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University of Southern Queensland  
FACULTY OF ENGINEERING AND SURVEYING

**Own Mechanism for solving disputes over retaining  
walls near property boundaries**

A Dissertation Submitted By:

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## Abstract

Retaining walls can be an important and sometimes a necessary construction in subdivisions for maximising land use and dividing allotments both vertically and horizontally. When ownership of a retaining wall erected near a property boundary is unknown it can cause disputes to arise over which property owner should bear the burden of responsibility. There is minimal legislation available in Australia which relates to retaining walls on or near property boundaries and since most States do not consider a retaining wall to be a fence, it therefore cannot be covered by dividing fence legislation.

The aim of this research is to conduct a review of the current Australian legislation relating to retaining walls and to create a mechanism which outlines possible solutions for overcoming disputes which may arise over retaining walls near property boundaries.

Comparing and contrasting Australian legislation confirms that there is minimal information which can be used to create the own mechanism and therefore general land law, common land law, case law and legislation outside of Australia is also investigated. The key to understanding the current Australian legislation can be clearly seen from the outcomes of specific case studies and the observations derived from them.

Results showed that if the ownership of a retaining wall is not known, the purpose of the retaining wall and who benefits from the retaining wall should then be considered. The own mechanism takes into account the answers to these two questions and produces possible solutions which aim to determine the ownership and responsibility of a retaining wall which is on or near a property boundary with the desired outcome being to overcome neighbouring disputes. The own mechanism is designed to produce possible outcomes without changing the current Australian legislation.

It may not be possible to create solutions in which everybody is satisfied, however, procedures have been identified which work well within the current legislation and may minimise disputes which arise over retaining walls.

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I further certify that the work is original and has not been previously submitted for assessment in any other course or institution, except where specifically stated.

Craig Ross Hancock

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Signature

18/10/2015

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Date

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## Glossary of Terms

<b>Term</b>	<b>Meaning</b>
<b>Appellant</b>	A person who appeals to a high court from a decision of a lower court.
<b>Case Law</b>	Law that is established by the outcome of previous cases.
<b>Common Law</b>	A set of laws and principles that are developed by judge's decision over time and is independent of any legislation.
<b>Covenant</b>	An agreement between parties that something will be done (positive) or not done (restrictive).
<b>Defendant</b>	A party sued or accused in a court of law.
<b>Duty of Care</b>	An obligation requiring reasonable care to be taken while performing any act with potential foreseeable damage.
<b>Easement</b>	Allows a person to use or restrict the use of another person's land.
<b>Encroachment</b>	An intrusion of a building or structure overhanging or upon the soil of another

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	person's land.
<b>Lease</b>	A contract allowing the use or occupation of all or some of a property for a certain period of time for a payment.
<b>Negligence</b>	A breach of a duty of care that has caused damage.
<b>Nuisance</b>	An annoyance or inconvenience.
<b>Plaintiff</b>	A person or party who initiates a lawsuit against another in a court of law.
<b>Profit a Prendre</b>	The right to take the natural produce or soil from another person's property.
<b>Retaining Wall</b>	A wall designed to hold back and support land and water.
<b>Secondary Interests</b>	Benefits or restriction that effect the main interest being the whole of the land parcels.
<b>Subdivision</b>	The process of dividing an allotment of land into additional allotments.
<b>Trespass</b>	When a person interferes with another person's property.

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# Chapter 1

## INTRODUCTION

### **1.1 Project Aim**

To investigate the current legislation relating to retaining walls which are on or near common property boundaries in each State of Australia and provide a practical mechanism for overcoming disputes arising between owners over retaining wall rights and responsibilities to be applied nationally.

### **1.2 Background Information**

With Australia's rising population growth comes the need for continual housing developments. Australia's current population is about 23.5 million with a growth between 2013 and 2014 of 364,900. 289,000 of those people consisting in the greater capital cities, making the national growth rate 1.6%. Residential subdivisions are a popular development strategy as they provide housing for Australia's growing population and can potentially return a high profit to the developers providing economic growth. Issues such as a competitive property market and affordable housing are becoming more important in each State.

Retaining walls can be an important and sometimes a necessary development in subdivisions to maximise the number of allotment areas where the land has a considerable natural slope. As a consequence developments are erecting retaining walls during the development stage of the subdivision and building them on the proposed boundaries. This generally allows for the centre or the face of a retaining wall to be on the new subdivision boundary and can create easements over retaining walls with a dominant and servient tenement or in some cases where retaining walls abut council land, the boundaries can be

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created around the walls so that they remain fully on the crown land. These processes allow retaining walls to be used in a way which doesn't compromise the right of property owners.

In situations where retaining walls are built during or closely after a subdivision or where the origin of a retaining wall is unknown, the walls can be considered as a pre-existing retaining wall. This can make ownership of retaining walls unclear. The question then arises, who is responsible for maintaining the structural integrity and maintenance of the walls?

Since ownership is unclear in most cases of pre-existing retaining walls, disputes can arise which become either unresolved or taken to Court to decide an outcome. This can become dangerous and unnecessarily burdensome to property owners or can be an expensive legal undertaking. A property owner's rights, responsibilities and restrictions can also come into questions when considering the ownership and responsibilities of a common boundary retaining wall.

All property owners have right related to the ownership of their land.

*“Property rights legally involve a mixture of rights, obligations and duties...Pollock (1929) refers to this as a ‘systematic expression of the degrees and forms of control, use, and enjoyment, that are recognised and protected by law’. The rights include the right to possess, the right to manage, the right to receive income from and the right be secure from interference from others, as well as the right to transfer to a chosen successor (Chambers 2001). Duties include the duty to prevent harm and the liability of having the property expropriated by the government or to pay debts” (Toner 2006)*

Staley (2006) defines two most fundamental aspects of property rights as being:

1. Possession or control of the resources available from property; and
2. Title which is the expectation that others will recognise rights to control a resource, even when it is not in possession.

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Retaining walls can be considered a beneficial resource to property owners land in several ways. Retaining walls can serve to act as a way of separating land both vertically and horizontally and can provide privacy and security. Retaining walls can provide financial value to land by maximising views and providing usable areas for developing. Retaining walls may also be necessary to retain earth that could potentially be a future threat to infrastructure. Land in its nature state, however, does not need retaining.

When it comes to the issue of retaining wall disputes government legislation tends to have very little information available as retaining walls are generally not considered a fence. This makes retaining wall issues more complicated than general boundary fencing disputes, and outcomes are normally left to the decision of the Courts. There is a large amount of information about regulations when it comes to constructing a retaining wall but there has been no examination on pre-existing retaining walls on or near property boundaries and how this affects neighbouring owners when it comes to disputes over property rights and responsibilities. This report investigates the current legislation surrounding retaining walls and how it affects property owner's rights. In the process, this report will make suggestions for possible solutions for overcoming retaining wall disputes that may arise between neighbouring property owners over rights and responsibilities. This report will serve as a guide for further retaining wall resolution procedures.

### **1.3 Project Objectives**

- Research current legislation in each State of Australia that relates to land with retaining walls near property boundaries
- Research the implications that retaining walls have on freehold land in relation to rights and responsibilities.
- Research law cases involving retaining walls and legislation outside of Australia that is related to retaining walls.

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- Use this information to develop a methodology that will result in a mechanism of possible outcomes to overcome disputes involving retaining walls.

## **1.4 Project Scope**

To achieve the projects aim it is necessary to examine all Australian States legislation relating to retaining walls. Since we are interested in retaining wall issues such as the rights and responsibilities of the property owners, it will also be necessary to examine the general land rights, responsibilities and even restrictions in place for freehold property owners. This information will then be used to propose practical solutions for disputes arising over retaining wall issues. To exhaustively examine the possible solutions relating to retaining wall disputes on a National scale is far too large an undertaking for a yearlong project. This project, therefore, will seek to show how the law already relates to retaining walls through an examination of the relevant legislation, examine case studies relevant to the project and then create possible solutions that can be used as a mechanism to overcome disputes. This will allow for further research to be undertaken in examining these possibilities.

## **1.5 Justification**

The current Sates legislation does not adequately specify the property owners rights, restrictions and responsibilities placed upon them in relation to retaining walls existing near property boundaries. This creates a considerable amount of confusion and assumptions for property owners when issues arise surrounding retaining walls. By reviewing the current legislation, law case studies and property owner's rights, restrictions and responsibilities this report will aid in providing more information regarding retaining walls near property boundaries and help identify why this confusion is apparent. By creating a mechanism for solving retaining wall disputes it will help alleviate some of the freehold land



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owner's confusion on the matter and give solutions for overcoming retaining wall issues.

## **1.6 Chapter Summary**

This project aims to investigate legislation and case law to determine the ownership and responsibilities surrounding retaining walls near property boundaries. The information gathered will culminate in a mechanism which will outline possible solutions for overcoming retaining wall disputes.

Chapter 2 will contain a literature review of the current Australian legislation which will provide the necessary background information needed for this research.

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## Chapter 2

# LITERATURE REVIEW

### 2.1 Applications

There seems to be very little literature relating to retaining walls and their legal standings. New retaining walls erected in residential subdivisions will generally be strategically built on crown land or have easements created over them to clarify the dominant and servient tenement. For pre-existing retaining walls where ownership is not obvious this becomes harder to determine the rights and responsibilities placed upon freehold property owners. There is however many factors in the states legislations that can directly and indirectly affect the right, responsibilities and restrictions of a retaining wall on or near property boundaries by way of their legal nature.

Since the literature spreads over all the states of Australia the review needs to cover the objectives of a retaining wall and the nature of a retaining wall. These factors can then be considered when reviewing the legislation.

A retaining wall situated along or near property boundaries serves two objectives:

1. To hold back and provide support to the land, and
2. To serve as a structure that separates neighbouring allotments in a horizontal and vertical manner.

These two objectives allow, in some cases, for a lot to actually be built upon where there is a steep natural grade of the land.

These factors need to be taken into account when considering a retaining walls effect on property owner's right, responsibilities and restrictions.

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### 2.1.1 New South Wales

In New South Wales there is little literature relating to retaining wall boundary resolution and a case by case approach for overcoming disputes is mainly left up to the courts and legal system. There is however legislation that can be used to help form an approach to retaining wall disagreements. Firstly, New South Wales clearly states that a retaining wall is not to be considered as a fence. In the *Dividing Fences Act 1991*, it states that a dividing fence “means a fence separating the land of adjoining owners”, as mentioned earlier, one of the objectives of a retaining wall is to separate neighbouring allotments, therefore the definition of the word ‘fence’ will become important. The Act continues to state that:

*“A fence...can include: ...any foundation or support necessary for the support and maintenance of the fence, but does not include a retaining wall...or wall which is part of a house, garage or other building.*

The laws that pertain to fences cannot be applied to retaining walls that are near or along the boundary and do not even apply when a fence is built on top of a retaining wall. The fence and the retaining wall fall under different laws. This is made clearer in Section 26 of the Act, which states that nothing in this Act affects retaining walls:

*“Nothing in this Act affects:...any law relating to retaining walls, easements of support or other rights of support in relation to land,”*  
*(Dividing Fences Act 1991 No 72 Part 4)*

This principle is applied in the case *Mary L Walsh v R Tomsic [2014] NSWCATCD 118* where the applicant wanted to seek contribution for a new retaining wall which was on the property boundary under Section 14 of the *Dividing Fences Act 1991*. The application was dismissed as the court was limited to ordering compensation only for fencing work that related to the immediate support of a fence and not the entire retaining wall.

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Since a retaining wall is not a fence, it is therefore a structure that can be considered an encroachment. In the New South Wales *Encroachment of Buildings Act 1922* we see that an encroachment means “encroachment by a building” with a wall falling under the same meaning as a building:

*“Building means a substantial building of permanent character and includes a wall” (Encroachment of Building Act 1922 Section 2)*

If the wall is deemed an encroachment then certain application by the Courts may take place including but not limited to the removal of the encroachment.

New South Wales also has a Law of Supports as part of *Conveyancing Act 1919* in which it states that a person has a duty of care not to do anything to the supporting land that could affect the supported land by removing supports provided. The Act mentions a duty of care in relation to buildings and structures:

*“The duty of care in relation to support for land does not extend to any support that is provided by a building or structure on the supported land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaimed state formerly provided to the supporting land.” (Schedule 1 Amendment of Conveyancing Act 1919 Section 177 part 4)*

This section allows a person to act against someone who has breached a duty of care for damages which are caused by the removal or any natural support or structures that have replaced the natural support.

### **2.1.2 Queensland**

Queensland has legislation in place for neighbouring disputes in the Neighbourhood Disputes (*Dividing Fences and Trees Act 2011*), its objective is:

1. To provide rules about each neighbour’s responsibility for dividing fences and for trees so that neighbours are generally able to resolve issues about fences or trees without a dispute arising; and

- 
2. To facilitate the resolution of any disputes about dividing fences or trees that do arise between neighbours.

However, in Section 10 of Part 1 under no effect on agreements or particular law, it states:

1. *This chapter does not affect-*
  - a. *A covenant or agreement, other than an agreement under this chapter, made between adjoining owners about a dividing fence before or after the commencement of this section; or*
  - b. *A by-law under the Body Corporate and Community Management Act 1997 or the Building Units and Group Titles Act 1980 about a dividing fence; or*
  - c. *A law about retaining walls or rights of support including easements of support.*

It goes on to say in section 11 that “a fence is not- a) a retaining wall or b) a wall that is part of a house, garage or other building.” Division 3, therefore, on resolving disputes does not apply to retaining walls.

The *Land Titles Act 1994* Part 6 Division 5 makes mention of walls when referring to its definition of encroachments. In Section 98 under Application by adverse possessor it states that encroachment means:

- a) *An encroachment within the meaning of the Property Law Act 1974, part 11, division 1; or*
- b) *The enclosure of a part of a lot with another lot if-*
  - a. *The enclosure is established by the use of a wall, fence, hedge, ditch, garden bed or other way of marking the boundary between the lots; and*
  - b. *The wall, fence, hedge, ditch, garden bed or other way of marking the boundary is not the true boundary between the lots as shown on a registered plan of subdivision.*

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It is important to note the statement above when it makes mention to a wall marking the boundary which is not the true boundary between the lots can be considered an encroachment.

In Part 6A Community Titles Schemes Division 5 – Statutory Easements Section 115N addresses the related legislation of easements for support. It details:

1. *An easement of lateral or subjacent support exists-*
  - a. *In favour of a lot against another lot capable of supplying lateral or subjacent support; and*
  - b. *In favour of a lot against common property capable of supplying lateral or subjacent support; and*
  - c. *In favour of common property against a lot capable of supplying lateral or subjacent support; and*
  - d. *In favour of common property against other common property capable of supplying lateral or subjacent support.*

It also states that:

4. *An easement for support under subsection (1) –*
  - a. *Entitles the owner of a lot (lot x) to enter a lot or common property supplying support to lot X under the easement to maintain or replace any support; and*
  - b. *Entitles the body corporate to enter a lot or common property supplying support to common property under the easement to maintain or replace any support.*
5. *An easement for support under subsection (1) subsists until the scheme no longer exists.*

Section 115S, in this division it refers to the maintenance of buildings close to the boundary:

1. *If a building is on the boundary of a lot (lot A) or so close to the boundary of lot A that maintenance or replacement of the building is not able to be carried out without entering another lot (lot B) or*

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*common property, an easement exists in favour of lot A and against lot B or the common property.*

- 2. The easement entitles the owner of lot A to enter lot B or common property to carry out the maintenance or replacement.*

Section 179 of the *Property Law Act 1974* details the right to support of land and buildings which states:

*For the benefit of all interests in other land which may be adversely affected by any breach of this section, there shall be attached to any land an obligation not to do anything on or below it that will withdraw support from any other land or from any building, structure or erection that has been placed on or below it.*

A retaining wall can apply to this section because it has been previously stated that a retaining wall is considered a building, structure or erection. This is further confirmed in Part 11 detailing encroachments and mistakes in Section 182 when it defines building as meaning a substantial building of a permanent character, and includes a wall.

### **2.1.3 South Australia**

Similar to New South Wales and Queensland, a retaining wall can be used as a footing for a fence but the wall itself is not considered to be a fence and is covered by different laws. Specifically the law in South Australia relating to retaining walls is found under the common law of nuisance as well as the *Development Act 1993* and *Development Regulations 2008*. When it comes to the common law of nuisance, it is up to the courts to decide what is deemed a substantial and unreasonable and this will often depend on the nature of the local council area.

Under the *Development Act 1993* there is a lot written concerning the construction of a party wall and the types of easements require after construction, however previously in the Act it states:

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*Party wall means a wall built to separate two or more buildings or a wall forming part of a building and built on the dividing line between adjoining premises for their common use and includes a common wall for the purposes of the Building Code of Australia.*

Therefore, in South Australia (as in New South Wales and other states) the term, party wall, does not cover retaining walls. Under the same act we find that a wall is defined as a structure and is not to be considered a building:

*Building means a building or structure or a portion of a building or structure (including any fixtures or fittings which are subject to the provisions of the Building Code of Australia), whether temporary or permanent, moveable or immovable, and includes a boat or pontoon permanently moored or fixed to land, or a caravan permanently fixed to land.*

The *Development Regulations 2008* states that a “Relevant wall or structure means any wall or structure that is due to development that has occurred, or is proposed to occur, on the relevant allotment but does not include any fence or retaining wall between the relevant allotment and an adjoining allotment.” Under Schedule 3 in this Act, retaining walls which retain a difference in ground levels which do not exceed 1 metre are excluded from the definition of development.

Based on this, it has been determined that each land owner is responsible for the land that they, or the previous owner, have altered from the land in its natural state. Easements for supports exist much like Queensland and New South Wales and duty of care are placed on each property owner under the law of nuisance.

Disputes over responsibilities to build, damages, repairs and costs of the retaining walls are to be dealt with in the courts because they are neighbourhood disputes arising under the common law of nuisance. The local councils roles are simply to consider development applications and ensure specifications are to appropriate standards.



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Unlike the *Development Act 1993* and *Development Regulations 2008* the *Encroachments Act 1944* definitions of building means “a substantial building of permanent character and includes a wall”. Therefore, retaining walls come under this Act and can be considered an encroachment. Cases such as *Hogarth v Karp and Anor [2013] SASC 159* show the power of the courts in ordering the removal of an encroaching retaining wall and the construction of a new retaining wall.

#### **2.1.4 Victoria**

Victoria has specific regulations when it comes to walls on boundaries. In the *Building Regulations 2006*, Part 4, Division 2, Section 415 it states:

- (1) *This regulation applies to the construction of-*
  - a. *A wall on or within 150mm of a side or rear boundary of an allotment; or*
  - b. *A carport constructed on or within 1m of a side or rear boundary of an allotment and which is open on the side facing the boundary or boundaries*
- (2) *The length of the wall, or of the carport, or of the wall and carport or that length combined with the length of any existing wall or carport, must not exceed the greater of the following lengths –*
  - a. *10m plus 25% of the remaining length of the boundary of an adjoining allotment; or*
  - b. *The length of any existing wall or carport constructed on an adjoining allotment which is within 150mm of the boundary of that allotment if the proposed construction abuts the existing wall or carport*
- (3) *The wall or carport must not exceed*
  - a. *An average height of 3m; and*
  - b. *A maximum height of 3.6m*

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*(4) Despite sub-regulation (3), if a wall or carport abuts an existing wall or carport it may be constructed to the same height as the wall or carport.*

*(5) The report and consent of the relevant council must be obtained to an application for a building permit in relation to a design that does not comply with this regulation.*

In Section 606 of the regulations under the heading 'retaining walls' says that the municipal building surveyor may require owners undertaking building works to provide retaining walls to maintain the stability of the soil if the allotment is adversely affected by excavation or filling. It is also stated in the regulations that retaining walls less than a metre in height do not need a building certificate.

In the *Fences Act 1968* it defines a dividing fence as a fence that:

- (a) Is located on the common boundary of adjoining lands (whether or not it is continuous or extends along the entire length of the adjoining lands); or*
- (b) Is not located on the common boundary of adjoining lands, but the purpose of which is to separate adjoining lands (whether or not it is continuous or extends along the entire length of the adjoining lands)*

It goes on to define what they mean by the word 'fence':

*Fence means a structure, ditch or embankment, or hedge or similar vegetative barrier, that encloses or bounds land, and-*

*(a) Includes the following-*

- i. Any gate, cattle grid or apparatus necessary for the operation of the fence;*
- ii. And foundation or support built solely for the support and maintenance of the fence;*

*(b) Does not include the following-*

- i. And retaining wall;*

- 
- ii. Any wall that is part of a house, garage or other building.*

Attention should be made to the statement in part (b) that says a fence does not include “any retaining wall”.

Resolving fencing disputes in Part 4, Section 30C, Sub-Section H of the Act states that “the Magistrates’ Court may make an order in relation to any other work to be carried out (including work for a retaining wall) that is necessary so that the fencing works and any subsidiary work agreed on by the parties or specified in the order can be carried out.” So even though a retaining wall is not considered a fence in Victoria it is still covered by the Courts if disputes arise over it.

### **2.1.5 Western Australia**

In the *Building Act 2011* it defines ‘incidental structure’ as a structure attached to or incidental to a building which includes a retaining wall. It goes on to say that a ‘boundary retaining wall’ means a retaining wall on, or close to either side of, a boundary of works land. Part 6, Division 2, Section 79 states that a person responsible for work must make sure that work does not affect the “structural, waterproofing, or noise insulation capacity...[of] a boundary retaining wall that protects land beyond the boundaries of the works land.” This is, unless the court orders an application that specified work may be done as outlined in Division 3, Section 86 of this Part. Division 4 talks about other boundary matters including walls. Section 88 talks about finishes of walls close to boundaries, however this section has does not provide any helpful literature.

In Part 6, Division 4, Section 89 it covers property owner’s obligations to maintain, repair encroachments, party walls and shared boundary retaining walls:

- (1) Unless otherwise agreed, each owner of land from which part of a building or incidental structure encroaches into, onto, or over,*

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*other land, is responsible for the costs of maintenance and repair of the encroaching part.*

*(2) Unless otherwise agreed, if a party wall or a boundary retaining wall that is wholly or partly on the boundary of land need maintenance or repair each owner of land on either side of the wall is liable to join in or contribute in equal proportions to the maintenance and repair of the wall.*

*(3) This section does not affect the operation of the Dividing Fences Act 1961 Part III*

The *Dividing Fences Act 1961* has no information regarding retaining walls; however there is some literature that may be worth considering in regards to fences. Part 1, Section 5 defines a dividing fence as “a fence that separates the lands of different owners whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary.” Part 2, Section 13 talks about neighbouring property owners paying half the amount of a new sufficient fence. Part 4, Section 21 states that every person engaged in construction or repairing a fence under this Act at all reasonable times during construction and repair may enter adjoining lands as is necessary or reasonable. It is Part 4, Section 24 that seems to be the most important bit of information in this Act which states that “a local government shall, when required by the Minister so to do, make a local law prescribing what constitutes a sufficient fence for the purpose of the definitions of sufficient fence in Section 5”.

