

Retaining Walls & the Dividing Fences Act – What you & your Neighbours Need to Know!

The Dividing Fences Act 1991 (**Act**) now applies to retaining walls which provide support for a fence separating the land of adjoining owners, whether on the common boundary of adjoining land or on a line other than the common boundary.

Pursuant to section 3(c) of the Act, ‘fence’ means a structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners, and includes:

- a) any gate, cattlegrid or apparatus necessary for the operation of the fence,
- b) any natural or artificial watercourse which separates the land of adjoining owners,
- c) any foundation or support necessary for the support and maintenance of the fence,

but does not include a retaining wall (except as provided by paragraph c) or a wall which is part of a house, garage or other building.

As outlined above, only the parts of the retaining wall directly supporting the dividing fence (i.e. fence posts going into the retaining wall) is considered to be a ‘fence’ as defined under the Act and can be included in the equal sharing of cost to carry out fencing work in respect of a dividing fence.

The case of *Margy L Walsh v R Tomsic* [2014] NSWCATCD 118 found that in circumstances where work is necessary to repair a retaining wall for its principal purpose as a retaining wall, and not as part of a dividing fence (i.e. work necessary for the immediate support of a fence), contribution from the adjoining owners will **not** be available.

The following principles were reiterated in *Inacio v Luckose* [2020] NSWCATAP 149 at [67]:

“The fact that a retaining wall provides support for a dividing fence, in the sense that the fence will fall over if the wall is removed, is not sufficient to establish that the wall is a foundation or support for the fence. It must be a common feature of retaining walls that whatever is constructed above the wall is likely to collapse if the wall is removed. It would not be consistent with the intention of the Act that any retaining wall constructed on or near the boundary between adjacent properties will be a dividing fence or part of a dividing fence. It is necessary that the wall be constructed as a foundation or support for a dividing fence, that is, for the purpose of providing a foundation or support for the fence.”

The main question to answer is whether a structure is a dividing fence and whether a retaining wall is a foundation or support for a dividing fence and this determination must have regard to the purpose for which the structure or wall has been constructed.

If you have a dividing fence dispute or question that you would like further assistance with, please contact Bannermans Lawyers directly on 02 9929 0226.

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