proceedings for the order except a successor in title to an owner bound by an order.

Division 3 Other provisions relating to access orders

Clause 24 provides that an access order may be varied or revoked by a Local Court.

Clause 25 provides that an access order ceases to have effect on the date specified in the order or if earlier revoked by a Local Court.

Clause 26 confers jurisdiction on the Local Court to make an order for compensation for loss, damage or injury arising from an access order. An order may be made by the Local Court when an access order is made or at a later time (even if the order is no longer in force) but an action for a compensation order may not be brought more than 3 years after the last date access occurred under the order.

Clause 27 provides that the costs of an application are payable at the Local Court's discretion. In determining who is to pay costs, the Local Court may consider any attempts before the proceedings to reach agreement between the parties, whether a refusal to consent to access was unreasonable in the circumstances and any other matter it thinks fit.

Clause 28 makes it an offence carrying a penalty of up to 5 penalty units (currently \$550) to fail to comply with an access order and provides for an additional remedy of damages to be available on failure to comply with an order.

Part 3 Transfer of proceedings to other courts and appeals

Clause 29 provides for the transfer of proceedings for compensation under the proposed Act from the Local Court to the Land and Environment Court if the amount of any compensation or damages is likely to exceed the Local Court's civil jurisdiction and for the transfer of proceedings by the Land and Environment Court back to the Local Court. Transfer may be on the Court's own motion or on the application of a party to proceedings.

Clause 30 enables a Local Court to refer a question of law arising in proceedings for an access order to the Land and Environment Court.

Clause 31 gives a right of appeal in proceedings for an access order from a Local Court to the Land and Environment Court. The appeal must be made within 30 days after the decision appealed against and may be made only on a question of law.

Part 4 Miscellaneous provisions

Clause 32 makes owners who are jointly entitled to use a utility service jointly liable for any repair or maintenance of the service carried out by one of the owners, if the owner or a user is so liable and the liability does not arise from another user's fault. The proposed section is to be subject to any contract or arrangement between the owner and the provider of the utility service and to the provisions of any other Act.

Clause 33 enables the regulations to prescribe model forms of agreement for access to neighbouring land and access to utility services.

Clause 34 applies provisions of the proposed Act to certain native title holders and claimants.

Clause 35 prohibits contracting out of the proposed Act.

Clause 36 sets out the manner in which notices under the proposed Act are to be given, either personally or by post addressed to the last known place of residence

or business of the person. The proposed section also provides for the manner in which notices are to be given to native title holders.

Clause 37 provides that proceedings under the proposed Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Clause 38 confers on the Governor a general regulation-making power and enables regulations to be made for or with respect to the service of notices where the owner of land cannot be found. It also enables relevant Local Court rules to be made with respect to practice and procedure.

Clause 39 is a formal provision giving effect to the consequential amendments to the *Land and Environment Court Act 1979* set out in Schedule 1. The amendments confer jurisdiction on the Land and Environment Court in relation to transferred proceedings and appeals.

Clause 40 provides for the Ministerial review of the proposed Act.

Schedule 1 contains amendments to the *Land and Environment Court Act 1979*.