In the *Property Law Act 1969* there is no mention of retaining wall, however when it talks about easements, encroachments and mistakes in Part XIII is states in Section 122, Subsection 7 that “For the purposes of this section building includes any structure...” and the previous 6 subsections proceed to explain the power of the Court to grant special relief in cases of encroachment. Whether a retaining wall is considered an encroachment will be up to the Court and the local council as specified in the *Dividing Fences Act 1961*.

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## 2.1.6 Australian Capital Territory, Northern Territory and Tasmania

The legislation in these states did not produce much relevant literature.

In the ACT the *Building Act 2004* in Part 2, Section 8, it makes mention that the definition of 'structure' includes a retaining wall but has no further information about a wall structure being built on or near property boundaries. In the *Common Boundaries Act 1981*, a basic fence means a fence that is erected between parcels of land, however, the basic rural fence and the basic urban fence descriptions do not include that of a retaining wall.

In the Northern Territory the *Encroachment of Buildings Act* talks about the powers of the Court on application for relief of encroachment, which includes payment, a transfer or lease on land and the removal of the encroachment. In this Act a wall is included in the definition of a building.

The *Fencing Act* similar to other States defines a fence as 'a structure of posts and board, palings, rails, galvanised iron, metal or wire or a wall, ditch or embankment or a combination of any of these, enclosing or bounding land and includes any foundation, foundation wall or support reasonably necessary for the support and maintenance of a building but does not include a wall which is part of a building.' It is important to note the use of the word 'wall' and the information about 'foundation' and 'support'

Tasmania did not reveal any information relevant to the literature review.

## 2.2 Knowledge Gaps and Research Significance

The analysis of the literature and the application of that literature have identified a number of knowledge gaps. Their relevance to this project is as follows:

1. A number of building acts layout regulations that only apply to the construction of new retaining walls. Not all regulations can be applied to pre-existing retaining walls.

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2. When it comes to declaring a retaining wall as an encroachment, the concept of an encroaching owner and an encroached upon owner becomes irrelevant to pre-existing retaining walls when ownership rights are not clear.
  3. The common law understanding of the right to support land is also irrelevant when it comes to pre-existing retaining walls when ownership rights are not clear.

### **2.3 Chapter Summary**

Western Australia is the only State which can consider a retaining wall as a boundary wall. New South Wales, Queensland, South Australia and Victoria all explicitly state that a retaining wall is not to be considered a fence. Western Australia is also the only state which provides some literature within Section 89 of the *Building Act 2011* that can be applied with reference to responsibility, maintenance and cost. All legislation says that a retaining wall can be an encroachment however that can become irrelevant if the owner is unknown.

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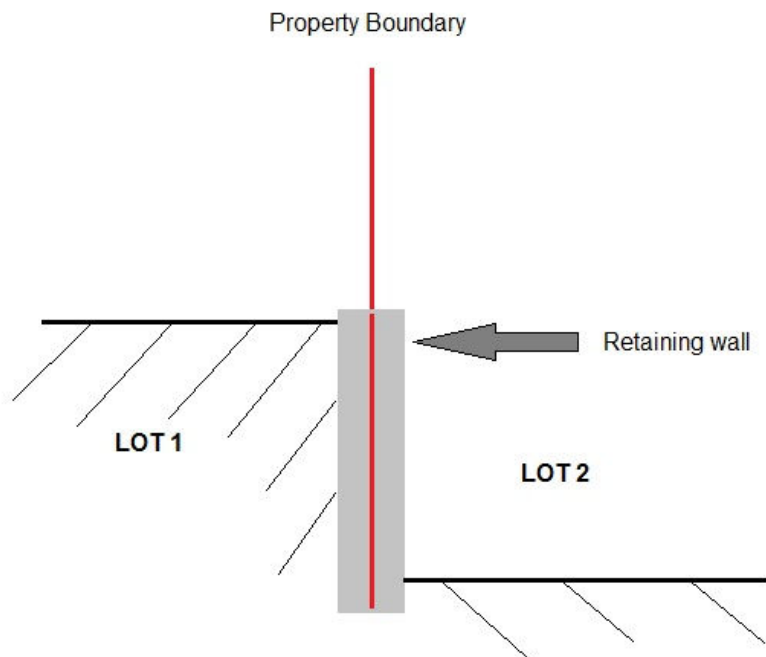
## Chapter 3

# METHODOLOGY

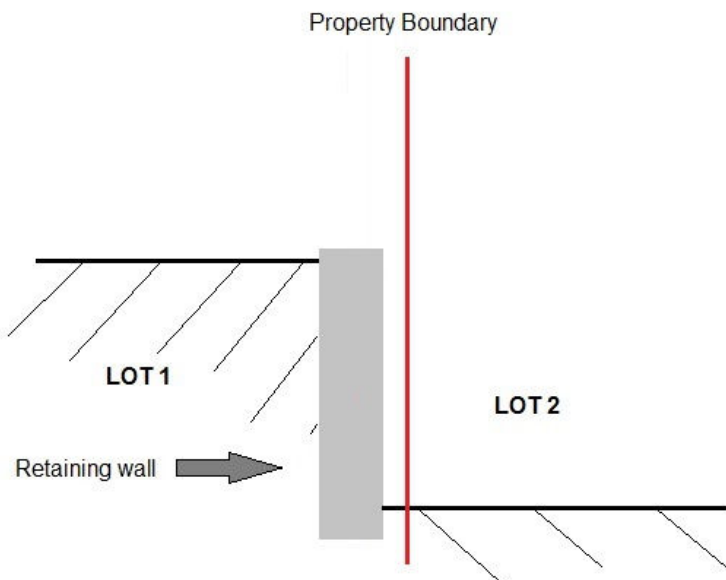
### **3.1 Introduction**

This project contains three distinct phases of research. The first phase is to review the current legislation between the States looking for similarities and differences that can be used to lay out a current State wide approach to retaining walls. The second phase involves exploring the land rights, restrictions and responsibilities that affect freehold property in Australia focusing where retaining walls are present and examine any further literature that relates to these aspects. The third phase uses the analysis of the first two phases along with case law studies and legislation outside of Australia to create a mechanism of possible solutions to overcoming the problem.

Below are diagrams of possible scenarios involving retaining walls in relation to property boundaries which need to be considered in each phase of the project.

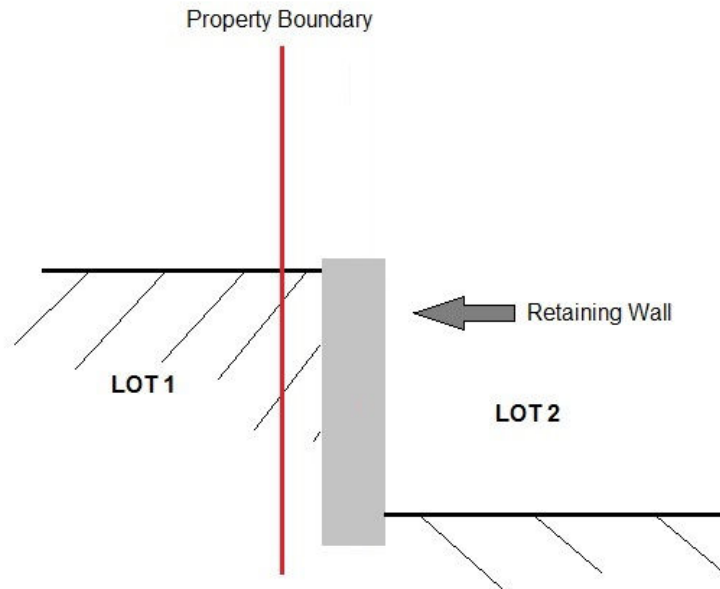


**Figure 3.1: Retaining wall on property boundary**



**Figure 3.2: Retaining wall wholly within the retained land's property**





**Figure 3.3: Retaining wall wholly within the retaining land's property**

### **3.2 Analysis of Literature and Legislation**

The first phase was conducted in the literature review process which identified all background legislation in each State of Australia that relates to retaining walls. This information can now be used as a basis for the information gathered in the second phase which focuses on general and common land law that underpins legislation and the third phase which focuses on case law which is the interpretation of the legislation.

### **3.3 Analysis of Results**

Australian legislation does not differ much from State to State regarding retaining walls. Each States building, fencing, property and encroachment Acts do not have much information regarding retaining walls. Solutions will be proposed with respect to the existing State wide legislation so that a mechanism can be developed that will resolve or simplify the issues.

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### **3.4 Chapter Summary**

This chapter has identified the methodology which will be used to create the own mechanism for overcoming disputes over retaining walls near property boundaries. The following chapter will focus on the general and common law related to land as a result of the reviewed legislation. This information gathered will lead to proposed solutions as described in Chapter 6.

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## Chapter 4

# GENERAL AND COMMON LAW RELATED TO LAND

### 4.1 Introduction

Since a mechanism for overcoming boundary disputes over retaining walls is heavily based on statutory law as well as case law it is important that general law and common law relating to land be investigated. Not only is this necessary as a basis for creating a mechanism but it is also important for property owners to be aware of their rights to use of their land and their security of tenure.

Retaining walls have the potential to cause confusion when it comes to a property owner's right and responsibilities simply due to the lack of legislation surrounding such a structure. By investigating the general rights, restrictions and benefits that property owners could benefit or be burdened by it will allow retaining walls to be compared to these and see how it could relate to the land.

In order to identify the misconceptions which can occur in regards to retaining walls near property boundaries an investigation on land parcels shall first be explored followed by secondary interests that could exist on certain parcels of land. A brief look into various common laws which could affect retaining walls will also be explored to give a well rounded appreciation of all the laws that could contribute to the issues which arise from retaining wall disputes. For the purposes of this project much of this chapter will explore the general definitions and aspects which apply to the following laws by exploring various legislation in Australia as well as utilising Hallmann's *Legal Aspects of Boundary Surveying* (2004). Hallmann's (2004) provides readily accessible information regarding law, estates and interests in land and related legislation. This chapter seeks to effectively describe the relevant background material needed as a basis for this

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project which will be used in conjunction with further analysis of legislation and case studies.

## **4.2 Land Identification**

In Australia, land forms the most basic unit for economic, social and environmental development. The term 'land' when it is used in relation to a certain parcel, at common law, refers to *"the soil beneath the surface to the centre of the Earth and the column of air above the surface."* (Hallman 2004) This includes any affixtures, such as trees, buildings and retaining walls. This can also include minerals underneath the surface.

In Queensland and New South Wales land is defined in the same way in their respective Interpretation Acts.

*'Land' includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in land. (Acts Interpretation Act 1954, section 35)*

## **4.3 Torrens Title System**

Robert Richard Torrens left his home country of England to settle in South Australia in 1839 and assisted with the colonisation of that State. Torrens didn't claim to have invented the title registration system that he introduced but rather he was the first person to see that the registration system used for merchant ships could be adapted to be used for land titles.

The Torrens Title System uses a single register for each land holding which contains all the details and interests which affect the land. Such things can include:

- Easements
- Covenants
- Mortgages

- 
- Resumptions
  - Caveats, and
  - Subsequent changes in ownership

#### **4.4 Encroachments**

According to the *Encroachment of Buildings Act 1922 (NSW)*, *Property Law Act 1974 (QLD)*, *Encroachment Act 1944 (SA)* and *Encroachment of Buildings Act (NT)* an 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.”*

The *Land Title Act 1994 (QLD)* further goes on to explain the meaning of encroachment:

“encroachment means...the enclosure of a part of a lot with another lot, if-

- i. The enclosure is established by the use of a wall, fence, hedge, ditch, garden bed or other way of marking the boundary between the lots; and*
- ii. The wall, fence, hedge, ditch, garden bed or other way of marking the boundary is not on the true boundary between the lots as shown on a registered plan of subdivision.”*

As previously mentioned, a building can be described by several legislations in regards to encroachments as including a wall. Therefore a retaining wall could potentially be considered an encroachment and building structure.

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## 4.5 Secondary Interests

Secondary interests are benefits or restriction that effect land parcels. These interests are important elements as they can be directly related to retaining walls.

### 4.5.1 Easement

*“An easement is a right appurtenant to land which allows the owner of that land either to use land of another person in a particular manner or to restrict its use by that other person to a particular extent, but which does not allow him or her to take any part of its natural produce or its soil. The land which has the benefit of an easement is called the ‘dominant tenement’, while the land which is burdened by the easement is called the ‘servient tenement.’” (Hallmann 2004)*

Some of the most common easements according to Hallmann include:

- Right of way; right of carriage way; right of footway
- Easement to: drain water, drain sewage
- Easement for transmission line, electricity substation, high voltage underground cable
- Easement for: overhanging roof, eaves and guttering
- Cross easements
- Easement to store water

### 4.5.2 Lease

*“The owner (the lessor) in possession of an estate in land may, by lease, grant to some other person (the lessee) the exclusive use of that land (or some part of it) for a term of years, subject to conditions governing the use of the property and granted...in return for the promise of payment of a rent.” (Hallmann 2004)*

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There are two aspects that make a lease valid. Those being, that the terms of the lease must have a definite start and finish and that the lessee must have the benefit of exclusive possession.

### **4.5.3 Covenant**

“A covenant, in simple terms, is an agreement between two or more parties that something will be done, e.g. ‘a wall be maintained’ (a positive covenant), or not to be done, e.g. ‘land not to be used other than for residential purposes’ (a restrictive covenant). A covenant can be placed over a retaining wall to make sure it is properly maintained or to restrict building on top of an existing structure.

### **4.6 Profit a Prendre**

A Profit a prendre is the right to take the natural produce or soil from another person’s property. This however cannot go beyond the right to go onto another’s land to remove part of the natural land. Going onto another’s land to cultivate the land, produce crop and then remove it, falls outside of the legal concept of a profit a prendre.

A profit a prendre can be created by a transfer, lease or mortgage. It can also be created by the registration of a plan or by resumption. A profit may exist as potentially infinite or for a term of years.

### **4.7 Common Law**

“Common law denotes the unwritten law...which does not derive its authority from any express declaration of the will of the Legislature. This unwritten law has the same force and effect as statute law. It depends for its authority upon the recognition given

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by our Law Courts to principles, customs and rules of conduct previously existing among the people.” Hallman (2004)

Common law is independent of any legislation and is a set of laws and principles that are developed by judge’s decisions over time. Some common law that might arise from neighbouring disputes include:

- trespass,
- nuisance, and
- negligence

#### **4.7.1 Trespass**

When a person directly, intentionally or negligently and without permission physically interferes with another person’s property he/she is committing trespass.

#### **4.7.2 Nuisance**

There are two types of nuisance that exists:

1. Public nuisance, and
2. Private nuisance

Private nuisance relates to property owners as it is committed when one person substantially and unreasonably interferes with another person’s right to use and enjoy their land. Unlike trespass, a private nuisance can be indirect and unintentional and can include such things as noise, dust, tree roots, vibrations and odours. However, for anything to constitute as a nuisance it has to be deemed as substantial enough to be seen as a reasonable nuisance to a land owner. This type of case law is determined by the courts discretion.



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### 4.7.3 Negligence

To prove that someone has acted negligently in a court of law it must be shown that:

- a. The defendant owed the plaintiff a “duty of care”
- b. The defendant has breached the “duty of care”, and
- c. This breach has caused damage to the plaintiff.

### 4.7.4 Duty of Care

A duty of care is a legal obligation to avoid causing damage and occurs when reasonable care is not taken. For a duty of care to exist there must be a sufficient degree of closeness or proximity between parties. For someone to breach a duty of care it must be established that a duty of care exists and that a person’s actions are unreasonable or below the standard expectation in the circumstances. A breach of duty of care can be an act of commission (doing something that causes damage) or an act of omission (not doing anything to prevent a reasonably foreseeable danger).

Section 177 of the *Conveyancing Act 1919 (NSW)* outlines a duty of care in relation to support for land:

*“ (1) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.*

*(2) Accordingly, a person has a duty of care not to do anything on or in relation to land (the supporting land) that removes the support provided by the supporting land to any other land (the supported land).*

*(3) For the purposes of this section, supporting land includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.*

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*(4) The duty of care in relation to support for land does not extend to any support that is provided by a building or structure on the supporting land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaimed state formerly provided to the supported land.*

*(5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.”*

*In relation to a duty of care relating to retaining walls, the South Australian Law Book states that; “Even if it is the responsibility of one owner to repair a retaining wall, if a neighbour is experiencing loss or damage due to a faulty, deteriorating or damaged retaining wall, that neighbour has an obligation to mitigate their damage, or else any claim may fail.”*

## **4.8 Chapter Summary**

These general and common laws relating to land provide the necessary background land information that can be used in the creation of a mechanism for overcoming retaining wall disputes.

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## Chapter 5

# CASE LAW AND LEGISLATION

### 5.1 Introduction

This chapter will explore several Australian case studies which involve various retaining wall disputes between neighbours as well as relevant legislation outside of Australia.

### 5.2 Case Law

There are many cases in Australia which involve neighbouring disputes over retaining walls. To gain a better understanding of how legislation is applied to real life scenarios it is important to observe a number of cases and to note any consistencies and differences in the outcomes. This is important as a mechanism to overcome disputes over retaining walls should cover all possible scenarios. Case law is not a system of law but is simply legal principles that have been derived from numerous reported law cases. Case law differs from statute law in that it can be said to be “judge-made” law. In this section several case studies will be summarised from excerpts in each case and then observations will be recorded at the end of each case study. These observations will be used to help formulate an erudite mechanism which will make reference to certain case studies.

There are over 300 reported cases that were found which involve retaining walls in Australia. To identify the cases most relevant to this topic, searches were conducted on the Australasian Legal Information Institute and Barnett Jade websites using key phrases such as:

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- Retaining walls
  - Dispute
  - Encroachment
  - Duty of Care
  - Right of Support

At the end of the search process ten law cases were selected for being the most relevant and applicable to this project.

1. Hill v Higgins [2012] NSWSC 270
2. Hogarth v Karp and Anor [2013] SASC 159
3. J and T Lonsdale v P Gilbert & Ors [2006] NSWLEC 30
4. John Llaverio v Brett Anthony Shearer [2014] NSWSC 1336
5. Margy L Walsh v R Tomsic [2014] NSWCATCD 118
6. Miller v Evans [2010] WASC 127
7. Owners SP 30339 v Torada Pty Ltd & Anor [2008] NSWSC 1154
8. Stereff v Rycen & Anor [2010] QDC 117
9. Warringah Properties Pty Ltd v Babij (Snr) & I Ors [2006] NSWSC 702
10. Yared v Glenhurst Gardens [2002] NSWSC 11

Each of these cases will now be reviewed and summarised with observations recorded at the end of each case to highlight relevant information that may be used in the mechanism later in the project. Each summary has been divided up using the most relevant headings for each section.

### **5.2.1 Hill v Higgins [2012] NSWSC 270**

#### **Introduction**

Mr and Mrs Hill and Mr and Mrs Higgins are neighbours living in their respective properties of 42 and 40 Kurrawong Avenue, Hawks Nest. Kurrawong Avenue slopes gently from north to south in the vicinity of the properties. Number 40 is on the higher northern side while number 42 is on the lower southern side. Originally a one metre high dwarf retaining wall of mostly brick and a mesh

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dividing fence ran from east to west along most of the northern side of the common boundaries between the two properties.

### **The Event**

At some stage in 2006, Mr Hill became aware of some deterioration of the double brick section of the retaining wall and had developed a slight lean, so that to some extent the retaining wall was encroaching onto his property. In late 2006 some earthwork and landscaping was undertaken by Mr and Mrs Higgins upon their property adjacent to the boundary in question. They did nothing to repair or to relocate the retaining wall. The local council was informed of the problems and soon became actively involved. A high timber fence was erected parallel to the boundary by Mr and Mrs Higgins on their property. This created more tension between property owners. The Hills state that this fence contributed to the decline of the retaining wall which was already compromised in stability and integrity. Surveyors and Engineers were soon consulted by both sides to provide reports and advice on all potential issues that were arising.

### **Legal proceedings**

Legal proceedings commenced on 26 August 2009. Mr and Mrs Hill sought declarations that their neighbours had encroached upon their property and had trespassed and created a nuisance. They asked for the encroachment to be removed and to pay them compensation under Section 4 of the Encroachments of Buildings Act 1922. The Hills also asked for compensation for damages which included aggravated and exemplary damages. Mr and Mrs Higgins filed their defence on 16 January 2011. They denied all that was alleged against them. Both sides filed evidence which was referred to over two days in court in 2011 as well as several witnesses who were called and cross-examined.

Both parties were in agreement that the retaining wall had to be removed but they could not agree on what should replace it. This arose because of issues involving engineering, aesthetics and finance. This impeded the Courts ability to issue an order for the removal of the encroachment. A certain course of action was suggested by the Courts which stated that it may be helpful for the proceedings to be adjourned to give the parties an opportunity to cooperate in

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the carrying out of the works.

## **Outcome**

The following orders were then given:

“On the application of the plaintiffs and with the consent of the defendants without admission of liability:

1. Order that the encroachment by the defendants’ land onto the plaintiffs’ land...be removed by the defendants.
2. Stand over these proceedings for further hearing before me on Friday 4 November 2011.
3. Grant liberty to the parties to apply to me on two days’ notice by arrangement with the other side and in consultation with my Associate.
4. Reserve consideration of all other outstanding matters including the plaintiffs’ claims for relief and the question of costs.”

The encroaching retaining wall was removed on 9 December 2011. However, the parties still required a decision upon the issues arising under the *Encroachment of Buildings Act*, and on the outstanding questions of trespass and nuisance. The Hills identified three separate sets of circumstances that they considered to be a trespass by Mr and Mrs Higgins to or upon their land. The first, was a deposit of a pile of bricks in their front yard, the second was entry by Mr Higgins onto the Hills property a few days later, and the third alleged trespass arising from the original presence of the retaining wall itself.

The first two trespasses were considered minor and insignificant and in relation to the third alleged trespass it was described as truly insignificant. The Court in all these circumstances could not accept an award of anything other than nominal damages. The land between the new timber fence and the retaining wall described as ‘orphan land’ was not considered a nuisance and the Courts did not accept the claim for damages for nuisance.

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## **Conclusion**

It was concluded for the first two trespass complaints that the Higgins would have pay for damages in the total sum of \$200 and a further \$20 for the trespass arising from the encroachment of the retaining wall.

