



## Do you have an encroachment?

***An encroachment relates to a building or structure that intrudes on or crosses over another person's land. The NSW Encroachment of Buildings Act 1922 ("the Act") deals with situations in which a building or structure encroaches over a land 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 on their property and its roof ends up overhanging the adjoining neighbour's property. Under Section 2 of the Act, an "Encroaching Owner" refers to the owner of the property that encroaches upon another person's land and an "Adjacent Owner" refers to an owner of land upon which an encroachment extends to.

### How to find out if there is an encroachment

If you consider that the owner of an adjoining property may have built something on their property that encroaches onto your property, then best starting point is to arrange for your property to be surveyed by a registered Surveyor. The survey report prepared by the Surveyor will indicate the boundaries of your property as conferred under your title deed and the location of the improvements on your land relative to those boundaries. It will also show what, if any, structures built on adjoining properties overhang or encroach over the boundaries onto your property.

If a dispute arises between adjoining property owners over the exact location of their property boundaries a property owner can make application to the Registrar General for a "Boundary Determination" under section 135B of the Real Property Act 1900. In this instance the Registrar General will invite both property owners to make submissions on the application and will determine the position of the boundary in question on the basis of all the evidence available but, if the evidence is inconclusive, it is made on the basis of what is just and reasonable in the circumstances.

### What to do when there is an encroachment

Under section 3(1) of the Act either of the adjoining 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 order 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;
2. The conveyance, transfer or lease of that part of the affected land to the Encroaching Owner; or the grant to the Encroaching Owner of an easement right or privilege in relation to the encroachment;
3. The removal of the encroachment.



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

- The person who made the application (Encroaching Owner or Adjacent Owner);
- The situation and value of the subject land and the nature of the encroachment;
- The character and purpose of the encroaching building;
- The loss and damage that has or will be incurred by the Adjacent Owner by the encroachment and by the Encroaching Owner if the encroachment was removed; and
- The circumstances in which the encroachment was made.

## Compensation

The Court may order the payment of compensation depending upon the circumstances of the encroachment such as whether it was intentional or the result of negligence. Under section 4 of the Act, 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. In determining whether the compensation shall exceed the minimum amount, and if so by what amount, the Court shall have regard to:

- the value, whether improved or unimproved, of the subject land to the Adjacent Owner;
- 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; and again
- the circumstances in which the encroachment was made.

## 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. However, should the Adjacent Owner decide to sell in the future, they should disclose existence of the known encroachment to any potential buyers.

*If you think that an adjoining owner may be encroaching on your property or you need advice or assistance with any property law issue, please contact one of our [accredited property law specialists](#), [Michael Battersby](#) or [John Bateman](#) on 02 4731 5899 or email [property@batemanbattersby.com.au](mailto:property@batemanbattersby.com.au).*