



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 44**

**Alteration of Ground Levels**

**DISCUSSION PAPER**

**SEPTEMBER 1984**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

**The Commissioners are –**

Mr D R Williams, QC, Chairman

Mr H H Jackson

Mr P W Johnston

Mr C W Ogilvie

Dr J A Thomson

**The officers are –**

Executive Officer and Director of Research –

Dr P R Handford

Research Officers –

Mr M G Boylson

Mr R W Broertjes

Mr A A Head

The Commission's offices are on the 16th Floor, St Martins Tower, 44 St George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022

# CONTENTS

Paragraph

## PREFACE

## CHAPTER 1 - INTRODUCTION

- |    |   |      |
|----|---|------|
| 1. | TERMS OF REFERENCE                      | 1.1  |
| 2. | AREAS COVERED BY THE TERMS OF REFERENCE | 1.3  |
| 3. | DETAILS OF CASES SOUGHT                 | 1.10 |

## CHAPTER 2 - WITHDRAWAL OF SUPPORT - COMMON LAW REMEDIES

- |    |   |      |
|----|---|------|
| 1. | COMMON LAW  |      |
|    | (a) Natural right of support to land by adjoining land                | 2.2  |
|    | (b) No natural right of support to buildings by adjoining land        | 2.6  |
|    | (c) Acquisition of easement of support to buildings by adjoining land | 2.7  |
|    | (d) Rules of negligence are not applicable                            | 2.10 |
| 2. | LIMITATIONS OF THE COMMON LAW   | 2.12 |
| 3. | COMMON LAW ALTERED IN QUEENSLAND                                      | 2.13 |
| 4. | IMPOSITION OF A CIVIL DUTY OF CARE                                    | 2.18 |

## CHAPTER 3 - WITHDRAWAL OF SUPPORT - STATUTORY PROTECTIONS

- |    |  |      |
|----|--|------|
| 1. | INTRODUCTION   | 3.1  |
| 2. | SECTION 391 OF THE LOCAL GOVERNMENT ACT              |      |
|    | (a) Outline of the section and its effect            | 3.2  |
|    | (b) Limitations of the section                       | 3.10 |
|    | (c) Comparable provisions elsewhere                  |      |
|    | (i) Australia and New Zealand                        | 3.15 |
|    | (ii) England   | 3.18 |
| 3. | THE UNIFORM BUILDING BY-LAWS                         |      |
|    | (a) General  | 3.23 |
|    | (b) Relevant enabling provisions                     | 3.24 |
|    | (c) The by-laws                                      | 3.28 |
|    | (d) Limitations of the Uniform Building By-laws      | 3.43 |
|    | (e) Comparable by-laws                               | 3.46 |
|    | (f) Civil liability under the by-laws                | 3.50 |
| 4. | BUILDING LICENCES: LOCAL GOVERNMENT ACT, SECTION 374 |      |

(a)	Outline of the section and its effect	3.52
(b)	Limitations of the section	3.57
(c)	Comparable provisions elsewhere	
(i)	Building licences	3.59
(ii)	Drainage of land	3.63
5.	PLANNING SCHEMES	
(a)	Metropolitan Region Scheme	3.64
(b)	Town planning schemes	3.66
6.	REMEDIAL POWERS OF LOCAL AUTHORITIES	3.67
7.	POSSIBLE EXTENSION OF LOCAL AUTHORITY POWERS	
(a)	Possible extension of existing powers	3.68
(b)	Possible objections to extension of powers	
(i)	Administrative complexity	3.77
(ii)	Legal liability of local authorities	3.78
(iii)	Proper extent of local authorities' powers	3.80
8.	DETAILS OF INADEQUACIES SOUGHT	3.82

#### **CHAPTER 4 - FALL OF SOIL**

1.	INTRODUCTION	4.1
2.	COMMON LAW	4.2
3.	STATUTORY PROTECTIONS	
(a)	Local Government Act and by-laws	4.3
(b)	Planning schemes	
(i)	Metropolitan Region Scheme	4.10
(ii)	Town planning schemes	4.11
(c)	Building licences	4.12
4.	POSSIBLE EXTENSION OF LOCAL AUTHORITY POWERS	4.13
5.	DETAILS OF INADEQUACIES SOUGHT	4.15