## **Observation**

This case provides a good example of the potential time wasted, unpleasant conflict and legal costs incurred due to a dispute over what could be considered a minor encroachment by an existing retaining wall. Actions taken by the Courts in regards to the retaining wall were all under the Encroaching Buildings Act which involved simply the power to removing the encroachment. Further allegations seemed to have risen due to the neighbour's animosity towards each other which could have been avoided. Communication between neighbours was poor and assumptions were made in regards to fixing the deteriorating retaining wall which enflamed passions all the more. The ownership of the retaining wall, I can only assume, belonged to the Higgins because this issue was never disputed and because the retaining wall was deemed an encroachment by the defendants. Because of this fact it would seem that the Higgins are responsible for the upkeep of the retaining wall, however since they are on the high side of the two properties they would need to get permission to enter the Hills property to undertake works. It seemed unwise that the Higgins erected a high timber fence on their property as this essentially hides the retaining wall and creates an 'out of sight, out of mind' scenario leading to either a) The retaining wall to deteriorate due to lack of maintenance, or b) The Hills having to fully absorb the cost of maintaining the wall even though in this situation they are not considered the owners of the retaining wall.

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## 5.2.2 Hogarth v Karp and Anor [2013] SASC 159

### Introduction

This case focuses on an appeal process however the details of the case that lead up to the appeal are also recorded in this case.

### The Event

The appellant (Mr Hogarth) and the respondents (Mr Karp) are the owners of two adjacent properties which share a common boundary. The respondents wished to demolish their existing house and redevelop a new single storey dwelling. A survey on the land revealed a retaining wall, on top of which was a brush fence, was encroaching on the respondents land by up to 32 centimetres. The respondents then lodged an application under the *Fences Act 1975* in the Magistrates Court seeking an order to remove the current retaining wall (which has been in existence at least since 1985) and fence and replace it with a new one with the cost being shared by the appellant.

Demolition of the existing dwelling was completed and excavation of the site commenced just before 17 January 2012. On 22 February 2012 the respondents order an identification survey in which the report indicated an encroachment of the retaining wall and fence. This was the first indication that the respondents had any encroachment into their property. After this the respondent contacted the appellant with the plans to remove and replace the wall onto the boundary with the suggestion that the removal and replacement costs be shared equally amongst the parties.

On 5 November onwards, however, the appellant filed a defence and undertook certain engineering checks by professionals which led to amended defence and counterclaims filed on the 1 February 2013. The trial in the Magistrates Court commenced on 23 January 2013 and continued on 13 and 14 May 2013 when judgement was reserved.



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## **The Case for the Respondents**

The respondents purchased their property in 1999 with the intention of living in the existing dwelling for a time and then demolishing it and constructing a new house for their retirement. The existing retaining wall and fence impinged significantly upon their regulation 900 millimetre house setback from the boundary.

## **The Case for the Appellant**

1. The encroachment is small and should be regarded as trivial,
2. The impingement on the 900 millimetre setback is exaggerated,
3. They would suffer significant loss of amenities if the respondents' application was granted (removal of wall would likely impact her plants, fishpond, electrical cabling, irrigation system, taps, outdoor power supply, stormwater pipes etc)
4. The present excavation had compromised the integrity of the retaining wall,
5. There are cheaper alternatives to replace the retaining wall, and
6. By way of counterclaim, the appellant sought (a) an interim injunction restraining the respondents from proceeding with construction (b) a declaration that, to the extent that the retaining wall is encroaching, it not be removed (c) damages caused by the respondents' excavation.

## **Conclusion**

The Magistrate concluded that the retaining wall/fence is an encroachment and does not lie on the true boundary. He found that removal of the brush fence and retaining wall is likely to have some effect upon those amenities mentioned but not upon any significant infrastructure. The encroachment was considered far from trivial and that the respondents' had a genuine reason for seeking removal of the encroachment. The final conclusion was that on balance the interests of justice favoured the granting of the respondents' application for removal of the existing structures and the construction of a new retaining wall and fence with the respondents to pay two-thirds of the new structure.

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## **The Appeal**

The appeal from the appellant aimed to call into question each of the orders and the whole of the judgement.

On further considerations of the issues the Court concluded that the appellant presented nothing to suggest that the Magistrate did not adequately take all relevant matters into account in relation to all alternatives to replacing the retaining wall. Furthermore it was within the Magistrate's discretion to take into account what he perceived as the long term benefits of marking the true boundary.

The Court found that the appellant did not demonstrate that the Magistrate was in error in his judgement of ordering the retaining wall and fence to be removed and it was well open to him to conclude that the orders accord with what is just in the circumstances of the case.

The appeal was therefore dismissed.

## **Important Extra Information from Case**

- It is the Courts job to interpret legislation and discretion to deal with encroachments under Section 4(2) is wide and not to be conditioned by anything other than the scope and objectives of the Act.
- Given the evidence that the brush fence permanently sits atop a concrete plinth, which in turn sits on top of the retaining wall, it would seem obvious that the retaining wall and the fence should be treated as one structure. The magistrate found that the retaining wall/fence is an encroachment for the purposes of the encroachments Act 1944.
- In all of the circumstances, it was open to the magistrate to come to the conclusion that the retaining wall should be removed irrespective of the matter of the excavation.

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## Observations

It is interesting that in this case that because the brush fence was affixed on top of the retaining wall that it was considered one fence structure, the reason for this is not specifically expressed but it can be determined that it is because a) the retaining wall is used as foundation/support for the boundary fence b) the purpose of the retaining wall itself is to serve as a boundary fence, that it, it is designed to separate the two properties horizontally (as well as serving the purpose of dividing the land vertically and having retaining qualities) or c) both. The *Fences Act 1975* does not mention anything about structures or retaining walls and the definition of dividing fence is broad:

*“dividing fence means a fence dividing contiguous land of adjoining owners;” (Fences Act 1975 S4(1))*

In this particular case the request to remove the structure was lodged in an application under the *Fences Act 1975* rather than the *Encroachment Act 1944*. Ownership of the retaining wall was never addressed; the encroachment was treated more as an encroachment by a boundary fence rather than as an encroachment by a neighbouring structure. It is a fair ruling by the Court that, instead of neighbours sharing the cost of the new fence structure equally, since the respondents have initiated the knock down and rebuild of the structure and also benefit more from it for them to pay two-thirds of the new structure.

### 5.2.3 J and T Lonsdale v P Gilbert & Ors [2006] NSWLEC 30

#### The Event

The original proceedings which were filed on the 21 July 2004 claimed relief against the first respondent when the encroachment, consisting of a timber retaining wall with a colorbond fence attached, first came into existence but who sold to the second Respondents in 2003 one of the two lots upon which the encroachment extended (each of which lots he had developed with dual

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occupancy residential development). The second Respondents were joined to the proceedings in June 2005.

### **Legal Proceedings**

The original settlement was to transfer so much of their land as was encroached upon by the timber retaining wall and colorbond fence to each of the Respondents respectively in return for the payment by the first Respondent only:

1. \$5,000 being the agreed value of the land subject to the encroachments,
2. \$10,000 legal costs, and
3. The costs of the registration of the necessary documents to adjust the respective common boundaries of the properties owned by the respective parties.

This settlement ultimately fell apart when the second Respondents refused to grant to the first Respondent a power of attorney authorising the first Respondent to claim compensation against the builder who constructed the retaining wall in question.

The second Respondents' position at the hearing was to support the Applicants' claims against the first Respondent who had been the encroaching owner when the encroachment was created, who was solely responsible for the state of affairs and who had sold their property to the second Respondent without disclosing the existence of the encroachment upon the Applicant's land.

On August 2005 the following relief was claimed against the first Respondent only:

1. Declaration that the log retaining wall and colorbond fence attached is an encroachment,
2. That the encroachment be removed under section 3(2) of the *Encroaching Buildings Act 1922* (NSW)
3. That any survey work or other work required to meet this requirement will be at the first Respondents expense, and
4. Conveyance work, and

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5. That the first Respondent pay the Applicants' cost

This relief was opposed by the first Respondent on the grounds that the encroachment is minor, the Applicants' accepted the timber retaining wall as an encroachment until the colorbond fence was added 19 months later, and the Applicants received some material benefit to their land when construction of the retaining wall was being done at the first Respondents expense.

The hearing was based upon the common basis that the Court had jurisdiction to order the first Respondent to remove the encroachment but because of the defined term "*adjacent owner*" and "*encroaching owner*", as found in section 3 of the *Encroaching Buildings Act 1922*, these terms mean the owners respectively at the time that the Court's jurisdiction is invoked, rather than the respective owners at some earlier point of time.

On review of the case, and taking into consideration the factors of Section 3(3) of the Act, the Court had concluded that this is an appropriate case where it is just and proper that the relief be granted under the Act. The Court did not conclude that the First respondent had made out a discretionary defence based upon any time delay of the colorbond fence or acceptance by the Applicants at the time of the construction of the retaining wall. The colorbond fence was also considered an encroachment as they found that it was not erected as a "*dividing fence*". The form of relief that had been the subject of the settlement negotiations was for a boundary readjustment. This relief being the Applicants' second preference caused the judgement to be passed that the most proper form of relief to be granted in the present case is an order for the removal of the encroachment at the first Repondents expense.

### **Conclusion**

The following orders were then given:

1. The Applicants' Points of Claim be amended to include a claim to relief against the second Respondents as encroaching owner.

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2. The first Respondent remove from the Applicants' land encroachments comprising a timber retaining wall and colorbond fence erected on top of the wall.
  3. The second Respondent to remove from the Applicants' land encroachments comprising a timber retaining wall and colorbond fence erected on top of the wall.
  4. The works should be carried out within 60 days
  5. The first Respondent shall fully indemnify the second Respondents in respect of the liability imposed upon them.
  6. The first Respondent to pay the Applicants' costs and the second Respondents' costs of the proceedings.
  7. Liberty to apply on three days' notice in respect of the outworking of the mandatory orders made for the removal of the encroachment.

### **Observations**

Ownership of the retaining wall was known and was constructed fairly recently, therefore it was always known that the first Respondent was the encroaching owner. The case became more complicated when the first respondent developed his land to a dual-occupancy and then sold the land with an existing encroachment. The benefit of the Legal system was even though the legislation says that they were both encroaching owners(first and second Respondents), since the first respondent erected the wall (through a builder) he should compensate not only the Applicant but also the second Respondent. Ownership and responsibilities were not unknown in this circumstance as the retaining wall was not an existing structure but was designed and benefited the first Respondent. In New South Wales legislation a retaining wall is not considered a fence. The log retaining wall therefore (because it encroaches on the neighbouring property) is considered an encroachment and therefore the colorbond fence was erected with a known encroachment and even though its physical description falls under the definition of fence in the *Dividing Fence Act 1991*, the Court did not consider it to be a dividing fence as it was erected later and on top of an existing encroachment. Therefore the purpose of the structure and fence played a big part in this case.

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## 5.2.4 John Llaverro v Brett Anthony Shearer [2014] NSWSC 1336

### Introduction

Mr and Mrs Llaverro (street No. 100) and Mr and Mrs Shearer (street No. 106) are neighbours at Stanmore (despite the numbering the two properties adjoin). The Shearer purchased number 106 around October 2009. The issues leading to this litigation are, first whether works done by the defendants (Mr and Mrs Shearer) caused the natural support of No. 100 to be affected, and second an encroachment onto No. 100.

### The Event

Before the Shearers went on holidays in mid November 2009 they instructed Mr Andy Cosco of Urban Constructions Pty Ltd what to do, as they were undertaking extensive renewal on the property, which included the removal of various trees and undergrowth and other vegetation along part of the dividing fence between No. 106 & No. 100. In late November, the removal of three trees and vegetation did affect the existing dividing fence and part of it collapsed. The next event was that subcontractors excavated about 26 metres along the common boundary between No. 100 and No. 106 (the whole boundary being 62 metres in length). The plaintiffs (Mr and Mrs Llaverro) said that the Shearers excavated so that part of their land was excavated, then they erected a retaining wall with inadequate backfill for the excavation.

The defendants had a duty of care not to do anything on or in relation to the neighbouring land that would remove the support provided by it to the land. The plaintiff pleaded that the duty of care on behalf of the defendants had been breached with the removal of the support provided to their land. The particulars were the removal of trees, the excavation, the storage of building materials on the land immediately adjacent to an embankment and leaving the excavation untreated for about a month. The plaintiffs Statement of Claim also contained a number of other causes of action including trespass by building a retaining wall partly on the plaintiffs' land and the a breach of statutory duty under environmental planning legislation. These, however, were not pressed at the trial.

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The issues submitted by the plaintiff was put in two categories:

1. Was there a breach of Section 177 of the Conveyancing Act 1919 and if so what were the quantum of damages and by who should these damages be payable, and
2. Issues under the Encroachment of Buildings Act 1922

The main accusations from the plaintiffs was that the works undertaken had caused damage to their residence in the forms of cracked brick work and internal cracks, concrete path running alongside their dwelling and the land in its natural state. They also accused that the new retaining wall erected encroached on their property and that it was not constructed in a way which was adequate to restore support to No. 100. The first and second defendants (The Shearers) were admit that the third defendant (The Builder) undertook tasks without permission or knowledge and therefore damaged the land, concrete and damaged a telephone line.

Expert evidence was provided from all parties which showed that the cracks in the Llaveros' house were there before excavation took place and that it did not cause any settlement or cracking of the plaintiffs' house. Moreover the path, as photographs showed, was worn concrete and a rough surface and that was not properly constructed in the first place.

The third defendant gave well documented evidence and it was decided that they did not act independently from the Shearer's and that they should not be held responsible for the issues between the plaintiffs and the first and second defendants. Although they did not deny that in the process of carrying out work they did damage the telephone wire.

It was decided that if a land owner is involved with removing his or her neighbour's support then that is a tort which involves breach of a non-delegable duty to the neighbour, so that the land owners are liable even though they may have retained a competent independent contractor. Had there been damages, therefore, the first and second defendants would have been liable for that damage.



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Evidence from both sides does suggest an encroachment of 2 square metres. Evidence also showed that the original support for the land was not properly supported and so the option of removing the encroachment under the Encroaching Buildings Act 1922 and restoring the land to its condition before the encroachment existed was not considered. Compensation of \$370, due to the fact that it is a minor encroachment, was increased to \$1,110 because the encroacher had not shown that it was neither intentional nor negligent. Courts costs would see that the plaintiffs are entitled to some costs because of the *Encroachment of Buildings Act*, but have to pay some costs because of the issue of supports. The plaintiffs were also to pay for the third defendant's costs as no relief was sought under the Encroachment of Buildings Act.

### **Observations**

It would seem that although issues of duty of care for support of land and encroachments are legitimate issues, the current case gave no grounds to suggest that anything had been done to compromise land support. It almost seems like it was assumed by the plaintiffs that the constructions on the land caused damage to their property but they failed to receive compensation for it because they failed to prove this. The encroachment is justified as the retaining wall is new and ownership is known, in this particular case it would seem the original fence was old and compromised and that there was no original retaining wall near the boundary and the land fell in its natural state. Issues of what a land owner's responsibilities are when it comes to construction near a property boundary is also a factor that needs to be taken into consideration (this includes how it relates to the laws of nuisance and duty of care). An insightful quote was recorded in the case:

"'peace' is not in the province of the Court to give. It never is in the case of a neighbourhood dispute. The only 'peace' that will come in a neighbourhood dispute is the peace that comes from the two neighbours. Unless the two neighbours are prepared to live together and live in harmony and work towards that, then there is nothing that a third party, let alone a court, can do to effect harmony."

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Creating a mechanism that can aid in overcoming a boundary dispute is a means to this end.

### **5.2.5 Margy L Walsh v R Tomsic [2014] NSWCATCD 118**

#### **Introduction**

Margy Walsh (the applicant) the owner of a property at Prince Albert Street, Mosman was seeking contribution for certain works from R Tomsic (the respondent) who owns the neighbouring block to the north of the applicants property. When the applicant moved into her home 44 year ago the retaining wall in question, which is located on her northern boundary, was existing at the time. On top of the brick retaining wall is a timber paling fence. The retaining wall is approximately 10 metres long and about 1 metre in height.

In 2014 a new paling fence was connected to the retaining wall by metal struts and was paid for by the respondent. After a complaint by the applicant the fence was lowered from about 1.8 metres to about 1.2 metres. As the retaining wall was in a diminished condition, it was recommended that it be repaired by excavation and the insertion of backfill. The applicant has sought contribution under *Section 14 (1)(c)* of the *Dividing Fences Act 1991* to the amount of \$5,350.

The respondent ignored the claim stating that the work wanting to be done is on 'a retaining wall and not a boundary fence'.

#### **Riggio Case**

The differentiation between a boundary fence and a retaining wall was discussed in a decision of the Land and Environment Court in *Riggio v The Estate of the Late Phyllis Annette Lockard [2011]* in which it is noted that the *Dividing Fence Act 1991* limits the scope of work that applies to a retaining wall and fence situation, in that only fencing work necessary for the immediate support of a fence will be covered within the scope of the power to order a contribution between parties. This means that a contribution is not available for

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repairing or maintaining when its main purpose is as a retaining wall and not as part of a dividing fence. Therefore, the Court is limited to ordering compensation for fencing work necessary for the immediate support of a fence and not to the entirety of the retaining wall.

### **Conclusion**

The applicant's land is the supporting land and without the aid of a survey report it was presumed that the retaining wall would be entirely within the boundary of the applicant's property and therefore not be a shared liability with the neighbouring supported land.

It was determined that the proposed rectification work on the retaining wall was not to be considered "fencing work" as defined by Section 3 in the Dividing Fences Act 1991. Maintenance of the retaining wall, from the Courts view, is the responsibility of the applicant being held to a duty of care of specified in Section 177 of the *Conveyancing Act 1919*.

The application was dismissed.

### **Observations**

This is a good case study to better understand the relationship between boundary fences and retaining walls (specifically in New South Wales, however most States have similar legislation when it comes to retaining walls). Special attention needs to be drawn to the section that only the immediate support of a fence will be covered within the scope of the power to order a contribution between parties. This means that a contribution is not available for repairing or maintaining when its main purpose is as a retaining wall and not as part of a dividing fence. Therefore, the Court is limited when ordering compensation and can only issue such an order for fencing work necessary for the immediate support of a fence and not to the entirety of the retaining wall. The immediate support in this case would consist of the metal struts and the wall in which only the metal struts attach to, however one of the main factors that contributed to this court's decision was that the retaining wall was presumed to be wholly on applicant's land. We know that the original timber fence was on top of the

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retaining wall, which means that the retaining wall was originally designed to be a boundary fence (as well as performing its retaining properties). The questions need to be asked:

1. If the fence is on top of a retaining wall, then what is considered as 'immediate support'.
2. If the boundary went through the centre of the wall or if the wall was more (or wholly) on the respondent's land, then would the duty of care for the upkeep of the wall fall equally on both parties or completely for the respondent.

### **5.2.6 Miller v Evans [2010] WASC 127**

#### **Introduction**

Mrs Miller (the plaintiff) and Mr and Mrs Evans (the defendants) are neighbours at Minim Cove. Both properties are burdened by a restricted covenant which limits what can be built near the rear boundaries of the properties. The rear boundaries are those which are in the direction of the Swan River. Years ago the defendants built retaining walls, an above ground spa and surrounding fences on their rear boundary adjacent to the plaintiff's land.

#### **The Event**

The plaintiff claims that these structures obstruct her view and are in breach of the restrictive covenant. The plaintiff seeks, amongst other things, to have these structures removed.

The defendants claim that the structures do not breach the restricted covenant. Furthermore, they also said that even if the structures were in breach of the covenant that the Court should not grant the sought orders because discretion has not been exercised, particularly because the plaintiff has delayed seeking any remedy and has allowed this breach. Other factors include, that the matter is trivial and disproportionate to the plaintiff's grief that it would be for them to remove the structures, that the matter has only been addressed because of spite

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on behalf of the plaintiff and that the plaintiff is also guilty of breaching the restricted covenant. Their final factor for why the Court should not grant the requested order if there is a breach is because their property already had the structures in place when the plaintiff purchased her property and that would have been reflected in the price she paid for her property and to obtain this order would give her a benefit that she never had.

The covenant is designed to burden the defendants land (being Lot 187) and benefit the plaintiffs land (being Lot 188). This is undisputed. In 2002 the defendants built their home on Lot 187 and later that year and in early 2003 the defendants built the structures in question. They consist of retaining walls on the rear and side boundaries, an above ground spa and enclosing fences. The structures were built above an existing large retaining wall that runs along the rear of the boundary of Lot 187 and continues to the neighbouring properties on either side. The existing retaining wall drops 6 metres to a road below.

According to the restricted covenant no buildings or tree or vegetation can exceed 1 metre in height for a distance of 3 metres from the southern boundaries. They found that the structures exceed the AHD (Australian Height Datum) height by between 2 cm and 1.02 m.

The Courts addressed the defendant's claims beginning with the claim that the retaining wall being the highest structure is not to be considered a 'building' within the terms of the restricted covenant that states "any building...which exceed[s] 1 metre in height [above] AHD". This however was over ruled as the covenant goes on to explain what the term 'building' can include, and although 'retaining wall' was not specifically mentioned, the fact that it goes on to explain what a building can include shows that it has a wide meaning and that the wall should be considered as a building. Their other points were also overruled as even though some of them may have had some truth in them, were irrelevant when it came to the conditions of the restricted covenant.

The Court decided that the defendants had breached the restricted covenant. The breach is not trivial and although the defendants will suffer a detrimental loss from a mandatory injunction, it is estimated that the neighbouring land

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value will decrease by about \$100,000 for having their view obstructed and therefore justifies the defendant's loss. The court order was for a mandatory injunction and required the defendants to lower the structures to the maximum levels allowed by the restricted covenant, this essentially causing the spa and fences to be removed.

### **Observations**

This case is a little different as the retaining walls are not in dispute about ownership and no encroachment has been mentioned. The responsibilities and restrictions in this case relate to the restricted covenant and although it is a neighbouring dispute, the fact is that it has not so much to do with the legislation around retaining walls but with the conditions of a covenant. One noticeable factor is the somewhat ignorance of the defendants on their responsibilities as land owners, although the court case showed that there was knowledge of the restricted covenant by the defendants. It is reasonable to suggest that in a mechanism for boundary disputes over retaining walls part of that mechanism should include some form of education on a land owner's rights and responsibilities which should include the possibility of covenants covering the wall.

## **5.2.7 Owners SP 30339 v Torada Pty Ltd & Anor [2008] NSWSC 1154**

### **Introduction**

The Plaintiff is an owner's corporation of the common property Strata Plan 30339. The Strata Plan relates to the land 17 Bungan Street, Mona Vale. The Strata Plan consisted of a two storey building with retail shops on the ground floor and commercial premises on the first floor. The Defendant (Torada) was, until June 2008, the registered owner of the adjoining land 24 Waratah Street, Mona Vale.

