

Moreton Bay Regional Council

Maintenance of Works in Waterway Areas Local Law 2023

Explanatory Notes

2023 | Version 1.0

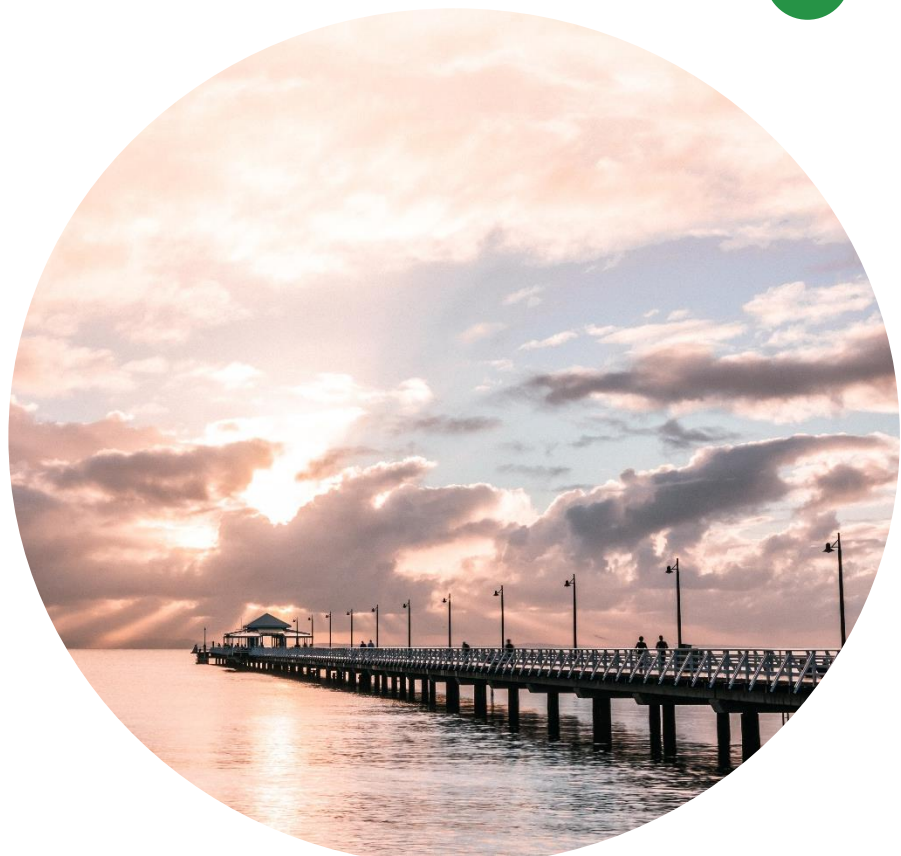


Table of Contents

| | |
|---|-----------|
| Short title | 3 |
| What is this Local Law trying to achieve and why? | 3 |
| How will the Local Law achieve those aims? | 4 |
| Who did Council seek feedback from in forming this law? | 6 |
| Plain English explanations of each section of the Local Law | 7 |
| Part 1 - Preliminary | 7 |
| Part 2 - Relationship with other laws | 7 |
| Part 3 - Interpretation | 7 |
| Division 1 - Dictionary | 7 |
| Division 2 - Other definitions | 8 |
| Part 4 - Building of required works in waterway areas | 21 |
| Part 5 - Maintenance of prescribed works in waterway areas | 24 |
| Part 6 - Entry to adjacent land for authorised activities relating to a seawall or revetment wall | 26 |
| Part 7 - Sale of lots | 30 |
| Part 8 - Prescribed work reports | 30 |
| Part 9 - Enforcement | 30 |
| Part 10 - Release | 32 |
| Part 11 - Administrative provisions | 32 |
| Part 12 - Reviewing decisions | 34 |
| Part 13 - Authorised persons | 34 |
| Part 14 - Subordinate local laws | 35 |
| Schedule Dictionary | 35 |
| Is this law consistent with fundamental legislative principles? | 36 |
| Is this law consistent with Human Rights? | 36 |





Short title

This Local Law may be cited as the *Maintenance of Works in Waterway Areas Local Law 2023*.

What is this Local Law trying to achieve and why?

The Moreton Bay Region has expansive waterway areas unique to Southeast Queensland. These areas include those waterways exposed to tides, coastal wetlands, lakes and canals. Moreton Bay Regional Council (**Council**) considers it necessary to regulate certain structures (**works**), including canal revetment walls, seawalls, jetties and pontoons, so that they do not fall into disrepair or cause harm. This is necessary to ensure built and natural waterway areas can be preserved and maintained.

There are a number of canal estates within the Region. Canals are man-made waterways which require different up-keep compared to naturally formed waterways. The primary function of a canal is to provide navigable access and safe mooring within a waterfront residential estate. To support this primary function, canal revetment walls are permanent works located along the canal frontage of the land which prevent subsidence of the land and erosion into the canal. Revetment walls have an engineered design life and will require regular inspection and proper maintenance. Revetment walls can collapse if they are not adequately maintained. Depending on the size and location of the wall, the consequences of falling walls could have severe impacts on nearby structures, people, neighbouring properties and the canal environment.

Our Region's coastal backdrop also has various natural waterway areas which experience erosion and land displacement from the sea. These natural processes help shape our unique coastline. However, they can become hazardous and impact coastal values. Beachmere, Scotts Point, Scarborough and Woody Point are areas in which permanent seawalls have been constructed to protect land from waves and to secure materials behind the wall.

This Local Law aims to clarify who is responsible for the maintenance and up-keep of these works, ensure works are maintained to an acceptable standard so they don't fall into disrepair or result in harm to other people, property or the environment and ensure that works (such as seawalls) are constructed where required to protect waterway areas, other land and people who use the waterway areas and avoid or minimise environmental harm and other damage to the waterway areas.

Ultimately, Council's aim in regulating these works is to ensure that our waterway areas remain attractive and safe locations to live and visit.

How will the Local Law achieve those aims?

This Local Law achieves its aims by:

- providing that the maintenance and repair of works in waterway areas is the responsibility of the person/s whose land is subject to, or receives a benefit from, the works and ensuring that these works do not fall into disrepair or cause harm to other people, property or the environment;
- ensuring that people build works where it is necessary to protect waterway areas and other land or persons who use waterway areas, or to avoid or minimise environmental harm or damage to waterway areas;
- ensuring that, specifically, seawalls are built and maintained on or near coastal beaches and that revetment walls are built and maintained in canals and non-coastal waterway areas; and
- protect the interests of buyers of certain lots by requiring sellers notify them about works that may be subject to obligations under the Local Law.



(1) Providing that the maintenance and repair of works in waterway areas is the responsibility of the person/s whose land is subject to, or receives a benefit from, the works and ensuring that these works do not fall into disrepair or cause harm to other people, property or the environment

This Local Law sets out who is a responsible person for the maintenance of works within a waterway area and includes a person who receives a benefit from the work. It also specifies the standard to which a responsible person must maintain the work and what is means to 'maintain' a work.

The purpose of requiring responsible persons to maintain a work is to ensure that works in waterway areas do not fall into disrepair or cause harm to human health or safety, property damage, or an environmental harm or nuisance.

(2) Ensuring that people build works where it is necessary to protect waterway areas and other land or persons who use waterway areas, or to avoid or minimise environmental harm or damage to waterway areas

This Local Law applies to all waterway areas within the local government area. There may be circumstances where Council believes it necessary for a person to build a work (a required work). This may be to stabilise their land or prevent adverse effects to another property. This Local Law gives Council the ability to issue a responsible person a waterway area required work notice to build a required work.

The waterway area required work notice must comply with rigorous requirements set out in this Local Law and must include all the facts and circumstances forming the basis for Council's belief that the responsible person for the required work should build the required work. It is important to note that a person given such a notice may make written representations and seek a review regarding the decision to issue a waterway area required work notice. To ensure compliance with such a notice, Council may undertake the works itself where a person has failed to comply with the notice. It may also recover the amount it properly and reasonably incurs in taking all necessary steps to build the required work.

The purpose of this is to protect waterway areas and other land or persons who use waterway areas. It achieves this aim in guaranteeing that a work will be built, either by the responsible person, or, upon the failure by the responsible person, Council, to avoid or minimise the risk of damage in waterway areas. Council considers this power necessary as a fast-acting compliance measure so that unintended consequences of a person's action or failure to act can be minimised.

(3) Ensuring that, specifically, seawalls are built and maintained on or near coastal beaches and that revetment walls are built and maintained in canals and non-coastal waterway areas

A person may be responsible for the maintenance of a work, including a canal revetment wall and a seawall, where they receive a benefit from the work. Ancillary to this, Council recognises that sometimes responsible persons need to enter adjacent land and interfere with existing seawalls or revetment walls to ensure new walls align. This Local Law authorises these responsible persons for required works and prescribed works to do this.

This authority is subject to a notice process, including a notice for entry and notice of damage, and a duty to avoid inconvenience and minimise damage. Additionally, Council may enter into a remediation agreement for Council to take remedial action in relation to any damage, by which Council may recover the cost of taking action from the relevant person who caused or contributed to the damage. This is to ensure that any damage to another's property can be rectified promptly.

Ensuring that seawalls and revetment walls are built and maintained accordingly is vital as the integrity and proper function of these works are generally dependant on other works. By guaranteeing this compliance, Council can reduce and promptly resolve disagreements between the respective owners of adjoining works. It also ensures that the responsible persons are actively aware of their responsibilities and rights to build and maintain seawalls and revetment walls.

(4) Protect the interests of buyers of certain lots by requiring sellers notify them about works that may be subject to obligations under the Local Law.

Council considers it necessary to ensure that buyers are made aware of the maintenance obligations for a work. Accordingly, this Local Law requires a seller to advise a buyer via a contract of sale of any relevant obligations in relation to a work under this Local Law. This ensures that when a property is sold, the buyer of that property is fully informed of their maintenance obligations under this Local Law.

Who did Council seek feedback from in forming this law?

Council sought the community's feedback on Local Law issues from 1 March to 5 September 2021. During this time, Council undertook targeted consultation regarding the maintenance of seawalls. This consultation took the form of a public survey, and Council invited submissions from relevant peak body organisations and state departments, including:

- Department of Environment and Science;
- Department of Agriculture and Fisheries;
- Department of Local Government, Racing and Multicultural Affairs;
- Newport Waterways Canal Property Owners Association;
- Pacific Harbour Residential Community Association;
- Bribie Gardens Waterway Association Inc.; and
- Bribie Island Environmental Protection Association.

Approximately 701 public survey responses and 2 peak body submissions were received on the issue of seawall maintenance.¹ Council reviewed all responses and identified issues that were the most prevalent for the community. An overview of the community feedback is provided below.

| Seawall Maintenance Survey | | |
|---|--------------------|---|
| Survey question | Responses received | Outcome |
| "Should Council or landholders pay to maintain seawalls that benefit private properties?" | 701 | Landowner = 52% Council = 41% Unsure = 7% |

In response to this question, common themes of the public survey suggested that Council should not have to pay to maintain infrastructure that benefits a specific property and that landowners take on that risk when they buy those kinds of properties. Other respondents said seawalls protect the coastline generally, which benefits everyone, and the general public have use of the canals too, so Council should pay for or at least contribute to the cost of maintaining canal revetment wall and seawall infrastructure.

Council decided to introduce this Local Law to clarify the circumstances in which a landowner who receives the benefit of a canal revetment wall or seawall will be required to maintain the wall and the standard to which the wall must be maintained.

¹ Consultation was also undertaken via social media and while responses provided via social media were considered, they are not counted in the totals.

Plain English explanations of each section of the Local Law

Part 1 - Preliminary

Section 1 - Short title

This section establishes the short title of the Local Law.

