

South Australia

## Encroachments Act 1944

An Act to provide for the adjustment of boundaries where buildings or walls encroach on adjoining land; to facilitate the determination of boundaries; and for purposes connected therewith.

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### Legislative history

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#### The Parliament of South Australia enacts as follows:

##### 1—Short title

This Act may be cited as the *Encroachments Act 1944*.

##### 2—Interpretation

In this Act, unless the context otherwise requires or some other meaning is clearly intended—

*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 a court which has jurisdiction in the particular matter;

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

*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;

**owner** means any person entitled to an estate of freehold in possession—

- (a) whether in fee simple or for life or otherwise;
- (b) whether at law or in equity;
- (c) whether absolutely or by way of mortgage;

and includes a mortgagee under a registered mortgage of a freehold estate in possession in land under the *Real Property Act 1886*;

**subject land** means that part of the land of the adjacent owner over which an encroachment extends;

**the Land and Valuation Court** means the Land and Valuation Court constituted under the *Supreme Court Act 1935*.

### **3—Jurisdiction**

The jurisdiction with which a court is invested under and pursuant to this Act (excepting section 11 of this Act) shall be exercised by the Land and Valuation Court.

### **4—Application to court in respect of encroachments**

- (1) Either an adjacent owner or an encroaching owner may apply to the court for relief under this Act in respect of any encroachment.
- (2) On the application the court may make such orders as it deems just 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 any easement, right, or privilege in relation thereto;
  - (c) the removal of the encroachment.
- (3) The court may grant or refuse the relief or any part thereof as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider amongst other matters—
  - (a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be;
  - (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;
  - (f) the circumstances in which the encroachment was made.
- (4) This section applies to encroachments made either before or after the commencement of this Act.

## **5—Compensation**

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

## **6—Charge on land**

- (1) The order for payment of compensation may be registered in the Lands Titles Office or the General Registry Office in such manner as the Registrar-General determines, and shall, except so far as the court otherwise directs, upon registration operate as a charge upon the land of the encroaching owner and shall have the same priority as if it were a mortgage registered at the time when the order is registered.
- (2) In this section the 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.

## **7—Encroaching owner—compensation and conveyance**

Wherever the court sees fit, and in particular where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court may determine—

- (a) by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately;
- (b) to whom, for whose benefit, and upon what limitations the conveyance, transfer or lease of the subject land or grant in respect thereof is to be made.

## **8—Adjacent owner—compensation and conveyance**

Wherever the court sees fit, and in particular where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court may determine—

- (a) to whom, for whose benefit, and in what proportions the compensation is to be paid or applied; and
- (b) by whom the conveyance, transfer or lease of the subject land or grant in respect thereof is to be made.

## **9—Vesting order**

Wherever the court may make or has made an order under this Act with respect to the subject land, the court may make such vesting order as it deems proper in lieu thereof or in addition thereto, or in default of compliance therewith.

## **10—Boundaries**

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

## **11—Suit, action, or other proceeding**

- (1) In any proceeding before a court, however originated, the court may, if it sees fit, exercise any of the powers conferred by this Act, and may stay the proceeding on such terms as it deems proper.
- (2) Where any proceeding is taken or is about to be taken by any person, and the court in which the proceeding is taken or is about to be taken, or the Supreme Court, is of 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 may deem proper, restraining the person from taking or continuing the proceedings.
- (3) In any proceeding the court may, if it is of opinion that the matter could more conveniently be dealt with by an application under this Act, stay the action on such terms as it deems proper.

## **12—Persons interested**

In any application under this Act the court may require—

- (a) that notice of the application shall be given to any person interested;
- (b) that any person interested shall be made a party to the application.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1944	24	<i>Encroachments Act 1944</i>	14.12.1944	14.12.1944
1969	53	<i>Encroachments Act Amendment Act 1969</i>	4.12.1969	21.5.1970 ( <i>Gazette 21.5.1970 p1842</i> )
2019	45	<i>Supreme Court (Court of Appeal) Amendment Act 2019</i>	19.12.2019	Sch 1 (cll 42 & 43)—1.1.2021 ( <i>Gazette 10.12.2020 p5638</i> )