#### **CHAPTER 5 - FENCING**

1.	SWIMMING POOL FENCE REQUIREMENTS	5.1
2.	FENCING FOR OTHER SAFETY REASONS	5.3

#### **CHAPTER 6 - PRIVACY AND VIEWS** 6.1

#### **CHAPTER 7 - MATTERS ON WHICH INFORMATION AND COMMENT SOUGHT** 7.1

**APPENDICES**

**APPENDIX I - LOCAL GOVERNMENT ACT 1960-1984, SECTION 391**

**APPENDIX II - EXTRACTS FROM THE UNIFORM BUILDING BY-LAWS 1974**

**APPENDIX III - STATUTORY PROVISIONS OF OTHER JURISDICTIONS**

**APPENDIX IV - BY-LAWS OF OTHER JURISDICTIONS**

**APPENDIX V - REMEDIAL POWERS OF LOCAL AUTHORITIES**

## **PREFACE**

The Commission has been asked to consider and report on the law as to the rights and obligations of adjoining owners when altering ground levels on their land.

The Commission has decided to issue this discussion paper in order to obtain;

information as to problems being encountered as a result of alteration of ground levels;

details of inadequacies or defects in the present law;

proposals for amending the present law and comment on such proposals, and in particular advice of, or comment on, practical considerations affecting any proposal.

The Commission welcomes such information, details, proposals or comment. It would greatly assist the Commission if replies were sent by 31 December 1984.

Unless advised to the contrary, the Commission will assume that comments received on the paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The paper is based on material available to the Commission on 30 June 1984 and can be studied at the Commission's office by anyone wishing to do so.

# CHAPTER 1 - INTRODUCTION

## 1. TERMS OF REFERENCE

1.1 The terms of reference require the Commission to consider and report on the law as to the rights and obligations of adjoining owners when one alters the ground levels on his land, and to recommend changes to the law it considers desirable.

1.2 The reference arose from the concern of some local authorities that they did not have adequate power to control excavation which might affect the support to adjoining land and buildings or to control the filling of land so as to prevent the fall of soil onto adjoining land. However the reference extends to cover the possible inadequacy of the common law and statutory remedies presently available to the adjoining owner himself. Nevertheless the reference was not intended to cover such broader aspects as the loss of privacy or view or the general aesthetic amenity of an area. As the Commission suggests in chapter 6 below, these matters should perhaps be dealt with, if at all, within the context of existing controls such as town planning schemes.

## 2. AREAS COVERED BY THE TERMS OF REFERENCE

1.3 The two main situations covered by the terms of reference are –

(a) **Withdrawal of support:** An owner excavates his land and this causes the land of an adjoining owner to subside. In addition to the subsidence, damage may be caused to improvements such as buildings on the adjacent land.

(b) **Fall of soil:** An owner raises the level of his land without providing an adequate retaining wall and as a result soil falls onto the land of an adjoining owner. In some cases, damage to a dividing fence also results.

1.4 Other areas covered are –

(a) **Loss of drainage:** An adjoining owner's land may lose natural drainage because an owner has raised the level of his own land.

(b) **Fencing:** Alteration of the ground level may require safety fencing to prevent persons, especially children, falling into excavated areas or render previously adequate fencing no longer adequate, for example, to safeguard swimming pools.

1.5 These various possibilities give rise to difficulties of varying degrees of significance or importance. The adjoining owner has certain remedies at common law both for withdrawal of support and for fall of soil, and the *Local Government Act* and *Uniform Building By-laws* also contain provisions governing alteration of ground levels associated with building.<sup>1</sup> These provisions and remedies are outlined below, together with a discussion of their possible inadequacies, both from a theoretical and practical point of view.

### Experience of local authorities

1.6 A number of local authorities informed the Commission that the problems of withdrawal of support and of fall of soil have arisen more frequently since the advent of the concrete slab-on-ground method of building. This method avoids the greater expense involved in laying foundations in the traditional style. On a sloping site the ground on which the slab is to be laid must be levelled before the concrete is poured. Often this means that a site must either be filled or excavated. The method is now usual in the construction of houses and common in the construction of medium density strata title developments.