Section 2 - Objects

This section sets out the objects of the Local Law. Provisions of the Local Law, including as imposing obligations on responsible persons and giving Council enforcement powers, are intended to give effect to, or facilitate the achievement of, these objects. Therefore, the Local Law's provisions are to be understood and operate consistently with the objects. In particular, the Local Law aims to:

- provide for the maintenance and repair of works in waterway areas that are in Council's local government area by persons whose land is subject to, or which receives a benefit from, those works;
- ensure that works in waterway areas do not fall into disrepair or cause harm to human health or safety, property damage, or an environmental harm or nuisance;
- ensure that, when appropriate, responsible persons build works that are necessary to protect waterway areas and other land or persons who use waterway areas, or to avoid or minimise environmental harm or damage to waterway areas;
- specifically, ensure that seawalls are built and maintained on or near coastal beaches and that revetment walls are built and maintained in canals and non-coastal waterway areas;
- protect the interests of buyers of certain lots by requiring sellers to notify them about works that may be subject to obligations under the Local Law; and
- protect the health and safety of users of waterway areas and the health of waterway areas.

The terms **works** and **waterway area** are respectively defined in sections 5 and 8.

Part 2 - Relationship with other laws

Section 3 - Relationship with other laws

This section provides that powers under the Local Law can only be exercised in a way that is not inconsistent with all State and Commonwealth Acts, including those expressly stated. For example, Council cannot require a person to build a work in a waterway area if an Act prohibits the building of the work.

Part 3 - Interpretation

Division 1 - Dictionary

Section 4 - Definitions—the dictionary

This section provides that the dictionary in the schedule contains definitions of particular works that are used in the Local Law.

Division 2 - Other definitions

Section 5 - Waterway area

This section defines **waterway area**. The Local Law applies to works in all types of waterway areas in the Moreton Bay Region. This means the Local Law applies to works in, for example, tidal waterways (such as tidal rivers and coastal waters), non-tidal waterways, lakes and artificial waterways, including canals. However, a waterway area must be within Council's local government area. Council's local government area includes areas that are within bathing reserves and foreshores under Council's control.

A waterway area is not confined to the waters of a waterway area. It includes the land of a waterway area. This also means that some waterway areas may include land that is not regularly subject to waters. Further, subsections (3) and (4) provide that where unallocated State land separates a parcel of land that is in a register under the *Land Act 1994* or the *Land Title Act 1994* and a waterway area, the unallocated State land is taken to be part of the waterway area.

This definition is important in determining when a person will be responsible for maintaining or repairing a work (see definition of "prescribed work" in section 6 and the obligation to maintain a prescribed work in section 11).

Section 6 - Work that is a prescribed work

This section defines **prescribed work**. A prescribed work is a work defined in section 8 that is completely or partly in, on, above or below a waterway area defined in section 5. However, a prescribed work also includes the following:

- a tidal work or prescribed tidal work (as defined);
- a work designed to be exposed, in whole or in part, to tidal or non-tidal water, of a waterway area because of a shoreline fluctuation or for any other reason (including flood, for example);
- a work that is an integral part of a prescribed work, wherever located (including, for example, a walkway to a pontoon where the walkway is located on 'dry' land);
- a revetment wall (as defined); and
- a seawall (as defined).

Under section 11, a responsible person for a prescribed work must maintain the prescribed work in the way stated in that section.

Section 7 - Work that is a required work

This section defines **required work**. A required work is a work defined in section 8 (for example, an embankment, landscape works, vegetation, hard surfacing and temporary works) that is necessary to secure, protect, support or stabilise a part of land that is, or improvements on land that is, immediately adjoining or touching a waterway area. Therefore, the type of work which a responsible person for a required work may be required to build will generally be limited.

However, a required work includes a revetment wall, a seawall, and a work that is prescribed by a subordinate local law to be a required work.

Section 8 - A work

This section defines **work**. A work is defined very broadly and is an inclusive definition. Mostly, the definition is relevant to the definition of prescribed work in section 6 and the definition of required work in section 7. Section 8 makes clear that a work can be a temporary work and part of a work.

Section 9 - Responsible person for a prescribed work and a required work

This section defines **responsible person for a prescribed work** and **responsible person for a required work**. Under the Local Law, a person only has an obligation to maintain a prescribed work under section 11 if the person is a responsible person for the prescribed work. A person only has an obligation to build a required work under section 10 if the person is a responsible person for the required work.

Responsible person for a prescribed work

Under section 9(1), any of the following persons will be a *responsible person for a prescribed work*:

- (a) if the prescribed work is completely or partly on freehold land—the owner of the land;
- (b) if the prescribed work is completely or partly on land that is leased from the State under the *Land Act 1994*—the lessee of the land;
- (c) if the prescribed work is completely or partly on land granted in trust under the *Land Act 1994* for which Council is the trustee or a reserve under Council's control or for which Council is the trustee, or other non-freehold land (including a road)—either or both of:
 - (i) a person who occupies any part of the land on which the prescribed work is situated (for example, under a permit under the *Land Act 1994*); and
 - (ii) a person who owns freehold land, leases land from the State under the *Land Act 1994*, or occupies other non-freehold land which:
 - 1) is waterfront land or waterfront (separated) land (as defined); and
 - 2) receives the benefit of the prescribed work under section 9(4);

Examples for section 9(1)(c)(ii)

- Jamie owns freehold land that is adjacent to a waterway area. Jamie's land receives the benefit of a pontoon. The pontoon is in a non-tidal reserve under the *Land Act 1994* which is for recreation purposes. Jamie is a responsible person for the pontoon. It does not matter that Council is the trustee of the reserve. If there is a trustee for the reserve (other than Council or the State), the trustee may also be a responsible person for the pontoon because the trustee occupies the reserve.
- Erin owns freehold land that is adjacent to a canal and on which a revetment wall is situated. Erin is a responsible person for the revetment wall. Erin is also a responsible person for rock buttressing constructed in the canal to benefit her freehold land by supporting the revetment wall. However, Erin may not be required to maintain the rock buttressing (as part of the revetment wall) if Erin pays a special rate or charge to Council for Council to maintain the rock buttressing (see section 11(5)).

- (d) if another law or an agreement obliges a person to maintain a prescribed work in a safe condition or in good working order, repair and condition—the person subject to that obligation;

Example for section 9(1)(d)

Majella is a responsible person for a jetty because she is a relevant person under section 124 of the *Coastal Protection and Management Act 1995* and is required to maintain the jetty in a safe condition under that section.

- (e) if a person would be responsible in law for any loss or damage suffered by someone else because the person has not maintained the prescribed work in a safe condition or in good repair and condition—the person who would be responsible in law;

Example for section 9(1)(e)

Jon is a responsible person for a pontoon if, under the common law of negligence, he would be responsible for any loss or damage that another person suffers because Jon failed to maintain a pontoon that he constructed in a watercourse.

- (f) if a person is the owner of the prescribed work—the owner.

An owner of a prescribed work is:

- if the work is a structure under the *Local Government Act 2009* and is in a canal, the person who is an owner under section 60(2) of the *Local Government Regulation 2012*;
- the holder of a development permit under the *Planning Act 2016* to build the work;
- the holder of an approval under another Act to build or use the work (for example, under the *Building Act 1975*); or
- a person who is or was required by an Act to obtain, or who is or was only lawfully able to build or use the work if there is or was a requirement for, a development permit or approval to build or use the work.

Example of an owner of a prescribed work

Alex constructed a pontoon in a canal without a development permit under the *Planning Act 2016*. Alex is a responsible person for the pontoon because Alex was required by that Act to obtain a development permit to build the pontoon.

A person may be a responsible person for part of a prescribed work on one basis and a responsible person for another part of the same prescribed work on another basis.

Example

Kaia may be a responsible person for part of a revetment wall as a prescribed work that is on her freehold land. Kaia may also be responsible for the part of the same revetment wall that is in an adjoining waterway area that is a canal. This is because Kaia's freehold is waterfront land and receives the benefit of the part of the revetment wall that is in the canal.

What are waterfront land, waterfront (separated) land, waterfront (separated non-public) land and waterfront (separated public land)?

These concepts are relevant to section 9(1)(c)(ii). They are defined in section 9(13).

Where a prescribed work is on trust land or a reserve or non-freehold land (including a road), a person who owns freehold land, is a lessee under a lease from the State under the *Land Act 1994*, or an occupier of other non-freehold land is a responsible person for the prescribed work if the person's land is waterfront land or waterfront (separated) land and his or her land receives the benefit of the prescribed work.

"Waterfront land"

"Waterfront land" is land that immediately adjoins or touches a waterway area. For example, freehold land that shares a common boundary with a canal is waterfront land.

"Waterfront (separated) land"

"Waterfront (separated) land" is either:

- (a) waterfront (separated non-public) land; or
- (b) waterfront (separated public) land.

"Waterfront (separated non-public) land" is land that is separated from a waterway area only by any or all of the following (and which is not part of a waterway area) (known as "**separating land**"):

- (a) a road, including a road subject to an occupation right;
- (b) trust land, including trust land subject to an occupation right; or
- (c) unallocated State land, including unallocated State land subject to an occupation right.

An "occupation right" is a right of occupation of a place by an occupier (for example, a permit over a road or reserve). That is, it does not matter that the separating land is subject to an occupation right. Because the land is "waterfront (separated non-public) land" it will be treated for section 9(1)(c)(ii) as though, for instance, an owner's freehold land is not separated from a waterway area by any other land.

However, if any separating land - land between an owner's, lessee's, or occupier's land and a waterway area - is public land, the owner's, lessee's or occupier's land is "waterfront (separated public) land".

"Public land" is separating land which:

- (a) the public is entitled to use and uses; or
- (b) contains permanent public infrastructure (for example, a formed walkway, recreation equipment or public toilets).

Example of difference between "waterfront (separated non-public) land" and "waterfront (separated public) land"

Sarah's freehold land is separated from a waterway by a public road. Her freehold land may be waterfront (separated public) land or waterfront (separated non-public) land.

If the public does not use the road (for example, because it is an unformed esplanade), the road is not public land unless the road contains public infrastructure. If the road is not used by the public and does not contain public infrastructure, Sarah's land is waterfront (separated non-public) land. However, if the public uses the road or the road contains public infrastructure, Sarah's land is waterfront (separated public) land.

For section 9(1)(c)(ii), whether Sarah's freehold land is "waterfront (separated public) land" or "waterfront (separated non-public) land" is important because the distinction is relevant to determining whether Sarah's land receives the benefit of a prescribed work that is not on her land under section 9(4). See below for an example.

When does land (other land) receive the benefit of a prescribed work where the prescribed work is on trust land or non-freehold land?

It is important here to identify **other land**. The other land is the land which may receive the benefit of a prescribed work that is on or in a waterway area and, therefore, make the owner, lessee or other occupier of the other land a responsible person for the prescribed work.

For section 9(1)(c)(ii), freehold land, land leased from the State under the *Land Act 1994*, or other occupied non-freehold land (the **other land**) that is waterfront land or waterfront (separated) land (whether waterfront (separated non-public) land or waterfront (separated public) land) only receives the

benefit of a prescribed work that is on trust land or non-freehold land in any of the 3 circumstances stated in section 9(4).

The 3 circumstances are:

- (a) where the prescribed work is a seawall:
 - (i) the seawall secures, protects, supports or stabilises the other land (including any improvements on the other land); and
 - (ii) if the other land (for example, freehold land adjoining a waterway area) is waterfront (separated public) land, the separating land does not contain any public infrastructure;

Example for section 9(4)(a)

Tim's freehold land is waterfront (separated public) land because it is only separated from a tidal waterway area by an unsealed esplanade (a public road) that is partly contained in a coastal beach. Unless the esplanade contains public infrastructure (such as a formed walkway or a public barbeque), Tim is a responsible person for a seawall that is located on the seaward side of the esplanade. This is because the seawall protects Tim's freehold land by preventing the encroachment, by wave action, of the sea past the wall.

- (b) where the other land (again, for example, freehold land adjoining a waterway area) is waterfront land or waterfront (separated non-public) land, the prescribed work (other than a seawall) secures, protects, supports or stabilises the other land (including any improvements on your land);

Example for section 9(4)(b)

Georgina's freehold land that is waterfront (separated non-public) land (because her land is separated from a waterway area by land in a deed of grant in trust for which Council is the trustee that is not used by the public and which does not contain any public infrastructure) receives the benefit of a revetment wall located in a reserve. Georgina's land receives the benefit of the revetment wall because the wall keeps in place materials and improvements that are contained in Georgina's freehold land.