### **The Event**

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In September 2006, Torada commenced construction works and in the course of construction demolished a retaining wall on its own land and also a low wall erected on the Plaintiff's land. Both walls run along the boundary between No 17 and No 24. The Plaintiff claims that their wall (which they call a boundary wall to keep distinct from the retaining wall) was demolished without consent and this has caused available pedestrian access between the two properties which is a continual nuisance.

The Plaintiff seeks:

- A mandatory injunction requiring Torada to restore the boundary wall, or
- Alternatively cost damages if the Plaintiff elects to do the work itself.

### **The Issue**

The issues are as follows:

1. Who owned the boundary wall at the time of its demolition.
2. If the Plaintiff owned the boundary wall, did Torada demolish it without the Plaintiff's consent and in breach of the *Dividing Fences Act 1991*

If Torada demolished the boundary wall without the Plaintiff's consent then has a nuisance been created caused by pedestrians, should the Court order Torada to reconstruct the boundary wall and if the Court refuses such an order, should the Plaintiff be awarded damages for trespass and the cost of rebuilding the boundary wall.

### **The Boundary Wall**

The retaining wall was 60mm inside the boundary of No 24. No 17 built a low brick wall alongside the retaining wall on No 24 in 1983. The boundary wall abutted against the retaining wall and was fixed to it by mortar. The boundary wall is a single brick about 120mm wide and therefore the boundary wall may be taken to be half on No17 and half on No 24.

The boundary wall was assumed to be the property of the Plaintiff because the owner of No 24 did not contribute to the cost of constructing it. However, when something, such as a wall, is permanently affixed to land it becomes part of the

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land, and its ownership follows the ownership of the land. Therefore it is of the Courts view that half the boundary wall was owned by Torada and half by the Plaintiff.

At the time of construction, since the boundary wall was physically attached to the retaining wall and encroached upon No 24, the Court inferred that the wall was never meant to mark the boundary but rather to aesthetically cover the retaining wall. The Court found that demolition of the retaining wall would involve demolition of the boundary wall that is attached to it. The degree of integration was so large that demolition of the entire retaining wall would necessarily involve demolition of the entire boundary wall.

In a 1955 case, *Walsh v Elson* it was stated that “either owner of part of a party wall may do what he wishes with his part of the wall. He may demolish it if he wishes, provided he does no injury to his neighbour’s half. Each, of course, has the ordinary remedy for any injury done to his portion of the wall.”

Before demolition the defendants could have sought a mandatory injunction requiring the Plaintiff to remove the part of the wall that encroached upon his property, in doing this the Plaintiff would have had to remove the whole boundary wall. Since the defendant did no such thing and since the Plaintiff did not consent to the demolition then the defendant has committed a trespass to the Plaintiff’s half of the wall.

No relief was given for damages for nuisance as it was deemed that such a nuisance was “utter fantasy.”

### **Conclusion**

Since restoration of the boundary wall would also restore an encroachment on No 24 the order was declined. The Plaintiff is only entitled to damages for trespass on their portion of the wall.

### **Observations**

It sounds like the Plaintiff was trying to manufacture an outcome by calling the 0.12m wide wall attached to the retaining wall a ‘boundary wall’. In calling this



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wall a 'boundary wall' they felt right in appealing for damages under the *Dividing Fences Act 1991*. The discretion of the court concluded that this wall did not serve as a boundary fence but only for aesthetics. They came to this conclusion even though the property boundary fell in the middle of the 'boundary wall'. Again, when it comes to wall structures, the outcome of this case relied in one aspect on the purpose of the wall. The purpose of the retaining wall did not in any way serve as a boundary fence as it was fully inside the defendant's property and served only to retain the land to benefit the defendant's land (however a case could be made that the plaintiffs also acquire some benefits to their land from the retaining wall. The purpose of the 'boundary wall' was only for aesthetics and did not serve to retain land or to be a dividing fence.

The issue of ownership of the 'boundary wall' is an interesting one, as the plaintiff constructed and paid fully for the wall it could be assumed that they owned it, however since the wall is a permanent fixture to the land and since the boundary runs through the centre of it the neighbours now own their respective halves of the wall. In this regard the defendant could have demolished their side of the boundary wall and left the plaintiff's side untouched, however because of the thickness of the wall this was not possible and therefore it was right for them to be charged for trespass on their neighbours portion of the wall.

## **5.2.8 Stereff v Rycen & Anor [2010] QDC 117**

### **Introduction**

The Plaintiff (Mr Stereff) was the owner of 6 Beech Avenue, Gladstone and the defendants (Mr and Mrs Rycen) were the owners of 4 Beech Avenue, Gladstone. From the time of the plaintiff's purchase of 6 Beech Avenue, there was a freestanding bluestone rock wall which was believed to be on the common boundary between No 4 and No 6. The wall is described as boulders and occupied about four-fifths of the length of the boundary.

### **The Event**

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Around October 2003 the defendant (Mr Rycen) approached the plaintiff with proposition to construct a new retaining wall along the common boundary, however they could not agree on an appropriate form of retaining wall. The Defendant remained quiet insistent that he wanted to build a coppers log wall, while the plaintiff wanted a cheaper option. No agreement was reached during conversations.

On 20 January 2004 the Defendant used earthmoving equipment to remove a large amount of embankment on the Plaintiff's land causing a more than one metre cut into the Plaintiff's land from the common boundary (committing trespass), however the Defendant denied that this was intentional. The Defendant performed the work without the knowledge or consent of the Plaintiff. The Plaintiff and the Defendant had an argument after the initial excavation where the Defendant became angry and verbally abusive. By the morning of the 21 January 2004 the remaining rock retaining wall was gone. On the same day it was also noted that the Defendant had erected several copper log posts on his side of the common boundary and proceeded to dump loose soil behind it thus committing further trespass upon the Plaintiff's land. The Defendants admitted that the natural support of the plaintiff's land was withdrawn and that some of that land subsided into the excavation. Because of the concerns of the plaintiff regarding the excavation builders and surveyors where engaged and an order was given to erect a dividing fence (a besser block wall with a steel mesh fence on top) on the common boundary.

### **Conclusion**

The Court gave judgement for the plaintiff for trespass to land and nuisance against the defendant as follows:

(a) Restitutionary compensation for damages

\$15,314

(b) Aggravated compensatory damages

\$15,000

(c) Interest at 10% per annum from 20 January 2004 to 26 March 2010

\$18,734

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(d) Exemplary damages

\$25,000

Totalling \$74,048

### **Observations**

This case is a good example on how neighbouring disputes can escalate and lead to even further damages. There are a lot of charges that relate to the abusive nature of the event, these do not need to be discussed here. Apart from the fact that the neighbours could not agree on the type of new retaining wall it seemed that initially the proposal was handled in the correct way in which the defendant approached his neighbour and discussed erecting a new retaining wall along the common boundary. There seems to be no reference that there was any other disagreement except for the type of wall. It would seem that because of this the Plaintiff never gave his full consent to the proposal and even if he did the manner in which it was undertaken was done without his knowledge and also the Defendant trespassed without his consent. The Defendant made numerous other illegal actions the most prevalent being failing to ensure a duty of care by removing the neighbouring lands natural foundations and to trespass on the adjoining land by removing their natural soil, these events were most likely driven by anger and impatience. It can be concluded that consent from neighbours before undertaking any type of boundary work is a must. It is also worth noticing that a dividing fence was ordered to be erected along the common boundary but that is dividing fence is described as a better block wall with a steel mesh fence on top thus suggesting that the retaining wall (with fence) serves not only as a retaining wall but also as a boundary wall.

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## **5.2.9 Warringah Properties Pty Ltd v Babij (Snr) & I Ors [2006] NSWSC 702**

### **Introduction**

The Plaintiff and the Defendants are adjoining property owners. Before redevelopment there was a sandstone structure which stood upon the common boundary between the two properties. A dispute arose in 2005 when the Plaintiff demolished the structure. The original structure is described as extending along the whole length of the common boundary (14.5 metres), varying in height from 2 metres to waist height and had some wire mesh with stakes on top of it. There was also a rocky outcrop which sits adjacent to the boundary on the Plaintiff's property.

A replacement paling fence was erected by the Plaintiff but this was considered not a satisfactory replacement by the Defendants. The Plaintiff claimed that the sandstone structure was a retaining wall and not a dividing fence. The Defendants seek relief under Section 8 of the *Dividing Fences Act 1991* which provides remedial costs where a dividing fence has been damaged or destroyed by a negligent or deliberate act. The main issue of the case was whether or not the structure was a retaining wall or a dividing fence. The Defendants were successful and the Plaintiff was ordered to pay them the sum of \$26,000.

### **The Appeal**

An appeal was made by the Plaintiff alleging an error in point of law and challenged the cost order.

### **Definition of "Fence"**

From the Act it was noted that the definition of "fence" is one of great width and would include any structure that has the characteristics of enclosing or bounding land. A "fence" would satisfy the statutory requirements of a "dividing fence" if it separates the land of adjoining owners.

There is a lack of evidence as to the purpose of the structures construction. However, its characteristics were summarised as:

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- roughly situated on the common boundary,
  - extending along the whole of the boundary,
  - the structure was higher than the fill on the Plaintiffs land,
  - its enclosed (or bounded) the land, and
  - it separated the two properties.

These characteristics constituted compelling evidence that the structure met the requirements of both a “fence” and a “dividing fence” as described by the Act. Because of the fill behind the structure the Plaintiffs case was that the structure was performing some retaining function. The question of ‘what is a retaining wall’ was not argued much, and it was briefly described as being a wall built to hold back or support material (including earth and water) but it could also be argued that there may be overlapping purposes such as a separating structure (a “fence”) and provide support. Even if a fence has a support function, the Court is not precluded from finding that it was a “fence.” Just because it has a function of support does not mean that it falls outside the Act.

### **Conclusion**

The Plaintiff did not demonstrate satisfactorily his appeal and therefore the summons was dismissed.

### **Observations**

Much can be learnt from this court case on when is a structure a retaining wall or a dividing fence as the appeal process hinged on this question. Not much needs to be said about this case except repeating the logical points that lead to the decision and making some extra observations.

1. The structure was roughly on the common boundary which suggests that it was designed to be on the common boundary. By definition a dividing fence is to be situation with the boundary running through the centre
2. The structure extended along the whole of the common boundary much like most dividing fences (this point is not a overly strong point as fences can extend over only some of the boundary and still be considered a

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dividing fence, however this evidence is used to only compound the courts )

3. The structure was higher than the fill on the high side. I think it should be clarified that the structure is noted to be waist high up to 2 metres high, although it's actual height is not mentioned in this point just the fact that it is above the fill. Remember that the original structure had a wire mesh fence on top of it.
4. It bounded the land and separated the two properties.
5. It supported a wire mesh and stake fence.

It is interesting to note that even though it could very well be called a retaining wall because it served the purpose of retaining land, that does not preclude it from also serving as a dividing fence (although this reasoning was backed up by several other points as mentioned above). The question needs to be raised; would the court still come to the same conclusion if the wire mesh fence was not erected on top of the structure, and if so, why? Since the structure was considered a fence the issues of ownership and responsibility were not needed to be addressed.

### **5.2.10 Yared v Glenhurst Gardens [2002] NSWSC 11**

#### **Introduction**

This case has arisen because of the collapse of a high retaining wall at the rear of the plaintiff's property at 56 New Beach Road, Darling Point. The back of their cottage was located about 1.5 metres to the west of the retaining wall. The defendant is the owner of the property to the rear of the plaintiff's property which is 11 Yarranabbe Road, Darling Point. The common boundary runs approximately in a north/south direction. The surface level of the defendant's property is about 4 to 7 metres above the surface level of the plaintiff's property. The retaining wall was constructed in 1927 at about the same time that the dwelling on the plaintiff's land was constructed. The wall was approximately 600mm thick at the base and 230mm thick at the top. From conflicting survey

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reports it is probable, in the Courts view, that the boundary run through the retaining wall.

### **The Event**

On the 6<sup>th</sup> and 7<sup>th</sup> of August 1998 a heavy rainfall occurred with about 228mm of rain falling between 9am and 5pm on the 7<sup>th</sup>. It was on this day that the retaining wall partly collapsed, with large amounts of brick, soil and vegetation falling on the plaintiff's land. The collapse damaged the cottage at the rear of the main house. Property loss assessors estimated that the retaining wall had literally shifted towards the house about 500mm at the northern end and up to 2500mm at the southern end. After the event the local Council issued a Notice of Proposed Order directed to the plaintiff to repair or replace the collapsed retaining wall. The defendant responded by offering to pay half of the cost of the preliminary investigation, however, the plaintiff's solicitor wrote to the defendant's solicitor saying that unless within 14 days the defendant accepts liability for the restoration of the wall, a proceeding would be commenced in the Court.

### **The Plaintiff's Claim**

The plaintiff seeks relief of two kinds:

1. She seeks an order that the defendant forthwith take reasonable steps to abate the nuisance subsisting on its land constituted by the exposed, unretained, face of the bank adjoining the plaintiff's property.
2. She seeks damages and interest to compensate her for the loss and damages she has suffered due to alleged wrongdoing by the defendant.

She seeks compensation for:

- a. Cost of construction of a new retaining wall
- b. Cost of the demolition and full reconstruction of the cottage.  
(\$350,000)
- c. Economic loss arising from damage to the cottage based on loss of rent (\$100,000)
- d. The destruction of "garden amenities"
- e. Loss of enjoyment of the garden

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f. General damages for suffering.

The plaintiff relies on cause of action in nuisance and negligence. The plaintiff alleges that the defendant had breached a duty of care. An essential aspect of the plaintiff's case is to establish causation.

### **The Defence**

The defendant denies liability:

1. He denies that he had the duties that were alleged at him.
2. He denies that works done in 1960 were not negligent on his part (construction of a car park).
3. He has failure of the retaining wall was not caused by any act or omission on his part but the material cause was the plaintiff's own conduct and omission, in failing to take reasonable care to maintain the wall.
4. The defendant raises a defence of *volenti non fit injuri*, contending that the plaintiff voluntarily, and with full knowledge of the circumstances and of the risk and consequences of failure of the wall, accepted that risk and those consequences.
5. The defendant says that the plaintiff has failed to mitigate the damage that arose from any act or omission on its part that the Court may find to be wrongful.
6. The plaintiff failed to take reasonable care to maintain the structural integrity of the wall.

### **The Defendant's Cross-Claims**

1. The plaintiff had a duty of care to maintain and not reduce the structural integrity of the wall, and not to cause its collapse, and says that she breached that duty.
2. The wall constituted a hazard on the plaintiff's property, which she failed to abate.



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3. The defendant has acquired by prescription an easement for support of its property from the plaintiff's property in which she breached her obligations under the easement.

### **Factual and Legal issues**

The main items of dispute in this case are:

- The nature, quantity and location of the fill material deposited by the defendant near the car park in 1960-1961
- The extent to which the defendant removed trees and vegetation from its land above the retaining wall, and
- The cause or causes of collapse of the retaining wall.

### **Deposit of fill material near the car park**

Structural plans from 1960 shows that the design has its own supports and the car park did not impart any load on the retaining wall below it. While there was fill towards the southern end of the boundary, the Courts found that even there the fill was not large enough to place any substantial additional lateral pressure on the retaining wall.

### **Removal of vegetation**

According to the plaintiff, over the years of her occupation of her house, a number of trees and some vegetation were removed from the defendant's land above the retaining wall. The Courts have noted that there is no evidence that the plaintiff complained to the defendant about the removal of the trees, or expressed concern about the affect their removal may have on the stability of the embankment.

### **The plaintiff's maintenance of the retaining wall**

The plaintiff gave evidence that approximately twice a year she would clean the vegetation that had grown over the wall. She would clear the weep holes in the retaining wall and remove any dirt or other materials. She said that she never saw any evidence of the mortar in the wall crumbling or any cracks in the wall. If the weep holes were blocked then rainfall would have "tanked" behind the wall,

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however, it would be unlikely that even if they were all clear that the wall would have survived.

### **Causes of the collapse of the retaining wall**

Several expert witnesses were involved in the case to explain the possible cause of the collapse of the retaining wall. Conflicting opinions and partially plausible explanations resulted in the Courts directing three of the expert witnesses (Dr Barda, Mr Pilz and Mr Hawkins) to meet onsite on 13 June 2000, and each of them sign a brief joint report consequent upon meeting. The experts said that while the construction of the wall was theoretically inadequate, the fact that the wall stood up for about 80 years indicated that it was behaving in a marginally adequate manner. They agreed that the addition of the fill material that was associated with the development of the car park would have locally increased the lateral force but would have only a marginal aggravation to the state of the wall. They observed that the predominant cause of the walls collapse was the increase in ground water flow, which was the result of the unusually intense storm period preceding the collapse.

The Court agreed with the experts that the increase in the hydrostatic pressure to the wall after heavy rainfall was a very significant causal factor and this was deemed the predominant cause of the collapse of the 70 plus year old retaining wall. The plaintiff tried to give evidence why the fill and removal of trees were a major contributing fact, however this was rejected as the Court found that the fill material deposited on the defendants land was not a significant causal factor, neither was the removal of the trees.

### **Leahey's case**

An interesting case was cited by the plaintiff called *Leahey v National Trust* in which a natural bank on the National Trust's land. The Leahey's pointed out, on several occasions, that the bank was deteriorating, however this was not addressed by the National Trust. After a natural weather occurrence this caused a large fall of the bank and caused extensive damages to the Leahey's property (the specifics of this case will not be mentioned here as they do not aid the summary of this case but will be reference to in the 'observations' section at the

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end of this summary). The plaintiff seeks to apply *Leakey's* case to support her claim for a) a mandatory injunction, and b) damages for nuisance.

### **Mandatory injunction to restrain future slippage**

The Court agreed that it is reasonable that by some means the soil from the defendant's land that has slipped onto the plaintiff's land should be retained. However, it does not follow that the defendant should bear the whole responsibility of solving the problem. The present state of the land has occurred because of the collapse of a retaining wall that adequately retained the defendant's land for the whole of the time up till August 1998. As mentioned earlier, the retaining wall was not wholly on the defendant's land. It benefited the defendant by retaining his soil and it benefited the plaintiff by maximising the use of land and protecting from landslip. The current problem has arisen because the wall is no longer there to confer these mutual benefits. Therefore, while the defendant has a relevant duty under the *Leakey* principle, it is not a duty to retain the land wholly at his own expense.

### **Damages for nuisance and negligence**

The Court deemed it correct that if the retaining wall failed solely because of the hydrostatic pressure produced by the rain, the plaintiff cannot recover damages from the defendant for losses consequent upon the failure of the wall. There was nothing to suggest that the defendant knew or ought to have known that the plaintiff and her property were at risk of damages through the collapse of the wall caused by heavy rain, therefore it cannot be said that the defendant had any duty to take remedial steps to prevent or minimise that risk. The plaintiff must therefore show that some material contributing cause of the failure of the wall was some act done behalf by the defendant. Such cause was not convincingly presented to the Court .

### **Conclusion**

In the Court's view the plaintiff failed to make out any entitlement to relief, likewise the defendant has failed to make out any of the claims for relief in his cross-claim. The Court therefore dismissed the proceeding and the cross-claim.

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## Observations

Before the Leakey's case, it was considered in English law that, solely as a result of natural causes, any encroachment and damages by natural material was not the liability of the property owner to the adjoining landowners. The Court held however that the National Trust owed a duty of care to the Leakey's in relation to the hazard of their land slipping onto their land. The Trust was recorded to be well aware of the propensity of the earth to slip and they had a duty of care to take reasonable steps to prevent or minimise the risk of injury or damage to the Leakey's and their property. It was quotes by Megaw LJ that; "The duty is a duty to do that which is reasonable in all circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property...". It is worth noting that although the plaintiff used the Leakey's case as grounds for Australian law, she was not able to cite any Australian cases in which the Leakey's case was applied. There is however no doubt that the principles used in the Leakey's case would be applied to Australian law.

It seems natural that the plaintiff would think that the defendant is in the wrong as she has incurred a large amount of damage from the collapse of the retaining wall, however, the conclusion of the Court is that the defendant did nothing wrong in regards to his duty of care and neither did the plaintiff for that matter. The damages were created by a natural act (the large amount rain fall) and although there were factors that contributed to the collapse of the wall, if it were not for the rain, these factors would be non-consequential. The court never addresses the wall as a fence even though the boundary runs through the middle of the wall and there is no mention of a fence either on the wall or near it. It could even be safe to assume that there was no fence present. In any case, the conclusion to dismiss the claims of the plaintiff and the cross-claims of the defendant suggests that the responsibility of the wall is shared between the two land owners. The wall benefited both land owners as it was said that; "It benefited the defendant by retaining the defendant's soil, and it benefited the plaintiff by maximising the plaintiff's use of her land and protecting the plaintiff from landslip." This is an insightful statement as it is the first time I have read a

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Judge verbally pointing out the mutual benefits of a retaining wall between adjoining land owners. Costs were never mentioned in this case, and as costs can give a general idea of the percentage of responsibility that a land owner has to a retaining wall we cannot make any conclusions in regards to this factor from the information we have. You could assume that the responsibility is fifty fifty but this is not worth discussing here in great detail.

The main observations we need to take from this case can be summarised as, a) the purpose of the wall is only for retaining land and is not considered a dividing fence, b) the retaining wall benefited both land owners, and c) the case was dismissed because neither the defendant nor the plaintiff had acted in malicious or negligent way which caused the collapse of the wall.

### **5.3 Legislation outside of Australia**

Legislation outside of Australia does not apply to Australian law. None the less due to the lack of direct legislation that pertains to retaining walls within Australia, it seems necessary to explore the legislation of other countries. By observing legalisation outside of Australia that is relevant to retaining walls it will show how the legislations compare and may show information that has not been considered within Australia. Information that is derived from these legislations, even though it cannot be applied directly, may help in formulating ideas to be considered when constructing the retaining wall dispute mechanism. A similar method used in researching Australian legislation has been applied to New Zealand and the United Kingdom to determine whether any relevant information regarding retaining walls has been implemented within their various legislations.

#### **5.3.1 New Zealand Legislation**

New Zealand, similarly to Australia, has the most relevant information within their building, fencing and property law acts.

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The *Building Act 2004* references retaining walls in two Clauses within Schedule 1.

In Part 1 of Schedule 1 it talks about building work for which building consent is not required. Under Clause 20 it makes mention that building work in connection with a retaining wall which a) retains no more than 1.5 metres depth of ground; and b) does not support any surcharge or any load additional to the load of that ground (for example, the load of vehicles.) does not need building consent from the required authorities.