1.7 Some local authorities indicated that problems occur when changes to ground levels are carried out without building being involved. In these cases, except where a retaining wall is being constructed,<sup>2</sup> a building licence is not required and the provisions in the *Uniform Building By-laws* governing alteration of ground levels do not apply.<sup>3</sup> In practice, the local authority usually has no prior knowledge of the intention to carry out the earthworks and,

---

<sup>1</sup> Paras 2.2 to 2.4, 2.7 to 2.9, 3.50 and 3.51, 4.2, 4.8, 3.2 to 3.6, 3.28 to 3.40, 3.52 to 3.56, 3.67 and 4.12 below. In July 1977, by-laws 31.5 to 31.7 were added to the *Uniform Building By-laws* to deal with a number of problems arising out of the use of the concrete slab-on-ground method of building. By-laws 31.5 to 31.7 are contained in Appendix II. These are mainly concerned with the structural soundness of slab-on-ground buildings. Some of the provisions are also aimed at protecting the interests of the adjoining owners: By-laws 31.6(1) and (3), and 31.7. Despite those provisions, the slab-on-ground method of building is still creating difficulties between building owners and adjoining owners.

<sup>2</sup> The definition of "building" in the *Local Government Act 1960-1984* appears to be wide enough to include a retaining wall. Many landowners seem not to apply for a building licence for a retaining wall where a building in the commonly accepted sense of the word is not also being built, especially where the retaining wall is a low one.

<sup>3</sup> Paras 3.24, 3.26, 3.27, 3.52 and 4.3 below.

where the adjoining lot is vacant, problems may not come to light until an application to develop the adjoining land is received.

1.8 The Parliamentary Commissioner for Administrative Investigations drew the Commission's attention to the types of cases concerning withdrawal of support, fall of soil and drainage problems which have been considered by his office in recent years. These confirmed the views of local authorities that their powers were limited in the area.<sup>4</sup>

1.9 The Builders' Registration Board has confirmed to the Commission that problems involving withdrawal of support, fall of soil, and fencing are from time to time also drawn to its attention. Such matters may come within its jurisdiction by virtue of section 12A of the *Builders' Registration Act 1939-1984* which empowers the Board to make an order against a builder ordering him to remedy unsatisfactory building work. Ancillary works such as retaining walls and fencing may in some circumstances come within the Board's jurisdiction.<sup>5</sup> The powers of the Board will normally be exercised following a complaint by an owner against his builder. However in some cases such a complaint will follow upon, or be intended to avoid, adverse communication from an adjoining owner or even a local authority. The jurisdiction of the Board is not further discussed in this paper. However, it may provide a means in particular cases of resolving actual or potential disputes.

### 3. DETAILS OF CASES SOUGHT

1.10 The Commission is aware of some problems arising from the alteration of ground levels as they affect adjoining owners. However it would welcome further information about actual situations which have given rise to difficulty, in order to put the range and seriousness of problems, and possible solutions, into proper perspective.

1.11 The problems which have been drawn to the Commission's attention have arisen in connection with residential development. Excavations may also occur, of course, where multi-storey buildings are being erected. The Commission seeks comments on any problems in that regard also.

---

<sup>4</sup> Many of the local authorities had obtained legal advice in this regard.

<sup>5</sup> This argument was upheld in *Builders' Registration Board v Amesz Holdings Pty. Ltd*, Perth Court of Petty Sessions complaints 11363 and 11364/82 where site works were so included.

## **CHAPTER 2 -WITHDRAWAL OF SUPPORT - COMMON LAW REMEDIES**

2.1 The right of adjoining land owners to support from adjacent land has long been recognised by the common law. The right applies in favour of land but not of buildings and can be extended to buildings by acquisition of an easement. However in some respects the right may be inadequate. Furthermore it may not be possible to enforce it until actual damage is suffered and even then enforcement may be difficult. Because of this, certain statutory protections have been developed aimed at preventing withdrawal of support in the first place. The common law will be discussed in this chapter. Statutory provisions will be discussed in the following chapter. Their limitations will be discussed and certain proposals for reform outlined.

