

Access to neighbouring land

If you own a house that is built right up against, or very close to the boundary between your property and your neighbour's property, then in order to properly repair or maintain your house you may need to enter your neighbour's land. For example if you want to repair the side of the house that is built close to or along the boundary you will need to carry out the repairs from your neighbour's land.

However, the law states that you cannot enter your neighbour's land without your neighbour's consent.

To do so would constitute a trespass. Also a court has no power to order your neighbour to allow you onto the land. As a result, you may not be able to properly maintain or repair your house or even comply with a council order that you carry out repairs.

To overcome these problems and to provide a solution, the *Access to Neighbouring Land Act 2000* (NSW) (Act) was introduced.

How does the Act help me?

The Act entitles a person to make application to a local court for an order enabling that person to enter neighbouring land. There are two types of orders that may be applied for.

1. 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 will normally be the owner of the land, but may also be an occupier of that land, applying with the consent of the owner. This ensures that people such as tenants and other occupiers of a property are able to make applications where necessary.

However a court will have discretion to waive the requirement for the owner's consent if the owner's consent has been unreasonably withheld, the owner cannot be located or for other similar reasons.

2. Utility service access order

A utility service access order enables a person who uses a utility service 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 neighbouring property and becomes blocked at some point of the line on that property, then the access order allows entry onto the property in order to fix the blockage.

Other utility services that the order can apply to are drainage, water, gas, electricity or telephone services. In the future it may become necessary to add other services by regulation.

Who can apply for a utility service access order?

The applicant can be anyone that is entitled to use the utility service. This means the applicant doesn't have to be the owner of the land or even have the consent of the owner of the land.

What notice must be given for an access order?

In both cases, the applicant must give at least 21 days notice of their intention to lodge an application. The notice must include the terms of the order sought.

The notice must be served on the owner of the land to which the access order is sought, any person entitled to use a utility service on which work is proposed and any other person who the applicant believes will be affected by the order.

This ensures that occupiers of the adjoining land will be given notice of the application and that where a utility service serves several properties (such as often occurs with sewer lines for a row of terrace houses), all the other users of the service will also receive notice.

In many cases the service of a notice of intention to commence an application may be a catalyst for the parties to be able to resolve the dispute themselves and the intended application may not need to be actually lodged.

What land cannot be the subject of an application?

An application for an access order cannot be made in respect of land that has been reserved or dedicated under Part 4 of the *National Parks and Wildlife Act 1974* (NSW) i.e. national parks, historic sites, state conservation areas, regional parks, nature reserves, karst conservation reserves, Aboriginal areas and land declared as an Aboriginal place.

Which court has jurisdiction?

The local court is empowered to determine applications for access orders.

What preliminary steps must be taken?

A court will not make an access order unless it is satisfied that the applicant has first made a reasonable effort to reach agreement with the applicant's neighbour for the access sought. This ensures that only genuine disputes are brought before the court.

What criteria does the court consider?

In reaching a decision the court considers two main issues:

1. Whether the proposed work cannot be carried out or would be substantially more difficult or expensive to carry out without access to the neighbouring land.
2. Whether granting the proposed access would cause unreasonable hardship to the neighbour affected by the order.

Unless a court is satisfied about these two issues the application will not be granted.

Can conditions be imposed?

Yes, if a court decides to make an order for access it can impose whatever conditions it decides are reasonably necessary in the circumstances. Conditions that could be imposed are, but not limited to, conditions for the purpose of avoiding or minimising loss or damage to the neighbour or any other person, land or property; for the purpose of avoiding or minimising inconvenience or loss of privacy to the neighbour or any other person; specifying precautions and safeguards; and requiring the taking out of insurance by the applicant against risk.

An access order must specify the date from which access is permitted and the date when access ceases to be permitted and if relevant, the time during which access is permitted.

Are there any other safeguards?

Yes, the Act contains safeguards for the property affected by the access order. It provides that a person granted an access order to neighbouring land is required to restore the neighbouring land to the same condition as it was in before the permitted work was carried out and indemnifies the neighbouring owner against any damage which might arise as a result of the access.

What about consent authority approval?

The granting of an access order to do work does not mean that any consent by a consent authority that would normally be required for the work does not apply.

If consent authority approval is needed for the particular type of work for which access has been granted then that approval must still be obtained. Similarly, if any work or activity is prohibited by another law then nothing in the Act operates to negate that prohibition.

Can an order be varied or revoked?

Yes, an access order can be varied or revoked by a local court on application by the applicant or by any other person affected by the order. This ensures that any matters that arise after the order is made can be acted upon by reviewing the order where necessary.

Can compensation be ordered?

Yes. One of the most important provisions of the Act is that it authorises the court to 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.

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

Compensation is not payable for loss of privacy or inconvenience suffered by the owner as a result of the access order.

Can costs be awarded?

Yes, the court can make an order as to costs although the costs of an access order are usually payable by the applicant unless the court makes an order to the contrary. When making a contrary order, the court may consider the attempts made by the parties to reach agreement before the proceedings and whether the refusal to grant the desired access was reasonable.

When must an application be transferred to the Land and Environment Court?

In three situations as stated below.

1. If the amount of compensation or damages involved in a matter is likely to exceed the amount of the local court's monetary jurisdiction which is \$100,000.
2. If a question of law arises in a hearing. In this case the local court has the option of referring the question to the Land and Environment Court.
3. An appeal on a question of law from a decision of the local court. In this case the appeal must be made to the Land and Environment Court. The Land and Environment Court has expertise in deciding all issues concerning land and is the appropriate forum for such matters to be referred.

Are any other matters dealt with in the Act?

As well as access to neighbouring land problems, the Act also provides for apportioning costs of repair and maintenance of shared utility services. For example, there are many households that share the use of a sewer line or a water pipe. When a blockage occurs in the line or pipe there is usually confusion as to who is liable to pay for the cost of fixing the problem. Is it all the households that share the service or only the household on whose land the blockage has occurred, or is it some other combination?

In order to resolve the confusion the Act provides that each user of a shared utility service be equally responsible for the costs of its maintenance and repair. However, where the need for maintenance or repair is caused by the deliberate act of one of the users then liability will rest with that user alone.

Has Native Title been considered?

As this Act deals with land it is necessary to also make provision for those parcels of land where native title might exist.

When any such parcel is the subject of an access application, the Act provides for the giving of notice of the application to the relevant native title body corporate or native title claimant. It also provides that in respect of a parcel of land where there is an approved determination that native title exists, a registered native title body corporate has the same rights and responsibilities under the Act as any other owner of land.

Who uses this Act?

This Act is mainly used by neighbours in residential situations but can also be used in relation to commercial, industrial, or rural property and may be utilised to solve commercial disputes as well as neighbourhood problems.

Where can I get a copy of the Act?

All NSW legislation can be viewed and downloaded at www.legislation.nsw.gov.au a service provided by the NSW Parliamentary Counsel's Office.

Legislation can also be viewed and downloaded at <http://www.austlii.edu.au> the site of the Australasian Legal Information Institute (AustLII) which provides free access to Australian legal materials.

More information

For further information on access to neighbouring land please contact your local court. The contact details of your local court can be found at <http://www.service.nsw.gov.au/nswgovdirectory/local-courts>

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