In Part 3 Clause 41 is makes mention that building work in which design is carried out or reviewed by a chartered professional engineer is applied to retaining wall in rural zones if:

- a. The wall retaining not more than 3 metres depth of ground; and
- b. The distance between the wall and any legal boundary or existing building is at least the height of the wall.

The removal of a retaining wall is also mentioned under this Part in Clause 43.

Under New Zealand's *Fencing Act 1978* in Part 1 it defines what the act considers a fence:

“fence means a fence, whether or not continuous or extending along the whole boundary separating the lands of adjoining occupiers; and includes all gates, culverts, and channels that are part of or are incidental to a fence; and also includes any natural or artificial watercourse or live fence, or any ditch or channel or raised ground that serves as a dividing fence.”

It also describes what consists of an adequate fence:

“Adequate fence means a fence that, as to its nature, condition, and state or repair, is reasonably satisfactory for the purpose that it serves or is intended to serve.”

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It is interesting to note that in Schedule 2 of the *Fencing Act 1978* it describes a masonry wall as an urban type fence. A masonry wall is described as “walls of brickwork, blockwork, or stonework adequately supported.”

A brief statement within the *Land Transfer Amendment Act 1963* defines occupation boundary in relation to land means “any fence, wall, hedge, building, ditch, or other artificial means, or any natural feature of the land, by which the land actually occupied by the applicant is limited or defined.” (Section 14) Attention should be drawn to the fact that a wall is considered an occupation boundary. Although it doesn’t specifically mention retaining wall it neither limits wall from including a retaining wall.

In the *Property Law Act 2007* a structure under Part 1 Section 4 “means any building, driveway, path, retaining wall, fence, plantation, or other improvement”. This definition is prevalent to Part 6 of the act as under this part it talks about the special powers of the court in relation to entry onto a neighbour’s land wrongly placed structures.

In relation to entering neighbouring land, an owner or occupier may apply to court for authorised entry for the purposes of erecting, repairing, adding to, painting or demolishing the whole or any part of any structure on the applicant’s land.

In subpart 2 of Part 6 the court may grant relief for wrongly placed structures in the following ways:

- a. Requiring any land specified in the order to be vested in the owner of the land affected by the wrongly placed structure
- b. Granting an easement over any land specified in the order for the benefit of the land affected by the wrongly placed structure
- c. Giving the owner of the land affected by the wrongly placed structure the right to possession of any land specified in the order for the period and on the conditions that the court may specify.
- d. Giving the owner of the land affected by the wrongly placed structure the right to possession of the whole or any part of the structure that is specified in the order.

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- e. Allowing or directing any person specified in the order to remove the whole or any specified part of the wrongly placed structure.
  - f. Requiring any person to whom relief is granted under paragraphs (a) to (e) to pay to any person specified in the order reasonable compensation as determined by the court.

However, the court must not grant this relief if the wrongly placed structure is a fence. Questions and disputes concerning a fence must be resolved using the jurisdiction conferred by Section 24 of the *Fencing Act 1978*

### **5.3.2 United Kingdom Legislation**

A wealth of information can be found in regards to retaining walls and overcoming disputes in the *Party Wall etc Act 1996*.

Although they describe a “Party Wall” as a wall that you share with your neighbour if you live in a semi-detached cottage or a terrace house and that a party wall usually separate buildings belonging to different owners, the term “party wall” can also include garden walls built on a boundary. These are known as party fence walls.

These terms fall under the *Party Wall etc Act 1996* which outlines the specific works that owners can carry out while at the same time protect the interests of the adjoining land owners. The Act was designed to avoid or minimise disputes by insuring that property owners:

- Notify their neighbours in advance of certain proposed works
- Obtain written consent from neighbour/s to the proposed works (where the adjoining owners do not ‘agree’ in writing then a surveyor (or surveyors) will determine the time and way in which those works are carried out.)

The following list contains actions that a property owner can undertake on a party wall or party fence wall under the Act after written agreement is obtained



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from the neighbour or a Party Wall Award is given by a surveyor. Such works include:

- Cutting into a wall to take the bearing of a beam (e.g. for a loft conversion),
- Inserting a damp proof course, even if only to your own side of a party wall,
- Raising a party wall and, if necessary, cutting off any objects preventing this from happening,
- Demolishing and rebuilding a party wall,
- Underpinning a party wall or part of a party wall,
- Weathering the junction of adjoining walls or buildings by cutting a flashing into an adjoining building,
- Excavating foundations within three metres of a neighbour's structure and lower than its foundations, and
- Excavating foundations within six metres of a neighbour's structure and below a line drawn down at 45 degrees from the bottom of its foundations.

It also notes that if a proposed new wall is to be built on the line of the boundary between two properties then you must also notify the adjoining neighbour.

The nature of the Act requires permission to be given for works to be undertaken and only relates to certain specific types of work (see list above). It is not designed as another way to prevent your neighbour from undertaking certain works and it should not be applied to minor works that do not affect the structural integrity or loading of a party wall, such as:

- Fixing plug sockets
- Screwing in wall units or shelving etc
- Replastering or rendering your walls, and
- Adding or replacing electrical wiring or sockets

If any works is intend to be undertaken, written notice must be given to the adjoining neighbours at least two months prior for party wall work and at least

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one month for party fence wall works including excavation works. If more than one adjoining land owner is affected by the proposed works then they should also be notified, therefore if a neighbouring property is tenanted, then notification must be given to the title owner and the tenant or occupier.

It is suggested, where possible, to talk to neighbour/s in detail about the proposed works before giving written notice. That way any potential problems can be sorted out in advance. Written agreement should be obtained from neighbouring owners in response to the notice. Before starting any works a neighbour's written agreement to the proposed works or a Party Wall Award from an appointed surveyor must be obtained by the property owner who is undertaking proposed works.

If written agreement is not given from adjoining property owners within 14 days of the notice, the solution that the Act provides is for both parties to appoint an 'agreed surveyor' who will act impartially or each owner appoints their own surveyor. The agreed surveyor or surveyors will then draw up a document called an 'Award'. The Award details;

- The work that is to be carried out,
- When and how the work will be done,
- Who pays for the work, and usually
- Records the condition of the relevant part of the adjoining property before work begins.

The Award may also grant access to both properties so that the proposed work can be carried out in a safe manner and allows the surveyor/s to inspect the progress of the work. Generally, the owner who initiated the proposed work pays for all expenses of the work and any other reasonable costs; however these costs are apportioned between neighbouring owners where appropriate.

It is important to maintain boundary fences to ensure that they do not fall into disrepair. If boundary fences are not clearly defined then it is important that the neighbouring owners understand and agree where their boundary is. A high importance is placed on discussing boundary work and erecting boundary

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fences with neighbour's before undertaking work. Never erect a boundary without your neighbour's knowledge or while they are away.

To prevent mirror disagreements becoming full-scale disputes involving solicitor's letters and court actions it is advised to seek expert advice from either a chartered land surveyor or a chartered surveyor specialising in boundary disputes. This is to prevent neighbouring owners from rushing into legal action, saving on costs while still protecting the land owner's rights. England's title system works similar to Australia's Old System Title and therefore boundaries can change over time for many reasons and this can be a contributing factor that leads to boundary disputes.

## **5.4 Chapter Summary**

The observations derived from this chapter will serve as vital contributing information for the proposed mechanism. The New Zealand and United Kingdom legislation cannot be directly used in Australia but will provide useful comparisons and advice. The following chapter will involve culminating of all the researched information to design a working mechanism for overcoming retaining wall disputes.

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## Chapter 6

# RESULTS

### **6.1 Introduction**

From the information gathered from Australian legislation, general land laws, Australian case studies and legislation from New Zealand and England a proposed own mechanism for solving disputes which arise over retaining walls near property boundaries. The proposed mechanism consists of two parts:

1. The Own Mechanism, and
2. The Pre-Mechanism process

As part of the retaining wall dispute solution process the pre-mechanism questions and guidelines should be applied before undertaking the own mechanism process. The mechanism itself is designed as a flow chart (see Diagram 6.1) so that the correct steps are taken to maximise the mechanisms potential dispute resolving ability. Research has shown that disputes will originally arise from questions regarding ownership and responsibility, the mechanism therefore focuses on these two aspects. The mechanism does exist to change any Australian legislation but rather is designed to work in conjunction with the current legislation. Examples are given at the end of this chapter to practically show the process of the mechanism.

### **6.2 Pre-Mechanism Process**

Disputes will arise from not having an accurate understand of rights and responsibilities as a property owner and also from not having clear and articulate conversation with adjoining property owners. The following steps should be considered before making decisions about retaining wall works or using the proposed mechanism.

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1. *Where is your boundary located?*

Get a registered surveyor to mark the boundary or give an identification survey with special attention to the structures along the subject boundary.

Although this will not overcome the issue of the level of responsibility for each owner or even who is the owner of the retaining wall is, defining property boundaries will allow property owners to see where the rights to land extend to and eliminate any assumptions that either property owner may have about the position of structures and the fence.

In the case *Stereff v Rycen & Anor (2010 QLD)* the assumption was made that the existing bluestone rock wall was on the common boundary and without the consent of the neighbour the defendant caused a one metre cut into the plaintiffs land causing an trespass. Once the original wall structure had been removed there was no clear indicator of where the common boundary was, and if, as the defendant claims, the trespass was unintentional, then having a surveyors boundary marks or offsets off structures could have prevented the trespass and removal of neighbouring soil because the common boundary would have been known. Similarly, in the case *J and T Lonsdale v P Gilbert & Ors (2006 NSW)* an encroachment by the timber retaining wall existed at the time of construction and it was apparently known by the Applicant even though charges weren't filed till the erection of colorbond fence on top of the existing timber retaining wall. Such an incident could have also been avoided if the boundaries were properly marked before construction.

Consult a land surveyor when a survey report is issued so that you understand what has been done. This also allows for any other questions you may need a surveyors professional opinion for to be asked.

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2. *Are there any covenants and/or easements? Who is the dominant and servant tenement?*

Issues over land use and wall structures may already be covered by a covenant or easement in the title. It can be seen from such cases as *Miller v Evans [2010] WASC 127* that a lack of information (or properly understood information) can lead to great distress and cost if properly investigated.

In regards to the *Miller v Evans [2010] WASC 127*, it was known that there was a restrictive covenant over the defendant's rear existing retaining wall. It cannot be proven whether the defendants did not fully understand the restrictions or just chose to ignore them but it is clear that instead of finding ways to defend themselves from the plaintiffs' accusations, they should have instead been aware and fully informed about the restriction and never have proceeded with the works.

Although consulting the local council may be of some benefit, it does not exempt property owners from not knowing their rights and responsibilities.

3. *Always talk with your neighbour before coming to any assumptions about the retaining wall.*

The neighbouring owner may not have any (or the correct) answers to questions about the boundary or ownership of the retaining wall but by initiating a conversation with the neighbour it shows respect and allows the property owner to avoid various accusations in the future.

The best outcome in initiating a conversation with a neighbour will be that the neighbouring owner may have some useful and historical information that could overcome any assumptions that may have been made. This information must always be tested (either by a surveyor or written documents or pictures) because even though the information may be

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favourable to both neighbours, it may need to be verified in the future.

4. *Neighbouring permission should be granted before undertaking any work involving the retaining wall*

In as far as it is possible, before any works are done in relation to a retaining wall near a property boundaries, written permission must be acquired from the neighbouring property owner. The permission should be written, formal and outlines all the works that are to be done. Any deviation from the works that are outlines must require a new written form that requires the consent from the neighbour.

When acquiring neighbouring permission is not possible due to a disagreement over the works or other situations, then it is even more important that:

- Your knowledge of your land rights are understood,
- You receive the property written documentation from the correct authorities (i.e Local Council)
- You know where your boundary is (so as to not encroach or trespass onto neighbouring land)
- You don't breach a duty of care (if one exists), and
- You take reasonable steps so to not be accused of 'nuisance'

It is up to the digression of the property owner, but in some situations an owner may decided that compromising slightly on the original plans may be worth the price of keeping the peace with the neighbouring owners:

"'Peace' is not in the province of the Court to give. It never is in the case of a neighbourhood dispute. The only 'peace' that will come in a neighbourhood dispute is the peace that comes from the two neighbours. Unless the two neighbours are prepared to live together and live in harmony and work towards that, then there is nothing that a third party,

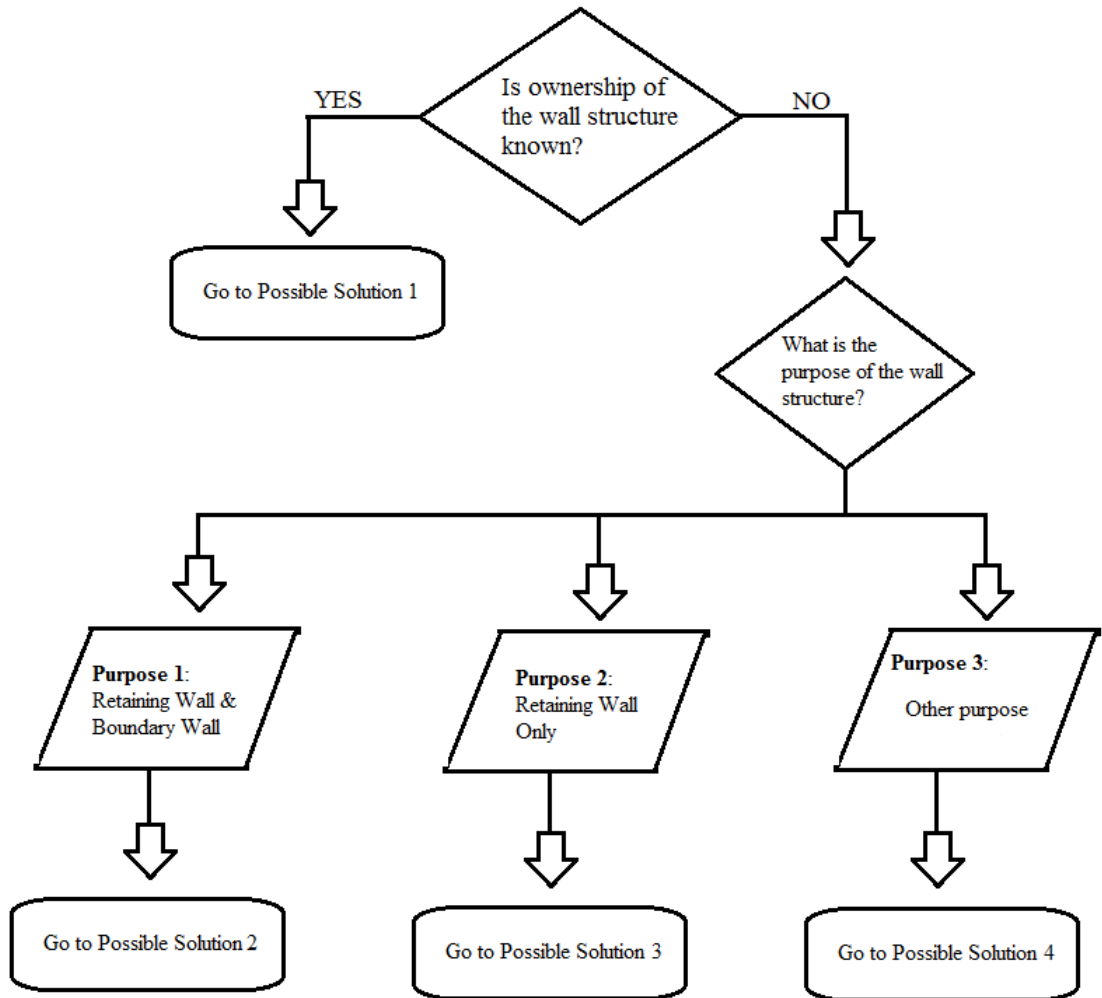
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let alone a court, can do to effect harmony." (*John Llaverio v Brett Anthony Shearer [2014] NSWSC 1336*)

### **6.3 Own Mechanism**

Once the necessary steps have been completed as stated above it may still be necessary to use the proposed mechanism to resolve the retaining wall dispute. The proposed mechanism was designed using a culmination of information gained from legislation and case law. The Flow Chart in Diagram 6.1 will lead to one of four possible solutions regarding retaining wall disputes. Each possible solution plus the possible purposes of wall structures are further explained below Diagram 6.1. Due to the outcome of the *Owners SP 30339 v Torada Pty Ltd & Anor [2008] NSWSC 1154* in regards to the supposed 'boundary wall' it seemed important to also include such a wall structure in the following mechanism. Although this type of wall is not a retaining wall it can cause confusion and can be directly related to a retaining wall in some circumstances and therefore should also be address in the mechanism.





**Figure 6.1**

### **Possible Solution 1**

If ownership of the wall is known, then:

- the property owner has full responsibility for the wall,
- the adjoining owner has a duty of care,
- the wall can be seen as an encroachment if any part of it is over the boundary.

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### **Purpose 1**

The wall has been defined as having two purposes

1. It has retaining qualities
2. It was designed to mark out the common boundary

Therefore, the wall structure would be defined as a retaining wall which also serves as a boundary wall. A retaining wall is not a fence according to Australian legislation; however this does not limit a retaining wall from having a similar purpose to a dividing fence.

### **Purpose 2**

The wall has a single purpose as a retaining wall only and was never designed to mark out the common boundary regardless of whether it is on or near the property boundary.

### **Purpose 3**

The wall does not retain land and therefore is not a retaining wall. The wall serves some other purpose (that purpose can include a boundary wall).

### **Possible Solution 2**

A retaining wall near a common boundary divides land both vertically and horizontally. A retaining wall can benefit both property owners by retaining one owners soil and by maximising the other owners use of land and protecting from landslips. A retaining wall on or near a common boundary should then be seen as mutually beneficial to both land owners.

A retaining wall is not a fence according to most Australian fencing legislation, however this definition only limits the retaining wall in so much as various dividing fences acts do not apply to it. This in no way stops the wall from acting as a boundary wall. This means that even though the wall is not technically a

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fence it still acts as one, in so much as it is designed to define the common boundary. This type of retaining wall should ideally be on the common boundary, however, much like a fence is still defined as a fence even though it may not be erected on the boundary, likewise, the retaining wall can still be considered a boundary wall even if the boundary does not fall in the centre of the wall for some or all of the structure. Since this wall acts as a boundary wall it could also be said that this is mutually beneficial to both adjoining land owners.

Since the structure benefits both land owners as a retaining wall and a boundary wall then ownership and responsibilities attached to the wall should be shared between owners. The owner of the retaining land has a duty of care and any cost to the wall should be divided between owners proportional related to each owners benefit from the structure.

### **Possible Solution 3**

In this solution the retaining wall (which is not considered a boundary wall also) can be an encroachment and therefore must be owned by one of the property owners.

Ownership can be deduced in two ways, either by position or by benefit. It should be treated on a case by case basis to decide which approach to use.

Ownership by position: If the retaining wall is wholly within one of the properties then, since a wall is affixed to the land, that wall becomes the property of the respective land owner.

Ownership by benefit:

1. If the natural state of the land can be ascertained then the land which most likely altered the natural land by erecting a retaining wall is the owner of the wall.
2. If the natural state of the land cannot be ascertained then the land who benefits most from the retaining wall should lay claim to ownership. To identify which land is the most benefited by a retaining wall it is fair to ask

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which land would suffer the most loss to enjoyment and use of land if the retaining wall was removed. If one property has a greater predicted loss then it is fair to appoint ownership of the retaining wall to that particular land owner.

Since 'benefit' can be a subjective term, then it is recommended that a qualified surveyor be called to determine the benefit of the retaining wall if an answer cannot be agreed upon between property owners.

Regardless of identifying who is the most likely owner of the retaining wall, it still remains that both properties at some level are experiencing mutual benefits from the existence of the retaining wall. Therefore, even though one property owner may be identified as the owner of the retaining wall, the other property owner still has a duty of care which should extend to a reasonable level of responsibility to maintain and look after the retaining wall. This means that if a property owner wishes to get rid of an encroachment by a retaining wall by demolishing it and erecting a new retaining wall clear of the boundary, then rather than the cost being fully absorbed by the decided owner, both property owners should be made to pay a portion of the costs. In this way the outcome is similar to possible solution 2. However the level of responsibility should be calculated by the percentage of benefit an adjoining owner has from a retaining wall. If an adjoining property owner gains no benefit from a retaining wall then their responsibility simply extends to a reasonable duty of care.

#### **Possible Solution 4**

In this section 'other purpose' means 'not a retaining wall'. The purpose of the wall could be as a boundary wall only or it could merely serve as a display wall or similar. If the wall is considered a boundary wall but is not a retaining wall then it is not excluded from being defined as a fence and falls under each states respective dividing fence legislation. If it serves any other reason, since as a wall it is affixed to the soil, then ownership and therefore responsibility will fall on the property owner on whose land the wall sits on. This is because as a general rule if something is attached to the land it thereby becomes the property

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of the land owner. If the wall straddles the boundary then each property owner owns whatever portion of the wall is on their land and can, if possible, remove their portion of the wall so long as they don't commit trespass by damaging the portion of wall that is not on their land.

### **Explanatory Note**

These possible solutions deal only with respect to ownership, responsibilities and restrictions and do not take into account any actions by a property owner that could compromise or damage a retaining wall, nor does it take into account a property owner who breaches a duty of care. Each property owner should be held responsible for his/her actions in any given situation.

## **6.4 Examples**

The following examples are related to Possible Solution 3 as this solution would be the most common case in relation to retaining walls and also the most confusing as there can be many scenarios related to this solution. Examples 1 to 3 cover three of the most likely scenarios, those being; a) a retaining wall which is both wholly contained within a property and fully benefiting that particular property owner, b) a retaining wall that straddles the boundary but fully benefits one property owner, and c) a retaining wall which is wholly contained within a property but benefits both land owners. Possible Solution 3 is applied to each example with the logical steps outlined and the conclusion stated.

### **Example 1**

The example illustrated in Figure 6.2 shows a brick retaining wall situated in a well-established residential area in Sutherland, New South Wales between the western property (retained land) and the eastern property (the retaining land). From following the steps in possible solution 3 we can ascertain that:

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1. The brick retaining wall is wholly within the property belonging to the retained land, and
  2. The brick retaining wall fully benefits the retained land as the eastern properties land is in its natural state.

The retaining wall therefore satisfies ownership by both benefit and position. It can then be deduce that the western property has full ownership and responsibility of the brick retaining wall and that the eastern property simply has a reasonable duty of care which would consist of but not limited to keeping their land tidy around the base of the wall and alerting the owner if deterioration on the eastern face of the retaining wall is discovered. No costs should be issued to the eastern land owner for maintenance or any other works regarding the retaining wall.