- (c) where the other land is waterfront land or waterfront (separated) land (or either type), the owner, lessee or occupier (as the case may be) of the other land is taken to be in control under section 9(5) of the prescribed work (other than a seawall). See explanation below.

When is the owner, lessee or occupier of other land taken to be in control of a prescribed work?

Under section 9(5), an owner, lessee or other occupier of other land (see above) - that is, land that is waterfront land or waterfront (separated) land - is taken to be in control of a prescribed work on trust land or non-freehold land for section 9(4)(c) and, therefore, benefit the other land for section 9(1)(c)(ii)(B):

- (a) if the work is physically joined or attached to the other land by any means and the other land is waterfront land (that is, the other land immediately adjoins or touches a waterway area), unless the owner, lessee or occupier of the other land proves that he or she is not in control of the work;

Example for section 9(5)(a)

Where a pontoon is physically attached to Lisa's freehold land that is waterfront land because a walkway extends from her land to the pontoon, Lisa is taken to be in control of the pontoon. However, Lisa may prove that she does not control the pontoon because, for example, the pontoon is only used by someone else. However, this would be difficult for Lisa to prove as it

is likely a pontoon will be used in the normal enjoyment of her land (given it is connected to her land). If Lisa can establish that she does not control the pontoon, Council may identify another responsible person or establish the pontoon is an abandoned work and remove it.

- (b) where, although the prescribed work is not physically joined or attached to other land (and whether the other land is waterfront land or waterfront (separated) land), if the owner, lessee or other occupier:

- (i) uses the prescribed work for a purpose that is directly connected with the normal enjoyment, and not mere convenience, of owner's, lessee's or occupier's land;

Example for section 9(5)(b)(i)

Freya's freehold land is waterfront (separated) land. Freya may be taken to be in control of the jetty because she uses the jetty in the course of her normal enjoyment of her land (for example, by permanently maintaining tables and chairs on the jetty). If Freya uses the jetty as a mere convenience with other members of the public, Freya would not control the jetty.

- (ii) uses the prescribed work, or any land on which the prescribed work is situated, on a regular or recurring basis, whether or not for the prescribed work's intended function (including, for example, the storage of property);

Example for section 9(5)(b)(ii)

Sam, the owner of freehold land that is waterfront (separated) land, may be taken to be in control of a pontoon in a non-tidal waterway where he regularly moors his boat to the pontoon or jetty. It does not matter that Sam has no legal right to moor his boat to the pontoon.

- (iii) regulates, or tries to regulate, access by other persons to the prescribed work (including, for example, by means of a locked gate, sign or direction);

Example for section 9(5)(b)(iii)

Eleanor, the owner of freehold land that is waterfront land, erects a sign on a pontoon that is not connected to her land but is located in a non-tidal waterway that says the pontoon is not for public use. Eleanor has tried to regulate access by other persons to the pontoon. Eleanor, then, is taken to be in control of the pontoon.

- (iv) permanently attaches property to, or removes attached property from, the prescribed work;

Example for section 9(5)(b)(iv)

Kirby, the owner of freehold land that is waterfront (separated) land, installs a railing on a jetty that is not connected to her land but which is near her land. Kirby may be taken to be in control of the jetty.

- (v) maintains the prescribed work (including, for example, by painting or cleaning);

Example for section 9(5)(b)(v)

Kerrie, the lessee of land leased under the *Land Act 1994* that is waterfront land, regularly cleans a boat ramp that is near, but not connected to, her lease land. Kerrie may be taken to be in control of the boat ramp.

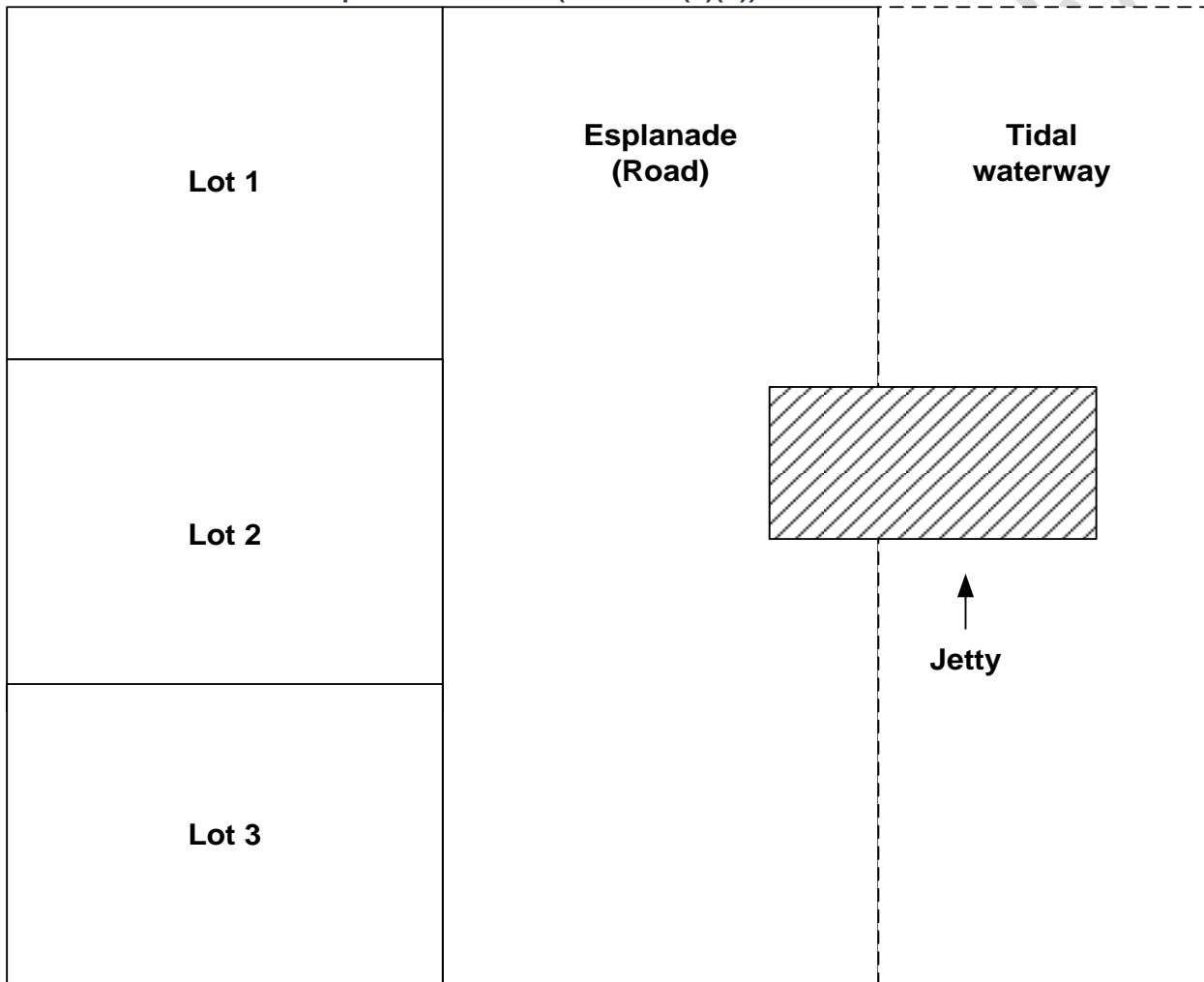
(vi) makes improvements to, or otherwise alters, the prescribed work.

Example for section 9(5)(b)(vi)

Melanie, the owner of freehold land that is waterfront land, replaces a part of a pontoon not connected to her land that has fallen into disrepair. Melanie may be taken to be in control of the pontoon.

Further illustrations of section 9's operation in relation to prescribed works

Figure 1: Where a responsible person is taken to be in control of prescribed work and, therefore, receives the benefit of the prescribed work (section 9(5)(b))



An owner of Lot 1, 2 or 3, as waterfront (separated) land, will be a responsible person for the jetty if he or she is taken to be in control of the jetty. The control establishes that an owner's land receives the benefit of the jetty. It does not matter that the jetty is not physically connected to any of the lots or is closest to Lot 2.

If the owner of Lot 1 uses the jetty to moor his boat on a regular basis, he is taken to be in control of the jetty (section 9(5)(b)(ii)). He is a responsible person for the jetty.

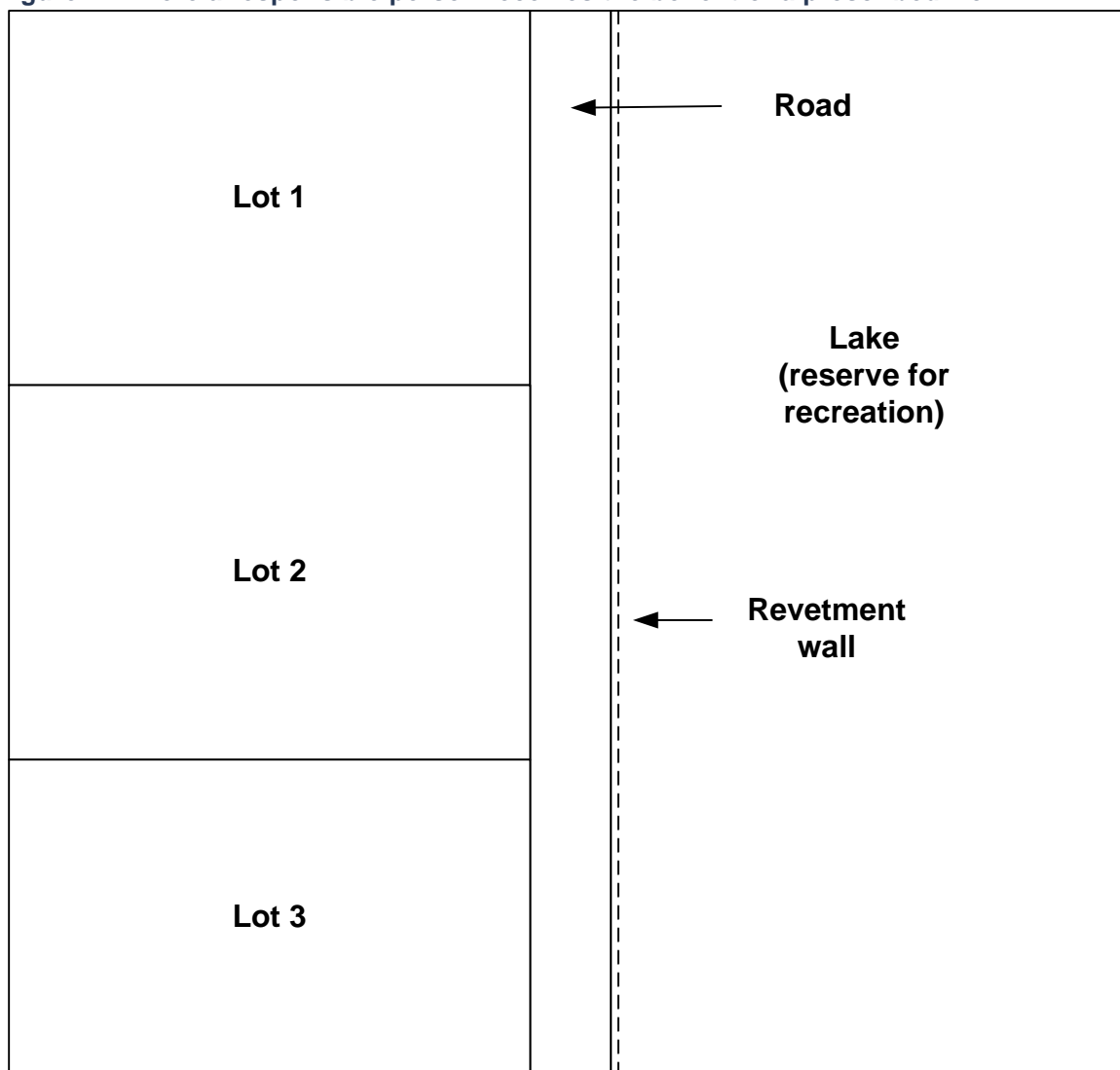
If the owner of Lot 2 has recently painted the jetty, she is taken to be in control of the jetty (section 9(5)(b)(v)). She is also a responsible person for the jetty.

