

# Encroachment of Buildings Act 1922 No 23

[1922-23]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Authorisation

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# Encroachment of Buildings Act 1922 No 23



New South Wales

An Act to make provision for the adjustment of boundaries where buildings encroach on adjoining land; to facilitate the determination of boundaries; and for purposes connected therewith.

## 1 Name of Act

This Act may be cited as the *Encroachment of Buildings Act 1922*.

## 2 Definitions

In this Act, unless the context or subject-matter otherwise indicates or requires:

**Adjacent owner** means the owner of land over which an encroachment extends.

**Boundary** means the boundary line between contiguous parcels of land.

**Building** means a substantial building of a permanent character and includes a wall.

**Court** means the Land and Environment Court.

**Encroaching owner** means the owner of land contiguous to the boundary beyond which an encroachment extends.

**Encroachment** means encroachment by a building, and includes encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.

**Owner** means any person entitled to an estate of freehold in possession:

- (a) whether in fee simple or for life or otherwise,
- (b) whether at law or in equity,
- (c) whether absolutely or by way of mortgage,

and includes a mortgagee under a registered mortgage of a freehold estate in possession in land under the *Real Property Act 1900*.

**Subject land** means that part of the land over which an encroachment extends.

### 3 Encroachments

- (1) Either an adjacent owner or an encroaching owner may apply to the Court for relief under this Act in respect of any encroachment.
- (2) On the application the Court may make such orders as it may deem just with respect to:
  - (a) the payment of compensation to the adjacent owner,
  - (b) the conveyance transfer or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest therein or any easement right or privilege in relation thereto,
  - (c) the removal of the encroachment.
- (3) The Court may grant or refuse the relief or any part thereof as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider amongst other matters:
  - (a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be,
  - (b) the situation and value of the subject land, and the nature and extent of the encroachment,
  - (c) the character of the encroaching building, and the purposes for which it may be used,
  - (d) the loss and damage which has been or will be incurred by the adjacent owner,
  - (e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment,
  - (f) the circumstances in which the encroachment was made.
- (4) The Court may refer any question involved in proceedings on the application to:
  - (a) any registered land surveyor (within the meaning of the [Surveying and Spatial Information Act 2002](#)), or
  - (b) any valuer.
- (5) This section applies to encroachments made either before or after the commencement of this Act.

### 4 Compensation

- (1) The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant to the encroaching owner shall, if the

encroaching owner satisfies the Court that the encroachment was not intentional and did not arise from negligence, be the land value of the subject land, and in any other case three times such land value.

- (2) In determining whether the compensation shall exceed the minimum, and if so by what amount, the Court shall have regard to:
  - (a) the value, whether improved or unimproved, of the subject land to the adjacent owner,
  - (b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner,
  - (c) the circumstances in which the encroachment was made.

## **5 Charge on land**

- (1) The order for payment of compensation shall except so far as the Court may therein otherwise direct, upon registration operate as a charge upon the land of the encroaching owner in priority to any charge created by the encroaching owner or by his or her predecessor in title.
- (2) In this section the land of the encroaching owner means the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part thereof as the Court may specify in the order.

## **6 Encroaching owner—compensation and conveyance**

Wherever the Court sees fit, and in particular where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances, the Court may determine:

- (a) by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately,
- (b) to whom, for whose benefit and upon what limitations the conveyance transfer or lease of the subject land or grant in respect thereof is to be made.

## **7 Adjacent owner—compensation and conveyance**

Wherever the Court sees fit, and in particular where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the Court may determine:

- (a) to whom, for whose benefit and in what proportions the compensation is to be paid or applied, and
- (b) by whom the conveyance transfer or lease of the subject land or grant in respect thereof is to be made.

## **8 Vesting order**

Wherever the Court may make or has made an order under this Act with respect to the subject land, the Court may make such vesting order as it may deem proper in lieu thereof or in addition thereto, or in default of compliance therewith.

## **9 Boundaries**

- (1) If any question arises as to whether an existing building encroaches or a proposed building will encroach beyond the boundary, either of the owners of the contiguous parcels of land may apply for a determination of the position of the boundary:
  - (a) to the Registrar-General under Part 14A (Boundary determinations) of the *Real Property Act 1900* (but only if the application could be made under that Part apart from this section), or
  - (b) if the application cannot be made under that Part or the Registrar-General refuses to make that determination—to the Court.
- (2) On an application to the Court the Court may make such orders as it may deem proper for determining, marking, and recording the true boundary.
- (3) The Court may refer to any registered land surveyor (within the meaning of the *Surveying and Spatial Information Act 2002*) any question involved in proceedings on the application.
- (4) This section applies to buildings erected either before or after the commencement of this Act.

## **10 Proceedings in the Supreme Court**

In any proceedings before the Supreme Court, the Supreme Court may:

- (a) if it sees fit, exercise any of the powers conferred on the Land and Environment Court by this Act and may stay the proceedings on such terms as it thinks proper, or
- (b) if of the opinion that the matter could more conveniently be dealt with by an application under this Act, stay the proceedings on such terms as it thinks proper.

## **11 Application by summons**

Until otherwise prescribed by rules of Court, any application under this Act may be made by summons.

## **12 Persons interested**

In any application under this Act the Court may require:

- (a) that notice of the application shall be given to any person interested,

(b) that any person interested shall be made a party to the application.

### **13 Registration**

- (1) Where any land affected by any application or order under this Act is not under the provisions of the *Real Property Act 1900*, the application or order may be registered in the register of causes, writs, and orders affecting land.
- (2) Where any land affected by any application or order under this Act is under the provisions of the *Real Property Act 1900*, a caveat may be lodged under that Act in respect of the application, and the order may be registered under that Act.

### **14 Costs**

In any application under this Act the Court may make such order as to payment of costs charges and expenses as it may deem just in the circumstances and may take into consideration any offer of settlement made by either party.

### **15 Rules and practice**

- (1) Rules of Court may be made for the practice and procedure of the Court in applications under this Act.
- (2) The practice and procedure of the Court shall, except so far as they are inconsistent with this Act or any rules of Court, apply to applications under this Act.

### **16 Savings and transitional provisions**

Schedule 1 has effect.

## **Schedule 1 Savings and transitional provisions**

(Section 16)

### **1A Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of any Act that amends this Act.
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

**1 Proceedings pending in Supreme Court**

Proceedings under this Act pending in the Supreme Court immediately before the commencement of Schedule 2 (2) to the *Real Property (Boundary Determinations) Amendment Act 1989* are to be dealt with as if that Act had not been enacted.