**Figure 6.2**

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## Example 2

The example illustrated in Figure 6.3 shows a concrete block retaining wall situated in a well-established residential area in Revesby, New South Wales between the northern property (retained land) and the southern property (the retaining land). From following the steps in possible solution 3 we can ascertain that:

1. The retaining wall is situated on the common boundary line and does not sit wholly within either property, and
2. The retaining wall fully benefits the retained land as the southern properties land is in its natural state.

Ownership cannot be deduced by position since the retaining wall straddles the common boundary line and is not wholly contained within any one property. However, since the southern land is in its natural state, the retained land has full benefit of the retaining wall. From this example the northern property fully benefits from the wall as it maximises their use of land and allows the land to remain relatively flat. It can then be deduced that the northern property has full ownership and responsibility of the concrete block retaining wall, that part of the retaining wall encroaches onto the southern land and that the southern property owner has a duty of care. No costs should be issued to the southern land owner for maintenance or any other works regarding the retaining wall.



**Figure 6.3**

### **Example 3**

The example illustrated in Figure 6.4 shows a stone retaining wall situated in a more recent developed residential area in Rockhampton, Queensland. The lands natural state falls towards the north. From following the steps in possible solution 3 we can ascertain that:

1. The retaining wall is situated wholly within the property belonging to the retaining (northern) land, and
2. The retaining wall benefits both the retaining land and the retained land as both properties have altered the natural state of the land.

Ownership cannot be deduced by benefit since the retaining wall benefits both properties by maximising their land usage and enjoyment. However, since the retaining wall is wholly within the northern property (the retaining land) ownership of the retaining wall should be attributed to the land owner as an affixed structure.



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Both land owners have a duty of care and it would be reasonable for the retaining lands property owner to maintain the retaining wall as it is wholly within their property and because any maintenance from the southern property owners would result in an act of trespass. However if any major works are required on the retaining wall that involve a cost, then both property owners should contribute since both parties benefit from the structure. In this particular case the benefit of the retaining wall is about 50/50 so the cost should be divided equally. Whatever the ratio of benefit is agreed upon, that is how much the cost should be distributed.



**Figure 6.4**

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## **6.5 Chapter Summary**

This chapter contains the results of this project as formulated in the pre-mechanism process and the own mechanism with examples to show the practical workings of this two part mechanism. This mechanism serves only as a guide for retaining walls on or near neighbouring properties where no traceable ownership is available. The mechanism is designed to work with the current Australian legislation; it does not seek to change it nor does this mechanism assume to have more authority than the power of the courts. The proposed mechanism still requires the cooperation of both neighbours to ensure that a fair and peaceful resolution is reached.

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## Chapter 7

### CONCLUSIONS

#### **7.1 Further Research**

This project has established that there is minimal legislation relating to retaining walls on or near property boundaries and that the creation of the own mechanism required both legislation and case law. The results of the own mechanism were derived from the information gathered and was limited by the time frame of the project. This project can be used as a starting point for further work to be conducted in the continual development of the current mechanism.

Further in depth research into case law and legislation is needed to produce a more erudite mechanism which may lead to the possibility of changing the legislation involving retaining walls near property boundaries.

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## List of Legislation

- 1) *Dividing Fences Act 1991 (NSW)*
- 2) *Encroachment of Buildings Act 1922 (NSW)*
- 3) *Conveyancing Act 1919 (NSW)*
- 4) *Dividing Fences and Trees Act 2011 (QLD)*
- 5) *Land Titles Act 1994 (QLD)*
- 6) *Property Law Act 1974 (QLD)*
- 7) *Development Act 1993 (SA)*
- 8) *Development Regulations 2008 (SA)*
- 9) *Encroachments Act 1944 (SA)*
- 10) *Building Regulations 2006 (VIC)*
- 11) *Fences Act 1968 (VIC)*
- 12) *Building Act 2011 (WA)*
- 13) *Dividing Fences Act 1961 (WA)*
- 14) *Property Law Act 1969 (WA)*
- 15) *Building Act 2004 (ACT)*
- 16) *Common Boundaries Act 1981 (ACT)*
- 17) *Encroachment of Buildings Act (NT)*
- 18) *Fencing Act (NT)*
- 19) *Building Act 2004 (NZ)*
- 20) *Fencing Act 1978 (NZ)*
- 21) *Land Transfer Amendment Act 1963 (NZ)*
- 22) *Property Law Act 2007 (NZ)*
- 23) *Party Wall etc Act 1996 (UK)*

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*J and T Lonsdale v P Gilbert & Ors [2006] NSWLEC 30*

*John Llaverio v Brett Anthony Shearer [2014] NSWSC 1336*

*Margy L Walsh v R Tomsic [2014] NSWCATCD 118*

*Miller v Evans [2010] WASC 127*

*Owners SP 30339 v Torada Pty Ltd & Anor [2008] NSWSC 1154*

*Stereff v Rycen & Anor [2010] QDC 117*

*Warringah Properties Pty Ltd v Babij (Snr) & I Ors [2006] NSWSC 702*

*Yared v Glenhurst Gardens [2002] NSWSC 11*

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## Appendix

### **Appendix A**

Project Specification



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University of Southern Queensland  
FACULTY OF ENGINEERING AND SURVEYING

**ENG 4111/4112 Research Project**  
**PROJECT SPECIFICATION**

FOR: **CRAIG HANCOCK**

TOPIC: OWN MECHANISM FOR SOLVING DISPUTES OVER RETAINING WALLS NEAR PROPERTY BOUNDARIES

SUPERVISORS: Shane Simmons  
Senior lecturer, Civil Engineering and Surveying School Coordinator

ENROLMENT: ENG 4111 – S1 (Distance), 2015  
ENG 4112 – S2 (Distance), 2015

PROJECT AIM: This project seeks to investigate the current legislation surrounding retaining walls which are erected near property boundaries, looking at ownership, rights and responsibilities and create an own mechanism for overcoming retaining wall disputes

**PROGRAMME: Issues A, 15 March 2015**

1. Research background information relating to land laws and retaining walls.
2. Research current legislation in each state that relates to retaining walls and boundaries.
3. Research and evaluate case studies involving boundary disputes that include a retaining wall.
4. Analyse information gathered and create a mechanism(s) for overcoming retaining wall disputes.
5. Apply mechanism(s) to case studies and other scenarios making note of the expected outcome.

*As time permits:*

6. Research legislation relating to retaining walls outside of Australia

AGREED \_\_\_\_\_ (student) \_\_\_\_\_ (supervisor)  
Dates: / / 2015 Dates: / / 2015

Examiner/Co-examiner: \_\_\_\_\_

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**Appendix B**

Survey Plan with Easements and Covenants over Retaining Walls

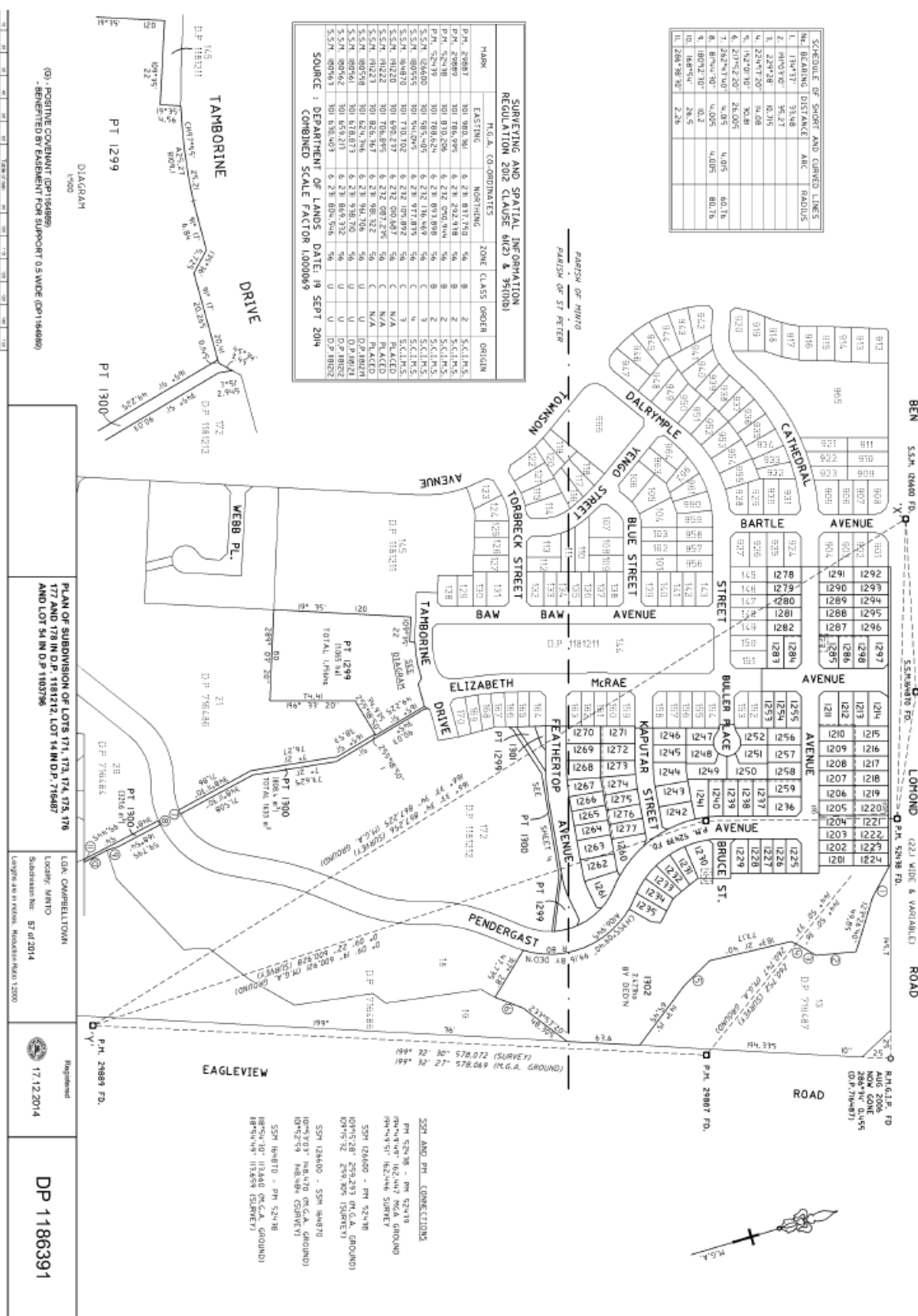
**SCHEDULE OF SHORT AND CURVED LINES**

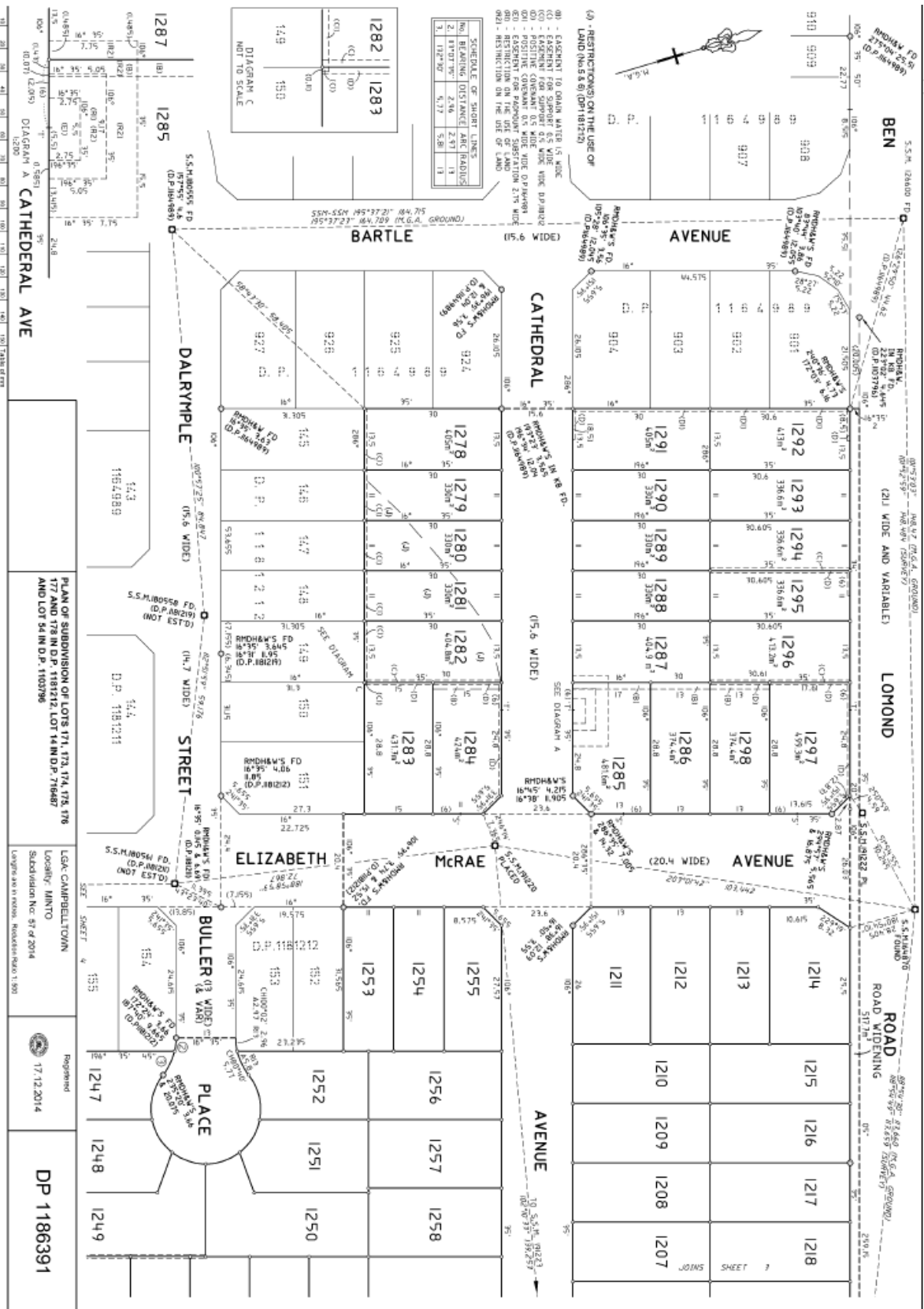
NO.	BEARING	DISTANCE	AIRC.	RADIUS
1	101°02'19"	35.27		
2	229°24'	60.05		
3	229°24'	60.05		
4	124°47'20"	60.08		
5	194°49'30"	60.81		
6	207°52'20"	24.035		
7	294°27'140"	60.05	60.75	
8	81°04'30"	60.05	60.75	
9	100°12'30"	60.2		
10	185°51'	26.5		
11	286°38'30"	2.26		

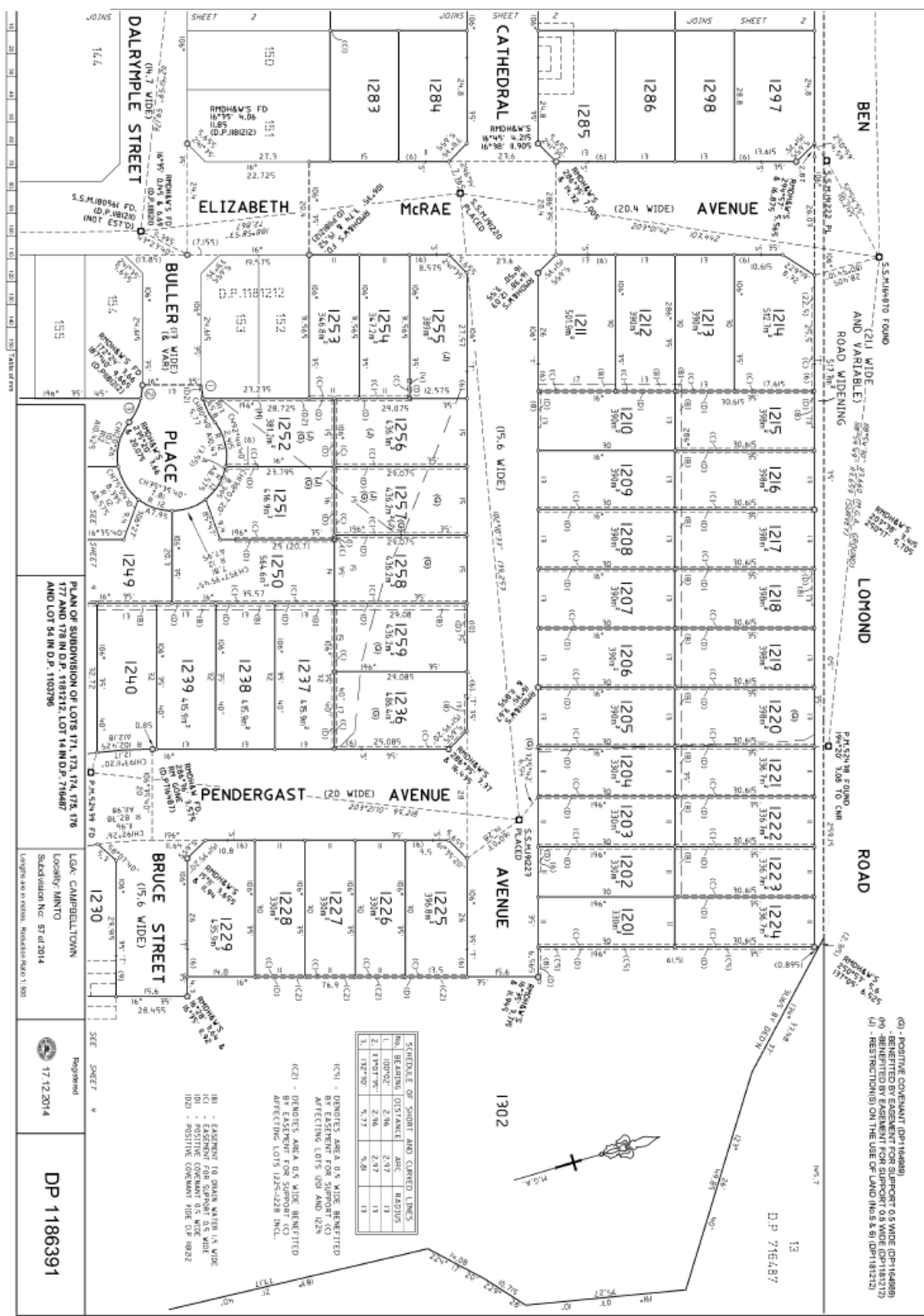
**SUBJECTING AND SPATIAL INCORPORATION REGULATIONS 2012 (CLAUSE 61C) & 35(10)(b))**

HARK	FIELD CO ORDINATES	ZONE CLASS	ORDER	ORIGIN
P.M. 20883	301 708.095	NORTHING	56	8
P.M. 20884	301 708.095	EASTING	56	8
P.M. 52430	301 878.5204	EASTING	56	2
P.M. 52431	301 878.5204	NORTHING	56	2
P.M. 52432	301 878.5204	EASTING	56	2
P.M. 52433	301 878.5204	NORTHING	56	2
P.M. 52434	301 878.5204	EASTING	56	2
P.M. 52435	301 878.5204	NORTHING	56	2
P.M. 52436	301 878.5204	EASTING	56	2
P.M. 52437	301 878.5204	NORTHING	56	2
P.M. 52438	301 878.5204	EASTING	56	2
P.M. 52439	301 878.5204	NORTHING	56	2
P.M. 52440	301 878.5204	EASTING	56	2
P.M. 52441	301 878.5204	NORTHING	56	2
P.M. 52442	301 878.5204	EASTING	56	2
P.M. 52443	301 878.5204	NORTHING	56	2
P.M. 52444	301 878.5204	EASTING	56	2
P.M. 52445	301 878.5204	NORTHING	56	2
P.M. 52446	301 878.5204	EASTING	56	2
P.M. 52447	301 878.5204	NORTHING	56	2
P.M. 52448	301 878.5204	EASTING	56	2
P.M. 52449	301 878.5204	NORTHING	56	2
P.M. 52450	301 878.5204	EASTING	56	2
P.M. 52451	301 878.5204	NORTHING	56	2
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P.M. 52454	301 878.5204	EASTING	56	2
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P.M. 52456	301 878.5204	EASTING	56	2
P.M. 52457	301 878.5204	NORTHING	56	2
P.M. 52458	301 878.5204	EASTING	56	2
P.M. 52459	301 878.5204	NORTHING	56	2
P.M. 52460	301 878.5204	EASTING	56	2

SOURCE : DEPARTMENT OF LANDS DATE: 19 SEPT 2010  
SCALE FACTOR: 1.0000009







SCHEDULE OF SHORT AND CURVED LINES

No.	Bearing	Distance	ARC	RADIUS
1	102° 52'	2.96	2.97	11
2	102° 52'	5.72	5.72	11
3	102° 52'	5.72	5.72	11

- (C1) - DENOTES AREA 0.5 WIDE BENEFITED BY EASTERN FOR SUPPORT (C1)
- (C2) - DENOTES AREA 0.5 WIDE BENEFITED BY EASTERN FOR SUPPORT (C2)
- (C3) - DENOTES AREA 0.5 WIDE BENEFITED BY EASTERN FOR SUPPORT (C3)
- (E1) - EASEMENT FOR SUPPORT 0.5 WIDE
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PLAN OF SUBDIVISION OF LOTS 171, 172, 173, 174, 175, 176, 177 AND 178 IN DP 1181212 LOT 14 IN DP 1180786 AND LOT 54 IN DP 1180786

LGC CAMPBELLTOWN  
LOCALITY MINTO  
Subdivision No. 57 of 2014



Registered  
17/12/2014  
DP 1186391



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## **Appendix C**

Example of Subdivision Plan with Retaining Walls shown

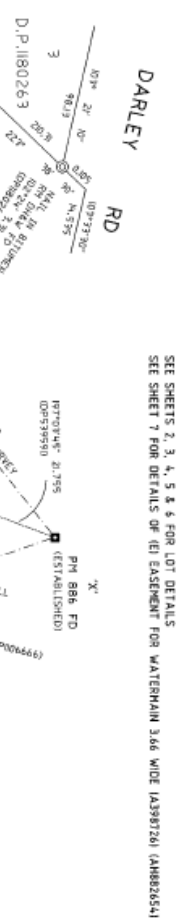


DIAGRAM 1

SEE SHEETS 2, 3, 4, 5 & 6 FOR LOT DETAILS  
SEE SHEET 7 FOR DETAILS OF (E) EASEMENT FOR WATERMAIN 3.66 WIDE (A390726) (A4802654)

