

# **Access Rights, Trespass and Access Agreements**

## **ASBC Meeting – 18 February 2020**

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# Outline

## Access rights including air space rights

- 1 What are access rights
- 2 When are they encountered
- 3 Why is the tort of trespass relevant

# What are air space rights

*“whoever’s is the soil, it is theirs all the way to Heaven and all the way to hell”*

(Cuius est solum, eius est usque ad coelum et ad inferos).

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On one view, the owner’s rights extend to protecting not only the land but the sky space above the land stretching the limits of the atmosphere and the soil beneath the surface down to the centre of the earth.



# When are air space rights and access licences encountered



Building into  
an adjoining  
property's  
airspace by way  
of cantilever



Ground Anchors



General access  
for construction



Access for  
construction via  
scaffolding or  
swinging crane  
jib

# Why is trespass relevant?

- Trespass to land consists of the unauthorised entry onto the plaintiff's property by the defendant.
- The plaintiff's property extends to the plaintiff's rights to the air above its land.
- The defendant need not actually enter the air space, it is enough for the defendant to cause some object to enter it.



# Outline

## Access Agreements/Licence



Access without  
consent or court  
order is  
trespass



Crane Access  
licence –  
access  
neighbours air  
rights



Principles apply  
to all forms of  
access – land  
access for  
construction



Drafting of  
Crane Access  
Licence



# Air space access for cranes

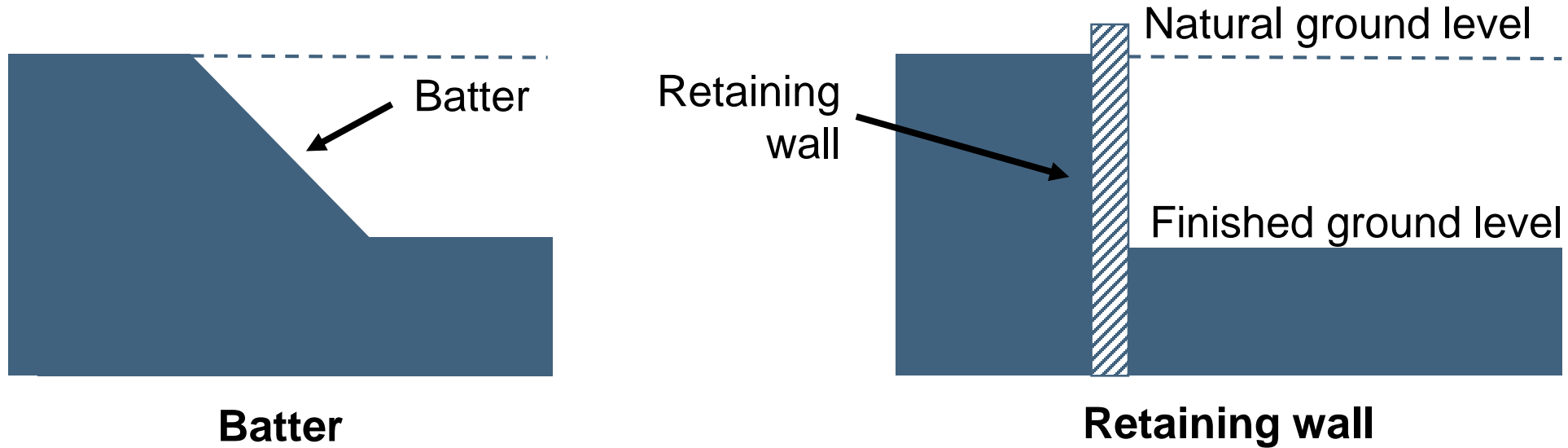
- ✓ Construction = cranes
- ✓ 735 cranes on projects in Australia 1
- ✓ 321 in Sydney
- ✓ 192 Melbourne, 72 Brisbane
- ✓ Residential sector accounted for 76%



# Land Access for construction

Access for

- Construction of batter and earth retaining structures
- Construction of public access overpass over creek





# Crane – weather vaning

No loads in  
air space

When not in use,  
crane must be  
allowed to rotate  
freely in the wind



# Crane access licence – issues

- Reimbursement –  
Negotiation and legal costs
  - Costs of  
neighbouring  
property owner
  - Separate agreed  
reimbursement or  
included in Licence  
Fee
- Compensation –  
Licence Fee



# Crane access licence – issues

## Term of Licence



- Realistic time period that developer/ builder will require access to airspace
- Option to extend

## Confidentiality



- Varying Licence fees as between neighbours

# Crane access licence – issues

## Crane Specifications and amenity

- Type, size and specifications of crane
- Operating hours of crane
- Allowable loads of crane
- Method of installation and removal of crane
- Engineering certification for crane footing and foundations (AS1418)
- Maintenance and repair of crane;
- Operating procedures (including likely noise)

