

Are You Affected By An Encroachment?

Many land owners are faced with the issue of what to do with an encroachment. An encroachment can occur where part of a building from one piece of land overhangs or enters on to a neighbouring block of land.

According to the relevant Act in New South Wales (the Encroachment of Buildings Act (1922), (“the Act”) “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”.

In practical terms this can mean anything from an air conditioning unit encroaching in to a neighbouring property to the foundations of your strata building encroaching on to your neighbours foundations.

Many encroachments may well go unnoticed and many others, such as the air conditioning unit or a window awning may be noticeable, but may cause no concern and so may well be left where they are without any problem between the neighbours. If an encroachment such as this has been there for a significant amount of time the Council policy may well be against any claim for compensation or any order for removal.

The foundations of your strata building may have been built incorrectly and may in fact be encroaching on your neighbour’s land without anyone knowing about it because it is all hidden underground. Where encroachment generally becomes significant however is when you want to carry out some new construction which may encroach upon your neighbour’s land or if your new neighbour wants to carry out some construction next door and discovers after excavation that your building’s foundations are encroaching into their property where they want to build their own foundations.

The Act sets out what can be done in such circumstances in New South Wales. The remedies available include a court order enforcing the removal of the encroachment (where practical) or the encroaching neighbour paying compensation to the neighbour encroached upon equal to the value of the land that the encroaching party has effectively taken over.

Section 4 of the Act specifies that the minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease or grant to the encroaching owner will be the value of the land if the encroaching owner satisfies the Court that the encroachment was not intentional. In any other case where the encroaching owner is not able to satisfy the Court that the encroachment was not intentional and did not arise from negligence the compensation shall be three times the subject land value.

Sections 6 and 7 of the Act also refers to the Court’s powers including to grant an easement, or transfer, or lease the affected land and provide for whose benefit such conveyance, transfer, lease or grant in respect thereof is to be made.

If it is not possible to remove an encroachment, then the encroaching party will be expected to compensate the other party and will possibly also have to defend a claim not just for the value of the land but also for any costs

associated with any loss or damage suffered by the encroached neighbour, for example if the encroachment has delayed the development next door.

The “encroachment” in this context is by a building. For the position on trees, cranes encroaching into the airspace or a dispute about your dividing fence please refer to the Bannermans articles below.

[Trees Causing Damage – What Can You Do?](#)

[Crane Airspace Licences](#)

[Fence, Trees and Retaining Walls](#)

**Prepared by Bannermans Lawyers
15 August 2014**