### **1. COMMON LAW**

#### **(a) Natural right of support to land by adjoining land**

2.2 The right to support of land from neighbouring land as recognised by the common law is a natural right attaching to real property, and does not need to be created by easement.<sup>1</sup> The right enables a landowner to have his land remain in a natural state unaffected by any excavation on the adjoining land.<sup>2</sup>

2.3 The withdrawal of support is not actionable of itself. It is actionable only when damage occurs as a result of the withdrawal of support. There may well be a difference in time between the withdrawal of support and the occurrence of the damage.<sup>3</sup> If subsidence is prevented by the use of artificial means of support, no cause of action arises.<sup>4</sup> A new cause of action will arise whenever a fresh subsidence occurs.<sup>5</sup>

---

<sup>1</sup> *Backhouse v Bonomi* (1861) 9 HLC 503, 11 ER 825; A J Bradbrook and M A Neave, *Easements and Restrictive Covenants in Australia* (1981) (hereinafter cited as "Bradbrook and Neave"), § 702.

<sup>2</sup> *Byrne v Judd* (1908) 27 NZLR 1106.

<sup>3</sup> *Taylor v Auto Trade Supply Ltd* [1972] NZLR 102, 108 per Perry J.

<sup>4</sup> S G Maurice, *Gale on Easements*, (14th ed 1972) 290.

<sup>5</sup> *Byrne v Judd* (1908) 27 NZLR 1106, 1107 and 1108; *Thynne v Petrie* [1975] Qd R 260, 262.

2.4 When damage occurs as a result of the withdrawal of support, the person affected may claim damages in the tort of nuisance.<sup>6</sup> Alternatively, or in addition, he may request an injunction ordering that further subsidence be prevented (a prohibitory injunction) or, in some cases, that the other party be compelled to carry out positive works in relation to the subsidence (a mandatory injunction).<sup>7</sup> Sometimes (by way of exception to the general principle stated in the previous paragraph) an injunction may be granted to prevent subsidence where none has yet occurred.<sup>8</sup>

2.5 There is no right to have land supported by water, and such a right cannot be acquired by prescription. Therefore one who by draining his own land withdraws from an adjoining owner the support of water lying beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the damage inflicted.<sup>9</sup> This rule does not apply to cases in which the withdrawal of support by oozing out of wet sand, silt or other partially liquid substance results in a subsidence of the adjacent surface.<sup>10</sup>

**(b) No natural right to buildings by adjoining land**

2.6 The natural right to support owed by one plot of land to adjoining land does not extend to liability to support any building erected on the adjoining land.<sup>11</sup> Thus at common law a landowner may make an excavation on his own land notwithstanding that by so doing he may cause his neighbour's building to fall.<sup>12</sup> The principle is subject to one exception. If the adjacent support is withdrawn so as to cause land to subside and the subsidence has not been the result of the additional weight of the buildings or other erections upon the land, the landowner is entitled to recover, in addition to damages for the subsidence of his land, damages for the injury to his buildings or other erections.<sup>13</sup>

<sup>6</sup> J G Fleming, *The Law of Torts* (6th ed 1983) (hereinafter cited as "Fleming"), 411. As to the position where the person affected sells his property before obtaining damages, see H Street, *Damage by Subsidence: The Conveyancing Problem* [1979] Conveyancer 241.

<sup>7</sup> R W M Dias (general ed), *Clerk and Lindsell on Torts* (15th ed 1982) (hereinafter cited as "Clerk and Lindsell (15th ed)"), § 7-03 to 7-06 and 7-08; Fleming, 412; Bradbrook and Neave, § 1872.

<sup>8</sup> Clerk and Lindsell (15th ed), § 707; Fleming, 413.

<sup>9</sup> Clerk and Lindsell (15th ed), § 23-57; Bradbrook and Neave, § 710 to 712. However, a landowner does have the right to the support of underground water against anyone except a neighbouring landowner: Bradbrook and Neave, § 712; *Metropolitan Water Supply and Sewerage Board v R. Jackson Ltd* [1924] St R Qd 82.

<sup>10</sup> Clerk and Lindsell (15th ed), § 23-57; Bradbrook and Neave, 714.

<sup>11</sup> Bradbrook and Neave, § 715; *Dalton v Angus* (1881) 6 App Cas 740, 791 and 792 per Lord Selborne; *Public Trustee v Hermann* [1968] 3 NSW 94, 108 per Isaacs J.

<sup>12</sup> *Dalton v Angus* (1881) 6 App Cas 740, 804 per Lord Penzance. Clerk and Lindsell (15th ed), § 23-59.

