

Other Boundary Issues

If you and your neighbour are in dispute over where the common boundary of your respective properties lies, you can try to resolve the dispute by having a survey done by a licensed surveyor. Otherwise, an application can be made to the Registrar-General for the determination of the position of a common boundary: Real Property Act 1900 (NSW) Part 14A.

The application can be made by an owner of land on either side of the boundary and should include any information (for example, an identification survey or peg-out survey) or documents that support their position. Application forms must be lodged in person and a lodgement fee paid.

The Registrar-General will then give notice to the adjoining owner and invite the owner to make submissions in reply to the application. The Registrar-General must also consult a registered surveyor before making a decision and may decide that a survey or other investigation should be carried out. The applicant may be required to pay for additional surveys or investigations.

The decision will be made in light of all the evidence available to the Registrar-General. If the evidence is inconclusive, a decision may be made on the basis of what is 'just and reasonable in the circumstances'. Notice of the determination will be given to both the applicant and the adjoining landowner.

If an owner on either side of the boundary is unhappy with the decision of the Registrar-General, they may appeal to the Land and Environment Court within 28 days of receiving notice of the decision.

ENCROACHING BUILDINGS

The *Encroachment of Buildings Act 1922* (NSW) regulates situations where a building has been built across a boundary. The Act applies to a 'substantial building of a permanent character'. This includes walls, overhangs and any part of a building above or below ground that crosses the boundary. If any question arises as to whether an existing building encroaches, or a proposed building will encroach beyond the boundary, either of the owners may apply for a determination of the position of the boundary. This may be made either 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)
- the Land and Environment Court, if the application cannot be made under that Part or the Registrar-General refuses to make that determination.

The Court can respond to an application by making orders that it considers proper to determine, mark, and record the true boundary. The Court may refer to any registered land surveyor (within the meaning of the *Surveying Act 2002* (NSW)) any question involved in proceedings on the application.

If a building encroaches, either owner may apply under the Act for relief. You make your application in the Land and Environment Court. Relief may include compensation, transfer or lease of the affected land, the removal of the part of the building causing the problem. (section 3(2)).

If an encroachment is caused by a development which was not in accordance with the approved building plan lodged with the Local Council, then the council can make an order that the extension be removed or altered to comply with the approved plans. Under *Environmental Planning and Assessment Act 1979*, anyone make take action to restrain or remedy a failure to follow approved plans.

ADVERSE POSSESSION

If a person has occupied a part or all of a parcel of land not belonging to them, the owner of that land may have lost the right to remove them under a legal principle called 'adverse possession'.

Under the *Limitation Act 1969* (NSW), if the period of occupation has continued for more than 12 years, the owner of the land may have lost the right to possession of the land. There are also all kinds of exceptions and qualifications to this rule. For example, to be sufficient to extinguish the documentary owner's title, the possession must be 'open, not secret; peaceful, not by force; and adverse, not by consent of the true owner' see *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464.

If you want to claim ownership of land based on adverse possession, you need to first work out:

- who owns the land (whether it is private land or government land); and
- title status (whether it is old system title or Torrens Title)

Finding out this information first is important:

- you *cannot* claim government-owned land
- there are different procedures for making a claim based on adverse possession depending on whether the title is old system or Torrens.

To find out the above information, you will need to do or get a professional adviser (a solicitor, licensed conveyancer or law stationer) to do a title search. See the Department of Lands NSW website (www.lands.nsw.gov.au) for more details.

If the land is Torrens title, the neighbour who has been in occupation of the land may make an 'possessory application' for ownership of the land. Such an application can only be in relation to the whole piece of land rather than a part.

If the land is old system title, you will need to make a primary application to claim ownership. Such an application can be made whether you have possessed the whole or only part of a block of land.

HOT TIP

The legal term 'nuisance' is different from the ordinary use of the word. A person can complain of nuisance only if damage is caused by some continuing or regular activity or occurrence on their neighbour's land, which the neighbour caused or did not try to prevent.

ENTRY INTO NEIGHBOUR'S PROPERTY

Under the law of trespass, you cannot enter your neighbour's land without your neighbour's consent. Nor can a Court order your neighbour to allow you onto the land.

An occupier can ask a trespasser to leave. If the person refuses, the occupier has the right to forcibly remove a trespasser, although if they use more force than is 'reasonably necessary', they can be charged with assault or sued by the trespasser. For this reason, it is better to call the police and ask for them to be removed.

An occupier can sue a trespasser for any damage and claim compensation for any damage caused. As most trespassing does not cause any damage, it will be more often the case that there is nothing to be gained from suing.

If, however, a person trespasses repeatedly, an occupier can seek an injunction from the Supreme Court requiring the person to stop trespassing. An injunction is a Court directing someone to do to or refrain from doing something. If person does not follow the Court's order they will be in contempt of court and face serious consequences.

In an urgent case where there are serious consequences if the trespass continues to occur, you can obtain an 'interim injunction' from the Supreme Court. Injunctions are a technical area of the law and can be expensive to obtain.

Implied permission to enter

There is an implied permission (a licence) for people to come onto a property for the purpose of knocking on the front door or for delivering goods.

Under the *Dividing Fences Act*, it is also legal for a person to enter a neighbour's land to do fencing work as long as the procedures under the Act have been complied with.