If the owner of Lot 3 has moored his boat to the jetty only on occasions, he is not taken to be in control of the jetty. He is not a responsible person for the jetty.

However, an owner of Lot 1, 2 or 3 could still be a responsible person for the jetty if section 9(1)(d) or (e) applies.

If the jetty is a public marine facility under the *Transport Infrastructure Act 1994* the jetty is not a prescribed work under the Local Law, even if the owners of Lots 1, 2 and 3 use the jetty in the ways described.

Figure 2: Where a responsible person receives the benefit of a prescribed work

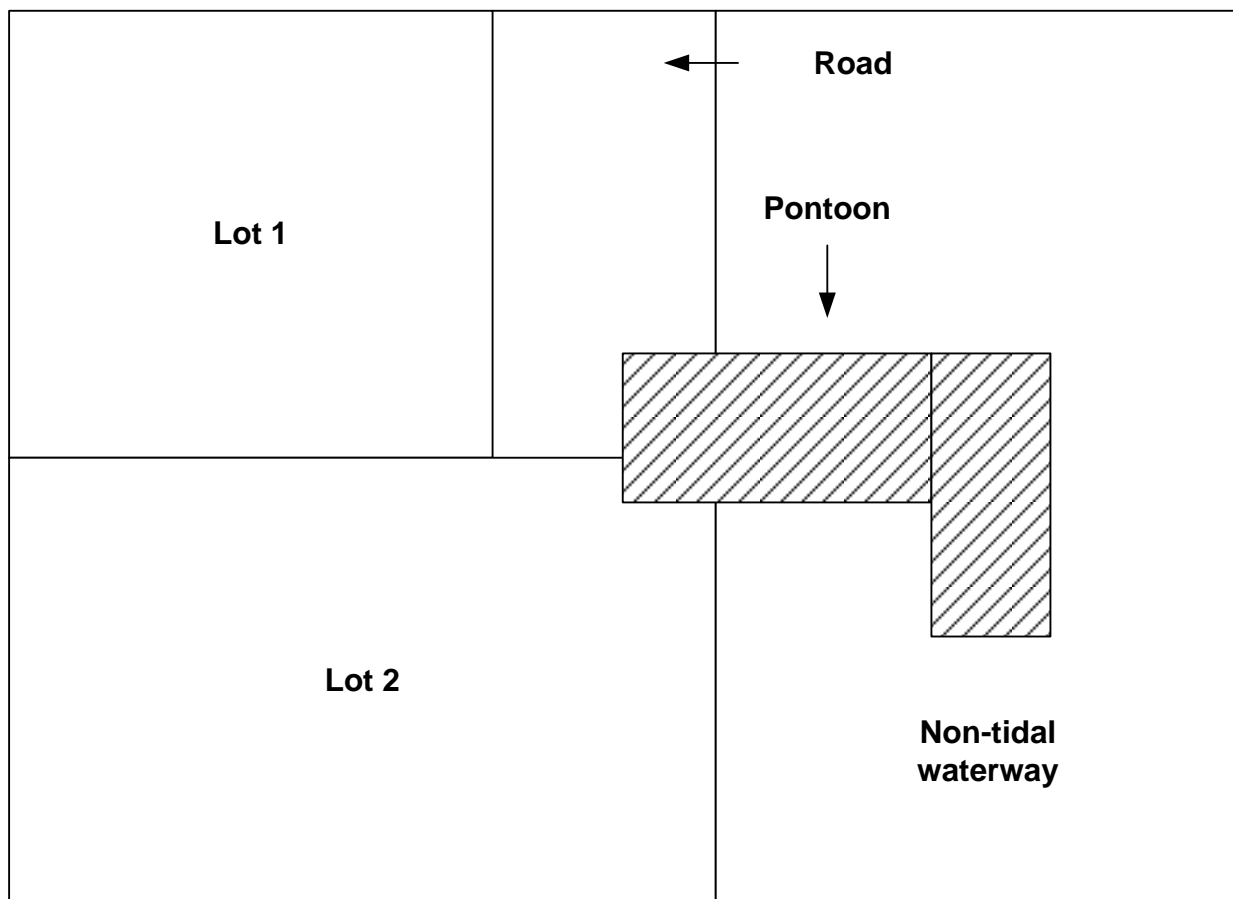


Lots 1 to 3 (freehold lots) are waterfront (separated) land. It may be necessary to establish whether the waterfront (separated) land is waterfront (separated public) land or waterfront (separated non-public) land.

Where a lot is waterfront (separated non-public) land – that is, where the public does not actually use the road and the road does not contain any public infrastructure – the owner of Lot 1, 2 or 3 will be a responsible person if the revetment wall secures, protects, supports or stabilises his or her lot (section 9(1)(c)(ii), (4)(b)); if the owner of Lot 1, 2 or 3 is taken to be in control of the revetment wall (section 9(5)(b)); if the owner of Lot 1, 2 or 3 is responsible under another law or agreement to ensure the revetment wall is maintained or in good working order, repair and condition (section 9(1)(d)(i)); if the owner of Lot 1, 2 or 3 is responsible for any wrong arising out of a failure to ensure the revetment wall is maintained in a safe condition or in good repair and condition (section 9(1)(d)(ii)); or if the owner of Lot 1, 2 or 3 is the owner of the revetment wall (as defined in the dictionary) (section 9(1)(e)).

Where a lot is waterfront (separated public) land – that is, where the public actually uses the road or the road contains public infrastructure – the owner of Lot 1, 2 or 3 will only be a responsible person if he or she is taken to be in control of the revetment wall (unless one of the other provisions making the owner a responsible person applies).

Figure 3: Various responsible persons for a prescribed work which is partly located on freehold land and partly located on non-freehold land



Lot 1 (freehold lot) is waterfront (separated) land.

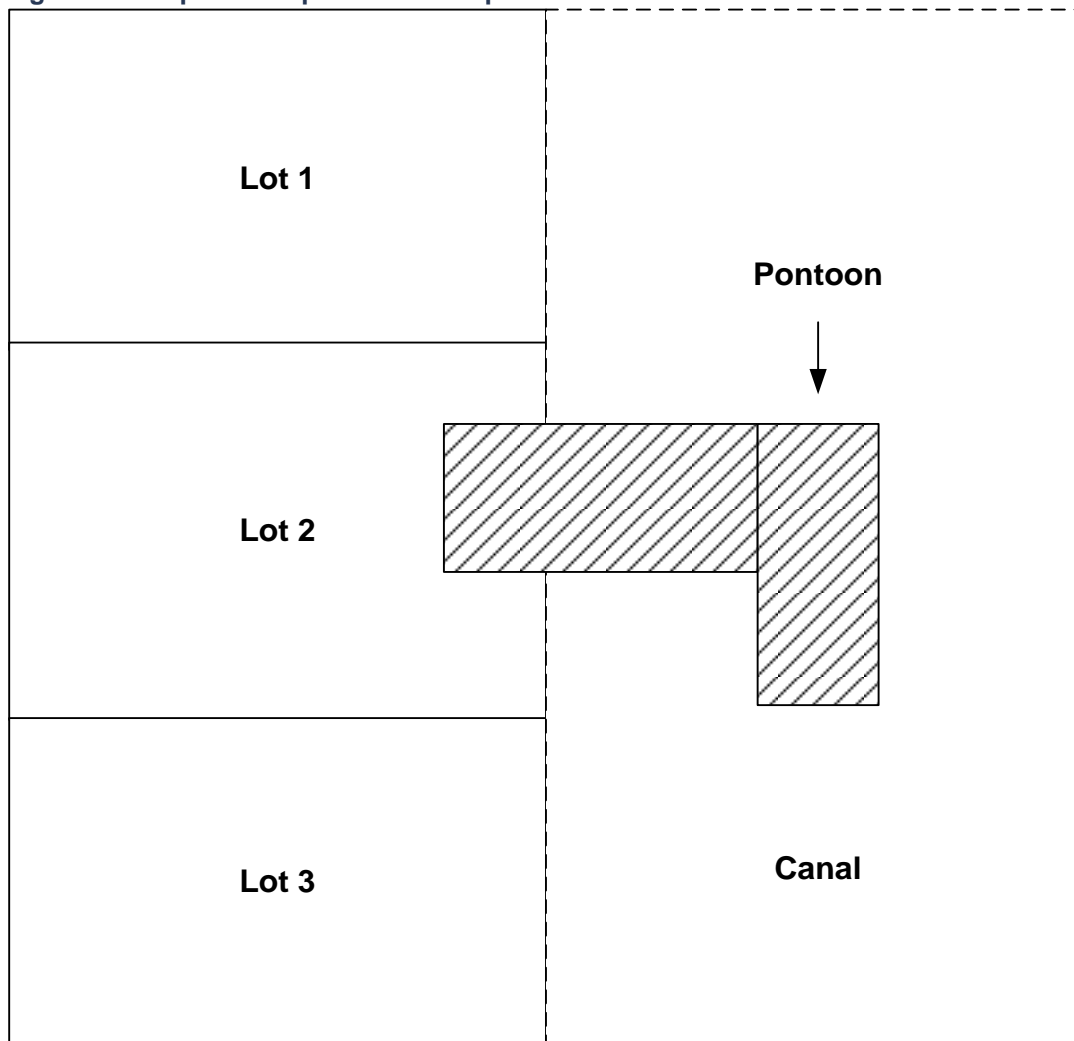
Lot 2 is waterfront land.

The owner of Lot 2 is a responsible person in respect of the part of the pontoon on Lot 2 (section 9(1)(a)). This person, as the owner of waterfront land, may also be a responsible person for the parts of the pontoon that are in the non-tidal waterway and the road, as non-freehold land (section 9(1)(c)(ii), (4), (5)). However, this will only be the case if Lot 2 receives the benefit of those parts of the pontoon. Lot 2 will receive a benefit if the owner of Lot 2 is taken to be in control of those parts of the pontoon. The owner can be taken to be in control because the pontoon is connected to Lot 2 (as waterfront land) (section 9(5)(a)). (It is not necessary to establish that the owner uses the pontoon.)

The owner of Lot 1 may also be a responsible person. However, as Lot 1 is waterfront (separated) land, it is necessary to show that the owner of the lot is taken to be in control of the parts of the pontoon that are in the non-tidal waterway and on the road, as non-freehold land. If, for example, the owner of Lot 1 uses the pontoon by mooring his boat to the pontoon, she is taken to be in control of the parts of the pontoon on the non-freehold land, including the road (section 9(5)(b)).

Also, the owner of the pontoon may be a responsible person (section 9(1)(e)). An owner includes the holder of an approval under an Act to build the pontoon or a person who was required by an Act to obtain an approval to build the pontoon.