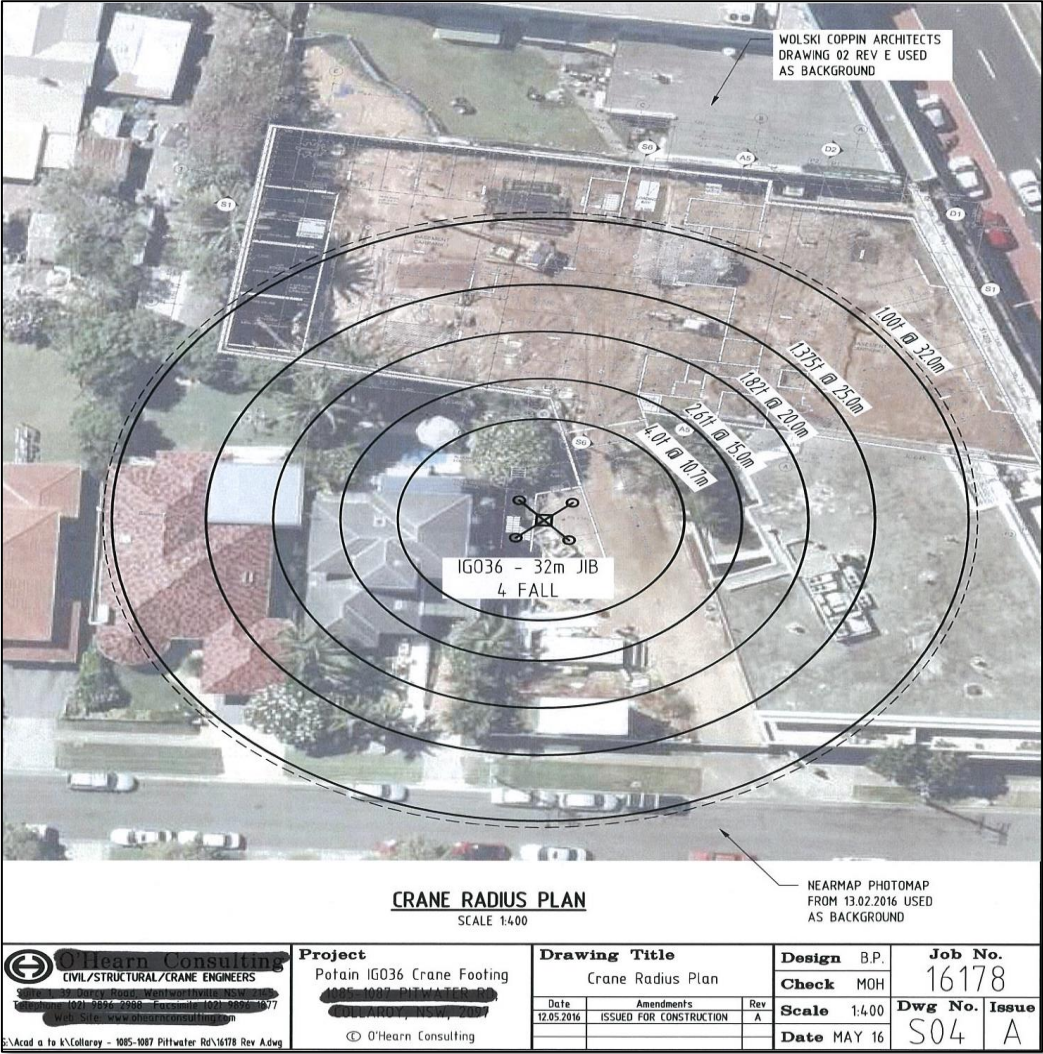


- Crane Specifications
- Foundations
- Concrete specifications





# Crane approval documents – radius plan





# Crane access licence – issues

## Engineering approval of crane base

- Certification of engineer
- Design review of foundation (AS 1418)
- Footings and foundations designed
  - in accordance with Australian Standards
  - with regard to geotechnical conditions
- Inspected crane pad reinforcing and holding down bolt prior to concrete pour
- Reviewed concrete testing results



# Crane access licence – issues



## Indemnity

- Indemnify Licensor for loss or damage
- Limitation of liability - Consequential loss

## Insurance

- Appropriate levels of cover
- Risk is not just in use but installation and removal of crane
- Damage to, loss or destruction of Licensor's property
- Owner noted as 'insured person'

## Security

- Costs incurred in developer breaches licence

# Crane access licence – issues

## Safety



No loads in air space



Copies of service & maintenance records



Inspection of crane  
AS2550/Safe Work Australia





# Access to Neighbouring Land Act 2000 (NSW)

## Application to Local Court

- Landowner (other person with landowner's consent)

**Notice** – 21 days

## Court considerations

- Whether more difficult or more expensive without access
- Access causes unreasonable hardship

## Order

- To carry out work on other person's land



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