RIGHTS OF WAY AND EASEMENTS

A person may have a formal right of way to cross a neighbour's land. This is legally known as an 'easement'. It may be formally created and recorded on the certificate of title or it may arise out of a longstanding custom of crossing the land. Other easements may protect the flow of water, air, or enable a person to have drainage pipes over another's land.

The creation and termination of easements is a very technical legal field, and you should seek legal advice if there is a dispute about the use or existence of an easement. Usually, a right of way can be ended only if both landowners agree, or if the right of way is not used for more than 20 years. It can also be ended by agreement (sometimes with a payment of money) or by the order of the Court. Commonly, in older areas of Sydney, disputes arise over easements for 'dunny lanes' when these lanes have been appropriated for private use.

ACCESS TO NEIGHBOURING LAND

Under the *Access to Neighbouring Land Act 2000* (NSW), a person is entitled to make an application to a local court for an order enabling that person to enter neighbouring land. There are two types of orders that you can apply for.

Neighbouring land access order

A neighbouring land access order entitles the applicant to enter neighbouring land for the purpose of carrying out work on the applicant's own land. An applicant can be either the owner of the land or an occupier applying with the consent of the owner.

Utility service access order

A utility service access order enables a person who uses a utility service (eg, sewer, drainage, water, gas, electricity or telephone services) that runs through neighbouring land to enter that neighbouring land to carry out work on the utility service. For example, if a sewer line that services a house runs through a neighbour's land and becomes blocked at some point of the line on the neighbour's property, then the access order allows entry onto the property in order to fix the blockage.

Anyone entitled to use the utility service may apply for a utility service access order. An applicant for either order must give at least 21 days notice of intention to lodge an application and provide a copy of the terms of the order sought to the neighbour and anyone else affected by the order. Many access disputes may be resolved within this 21-day timeframe and the intended application may not have to be lodged.

Protection against damage or injury

An applicant granted an access order must, as far as possible, restore the land to the state it was in before the order was made. The applicant must also indemnify the owner of the land to which access is granted against damage to land or personal property arising from access.

The court can order an applicant who has been granted an access order to pay compensation to the owner of the neighbouring land for loss or damage caused by the access. Proposed changes to the *Access to Neighbouring Land Act 2000*¹ would also mean that the applicant would usually have to pay the landowner's legal costs, although the discretion would remain to make an order for costs considered appropriate in the circumstances.

Compensation may be sought by the neighbouring owner after the date that the access order is made, but must not be sought more than three years after the date on which the last access under the order occurred.

Appeals against a Local Court's decision to grant or refuse an access order may be made to the Land and Environment Court within 30 days of the decision. An appeal may only be made on a question of law.

ENTRY OF ANIMALS

An animal can only be left on another person's property with the consent of the owner. If permission is withdrawn, the animal must be removed immediately, or the owner of the animal can be sued for trespass.

If an animal is trespassing on land, the owner of the land can impound it and keep it for collection for up to four days. If it is not collected in that time, it must be taken to the council pound.

Within 24 hours, the land owner must ensure that there is food, water and shelter for the animal, and advise the animal's owner if possible.

ENTRY OF WATER

If water is naturally flowing from one parcel of land onto another because of the lie of the land, there is no legal issue. Drainage easements are often granted when land is subdivided so that waste water may flow over another's lane (or under it, in pipes) without causing difficulties. If, however, a flow of water is directly or indirectly caused by a neighbour's activities and damage occurs, then an occupier may have a right to take legal action for compensation.

If the act is deliberate (for example, a neighbour deliberately directing a hose onto the land), the flow of water is a trespass. If it is an ongoing activity then the flow could constitute nuisance (for example, a leaking drainpipe). If the flow is a result of a neighbour's carelessness, then there may be a case of negligence (for example, a careless construction of a drainpipe). In rural areas, there may be a particular problem if neighbours share a stream or river or other waterway.

Activities which pollute a waterway should be reported to the Department of Environment & Climate Change NSW (Environment Protection Authority). Call 131 555 (in NSW, except from mobile phones) or (02) 9995 5555.

CREATING AN EASEMENT

An easement is a legal right to utilise other land of different ownership in a particular manner or to prevent the owner of the other land from utilising his land in a particular manner. The right is annexed to the land, meaning that if the owner sells the land, the next owner will also enjoy the right. Examples of easements are:

- a right of way (for either pedestrians or vehicles)
- a right to drain water
- a right to have access over another person's land for the purpose of erecting a building

An easement is exercised over land (the 'servient tenement') for the benefit of other land (the 'dominant tenement'). An easement does not give the owner of the easement the right to improve or modify the servient land.

Application to the Supreme Court

A person may apply to the Supreme Court for an order creating an easement over another person's land if it is 'reasonably necessary for the effective use or development' of the land (*Conveyancing Act 1919* (NSW), section 88K). Compensation is normally required, as is payment of the other person's legal costs.

Application in the Land and Environment Court

A person may apply for an easement under the *Land and Environment Court Act 1979* (section 40) where the court has issued a development consent and:

- the easement is reasonably necessary for the development to have effect in accordance with the consent, and
- use of the land having the benefit of the easement will not be inconsistent with the public interest, and
- the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
- all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

1. See the Dividing Fences and Other Legislation Amendment Bill 2008, introduced on 11 April 2008, available at www.legislation.nsw.gov.au