Figure 4: Responsible persons for a pontoon in a canal

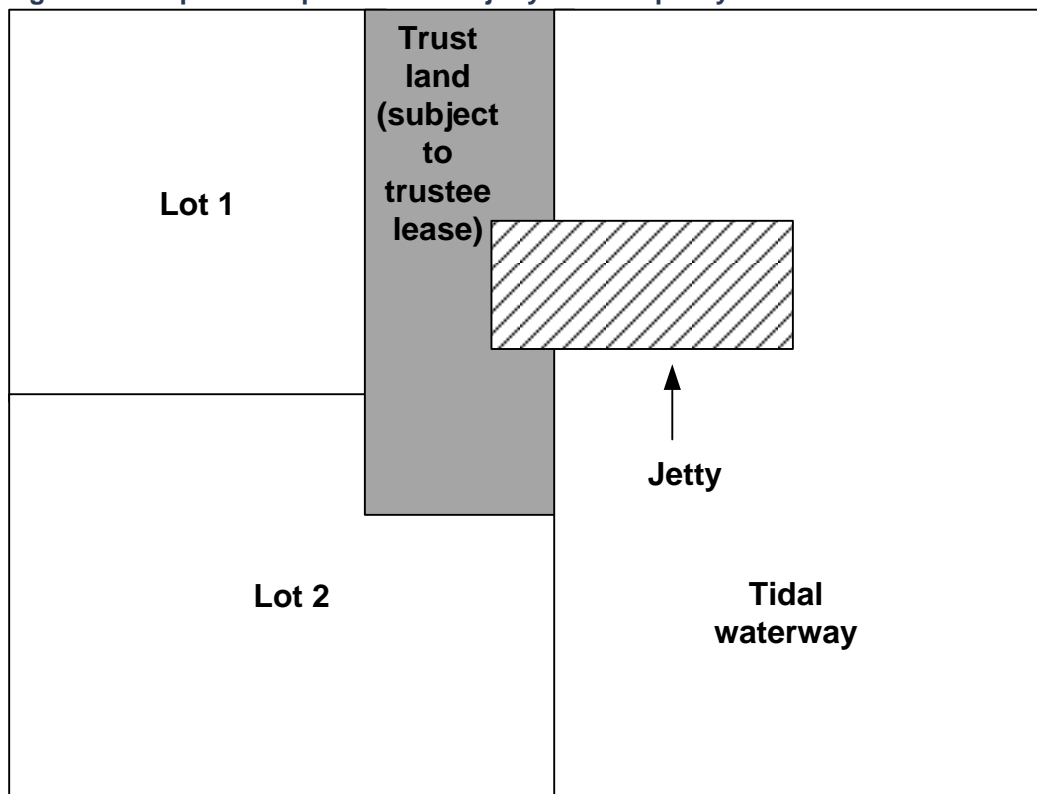


The owners of Lots 1 and 3 (freehold lots) are unlikely to be responsible persons for the pontoon.

The owner of Lot 2 is a responsible person for the pontoon. The owner is a responsible person in respect of that part of the pontoon on her freehold lot (section 9(1)(a)). She is a responsible person for the part of the pontoon that is in the canal if she has a development permit for the pontoon. Because part of the pontoon is in a canal, she will be a responsible person because she is required to maintain the pontoon in a safe condition under section 124 of the *Coastal Protection and Management Act 1995* (section 9(1)(d)). Also, she is a responsible person because, as the holder of a development permit for the pontoon, she is owner of the pontoon (section 9(1)(e)). If she built the pontoon without a development permit, she is still a responsible person as an owner of the pontoon because she was required to obtain a development permit (for operational works that are prescribed tidal works).

It is not necessary to establish that Lot 2 benefits from the pontoon. However, because Lot 2 is waterfront land, the owner of the lot would be a responsible person as the pontoon is connected to the lot.

Figure 5: Responsible persons for a jetty located partly on trust land and in tidal waterway



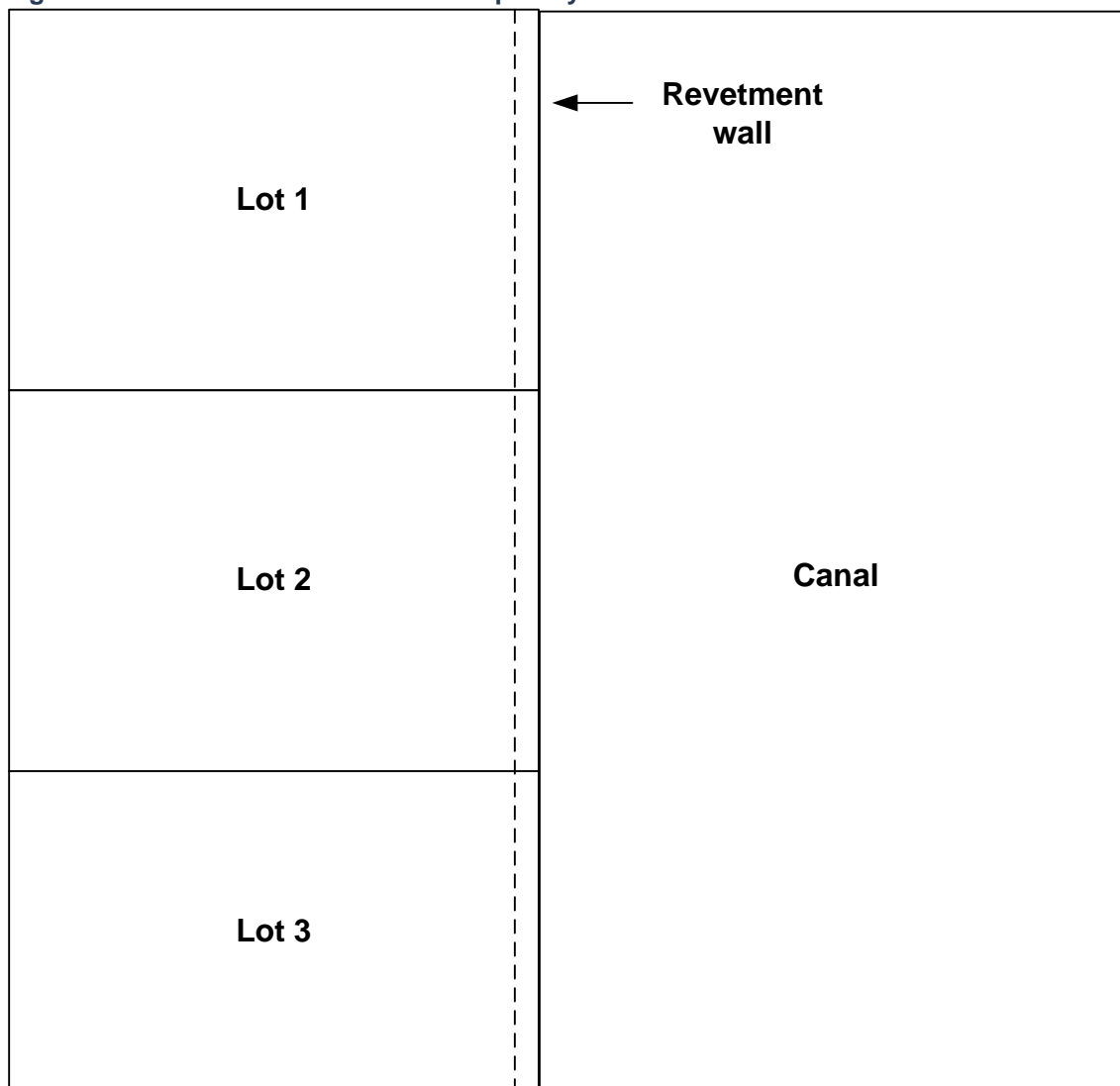
In this scenario, there may be more than one responsible person for the jetty. Each responsible person is required to maintain the jetty.

The lessee of the trustee lease is a responsible person for the part of the jetty that is on the leased land (section 9(1)(c)(i)). The lessee may also be a responsible person for the part of the jetty that is in the tidal waterway as the trust land (that is subject to the trustee lease) is waterfront land and the trust land receives the benefit of the jetty (section 9(1)(c)(ii)). This is because the lessee, as an occupier, is taken to be in control of the part of the jetty in the tidal waterway as the jetty is connected to the trust land (section 9(4)(c), (5)(a)). However, the lessee can show that he or she is not in control of the jetty in the tidal waterway by proving to the contrary. It is highly unlikely the lessee would be successful in showing that he or she is not in control of the part of the jetty in the waterway area if the lessee leases the part of the jetty that is on the trust land.

The lessee may also be a responsible person for the part of the jetty on the trust land if the trustee lease says that the lessee must maintain (that part of) the jetty in good working order, repair and condition (section 9(1)(d)(i)). Also, the lessee, as the person responsible, under the trustee lease, to maintain (that part of) the jetty may be a responsible person because he or she would be responsible for any wrong arising out of a failure to ensure the jetty is maintained in a safe condition or in good repair and condition (section 9(1)(d)(ii)).

The owner of Lot 1, which is waterfront (separated) land, may be a responsible person if she can be taken to be in control of the jetty (section 9(1)(c)(ii), (4)(c), (5)(b)). Also, the owner of Lot 2, which is waterfront land, may be a responsible person if he can be taken to be in control of the jetty. Although the owner of either of these lots may use the jetty on a regular or recurring basis, their control is less likely to be able to be established when compared with the trustee lessee.

Figure 6: Revetment wall located completely on freehold land



Each of the owners of Lots 1 to 3 (freehold lots) is a responsible person for that part of a revetment wall that is situated on his or her lot (section 9(1)(a)). Each lot owner is also a responsible person because he or she is the owner of the revetment wall (section 9(1)(e)).

Under the definition of **revetment wall** in the dictionary, a revetment wall is a "a wall, and all support materials (including rocks, for example), constructed in or near a waterway area and along or near the bottom of an embankment to—

- (a) protect the embankment from erosion; and
- (b) keep in place the materials that are landward of the wall.

Part of a revetment wall - for example, a vertical wall - may be located on Lot 1, 2 and 3. Therefore, the owner of each of Lot 1, 2 and 3 is a responsible person for that part of the revetment wall because the vertical wall is on an owner's lot. However, another part of the revetment wall - for example, rock buttressing that supports the vertical wall - may be located in the canal. In that case, the owner of Lot 1, 2 or 3 may be a responsible person for that part of the revetment wall because each of Lot 1, 2 and 3 is waterfront land and the part of the revetment wall in the canal secure, protects or stabilises the lot.

Also, an owner of Lot 1, 2 or 3 could be a responsible person for the part of the revetment wall in the canal because the owner is required under section 124 of the *Coastal Protection and Management Act 1995* to maintain that part or because the owner is the owner of that part (as a prescribed work) (section 9(1)(d), (e)).

Note, however, that where the responsible person is liable to pay the local government a special rate or charge for the local government's maintaining the part of the revetment wall that is in the canal, the responsible person cannot be liable for contravening a maintenance obligation under section 11(1) in respect of that part, except in certain circumstances (see section 11(5)).

When can a body corporate or a lot owner in a community titles scheme be a responsible person for a prescribed work?

A body corporate of a community titles scheme under the *Body Corporate and Community Management Act 1997* may be a responsible person for a prescribed work.

A body corporate may, at law, be the owner of common property. Common property will be freehold land.

Under section 9(10), if any land, including common property, in scheme land of a community titles scheme is waterfront land or waterfront (separated) land, all other land in the scheme land (that is, other lots, including any other common property) is taken to be waterfront land or waterfront (separated) land.

Also, any lot, including common property, in scheme land can be separately treated as other land (see above). This means, because all lots in scheme land can be treated as waterfront land or waterfront (separated) land, an owner of a lot within the scheme land can, even if his or her lot does not adjoin a waterway area or is not immediately separated from a waterway area by a road, trust land or unallocated State land, be a responsible person for a prescribed work.

However, it is unlikely that the owner of a lot in scheme land that is not connected to a prescribed work will be a responsible person for that work. Section 9(11) means that, where a person can only be a responsible person for a prescribed work because the prescribed work is connected to waterfront land (that is, as provided for in section 9(5)(a)), land in scheme land to which a prescribed work is not physically connected, joined or attached by any means - for example, a lot in the scheme land that is on the far, landward side - is not connected to the land even it is otherwise taken to be waterfront land. However, the owner of a lot in scheme land that is not connected to a prescribed work can still be a responsible person for the work if, for example, the person controls the work.

Example for section 9(10)(b)

The Seaview Community Titles Scheme is waterfront land because common property of the scheme land physically adjoins a waterway area that is a canal. The common property and each lot in that scheme land is taken to be waterfront land. If a pontoon as a prescribed work is physically connected only to the common property lot, for section 9(5)(a), only the body corporate is a responsible person for the pontoon. However, if the pontoon is not connected to any lot in the scheme, the body corporate or a lot owner in the scheme land could be a responsible person for the pontoon by applying section 9(5)(b). For example, if a particular owner of a lot in the scheme land uses the pontoon for his or her own purposes or maintains it, that owner is a responsible person for the pontoon. Alternatively, the body corporate may, for example, be a responsible person for the pontoon because it is the owner of the pontoon (section 9(1)(e)).