<sup>13</sup> *Public Trustee v Hermann* [1968] 3 NSW 94.

**(c) Acquisition of easement of support to buildings by adjoining land**

2.7 A right of support for buildings by the soil of the adjacent plot of land can, however, be acquired as an easement.<sup>14</sup> When the easement is acquired, the right of the owner of the building to support for it is exactly the same as that of the natural right in respect of land<sup>15</sup> and thus if damage occurs as a result of the withdrawal of support, the person affected may claim damages in the tort of nuisance.<sup>16</sup> Where an easement has been acquired, even in the absence of damage, the plaintiff will be able to recover at least nominal damages for the interference with his rights.<sup>17</sup>

2.8 The methods by which an easement of support to a building can be created are by –

- (a) express grant or reservation, (by deed or sufficient writing);
- (b) implied grant or reservation;
- (c) prescription.

2.9 Prescription has been described as "the method by which English law gives legal recognition and effect to various kinds of de facto situations in which the relevant state of affairs has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice."<sup>18</sup> Easements may be acquired by prescription under –

- (i) the doctrine of lost modern grant; or
- (ii) the *Prescription Act 1832*.<sup>19</sup>

Under the doctrine of lost modern grant, where there has been twenty years' enjoyment of support to a building from the adjacent land, and that support has been peaceable, open, and continuous, the courts will presume that a right of support was granted but that the grant was

---

<sup>14</sup> *Dalton v Angus* (1881) 6 App Cas 740.

<sup>15</sup> *Dalton v Angus* (1881) 6 App Cas 740, 809 per Lord Blackburn.

<sup>16</sup> Alternatively, or in addition, an injunction may be requested: para 2.4 above.

<sup>17</sup> *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, 349 per Lord Wright MR.

<sup>18</sup> English Law Reform Committee, *Fourteenth Report (Acquisition of Easements and Profits by Prescription)* (Cmnd 3100) (1966) 5.

<sup>19</sup> The *Prescription Act 1832* was an Act of the Parliament of the United Kingdom which was adopted in this State in 1836 by 6 Will IV, No 4.

subsequently lost.<sup>20</sup> The doctrine of lost modern grant was not affected or repealed by the *Prescription Act 1832* and the Act did little more than restate the doctrine in statutory form.<sup>21</sup>

**(d) Rules of negligence are not applicable**

2.10 Where a natural right to support to land exists, or where an easement of support for a building has been acquired, the protection afforded to the owner of adjoining land is absolute. The landowner responsible will be liable in nuisance for withdrawal of support even if the excavation is conducted without negligence.<sup>22</sup> This is consistent with the principles generally adopted in the tort of nuisance.<sup>23</sup>

2.11 However, in the case where withdrawal of support causes damage to a building, and no easement of support has been acquired, the affected landowner will have no right to sue for damages, even if in carrying out the excavation the landowner responsible was acting

---

<sup>20</sup> *Dalton v Angus* (1881) 6 App Cas 740.

The enjoyment of the support must be without particular leave of the owner of the adjoining land: Bradbrook and Neave, § 518. A claim to an easement by prescription "can always be defeated by proof of a licence, even an oral one, for a period comprising the whole or a part of the twenty years": *Austin v Wright* (1926) 29 WALR 55 per McMillan CJ; see also Bradbrook and Neave, § 522.

An easement of support will not be created by prescription unless the support is capable of being withdrawn without the expenditure of more labour or money, or the incurring of more loss or damage to his own property, than a man could reasonably be expected to incur: *Dalton v Angus* (1881) 6 App Cas 740, 805 and 806 per Lord Penzance; Bradbrook and Neave, § 531. Vaughan Williams LJ has stated that in his opinion the support must be capable of being withdrawn by the neighbour "without destruction or serious injury to his own close": *Union Lighterage Co. v London Graving Dock Co.* [1902] 2 Ch 557, 568.

If the burden on land is increased within 20 years by the erection of new buildings exerting a greater pressure, the right to a proportionate increase of lateral support necessary to uphold the increased weight will not accrue until the expiry of 20 years from the date of the increase of the burden: *Johns v Delaney* (1890) 16 VLR 729.

As time does not run against the Crown, an easement of support cannot be acquired by prescription over land owned by the Crown: Bradbrook and Neave, § 512.