MARK	H.O.A.	COORDINATES	CLASS	ORDER	LEVEL	CLASS	ORDER	ORDIN
PM 882	34.1	520.728	8	7	31.095	1B	1	520.728
PM 884	34.1	520.855	8	7	31.095	1B	1	520.855
PM 888	34.1	520.978	8	7	31.095	1B	1	520.978

COMBINED SEA LEVEL SCALE FACTOR = 0.999901  
SOURCE: M.G.A. CO-ORDINATES ADOPTED FROM I.S.M. 16th AUGUST 2010

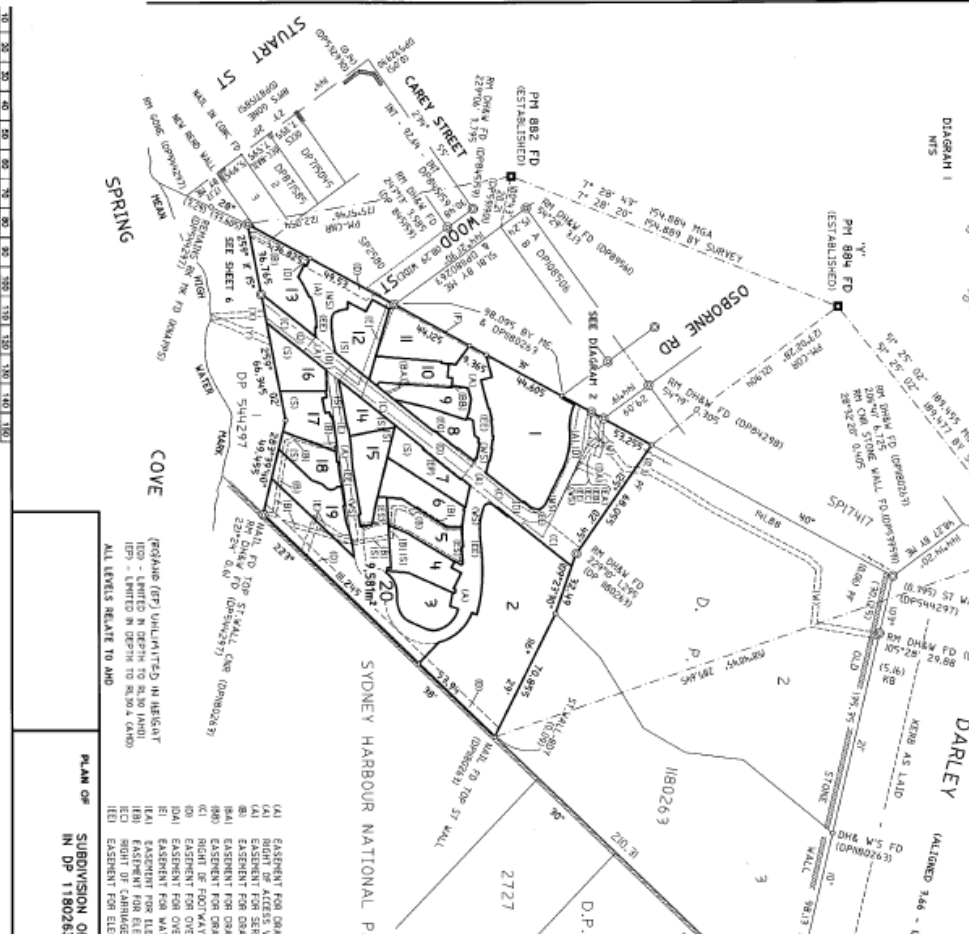


DIAGRAM 2

- (A1) EASEMENT FOR DRAINAGE OF WATER VARIABLE WIDTH
- (A2) RIGHT OF ACCESS VARIABLE WIDTH
- (A3) EASEMENT FOR DRAINAGE OF WATER 2 WIDE
- (A4) EASEMENT FOR DRAINAGE OF WATER 1.15 WIDE
- (A5) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE
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- (A95) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE
- (A96) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE
- (A97) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE
- (A98) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE
- (A99) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE
- (A100) EASEMENT FOR OVERHEAD POWER LINE 3 WIDE

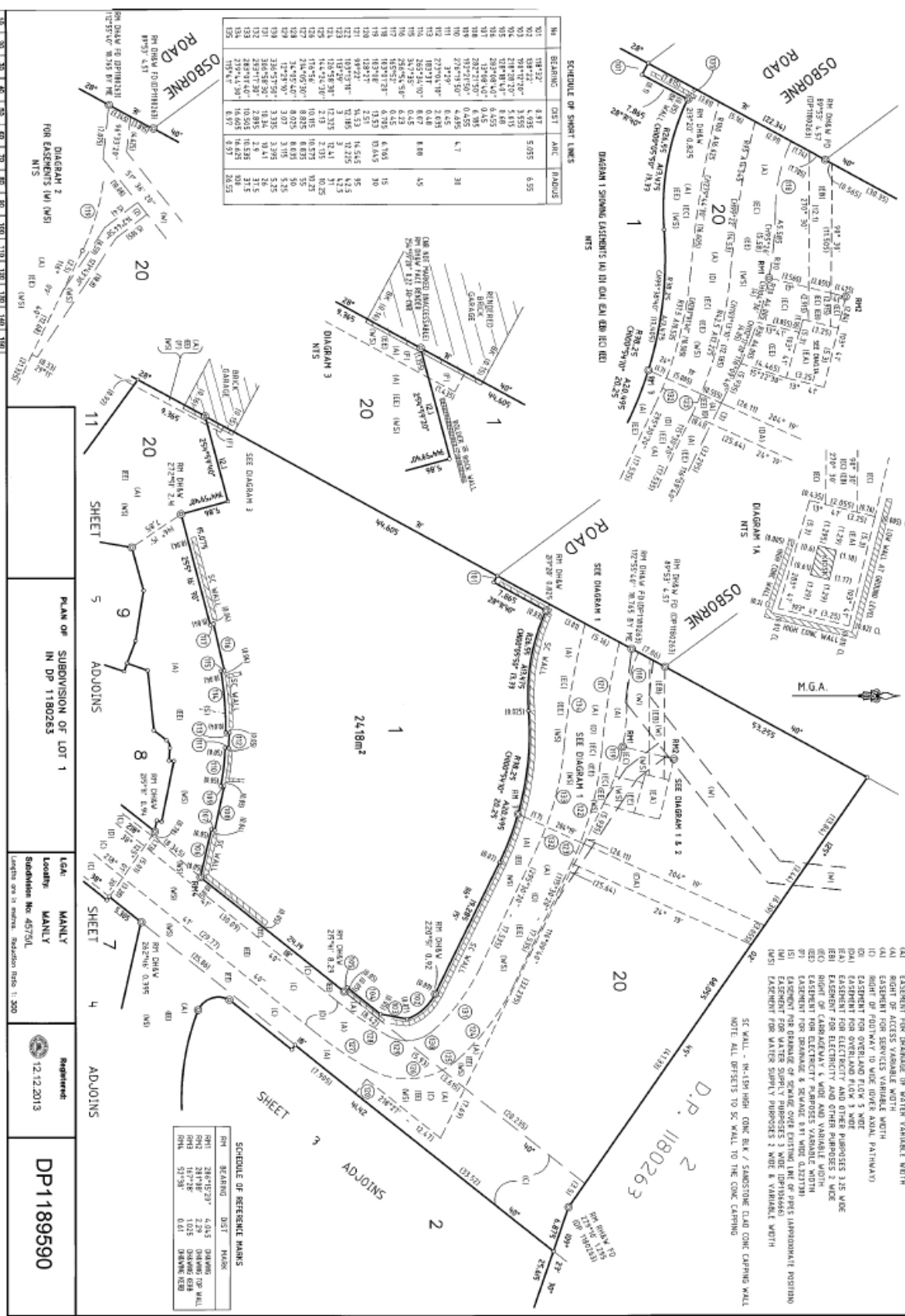
PLAN OF SUBDIVISION OF LOT 1 IN DP 1180263

Scale: 1:1000

Registered: 12/12/2013

DP1189590 P





SCHEDULE OF SHORT LINKS

NO	BEARING	CST	ARC	RADIUS
101	188°22'	4.97	5.075	6.55
102	188°22'	4.98	5.075	6.55
103	217°20'10"	5.113	5.113	6.60
104	188°22'	4.98	5.075	6.55
105	188°22'	4.98	5.075	6.55
106	188°22'	4.98	5.075	6.55
107	188°22'	4.98	5.075	6.55
108	188°22'	4.98	5.075	6.55
109	188°22'	4.98	5.075	6.55
110	188°22'	4.98	5.075	6.55
111	188°22'	4.98	5.075	6.55
112	188°22'	4.98	5.075	6.55
113	188°22'	4.98	5.075	6.55
114	188°22'	4.98	5.075	6.55
115	188°22'	4.98	5.075	6.55
116	188°22'	4.98	5.075	6.55
117	188°22'	4.98	5.075	6.55
118	188°22'	4.98	5.075	6.55
119	188°22'	4.98	5.075	6.55
120	188°22'	4.98	5.075	6.55
121	188°22'	4.98	5.075	6.55
122	188°22'	4.98	5.075	6.55
123	188°22'	4.98	5.075	6.55
124	188°22'	4.98	5.075	6.55
125	188°22'	4.98	5.075	6.55
126	188°22'	4.98	5.075	6.55
127	188°22'	4.98	5.075	6.55
128	188°22'	4.98	5.075	6.55
129	188°22'	4.98	5.075	6.55
130	188°22'	4.98	5.075	6.55
131	188°22'	4.98	5.075	6.55
132	188°22'	4.98	5.075	6.55
133	188°22'	4.98	5.075	6.55
134	188°22'	4.98	5.075	6.55
135	188°22'	4.98	5.075	6.55

SCHEDULE OF REFERENCE MARKS

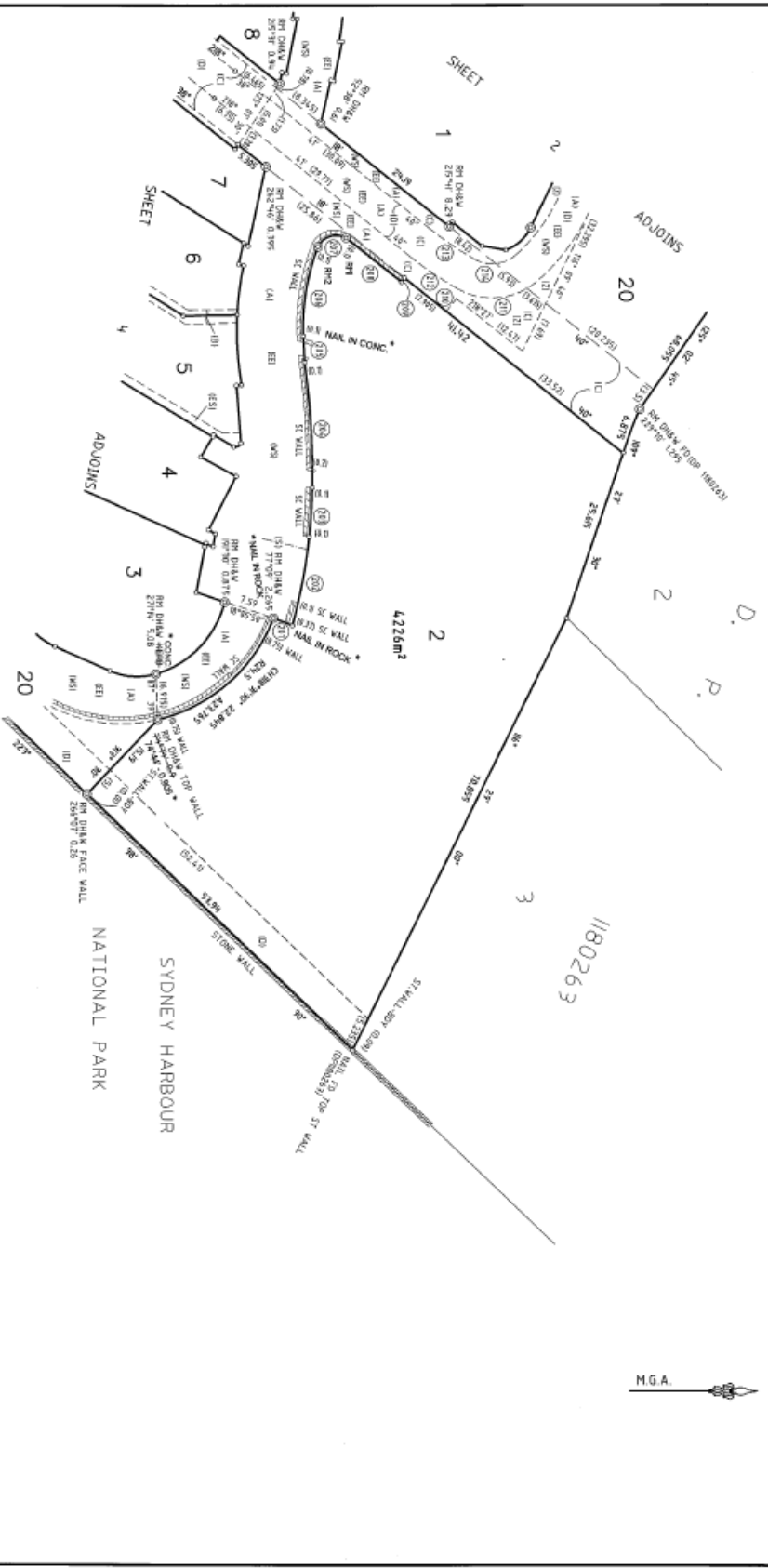
MARK	BEARING	DIST	MARK
RH1	286°15'20"	4.045	DRIVING
RH2	147°12'	1.025	DRIVING CORNER
RH3	51°59'	0.61	DRIVING CORNER

PLAN OF SUBDIVISION OF LOT 1  
IN DP 1180263

SCALE: MAINLY  
Location: MAINLY  
Standard No: 4579L  
Adjoins: SHEET 4, 5, 7, 8, 9, 10, 11

Approved: 12/12/2013

DP1189590



SCHEDULE OF SHORT LINES

NO	BEARING	DIST	ARC	RADIUS
201	20°44'	2.725	12.22	80.8
202	38°48'40"	12.125	12.22	80.8
203	28°48'40"	12.125	12.22	80.8
204	244°28'50"	18.405	18.42	125.2
205	200°01'28"	1.885	18.42	125.2
206	27°25'30"	13.21	13.215	37.3
207	18°11'46"	70.425	4.045	3
208	108°17'47"	0.415		
209	108°17'47"	2.81		
210	108°17'47"	2.81		
211	214°15'28"	8.025	8.025	14.15
212	34°45'44"	8.025	8.025	58
213	172°28'18"	3.07	3.115	57.9

SCHEDULE OF REFERENCE MARKS

R/M	BEARING	DIST	MARK
R/M1	27°16'	2.145	DH&W FACE WALL
R/M2	28°59'	2.89	DH&W FACE WALL

SE WALL - 1815MM HIGH CONC B&K / SANDSTONE CLAD CONC CARPING WALL  
 NOTE: ALL OFFSETS TO SE WALL TO THE CONC CARPING WALL

Surveyor: **WYNNE R LOUIS**  
 Date of Survey: **25TH AUGUST 2013**  
 Surveyor's Ref: **MA147-SUB-LOT1**

PLAN OF SUBDIVISION OF LOT 1  
 IN DP 1180263

LGA: **MANLY**  
 Locality: **MANLY**  
 Subdivision No: **45750L**  
 (Lengths are in metres. Refer to Rule 1.400)

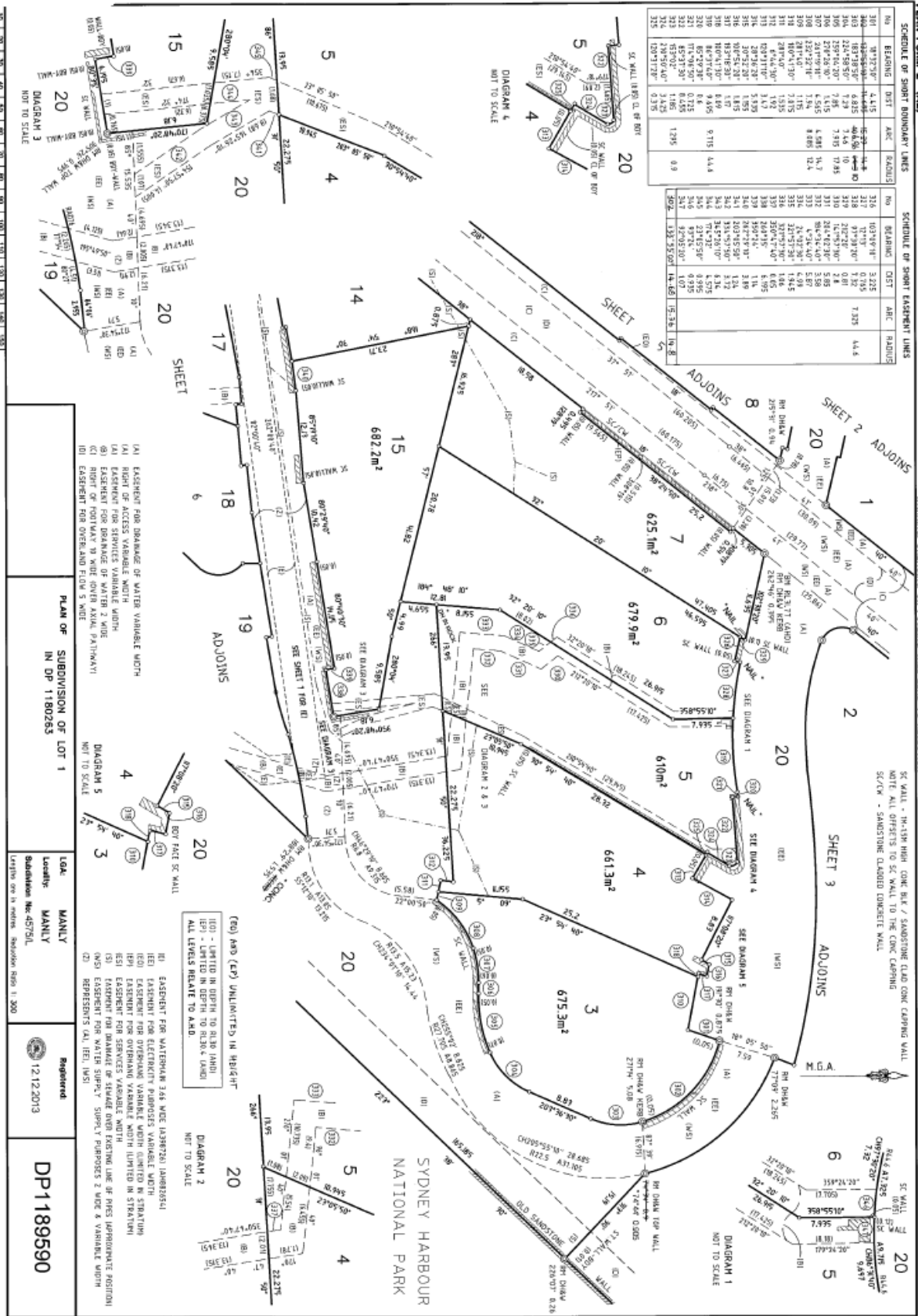
Regulations: **12.12.2013**

**DP1189590**

- (A) EASEMENT FOR DRAINAGE OR WATER VARIABLE WIDTH
- (A1) RIGHT OF ACCESS VARIABLE WIDTH
- (A2) EASEMENT FOR SERVICES VARIABLE WIDTH
- (B) EASEMENT FOR DRAINAGE OR WATER 2 WIDE
- (C) RIGHT OF FOOTWAY TO WIDE OVER ADJACENT PATHWAY
- (D) EASEMENT FOR OVERLAND FLOW 5 WIDE
- (E) EASEMENT FOR OVERLAND FLOW 10 WIDE
- (F) EASEMENT FOR SERVICES VARIABLE WIDTH
- (F1) EASEMENT FOR DRAINAGE OR SEWAGE OVER EXISTING LINE OR PIPES APPROXIMATE POSITION
- (F2) EASEMENT FOR WATER SUPPLY PIPES 2 WIDE & VARIABLE WIDTH
- (F3) REPRESENTS IAL (E), (NS)

\* VARIOUS AMENDMENTS WIDE 2014-1615 3/12/2014

SCHEDULE OF SHORT BOUNDARY LINES				SCHEDULE OF SHORT EASTMENT LINES			
No.	BEARING	DIST	ARC. RADII	No.	BEARING	DIST	RADII
301	91°37'30"	4.115	15.295	310	103°49'18"	3.225	12.5
302	142°52'30"	1.448	5.444	311	71°53'	0.955	3.5
303	183°38'30"	0.825	3.142	312	17°19'	1.12	4.4
304	229°46'30"	7.81	29.4	313	121°52'30"	2.7	10.2
305	274°26'30"	4.115	15.295	314	282°42'30"	5.85	21.8
306	314°59'18"	4.585	16.9	315	304°21'40"	4.29	15.9
307	341°09'18"	4.585	16.9	316	324°29'30"	4.9	18.3
308	214°40'	1.175	4.44	317	342°38'	6.895	25.6
309	214°40'	1.175	4.44	318	354°52'30"	3.72	14.1
310	180°14'30"	7.815	29.4	319	324°52'30"	14.5	53.8
311	287°40'30"	1.47	5.444	320	339°52'30"	11.4	42.5
312	292°31'18"	1.47	5.444	321	359°24'30"	3.09	11.6
313	292°31'18"	1.47	5.444	322	342°42'30"	3.72	14.1
314	292°31'18"	1.47	5.444	323	354°52'30"	6.895	25.6
315	292°31'18"	1.47	5.444	324	342°42'30"	3.72	14.1
316	292°31'18"	1.47	5.444	325	354°52'30"	6.895	25.6
317	292°31'18"	1.47	5.444	326	342°42'30"	3.72	14.1
318	292°31'18"	1.47	5.444	327	354°52'30"	6.895	25.6
319	292°31'18"	1.47	5.444	328	342°42'30"	3.72	14.1
320	292°31'18"	1.47	5.444	329	354°52'30"	6.895	25.6
321	292°31'18"	1.47	5.444	330	342°42'30"	3.72	14.1
322	292°31'18"	1.47	5.444	331	354°52'30"	6.895	25.6
323	292°31'18"	1.47	5.444	332	342°42'30"	3.72	14.1
324	292°31'18"	1.47	5.444	333	354°52'30"	6.895	25.6
325	292°31'18"	1.47	5.444	334	342°42'30"	3.72	14.1
326	292°31'18"	1.47	5.444	335	354°52'30"	6.895	25.6



- (A) EASEMENT FOR DRAINAGE OF WATER VARIABLE WIDTH
- (B) RIGHT OF ACCESS VARIABLE WIDTH
- (C) EASEMENT FOR SERVICES VARIABLE WIDTH
- (D) EASEMENT FOR DRAINAGE OF WATER 2 WIDE
- (E) RIGHT OF FOOTWAY 3 WIDE OVER AXIAL PATHWAY
- (F) EASEMENT FOR OVERLAND FLOW 5 WIDE
- (G) EASEMENT FOR WATER SUPPLY
- (H) REPRESENTS (A), (B), (C), (D), (E), (F), (G), (H)

- (FO) AND (EP) UNLIMITED IN HEIGHT
- (FI) - LIMITED IN DEPTH TO 0.30M LAND
- (FJ) - LIMITED IN DEPTH TO 0.30M LAND
- ALL LEVELS REFER TO A.M.D.