Who cannot be a responsible person for a prescribed work?

Neither Council nor the State is a responsible person for a prescribed work (section 9(7)(a)).

Council may, by a subordinate local law, exclude a person, or a class of persons, as a responsible person (or responsible persons) for a prescribed work (section 9(7)(b)). A class of persons is a class of persons described by reference to their relationship with land or with a prescribed work.

In some circumstances (see sections 11(5), 25 and 26), although a person may be a responsible person for a prescribed work, that person may not be liable under the Local Law for not maintaining the work.

Responsible person for a required work

A required work (as defined in section 7) is different to a prescribed work (as defined in section 6). Generally, a required work is a work that needs to be built under the Local Law. Generally (but not always), a prescribed work is a work that already is built and must be maintained under the Local Law.

Under section 9(9), a person may be a responsible person for a required work if the person would be a responsible person for maintaining the work as a prescribed work if it were built. When any work is built it will be a prescribed work under section 6.

A responsible person for a required work may be given a waterway area required work notice under section 10. A waterway area required work notice requires a responsible person for a required work to build a specified required work.

Example for section 9(9)

Barry is an owner of freehold land that is adjacent to a canal. Barry's land is waterfront land under the Local Law. There is no revetment wall that keeps in place soil on Barry's land. Council decides that a revetment wall should be built on Barry's land. A revetment wall is a prescribed work under section 6(2)(d). Because the revetment wall would, once built, be on Barry's land, Barry, as the owner of that land, will be a responsible person for the revetment wall, as a prescribed work under section 9(1)(a). That is, Barry will be the person responsible for maintaining the revetment wall, once the wall is built, under section 11. Therefore, Barry is a responsible person for a required work and can be given a waterway area required work notice under section 10 to build the revetment wall.

If the revetment wall was to be built in the canal (that is, outside the boundary of Barry's land), Barry will still be a responsible person for a required work because, for example, the wall, once built, will benefit Barry's land - which is waterfront land - because the wall will secure, protect, support or stabilise his land (section 9(4)(b)).

Part 4 - Building of required works in waterway areas

This part deals with required works. It imposes obligations on responsible persons for required works to build such works. Parts 6, 9 and 11 affect the operation of Part 4.

A required work is defined in section 7. A responsible person for a required work is defined in section 9.

If Council gives a waterway area required work notice (see section 10(1)) to a responsible person for the required work, the responsible person must, at the responsible person's cost, build the required work in the way stated in the notice and carry out all necessary incidental and consequential work. It is an offence for a responsible person not to build the required work, including any necessary incidental and consequential work.

For Part 4 most required works will be revetment walls and seawalls. A responsible person may be required to replace an existing revetment wall or seawall in certain circumstances.

Section 10 - Building of required work

This section provides that Council may give a responsible person for a required work a waterway area required work notice if Council reasonably believes that the person should build a required work in Council's local government area.

A waterway area required work notice must comply with all the requirements of section 10(2) and may also state:

- (a) if Council reasonably believes undertaking particular incidental and consequential work is necessary to build a required work, the particular incidental and consequential work (as defined in section 10(21)); and

Example for section 10(4)(a)

Council gives Alex a waterway area required work notice to build a new seawall. Council may state in the notice that Alex must remove an existing seawall as incidental and consequential work because removal of the existing seawall is necessary to enable Alex to build the new seawall.

- (b) any other matter which a subordinate local law specifies may be stated in the notice.

A waterway area required work notice must always outline the facts and circumstances forming the basis for Council's belief that the responsible person for the required work should build the required work. Under section 10(3)(a), these facts and circumstances must include that:

- (a) the required work is intended to, or, once built, will secure, protect, support or stabilise land or improvements which the responsible person owns, occupies or controls (**relevant land**); and
- (b) a failure to build the required work in the location stated in the notice will, or is likely to:
 - (i) at any time, result in the escape of materials (of any nature, for example, soil or fill) from the relevant land into a waterway area; or
 - (ii) adversely affect:
 - A. the use of a waterway area by another person or the public generally;
 - B. the use, stability or function of, or support for, land or improvements owned or controlled by another person or a prescribed work for which another person is a responsible person;

Example for section 10(3)(b)(ii)(B)

Council may give Jamie a waterway area required work notice for Jamie to build a seawall in a waterway area adjacent to Jamie's land because, in addition to protecting Jamie's land, a failure to build the seawall adversely affects a seawall that protects Jamie's neighbour's land.

- C. a waterway area or coastal, tidal or any other natural processes (including the transportation of sediment, for example) associated with a waterway area.

However, sections 10(5) and 10(6) provide that, if the required work is a revetment wall or a seawall, Council may, for section 10(1), be taken to reasonably believe that a person should build a required work and section 10(3) may be taken to be satisfied:

- (a) if the wall is intended to, or will, be built to keep in place materials that are landward of the wall and contained in the land which the responsible for the wall owns, occupies or controls; or
- (b) if there is no existing wall, but there is a development permit in place to build a new wall (and paragraph (a) is satisfied); or
- (c) if the wall is a replacement wall for an existing wall for which there is no existing approval and no approval could be given for the wall or there is a development permit in place to build the replacement wall (and paragraph (a) is satisfied).

Example for section 10(5)(b(i))

Jon's land is currently protected by an existing seawall. However, the seawall has not been approved as required by law and cannot be approved in its current form. Council may require Jon to build a replacement wall even though the existing seawall protects his land. Alternatively, if there is a development permit in place for the replacement wall, Council may require Jon to build the replacement wall.

Person given notice may make representations and seek review about waterway area required work notice

A person given a waterway area required work notice may make representations about the notice. Council must consider any representations made by the notice.

After considering any representations, Council may, under section 10(11) give the person a notice stating that the waterway area required work notice:

- (a) continues in force, with or without stated changes; or
- (b) is withdrawn.

The notice under paragraph (a) must be accompanied by a decision notice (see section 34 and definition of **decision notice** in the dictionary). If Council gives a person a notice that the waterway area required notice continues in force, the person may apply for a review of Council's decision under part 11 (section 10(14)).

Compliance with a waterway area required work notice

A responsible person who is given a waterway area required notice that has not been withdrawn must comply with the notice (section 10(15)). In complying with the notice, the responsible person must also carry out all incidental and consequential work that is expressly stated in the notice or which is reasonably necessary to comply with the notice (section 10(16)). Such incidental and consequential work may include repairing any damage, or restoring land or a work, owned, leased, or controlled by someone else or interfering with a prescribed work for which another person is a responsible person under the Local Law.

Example for section 10(16)

To build a seawall on her land under a waterway area required work notice, Erin may need to carry out incidental and consequential work consisting of interfering with her neighbour's seawall. If carrying out that interference has been stated in the waterway area required work notice or if the interference is reasonably necessary to build her seawall, she must interfere with the neighbour's seawall to comply with the notice. The interference is an authorised activity under Part 6. If Erin causes damage to the neighbour's land or something on the land, the owner of the land or thing may give Council notice of the damage. Council may, then, enter into a remediation agreement with the owner to take remedial action in relation to the land or thing.

It is an offence for Erin not to comply with the waterway area required work notice (section 10(15)). Also, Council may take all necessary steps to build the seawall and undertake any incidental and consequential work (section 10(17)). Council may recover the amount it properly and reasonably incurs in taking all necessary steps to build the required work (including carrying out any incidental and consequential work), including as a debt payable by Erin to Council (section 10(20), (21)).

Part 5 - Maintenance of prescribed works in waterway areas

This part deals with prescribed works. It imposes obligations on responsible persons for prescribed works to maintain those works.

A prescribed work is defined in section 6 and will include a wide variety of works such as a seawall, a revetment wall, a pontoon, a jetty, a boat ramp, landscaping and vegetation.

A responsible person for a prescribed work is defined in section 9.

Parts 6 (Entry to adjacent land for authorised activities relating to a seawall or revetment wall), 9 (Enforcement) and 12 (Reviewing decisions) affect the operation of Part 5. In particular, a responsible person may need to obtain:

- (a) a development permit under the *Planning Act 2016* or an approval under another Act; and
- (b) a right to occupy the waterway area from the manager of the waterway area,

to be able to maintain the prescribed work in the ways required in Part 5. Sections 25 and 26 (in Part 9) explain what happens if the responsible person does not obtain the necessary permit, approval or right to occupy the waterway area. However, if the prescribed work is a seawall or a revetment wall, Part 6 may authorise the responsible person to enter certain other land so that person can maintain the wall.

A responsible person for a prescribed work must maintain a prescribed work in the ways stated in section 11. These ways are, one, in a safe condition, and, two, in good working order, repair and condition, including so that the prescribed work can continue to perform its intended function.

A maintenance obligation applies at all times. While Council can take enforcement action for non-compliance with the maintenance obligation, it is not necessary for Council to give a responsible person a compliance notice before the responsible person becomes liable to maintain, including repair, a prescribed work.

As explained in section 9, a person can be a responsible person for a prescribed work because of that person's particular relationship with land (for example, the person's land is adjacent to a waterway area) and with the prescribed work (for example, because a landowner receives the benefit of a pontoon that is near the landowner's land or because the landowner is the owner of the prescribed work). Accordingly, a person may, in some instances, still be a responsible person for a prescribed work even if the person's land is not physically connected to the work.

Section 11 - Good repair and safe condition requirement

This section provides that a responsible person for a prescribed work must maintain and keep the prescribed work in:

- (a) a safe condition; and
- (b) good working order, repair and condition, including so that the prescribed work can continue to perform its intended function (section 11(1)).

Example for section 11(1)(b)

Chloe is a responsible person for a prescribed work that is a seawall. Chloe must maintain and keep the seawall in good working order, repair and condition so that the seawall can continue to perform its intended function of:

- i. preventing encroachment, by wave action, of the sea past the wall; and
- ii. keeping in place the materials that are landward of the wall.

"Maintain" is not exhaustively defined in the Local Law. However, the dictionary says "*maintenance*" includes repair and replacement and taking preventive action and that "maintain" has a corresponding meaning.

Section 11(2) does say that "maintain" specifically includes:

- (a) undertaking regular inspections of a work to determine whether it is in a safe condition or good working order, repair and condition; and
- (b) having regard to the nature and life expectancy of a work, obtaining a report prescribed under a subordinate local law, when reasonably prudent, to determine whether maintenance is required to ensure that the work is in a safe condition and in good working order, repair and condition, including so that the prescribed work can continue to perform its intended function.

Example for section 11(2)(b)

Several seawalls in the general location of Chloe's seawall failed during recent coastal storm activity. Those seawalls were built at the same time and according to the same specifications as Chloe's seawall. While Chloe's seawall has not failed, it would be reasonably prudent for her to obtain a prescribed work report to determine whether any particular maintenance of her seawall is required to ensure the seawall currently is in a safe condition and in good working order, repair and condition, including so it will not fail if more coastal storm activity should occur.

For deciding whether a responsible person is complying with the obligation, any of the matters stated in section 11(3) may be taken into account (for example, the age, structural integrity and existing or intended function of the prescribed work).

The obligation under section 11 of the Local Law may apply in addition to an obligation under a State law (for example, section 124 of the *Coastal Protection and Management Act 1995*) or another local law to maintain a structure or work or to keep a structure or work in a particular condition (for example, under a condition of a development permit).

Where responsible person for a prescribed work pays a special rate or charge to Council to maintain the prescribed work or part of the prescribed work

In some circumstances, although a person may be a responsible person for a prescribed work, the person may not be liable under the Local Law for not maintaining the prescribed work as required by section 11(1) if the person is liable to pay Council a special rate or charge for Council to maintain the prescribed work or part of the prescribed work (section 11(5)) (a **relevant responsible person**). A relevant responsible person must, however, maintain any part of the prescribed work that Council does not maintain under its maintenance service.

