

# NORTHERN TERRITORY OF AUSTRALIA

## ENCROACHMENT OF BUILDINGS ACT

As in force at 12 April 2000

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# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 12 April 2000

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## ENCROACHMENT OF BUILDINGS ACT

An Act to provide for relief in respect of encroachments and improvements made under mistake of title

### Part I Preliminary

#### 1 Short title

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

#### 2 Commencement

This Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*.

#### 3 Interpretation

In this Act, unless the contrary intention appears:

**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 Supreme Court.

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

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

**local authority** means a municipal council or community government council within the meaning of the *Local Government Act*.

**owner** means:

- (a) a registered proprietor under the *Real Property Act*;
- (b) a mortgagee in possession of land under a mortgage registered under the *Real Property Act* of a freehold estate;
- (c) where the land is held by the Crown in right of the Territory, or forms part of a road as defined in the *Control of Roads Act*, the Territory; or
- (d) where land is held by the Crown in right of the Commonwealth, the Commonwealth.

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

**unimproved capital value**, in relation to land, means the unimproved capital value of that land ascertained in accordance with section 9 of the *Valuation of Land Act*.

#### **4 Application to Crown**

This Act binds the Crown in the right of the Territory and, so far as the legislative power of the Legislative Assembly permits, the Crown in right of the Commonwealth.

## **Part II Encroachment of buildings**

### **5 Application for relief in respect of encroachments**

- (1) Either an adjacent owner or an encroaching owner may apply to the Court for relief under this Part in respect of an encroachment.
- (2) This section applies to an encroachment whether made before or after the commencement of this Act.

### **6 Powers of Court on application for relief**

- (1) On an application under section 5, the Court may make such order as it thinks fit 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 him of any estate or interest therein or of an easement, right, or privilege in relation thereto; or

- (c) the removal of the encroachment.
- (2) The Court may grant or refuse the relief or any part thereof as it thinks fit and in the exercise of this discretion may consider amongst other matters:
- (a) whether the application is made by the adjacent owner or by the encroaching owner;
  - (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 he were required to remove the encroachment; and
  - (f) the circumstances in which the encroachment was made.

## **7 Compensation**

- (1) The minimum compensation to be paid to the adjacent owner in respect of a conveyance, transfer, lease or grant under section 6 to the encroaching owner shall be:
- (a) if the encroaching owner satisfies the Court that the encroachment was not intentional and did not arise from negligence, the unimproved capital value of the subject land; and
  - (b) in any other case, 3 times the unimproved capital value of the subject land.
- (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 order proposed to be made in favour of the encroaching owner; and
  - (c) the circumstances in which the encroachment was made.

**8 Charge on land**

- (1) An order under section 6 for payment of compensation may be lodged with the Registrar-General, and upon receipt by the Registrar-General of the order, it shall:
- (a) except so far as the Court otherwise directs, operate as a charge on the land of the encroaching owner and have priority over any charge created by him or his predecessor in title; and
  - (b) be deemed to be a caveat lodged under section 191 of the *Real Property Act*.
- (2) In this section ***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 specifies in the order.

**9 Determination by Court**

The Court may determine:

- (a) in appropriate cases, and in particular where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances:
  - (i) by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately; and
  - (ii) to whom, for whose benefit and upon what limitations the conveyance, transfer or lease of the subject land or grant of a type referred to in section 6(1)(b) in respect of the subject land is to be made; and
- (b) in appropriate cases and in particular where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances:
  - (i) to whom, for whose benefit, and in what proportions the compensation is to be paid or applied; and
  - (ii) by whom the conveyance, transfer or lease of the subject land or grant of a type referred to in section 6(1)(b) in respect of the subject land is to be made.

**10 Vesting order**

Where the Court may make or has made an order under this Part with respect to subject land, it may make such vesting order as it thinks fit in place of, in addition to, or in default of compliance with, that order.

**11 Boundaries**

- (1) Where any question arises as to whether an existing building encroaches or a proposed building will encroach beyond a boundary, either of the owners of the contiguous parcels of land may apply to the Court for the determination under this section of the true boundary.
- (2) On an application under subsection (1) the Court may make such orders as it thinks fit for determining, marking, and recording the true boundary.
- (3) This section applies to buildings erected either before or after the commencement of this Act.

**12 Persons interested**

In an application under this Part the Court may require:

- (a) notice of the application to be given to any person who is, or appears to be, interested; or
- (b) that a person who is, or appears to be, interested be made a party to the application.

**Part III Buildings erected under mistake of title****13 Relief in case of buildings erected under mistake**

Where a person erects a building on land owned by another in the genuine but mistaken belief that:

- (a) such land is his property; or
- (b) such land is the property of a person on whose behalf the building is erected or intended to be erected,

application may be made to the Court for relief under this Part.