<sup>21</sup> The differences are explained in Bradbrook and Neave, § 533 to 549.

One of the pertinent provisions in the Act relates to the length of enjoyment. The fiction of a lost modern grant may be rebutted by showing that the alleged grantor was under a legal incapacity eg infancy or insanity, to make the grant. The length of enjoyment necessary before a presumption of a lost grant will arise under the Act is 20 years, the same as the period under the fiction of a lost modern grant. However, the Act in s 2 additionally provides that if the enjoyment has continued for 40 years, the right to the easement is deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. Thus under the Act, the presumption will arise after 40 years enjoyment despite the legal incapacity of the alleged grantor.

<sup>22</sup> *Johns v Delaney* (1890) 16 VLR 729; 732.

<sup>23</sup> Fleming, 394-406. Persons other than the landowner could also be liable, if they were responsible for the creation of the nuisance: id 394. An example would be an engineer who was negligent in calculating specifications for a retaining wall. In such a case, if the landowner had been held liable in nuisance to the adjoining owner, he could claim contribution or indemnity from the engineer, since an engineer, like other professional men, will be liable to his client either in contract or tort: see J H Holyoak and D K Allen, *Civil Liability for Defective Premises* (1982), ch 4; R M Jackson and J L Powell, *Professional Negligence* (1982), ch 2.

negligently or recklessly.<sup>24</sup> This was confirmed in *Dalton v Angus*.<sup>25</sup> In that case, the House of Lords said that until the adjoining land-owner had acquired an easement of support by 20 years uninterrupted enjoyment, a landowner had a right to do as he wished with his own land and could therefore by excavation on his land deliberately withdraw support to his neighbour's building if he chose to do so. Thus, the situation is one in which the law does not recognise a duty of care in negligence. Any such duty would be inconsistent with the landowner's absolute property right.

## 2. LIMITATIONS OF THE COMMON LAW

2.12 The principal limitations of the common law seem to be that:

- (i) The natural right to support owed by one plot of land to adjoining land does not extend to liability to support a **building** erected on the adjoining land.<sup>26</sup> In the absence of an easement, where an owner excavates and causes an adjoining building to subside, he can escape liability if the subsidence was caused by the weight of the building on the adjoining land and the support to the land in its natural state would not have been affected.<sup>27</sup>
- (ii) Furthermore, a landowner could excavate in such a way that the support to adjoining **vacant** land is not affected but would be inadequate when the neighbour builds a house on the land. At present, the neighbour would have no remedy at common law.<sup>28</sup> As a consequence, he will be put to the expense of building a retaining wall or may have to build the house further from his boundary than he originally intended. The Shire of Kalamunda has indicated to the Commission that this type of excavation occurs from time to time in its district.
- (iii) The law of prescription actually encourages a landowner to withdraw the support to buildings newly erected on adjoining land. The landowner can stop

---

<sup>24</sup> This statement is subject to the exception mentioned in para 2.6 above.

<sup>25</sup> (1881) 6 App Cas 740. Compare the position in New Zealand, the United States and Canada: para 2.19 below.

<sup>26</sup> Para 2.6 above.

<sup>27</sup> Para 2.6 above.

<sup>28</sup> The issue of whether it would be practicable to provide a remedy in respect of anticipated development on the adjoining land is discussed in para 2.17 below.

the twenty year period running by excavating on his own land so as to withdraw support from the new building on the adjoining land.<sup>29</sup>

- (iv) It is not the removal of support but the causing of a change in the state of the adjoining land which gives rise to a cause of action. This is a principle which can make the recovery of damages a costly and inconvenient remedy where removal of support occurs. Each successive change or subsidence gives rise to a fresh cause of action, and in estimating the damages the depreciation in market value of the property due to the risk of future subsidence cannot be taken into account.<sup>30</sup>

### 3. COMMON LAW ALTERED IN QUEENSLAND

2.13 In Queensland the common law has been altered by section 179 of the *Property Law Act 1974-1982*. The provision has extended the natural right to support owed by one plot of land to adjoining land. It imposes liability for withdrawing support not only from adjoining land but from any building, structure or erection which has been placed on it. Section 179 provides:

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

Queensland is the only Australian State which has enacted a provision along these lines. The enactment of the provision implemented a recommendation made by the Queensland Law Reform Commission in its report on Property Law Reform.<sup>31</sup> The Queensland Commission

<sup>29</sup> Para 2.11 above. He will, however, be liable for withdrawing support to the land, as distinct from the building on it: para 2.2 above. Furthermore, if the support is withdrawn so as to cause the land to subside and the subsidence has not been the result of the additional weight of the building upon the land, the landowner is entitled to recover, in addition to damages for the subsidence of his land, damages for the injury to his building: para 2.6 above.