Although a relevant responsible person for a prescribed work (for example, a revetment wall) may only be liable to maintain the part of the revetment wall on the person's land (for example, the part of the revetment wall consisting of a vertical wall constructed on freehold land) (the **unaffected part**) while Council maintains another part of the wall (for example, rock buttressing in a canal) (the **affected part**), if the relevant responsible person does not comply with the maintenance obligation under section 11(1) in relation to the unaffected part, Council may give the responsible person a compliance notice requiring the relevant responsible person to do a thing stated in section 23(3) and (4) in relation to the affected part as well. This is because, for example, the only real way to repair the unaffected work is to also repair the affected part.

Also, a relevant responsible person does not obtain the benefit of section 11(5) in relation to a prescribed work or affected part subject to Council's maintenance service if maintenance is necessary because of the relevant responsible person's default (section 11(8)). This means the maintenance obligation under section 11(1) will apply. Default may occur, for example, because the relevant responsible person has been negligent or has deliberately caused damage to the prescribed work or affected part subject to Council's maintenance service.

Section 12 - Removal of a prescribed work which is abandoned

This section applies to a prescribed work (or part of a prescribed work) on trust land, a reserve or non-freehold land (including a road) that is abandoned. Section 13 explains what Council may do with an abandoned prescribed work.

The prescribed work can only be abandoned under the Local Law if Council:

- (a) reasonably believes there is no responsible person for the prescribed work under section 9(1)(c) or (d) (that is, generally, a person whose land would ordinarily receive the benefit of a prescribed work that is not on the person's land or a person would, under a law (other than the Local Law) or agreement, be responsible for maintaining the prescribed work);
- (b) publishes a notice in a local newspaper stating that a person may show cause, in writing, why Council should not remove the prescribed work;
- (c) attaches a notice stating the information in (b) to the prescribed work; and
- (d) no one shows cause why Council should not remove the work from its present location.

A person may only show cause why Council should not remove the prescribed work by showing that the person is a responsible person for the prescribed work. This means that, by doing so, the person may be responsible for maintaining the work under section 11.

Section 13 - Removal of abandoned prescribed work by local government

This section provides for what Council may do with a prescribed work that has been abandoned under section 12.

Council may remove an abandoned prescribed work from the relevant land and restore the land. Council may also dispose of a removed prescribed work. Depending on the prescribed work's value, Council may, for example, sell the work by private sale or public auction, destroy it or give it away.

Council must apply any proceeds of sale received for a disposed prescribed work as provided for in the section.

Part 6 - Entry to adjacent land for authorised activities relating to a seawall or revetment wall

This part authorises responsible persons for required works and prescribed works that are seawalls and revetment walls to enter adjacent land and to interfere with an existing seawall or revetment wall on adjacent land in certain circumstances.

Part 6 is limited to seawalls and revetment walls because the integrity and proper functioning of a seawall or revetment wall in a particular location along a coastal beach, canal or other waterway area generally depends on the wall's joining any existing seawall or revetment wall. If, however, the responsible person causes damage to the adjacent land or existing seawall or revetment wall, the affected person may enter into a remediation agreement with Council. Under the agreement, Council will repair the damage and may claim the cost of doing so from the person who caused the damage.

If a responsible person for a seawall or revetment wall can enter adjacent land under Part 6, section 26 (in Part 9) does not apply.

Section 14 - Definitions for pt 6

This section sets out definitions for Part 6. Three key definitions for Part 6 are **adjacent land**, **authorised activity** and **relevant person**.

"Adjacent land" is land:

- (a) that is immediately adjoining or touching:
 - i. land on which an existing seawall or revetment wall exists as a prescribed work and for which there is a relevant person (being a person required to carry out an authorised activity); or
 - ii. land on which a seawall or revetment wall is required to be built under a waterway area required work notice under section 10 by a relevant person (that is, a person required to build the seawall or revetment wall); or
- (b) for which a relevant person reasonably requires entry to carry out an authorised activity.

Under paragraph (b), the land, although called "adjacent land", need not be immediately adjoining or touching any land.

An "authorised activity" is:

- (a) for a seawall or revetment wall that is required to be built, any incidental and consequential work a responsible person for the required work must carry out to comply with section 10(13);
- (b) for a seawall or revetment wall that is a prescribed work, any activity a responsible person for the prescribed work must do to comply with the maintenance obligation under section 11(1).

A "relevant person" is

- (a) a responsible person for building a seawall or revetment wall who is required to carry out an authorised activity; and
- (b) a responsible person for maintaining a seawall or revetment wall who is required to carry out an authorised activity; and
- (c) for sections 16, 17, 18 and 19—includes a person engaged or authorised by a person in paragraph (a) or (b) to carry out an authorised activity (for example, a licensed contractor who is engaged by a responsible person to build a seawall and to carry out an authorised activity).

Section 15 - Notice of entry

This section provides that a relevant person (under paragraph (a) or (b) of the definition of "relevant person" in section 14) who intends to enter adjacent land under Part 6 - including entry of a person engaged or authorised by the relevant person - must give the occupier of the adjacent land written notice of the intended entry. The written notice must state the matters in subsection 15(2). However, before giving a written notice, the relevant person must make a reasonable attempt to contact the occupier of the adjacent land and obtain the occupier's consent to the entry.

Example for section 15

Jon has been given a waterway area required work notice by Council to build a seawall on Jon's land. To carry out all necessary incidental and consequential work (an "authorised activity"), Jon needs entry to land owned by his neighbour Freya and to interfere with the seawall on Freya's land (by aligning Jon's seawall with Freya's). Jon should approach Freya to explain that he needs to enter her land and to interfere with her seawall so that he can comply with the waterway area required work notice. Jon

should give Freya all the details that are set out in section 15(2) so Freya can make an informed decision about giving (or not giving) her consent. If Freya is prepared to give Jon her consent to entry, Freya and Jon may agree on the terms of Jon's entry. If Freya does not give her consent, Jon may then give Freya a notice under section 15. Jon's notice must state the matters in section 15(2) otherwise Jon may not enter Freya's or interfere with her seawall under section 16.

Section 16 - Entering adjacent land for authorised activities

This section provides that a relevant person may, without consent or warrant, enter adjacent land to carry out an authorised activity. However, a relevant person can only enter adjacent land without consent or warrant, if a relevant person has given the occupier of the adjacent land written notice under section 15.

Section 16 says what a relevant person may take onto or over the adjacent land (for example, vehicles and building supplies). Section 16 also places limits on a relevant person's entry (for example, only entering adjacent land between 7am and 6pm unless the entry is otherwise reasonably necessary).

A relevant person for section 16 includes a person engaged or authorised by a relevant person who has given notice under section 15.

Example for section 16

Jon has given Freya a written notice to enter her land (as adjacent land) under section 15 to carry out authorised activities of interfering with her seawall so Jon can build a seawall (as a required work) on his land.

Jon has authorised Seawall Constructions Pty Ltd to build his seawall and to carry out all necessary incidental and consequential work, including aligning his seawall with Freya's seawall (as authorised activities). Jon's notice under section 15 stated all persons employed by Seawall Constructions Pty Ltd who intend to enter Freya's land and to interfere with, as necessary, her seawall for that purpose.

Jon and the stated employees of Seawall Constructions Pty Ltd (as relevant persons) may, after a period of 10 days has passed since giving Freya the written notice under section 15, enter Freya's land to carry out the authorised activities. A relevant person who enters Freya's land may take any thing the person reasonably requires for the carrying out the authorised activities onto Freya's land (for example, a vehicle). However, Jon and any other relevant person must, when entering Freya's land, comply with sections 17 and 18.

Section 17 - Duty to avoid inconvenience and minimise damage

This section provides that a relevant person who enters adjacent land (including with the consent of an occupier of the adjacent land) must take all reasonable steps to avoid:

- (a) causing inconvenience to an occupier; and
- (b) damaging the land or anything on the land (other than is reasonably necessary to carry out an authorised activity).

Section 18 - Relevant person must give notice of damage

This section provides that a relevant person who enters adjacent land (including with the consent of an occupier of the adjacent land) and who causes or contributes to damage to the adjacent land or something on the land (other than where there is trivial damage or, for a thing on the land, there is no one in possession of the thing) must give notice of the damage to the occupier of the adjacent land. It is an offence not to give notice of the damage to the occupier. The notice must state particulars of the damage and that the owner of the land or thing may seek remediation of the damage under Part 6. See sections 19 and 20.

If the damage has been caused by a person engaged or authorised by a responsible person for a seawall or revetment wall, and the engaged or authorised person (the "authorised relevant person") does not give an occupier notice of the damage in circumstances where the responsible person knew or ought to have known of the damage, the responsible person must give the occupier a notice.

Section 19 - Interested person may give notice of damage to the local government

This section applies in circumstances where a relevant person has entered adjacent land (including with the consent of the occupier) and a person (an "interested person") reasonably believes the relevant person has caused or contributed to damage to the adjacent land or something on the land. An interested person is a person who owns the land or the thing.

The interested person may give Council written notice of the damage. The notice must include the information stated in section 19(3) and must be given no later than 90 days after the interested person became aware of the damage.

Council must, within 30 days of receiving the notice, give the interested person and the relevant person notice of whether Council will enter into a remediation agreement with the interested person under section 20.

An interested person may give Council a notice under section 19 even if a relevant person does not give an occupier notice of damage under section 18.

Section 20 - Remediation agreement

This section provides entry into a remediation agreement between Council and an interested person under section 19 (that is, the person whose land or thing has been damaged by a relevant person).

A remediation agreement provides for Council to take remedial action in relation to land or a thing that has been damaged by a relevant person when entering adjacent land (including with the consent of an occupier of the land). A remediation agreement binds the parties to the agreement and the parties' personal representatives, successors and assigns.

Council may recover the amount it properly and reasonably incurs in taking any remedial action under a remediation agreement as a debt payable to Council by the relevant person who caused or contributed to the damage. A relevant person is a person who caused or contributed to the damage or a responsible person for a seawall or revetment wall who engaged or authorised the relevant person who caused or contributed to the damage (such as a licensed contractor). A relevant person is not a party to a remediation agreement.

Example for sections 19 and 20

An employee of Seawall Constructions Pty Ltd (as a relevant person) engaged by Jon to carry out an authorised activity (see above) on Freya's adjacent land destroys an ornamental tree on Freya's land.

Freya, as the owner of the adjacent land (and whether or not she receives a notice of the damage under section 18), may give a notice to Council detailing the damage to the tree and the circumstances she believes led to the damage. Freya must also state in her notice what remedial action she considers Council should take. Here, that would be for Council to replace the tree.

On reviewing Freya's notice, Council decides to enter into a remediation agreement with Freya to take remedial action of replacing the tree. Council may recover the cost of taking the remedial action from the relevant person who caused or contributed to the damage or Jon, as the person who authorised Seawall Constructions Pty Ltd to carry out authorised activities on Freya's land.

Sections 19 and 20 are not intended to prevent an interested person from taking legal action against a relevant person who causes damage to his or her land or any thing on his or her land.

Part 7 - Sale of lots

Section 21 - Sale of lot subject to specified prescribed work

This section provides that sellers under contracts of sale for relevant lots must disclose certain matters relating to specified prescribed works (for example, a seawall or a revetment wall) for which the seller may be a responsible person under the Local Law. A prescribed work is only a specified prescribed work if it is stated to be a specified prescribed work in a Subordinate Local Law.

It is an offence not to comply with section 21. Section 21 does not authorise a buyer under a contract of sale to terminate a contract if the seller does not comply with the disclosure requirement.

Section 21 is intended to give buyers, when entering into contracts to buy relevant lots, information about their potential obligations under the Local Law relating to specified prescribed works.

Part 8 - Prescribed work reports

Section 22 - Prescribed work report

This section says that Council may give a responsible person for a prescribed work a prescribed work report notice requiring the person to obtain and give Council a prescribed work report about a specified prescribed work (for example, a seawall or a revetment wall) within a reasonable period state in the notice. A prescribed work is only a specified prescribed work if it is stated to be a specified prescribed work in a Subordinate Local Law.

The purpose of section 22 is to allow Council to monitor the state of maintenance of a specified prescribed work. If appropriate, Council may decide to take enforcement action against a responsible person under Part 9 as a result of a prescribed work report.