**14 Nature of relief**

- (1) If, in the opinion of the Court, relief should be granted to the applicant or to any other person, it may make an order:
- (a) vesting in a person or persons specified in the order the whole or any part of the land on which the building or any part thereof has been erected either with or without any surrounding or contiguous or other land;
  - (b) that a person or persons specified in the order shall or may remove the building or any part thereof from the land or any part of it;
  - (c) that a person or persons specified in the order pay compensation in respect of:
    - (i) any land or part thereof;
    - (ii) any building or part thereof; or
    - (iii) any damage or diminution in value caused or likely to be caused by or to result from the erection of a building or the making of an order under this Part;
  - (d) that a person or persons specified in the order have or give possession of the land or building or part thereof for such period and upon such terms and conditions as the Court specifies,
- or any combination of those things.
- (2) An order under this Part, and any provision of the order, may:
- (a) include or be made upon and subject to such terms and conditions as the Court thinks fit, whether as to payment by a person of an amount of money, including costs, or the execution by a person of a mortgage, lease, easement, contract or other instrument, or otherwise;
  - (b) declare that an estate or interest in the land or any part thereof on which the building has been erected to be free of any mortgage, lease, easement or other encumbrance, or may vary, to such extent as the Court thinks fit, a mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part thereof;



- (c) direct that any person or persons execute any instrument in registrable or other form necessary to give effect to the declaration or order of the Court;
- (d) order a person to produce to a person specified in the order a title deed or other instrument or document relating to any land; or
- (e) direct a survey to be made of any land and a plan of survey to be prepared.

## **15 Application for relief**

- (1) An application for relief under this Part may be made by:
  - (a) a person who made or who is for the time being in possession of a building referred to in section 13;
  - (b) the Territory or a person having an estate or interest in the land or any part thereof upon which such building has been erected;
  - (c) a person claiming to be a party to or to be entitled to a benefit under a mortgage, lease, easement, contract or other instrument relating to such land or building;
  - (d) the successor in title to, or mortgagee or lessee of, a person upon whose land the building or any part thereof was intended to be erected;
  - (e) the consent authority within the meaning of the *Planning Act* in relation to the land on which the building is situated; or
  - (f) the local authority within whose area the land or building or any part thereof is situated.
- (2) In an application under this Part the Court may require:
  - (a) that notice of the application be given to any of the persons referred to in subsection (1) and to any other person who is or appears to be interested in or likely to be affected by an order made under this Part; and
  - (b) that any such person be made a party to the application.

**Part IV                    General****16                    Exercise of powers by court in other proceedings, &c.**

- (1) In any proceeding before the Court, however originated, the Court may, if it thinks fit, exercise any of the powers conferred by this Act, and may stay the proceeding on such terms as it thinks fit.
- (2) Where an action or proceeding is taken or is about to be taken at law by a person, and the Court is of the opinion that the matter could more conveniently be dealt with by an application under this Act, the Court may grant an injunction, on such terms as it thinks fit, restraining the person from taking or continuing the action or proceeding at law.
- (3) In an action or proceeding at law a Judge may, if he is of the opinion that the matter could more conveniently be dealt with by an application under this Act, stay the action or proceeding on such terms as he thinks fit.

**17                    Costs**

In an application under this Act the Court may make such order as to payment of costs, charges and expenses as it thinks fit and may take into consideration any offer of settlement made by either party.

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**ENDNOTES**
**1****KEY**

Key to abbreviations

**amd = amended**  
**app = appendix**  
**bl = by-law**  
**ch = Chapter**  
**cl = clause**  
**div = Division**  
**exp = expires/expired**  
**f = forms**  
**Gaz = Gazette**  
**hdg = heading**  
**ins = inserted**  
**lt = long title**  
**nc = not commenced**

**od = order**  
**om = omitted**  
**pt = Part**  
**r = regulation/rule**  
**rem = remainder**  
**renum = renumbered**  
**rep = repealed**  
**s = section**  
**sch = Schedule**  
**sdiv = Subdivision**  
**SL = Subordinate Legislation**  
**sub = substituted**

**2****LIST OF LEGISLATION*****Encroachment of Buildings Act 1982 (Act No. 66, 1982)***

Assent date           8 October 1982  
 Commenced           10 December 1992 (*Gaz* G49, 10 December 1982, p 5)

***Statute Law Revision Act 1989 (Act No. 60, 1989)***

Assent date           2 October 1989  
 Commenced           2 October 1989

***Local Government (Consequential Amendments) Act 1993 (Act No. 84, 1993)***

Assent date           13 December 1993  
 Commenced           1 June 1994 (s 2, s 2 *Local Government Act 1993* (Act No. 83, 1993) and *Gaz* S35, 20 May 1994)

***Planning (Consequential Amendments) Act 1999 (Act No. 56, 1999)***

Assent date           14 December 1999  
 Commenced           12 April 2000 (s 2, s 2 *Planning Act 1999* (Act No. 55, 1999) and *Gaz* S15, 12 April 2000)

**3****LIST OF AMENDMENTS**

s 3                   amd No. 60, 1989, s 6; No. 84, 1993, s 6  
 s 8                   amd No. 60, 1989, s 6  
 s 15                  amd No. 56, 1999, s 3