SYDNEY HARBOUR NATIONAL PARK

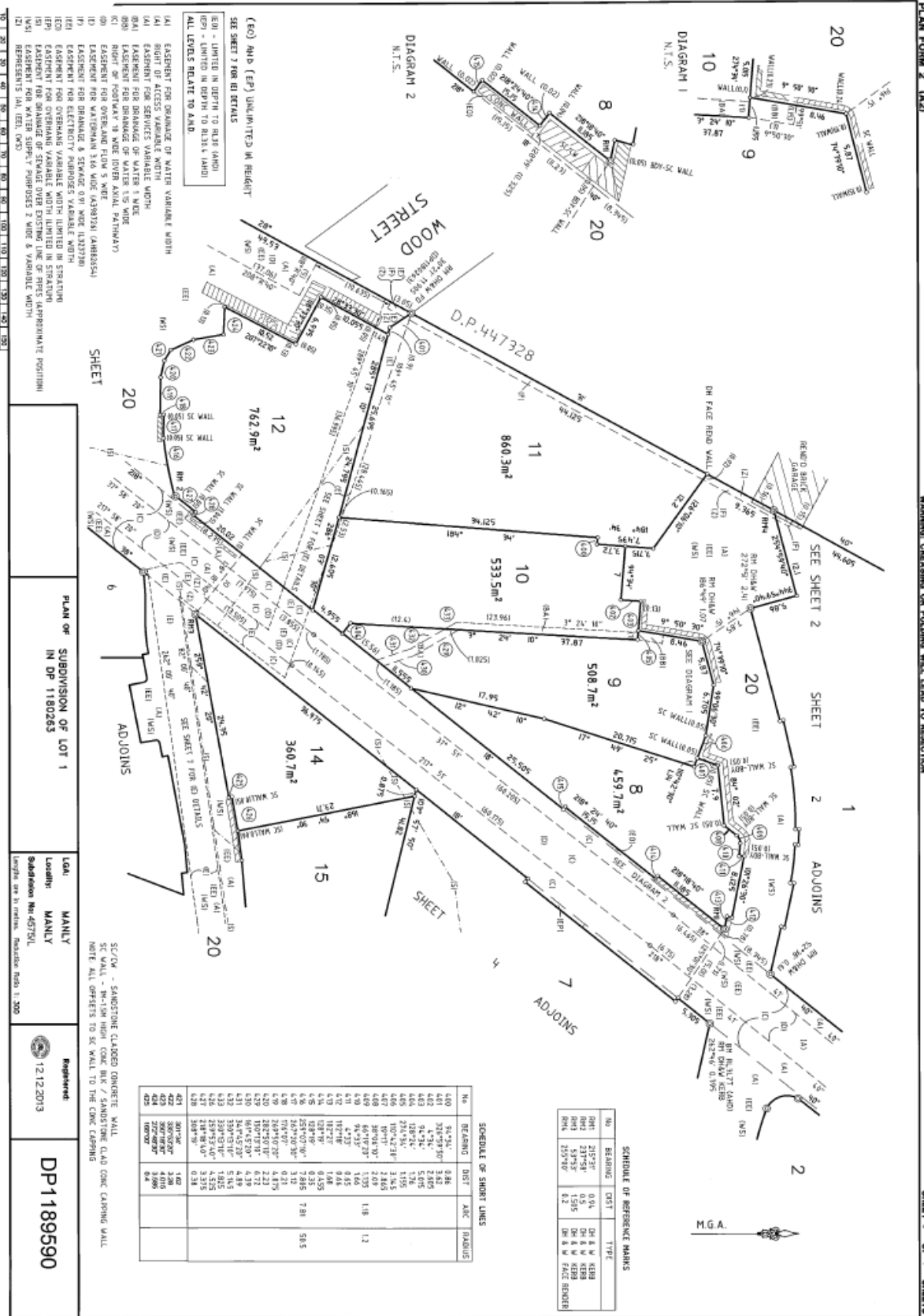
PLAN OF SUBDIVISION OF LOT 1 IN DP 1180285

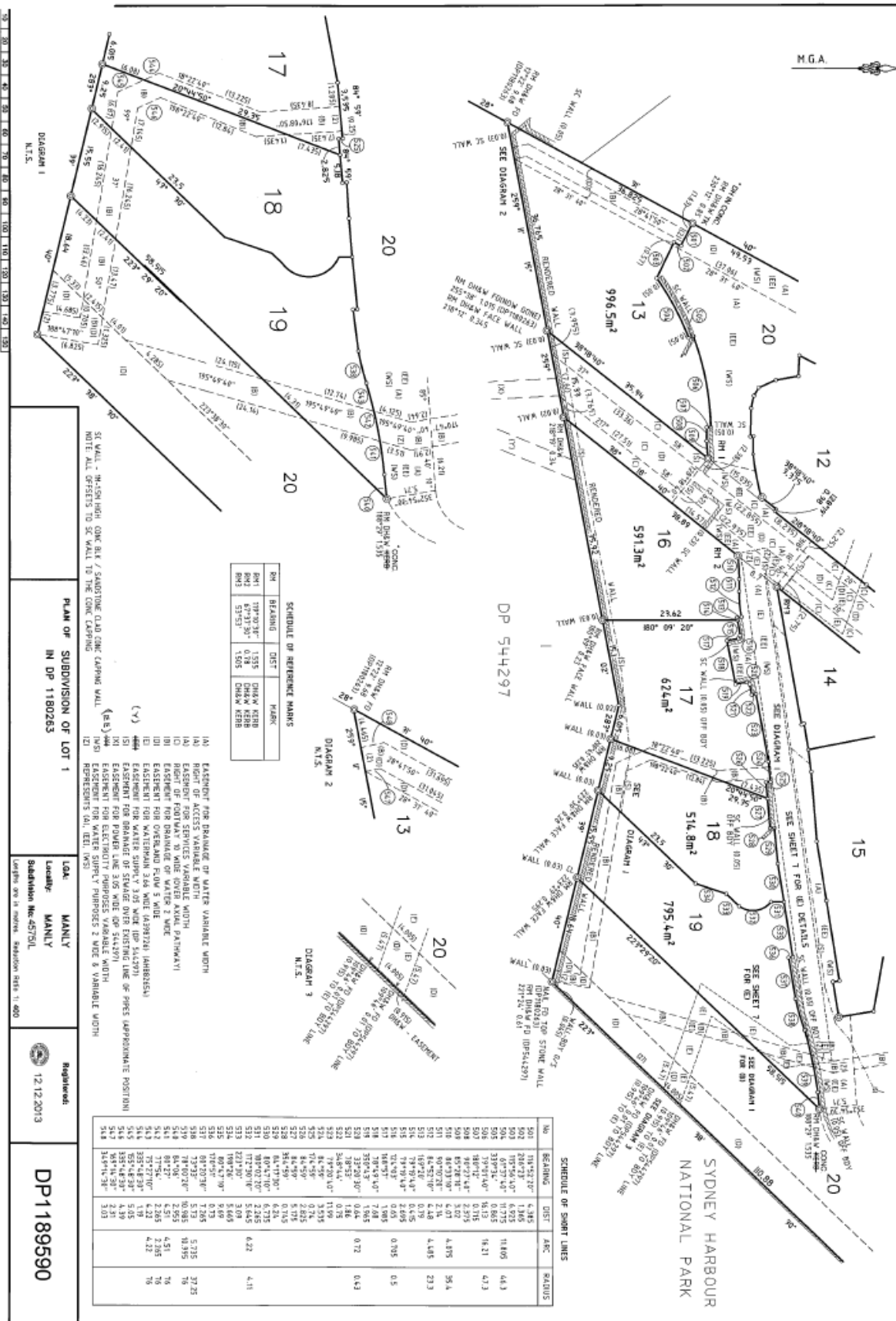
Locality: MAINLY  
Subdivision No: 4575/L

Registered: 12/12/2013

DP1189590

VARIOUS AMENDMENTS VIDE 2014-1615 3 12 2014





SCHEDULE OF REFERENCE MARKS

BM	BEARING	DIST	MARK
BM1	179°03'4"	1.555	CHALK MARK
BM2	67°31'30"	0.78	CHALK MARK
BM3	55°53'	1.503	CHALK MARK

- (A) EASTERN FIRE DRINKAGE OR WATER VARIABLE WIDTH
- (AA) RIGHT OF ACCESS VARIABLE WIDTH
- (AB) EASEMENT FOR SERVICES VARIABLE WIDTH
- (AC) EASEMENT FOR SERVICES VARIABLE WIDTH (PLATINUM)
- (AD) EASEMENT FOR DRAINAGE OF WATER 2 WIDE
- (AE) EASEMENT FOR OVERLAND FLOW 3 WIDE
- (AF) EASEMENT FOR WATER SUPPLY 3.64 WIDE (AS 3972) (HARBOURS)
- (AG) EASEMENT FOR WATER SUPPLY 3.05 WIDE (DP 54297)
- (AH) EASEMENT FOR POWER LINE 3.05 WIDE (DP 54297)
- (AI) EASEMENT FOR ELECTRICITY PURPOSES VARIABLE WIDTH
- (AJ) EASEMENT FOR WATER SUPPLY PURPOSES 2 WIDE & VARIABLE WIDTH
- (AK) REPRESENTS SOI, (IEL, IAS)

SCHEDULE OF SMART LINES

No	BEARING	DIST	ARC	RADIUS
501	174°52'20"	4.385		
502	234°73'	1.965		
503	105°50'10"	6.255	18.05	44.3
504	339°32'	0.865		
505	179°41'40"	16.13	18.31	47.3
506	160°27'44"	2.215		
507	85°28'18"	3.07		
508	84°39'08"	4.07	4.85	58.4
509	84°39'08"	4.07		
510	84°39'08"	4.07		
511	169°12'0"	0.19		
512	84°32'07"	4.48	4.85	23.3
513	84°32'07"	4.48		
514	70°49'3"	0.65		
515	70°49'3"	0.65	0.95	0.5
516	168°53'	1.888		
517	310°43'0"	1.86		
518	310°43'0"	1.86		
519	33°29'30"	0.64	0.72	0.43
520	168°53'	1.86		
521	168°53'	1.86		
522	84°39'08"	4.07		
523	84°39'08"	4.07		
524	84°39'08"	4.07		
525	84°39'08"	4.07		
526	84°39'08"	4.07		
527	84°39'08"	4.07		
528	84°39'08"	4.07		
529	84°39'08"	4.07		
530	84°39'08"	4.07		
531	172°29'10"	5.645	6.22	4.11
532	172°29'10"	5.645		
533	109°26'	5.669		
534	69°41'09"	9.49		
535	69°41'09"	9.49		
536	69°41'09"	9.49		
537	69°41'09"	9.49		
538	69°41'09"	9.49		
539	173°32'	5.73	5.735	37.25
540	173°32'	5.73		
541	173°32'	5.73		
542	80°22'	4.51	4.51	76
543	80°22'	4.51		
544	80°22'	4.51		
545	77°54'	2.26	2.26	76
546	77°54'	2.26		
547	77°54'	2.26		
548	77°54'	2.26		
549	77°54'	2.26		
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567	77°54'	2.26		
568	77°54'	2.26		
569	77°54'	2.26		
570	77°54'	2.26		
571	77°54'	2.26		
572	77°54'	2.26		
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580	77°54'	2.26		
581	77°54'	2.26		
582	77°54'	2.26		
583	77°54'	2.26		
584	77°54'	2.26		
585	77°54'	2.26		
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600	77°54'	2.26		

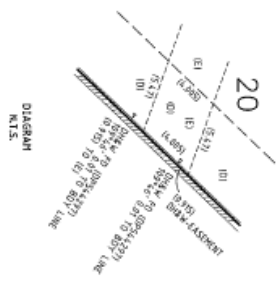
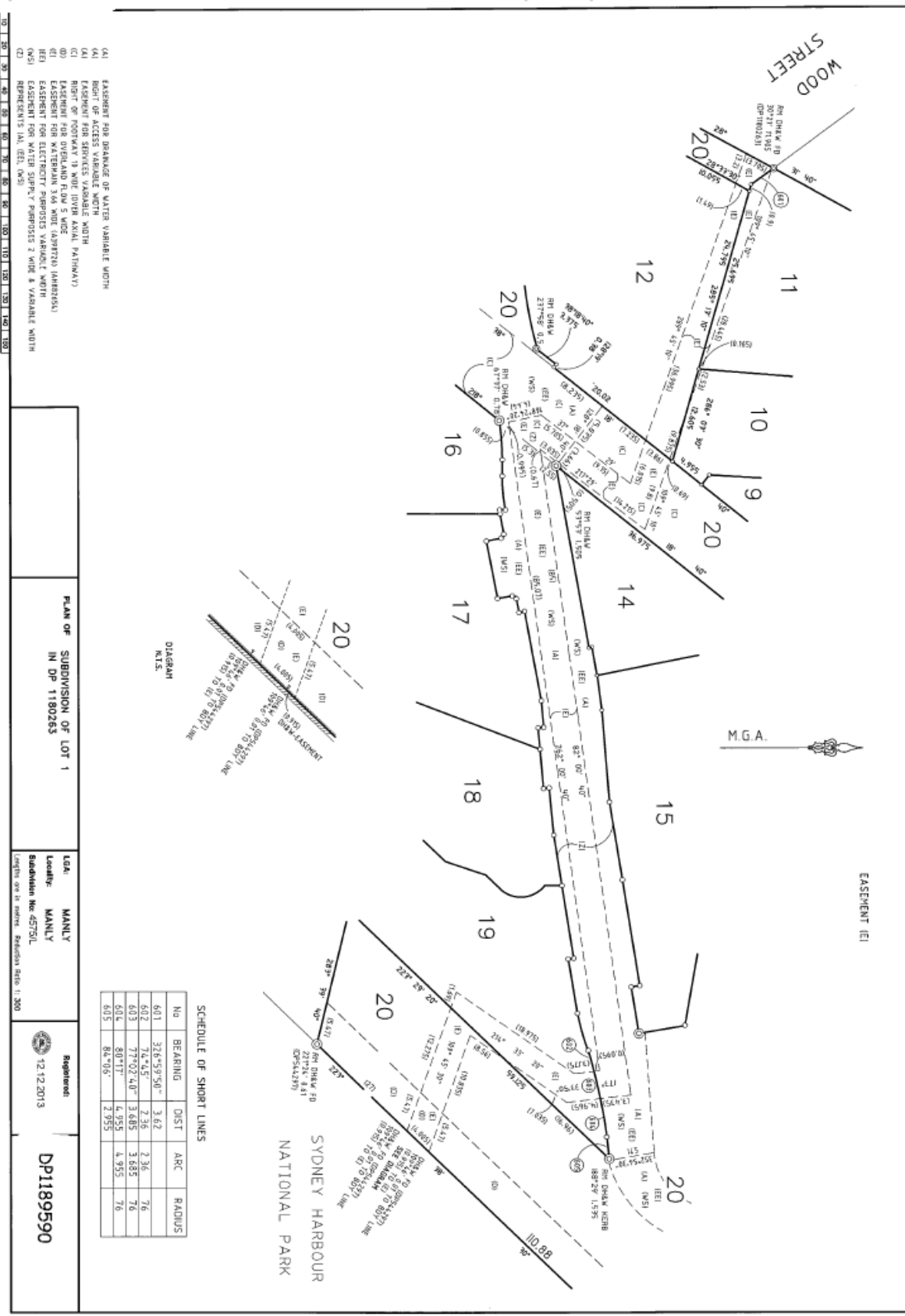
PLAN OF SUBDIVISION OF LOT 1  
IN DP 1180263

LOA: MANLY  
Subdivision No: 4570/L

Registered: 12/12/2013

DP1189590

VARIOUS AMENDMENTS VIDE 2014-1615 3.12.2014



SCHEDULE OF SHORT LINES

No	BEARING	DIST	ARC	RADIUS
601	$316^{\circ}59'50''$	3.62	2.36	76
602	$71^{\circ}45' 00''$	2.36	3.685	76
603	$77^{\circ}02' 40''$	3.685	4.955	76
604	$80^{\circ}17' 00''$	4.955	2.955	76
605	$84^{\circ}06' 00''$	2.955		

- (A1) EASEMENT FOR DRAINAGE OF WATER VARIABLE WIDTH
- (A2) RIGHT OF ACCESS VARIABLE WIDTH
- (A3) EASEMENT FOR SERVICES VARIABLE WIDTH
- (A4) EASEMENT FOR OVERLAND FLOW OF WATER
- (A5) EASEMENT FOR WATERWAY 3.66 METER (ASPECTED) (AERIAL)
- (A6) EASEMENT FOR ELECTRICITY PURPOSES VARIABLE WIDTH
- (A7) EASEMENT FOR WATER SUPPLY PURPOSES 2 METER 4 VARIABLE WIDTH
- (A8) REPRESENTS (A), (E), (N), (S)

PLAN OF SUBDIVISION OF LOT 1  
IN DP 1180263

LGA: MANLY  
Localities: MANLY  
Statistical No: 45750L  
Lengths are in meters. Reduction Ratio: 1:200

Registered  
12/12/2013

DP1189590

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## **Appendix D**

### Retaining Wall Survey Report and Sketch



## SURVEYOR'S REPORT

Liverpool City Council Store  
101 Rose Street  
LIVERPOOL NSW 2170

Our ref.....215019-1.....

Your ref.....PO0050070.....

**RE:** Identification Survey on concrete block

**PROPERTY:** 694-696 Hume Highway, Casula

**LAND** at Casula in the City of Liverpool having frontages of 37.26 metres and 37.08 metres to the Hume Highway, being Lot 55 as shown in Deposited Plan number 1151428 and Lot 2 as shown in Deposited Plan number 15511 and comprising the land in folio of the Register identifier numbers 55/1151428 and 2/15511 respectively.

**WE REPORT** that we have surveyed the above mentioned land, in part, for identification purposes only, such being that shown by red edging on the sketch plan herewith.

**ERECTED** upon part of the north western boundary of the subject property is a concrete block retaining wall. The base of the wall stands up to 0.16 metres upon the Hume Hwy. while the top of the leaning wall encroaches by up to 0.34 metres, as shown on the sketch.

**THE SKETCH** shows the position of the retaining wall in relation to those boundaries surveyed.

**OFFSETS** of the wall to the adjoining boundary are as shown upon the sketch.

**FULL DETAILS** in relation thereto are shown on the adjoining sketch, together with sufficient information to identify the property.

4 February 2015

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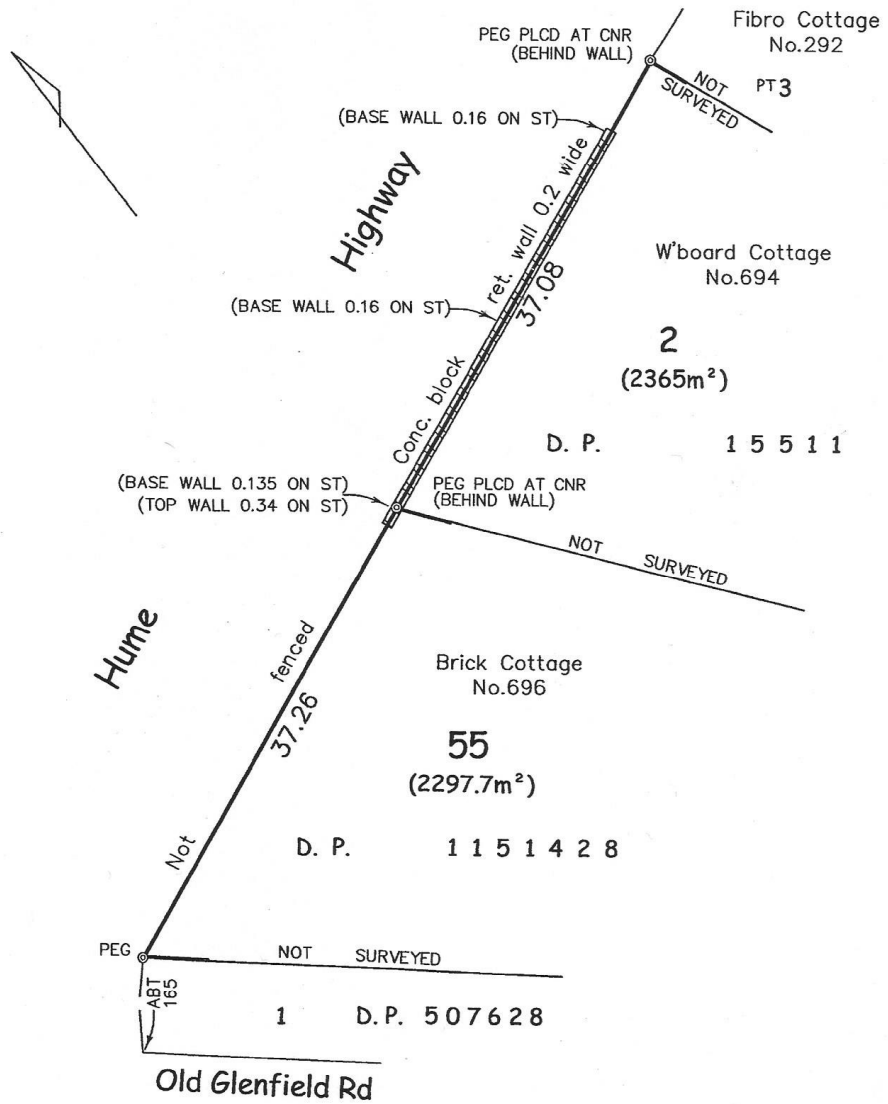
*Member of the Institution of Surveyors N.S.W. Inc.*



# SKETCH

REFERENCE No.: 215019-1  
 REDUCTION RATIO: 1:400

DATE OF SURVEY: 3 FEB 2015  
 DATUM: N/A



The survey represented in this report is for identification purposes only. Where any improvements are proposed to be made on or near the boundaries of the property, further survey and marking of the boundaries will be required.