It is an offence not to comply with a prescribed work report notice. Also, Council may obtain the report if the responsible person does not and may recover the cost of doing so from the responsible person. However, Council cannot give a responsible person for a prescribed work a compliance notice under section 23 for not complying with a prescribed work report notice.

Part 9 - Enforcement

This part explains how Council may enforce certain provisions of the Local Law, in particular, section 11 (Good repair and safe condition requirement). Enforcement generally starts with compliance action under section 23.

Section 23 - Compliance

This section applies if a person contravenes the Local Law, other than section 10 (Building of required work), 21 (Sale of lot subject to specified prescribed work) and 22 (Prescribed work report).

Council may give a person who contravenes the Local Law or who is involved in the contravention a compliance notice. A compliance notice may require a person to do any of the things stated in section 23(3) and (4).

It is an offence not to comply with a compliance notice (section 23(6)).

A compliance notice must include, or be accompanied by, a decision notice (section 23(5)). This means a person given the compliance notice may apply to review the giving of the notice under Part 12.

Section 24 - Liability for consequential damage

This section provides that a person who contravenes the Local Law (other than section 10, 21 or 22) is liable for any consequential loss or damage to or incurred in respect of Council's land or a work that is the property of Council.

Council may recover the amount that it properly and reasonably incurs in taking all necessary steps to make good the consequential damage from the person whose contravention caused the consequential damage (section 24(3)).

Example for section 24

Alex fails to maintain a seawall (a prescribed work) on a foreshore (a waterway area) for which Alex is a responsible person, as required by section 11. The foreshore is controlled by Council. The seawall eventually fails and must be removed. Council decides to remove the seawall. Council may recover the cost of removing the seawall from Alex. *Note:* Alternatively, Council could give Alex a waterway area required work notice requiring Alex to build a new seawall and, as incidental and consequential work, remove the existing seawall so the new seawall may be built.

Section 25 - Permission required to perform obligation

This section provides that, if the Local Law or a compliance notice under section 23 requires a person (the "liable person") to perform an obligation (for example, to build a seawall under a waterway area required work notice) (an "original obligation") and performing the obligation would contravene another law (for example, the *Planning Act 2016*) unless the person had an approval or permission to perform the obligation, the liable person is not liable for an offence under the Local Law for failing to perform the original obligation. However, the liable person must take all reasonable steps to obtain the approval or permission because the liable person remains, at all times, a responsible person for the required work or prescribed work (as the case may be).

Council can, though, still give a liable person a notice requiring the person to take other action. Also, the liable person must continue to perform any part of the original obligation that may be performed without the permission.

Section 26 - Occupation right required to perform obligation

This section provides that, if the Local Law or a compliance notice under section 23 requires a person (the "liable person") to perform an obligation (an "original obligation") and the person needs an occupation right to use or occupy land or waters under an Act or from another person to perform the original obligation, the liable person must take all reasonable steps to apply for or acquire the occupation and comply with the terms and conditions of the occupation (if acquired). If, after taking the reasonable steps, the liable person is unable to acquire an occupation right, the liable person is not liable for an offence under the Local Law for failing to perform the original obligation.

Section 26 does not apply to the carrying out of an authorised activity for a seawall or revetment wall on adjacent land under Part 6. Part 6 authorises entry to adjacent land in certain circumstances.

Section 26 will generally apply to acquiring an occupation right on or in the State's land (for example, in a tidal waterway) to build or maintain a work such as a seawall or revetment wall. If Council can, apart from the Local Law, give the person an occupation right, Council must do so (section 26(4)).

Examples for sections 25 and 26

- Majella, the owner of freehold land, is given a waterway area required work notice by Council under section 10 requiring Majella to build a revetment wall in a tidal waterway that is adjacent to her land and which is State tidal land under the Coastal Protection and Management Act 1995. If a development permit under the Planning Act 2016 is granted so the revetment wall may be built, Majella is a relevant person who has a right to occupy and use the State tidal land to build and

maintain the revetment wall (section 123 Coastal Protection and Management Act 1995). Under section 25, Majella must take all reasonable steps to obtain the development permit.

- Kaia, the owner of freehold land that is landward of a right line tidal boundary, is given a waterway area required work notice by Council under section 10 requiring Kaia to build a seawall wholly on land that is seaward of the right line tidal boundary, including land below high-water mark. That land is the property of the State under section 9 of the *Land Act 1994* and may be dealt with as unallocated State land. If the State does not give owner's consent to a development application to build the seawall, Kaia will not have a right to occupy and use State tidal land. Separately, if the State refuses to give Kaia an occupation right, she will not be able to build the seawall. Kaia cannot be liable for an offence under the Local Law for failing to build the seawall.

Section 27 - Inspection of places

This section provides for authorised persons under the Local Law to enter and inspect places to establish whether there is compliance with the requirements of the Local Law or a compliance notice under section 23.

Section 28 - Performance of work

This section applies where a person has failed to perform work required to be performed by a compliance notice under section 23 (for example, to repair a revetment wall that has fallen into disrepair).

Under section 28 Council may perform the necessary work and may recover the amount that it properly and reasonably incurs in performing the work as a debt payable by the person who failed to perform the work (section 28(6)).

Part 10 - Release

Section 29 - Release

This section applies only to the extent it is not contrary to a State law.

Under section 29, no action for damages or other right to remedy lies against Council or any officer, employee or agent of Council, in relation to those matters stated in section 29(2). However, the release only applies to an act or omission if the act was done or the omission was made in good faith and without negligence.

Part 11 - Administrative provisions

This part contains provisions that support the operation of other provisions of the Local Law in relation to offences.

Section 30 - Owners and occupiers must ensure compliance with the local law

This section provides that owners and occupiers of places must ensure that an offence under this Local Law is not committed in or on a place. Failure to do so means the owner or occupier also commits an offence. The intent of this provision is to ensure persons take responsibility for activities occurring in places they own or occupy. It is a defence for an owner or occupier of a place where the offence occurred to prove that they did not have knowledge of the act/omission which led to an offence, and they could not have reasonably prevented it. Council recognises that there are some circumstances where it may not be reasonable or fair to hold the owner or occupier of a place responsible for an offence.

The words '*place*', '*owner*' and '*occupier*' are defined in the dictionary schedule of this Local Law.

Section 31 - Joint and several liability

This section provides that where this Local Law imposes responsibility on multiple people that are either engaged in the activity or joint owners/occupiers of a place, each person can be held liable, with or separate from the other. The aim of this section is to ensure any and all responsible parties can be held accountable via compliance and enforcement mechanisms under this Local Law.

Section 32 - Liability of third parties

This section provides that a person involved in a contravention of the Local Law (for example, by aiding a contravention) also commits an offence.

Section 33 - Providing false or misleading information

This section makes it an offence for a person to give information that they know is false or misleading in relation to this Local Law. This aims to ensure the community is aware of their obligations to provide correct and truthful information to Council and to deter the community from providing false or misleading information, through penalties. False or misleading information could result in Council making a decision that is not consistent with the objects of this Local Law, or community expectations.

Section 34 - Attempts to commit offences

This section provides that a person who attempts to commit an offence under this Local Law commits an offence. This means that even if a person unsuccessfully attempts to commit an offence, the person has committed the offence of attempting to commit an offence.

The maximum penalty for the offence under this section is half the penalty for the offence attempted.

Section 35 - Defences

This section provides that it is a defence to any breach of or non-compliance with any provision in this Local Law if the person has a lawful excuse or defence.

Section 36 - Proceedings for offences

This section sets out the requirements and timeframes within which Council can commence proceedings for offences under this Local Law. If Council seeks to prosecute a person in court for an offence under this Local Law, it must be dealt with in the Magistrates Court as a summary offence. The purpose of this section is to facilitate legal proceedings occurring within a reasonable period of time after the commission of the offence. See section 237 of the *Local Government Act 2009* for the name in which proceedings by the local government may be started.

Section 37 - Enforcement orders

This section gives the Magistrates Court discretion to make an enforcement order requiring a person to take certain action within a specified period. The purpose of this clause is to give the presiding Magistrate power to order a person to comply with a direction to secure compliance with this Local Law. This is particularly useful where a person has previously been given opportunities to comply by Council officers but has refused to do so (e.g., has not complied with a compliance notice to disclose certain matters relating to section 21 of this Local Law). It also means that there are more potential consequences that can be imposed by the court on the person if they fail to comply with the enforcement order.

Section 38 - Extrinsic material

This section enables Council to make an explanatory note (which includes this document), which can be used to assist in the interpretation of this Local Law. The explanatory note must be passed by a resolution of Council and published on Council's website. The effect of this provision is that, where the meaning of a section of the Local Law is unclear or is debated, Council can refer to the explanation of that section in this Explanatory Note (or another Explanatory Note passed by Council resolution) to try and determine the meaning of the section. The information provided in the Explanatory Note should not

be treated as an exhaustive statement on the subject, but rather a tool to inform of the operation and intent behind each provision.

Part 12 - Reviewing decisions

This part applies to the review of certain decisions made by Council under the Local Law.

Section 39 - Application for review

This section provides that a person who is given, or entitled to be given a decision notice may apply to Council for a review of a decision. This gives the person a right to have the following types of decisions reviewed internally by Council:

- decisions to issue waterway area required work notices, under section 10.
- decisions to issue compliance notices, under section 23.

A review application must be made within the period stated in section 39(2). The application must be accompanied by a statement of the grounds on which the applicant seeks the review of the decision (section 39(3)). It is important to state the grounds so that Council can properly assess the application and review the relevant decision.

Internal reviews help Council ensure consistency in decision-making. If a person wishes to complain about any other issues that do not attract a formal review right under this Local Law, they may be do so through the administrative actions complaints process, which Council must administer under the *Local Government Act 2009*.

Section 40 - Review decision

This section sets out requirements for Council's review of a decision. Council is required to either confirm or amend the original decision or substitute another decision. It is a requirement that the review application cannot be handled by the same person who made the original decision or a less senior person, unless the original decision was made by the CEO. This is to ensure the objectivity, impartiality and fairness of the review decision.

Section 41 - Stay of operation of original decision

This section provides that a review application does not stay the original decision. This means a person remains bound by the original decision unless and until the original decision is amended or substituted by another decision. *For example, if Council issues a compliance notice and the person applies for a review of that decision, Council's decision to issue a compliance notice is still valid while the review process is underway, and the person must comply with the compliance notice.*

Part 13 - Authorised persons

Section 42 - Appointment of authorised persons

This section provides for the appointment of authorised persons under the Local Law. For the Local Law, an authorised person is a person appointed under section 37 or the *Local Government Act 2009*.

Section 43 - Threatening an authorised person

This section makes it an offence to threaten, insult or use abusive language to an authorised person. The intention of this provision is to protect the safety of authorised persons and enable them to perform their roles and responsibilities under the Local Law in an effective and safe manner. If a person commits an offence under this section, an authorised person can issue them with a penalty infringement notice.

Part 14 - Subordinate local laws

Section 44 - Subordinate local laws

This section allows Council to make Subordinate Local Laws in relation to those matters listed in section 44.

The purpose of this section is to define the scope of what Council can regulate by Subordinate Local Law.

Schedule Dictionary

The *dictionary* sets out the meaning of words commonly used in the Local Law.

Consultation Copy Only

Is this law consistent with fundamental legislative principles?

The Local Law is generally consistent with fundamental legislative principles. While it imposes obligations on responsible persons to build and maintain works that are not on their own land, the Local Law only does so where the person's land has some connection with or receives the benefit of the work. The Local Law does authorise entry to, and activities on, adjacent land under Part 6 for a responsible person to carry out authorised activities. However, this is necessary for the responsible person to be able to comply with his or her obligations to build or maintain a seawall or revetment wall. Council and an interested person may enter into a remediation agreement requiring Council to take remedial action in respect of any damage caused to land or a thing owned by the interested person.

Is this law consistent with Human Rights?

The Local Law is generally compatible with the Human Rights Act 2019. In particular, the Local Law does not seek to acquire or interfere with any right of property. However, as explained, the Local Law does authorise entry onto land, without consent or warrant, in certain circumstances.