<sup>30</sup> *West Leigh Colliery Co. Ltd v Tunnicliffe and Hampson Ltd* [1908] AC 27.

<sup>31</sup> Queensland Law Reform Commission, *Report on Property Law Reform* (QLRC 16), (1973) § 179. The recommendation of the Queensland Law Reform Commission was itself based on an earlier proposal of the English Law Commission: Law Commission Working Paper on *Appurtenant Rights*, No 36, 1971. A report has not yet been submitted by the Law Commission because of priority given to other projects: Law Commission Thirteenth Annual Report (1977-1978), para 2.30: See para 3.18 below for further proposals made by the English Law Commission.

The Queensland Commission was also of the view that a right to continue to have land naturally supported by water should be recognised: *ibid.* Although not expressly stated in s 179, one of the effects

had said that it had little doubt that, with advances in modern engineering techniques, an owner both can and should, and in practice almost invariably does, take precautions against damage to his neighbour's building caused by subsidence arising from excavations on adjoining land. The Commission's approach was therefore that a requirement of good building practice should be converted to a legislative requirement. The Queensland Commission also argued that the provision would have the incidental practical advantage of avoiding the necessity for attempting to distinguish between support for land and support for buildings upon it.<sup>32</sup>

2.14 It is to be noted that section 179 is the only relevant provision provided in the Queensland legislation and that in Western Australia the *Property Law Act 1969-1979* contains no equivalent provision.

2.15 It should be noted that the Queensland provision would apply where an owner (B) erects a building using A's building as a means of direct or indirect support for the new building. A would be liable in damages if he demolished his building without retaining the support to B's building. This raises the question whether an owner in A's situation should be required to take precautions against damage to B's building, particularly as B's building was constructed after A's building. The Commission welcomes comment on whether, assuming that in general there should be support for buildings on adjoining land, some qualification is desirable in cases such as the one outlined in this paragraph.<sup>33</sup> It is to be noted that the Queensland Law Reform Commission has received a suggestion along these lines in response to its announced intention to review the operation of that State's *Property Law Act* as a whole.

2.16 It will be noted that the Queensland provision is limited to creating a right of support to existing buildings. In considering what the law in relation to withdrawal of support should be, one, question is whether the object of reform should be to provide support adequate for

---

of that section is to implement this recommendation. Before s 179 came into operation, the law in Queensland was that there was no right of support of land by water. Thus, if the effect of drainage on neighbouring lands was to cause settlement of an owner's land with consequent damage to buildings, no right of action existed. This is still the position at common law in Western Australia: para 2.5 above.

<sup>32</sup> Report, § 179. The Commission added that it would also have the advantage of avoiding the necessity for attempting to distinguish between support derived from water and support derived from silt: see para 2.5 above and immediately preceding footnote.

<sup>33</sup> The same question can be asked where A wishes to modify his building in a way which would have the effect of withdrawing support from B's building.

any building or other improvements which can reasonably be expected to be built on the adjoining land.<sup>34</sup>

2.17 If the excavating owner is only required to take into account the adjoining land in its existing state, he gets an advantage if he builds before his neighbour. Despite this the difficulties which would be caused if he had to anticipate reasonably foreseeable improvements on the adjoining land may outweigh this consideration. On this basis, the case for placing an obligation on an owner to provide support for improvements expected but not certain to be constructed on the adjoining land is not an overwhelming one. In the interests of simplicity and certainty, and bearing in mind the reciprocal aspect, it may be desirable to require the excavating owner only to support the existing improvements on the adjoining land. The problem of anticipated developments may to the extent appropriate best be dealt with in the *Uniform Building By-laws* discussed in the following chapter.<sup>35</sup>

#### 4. IMPOSITION OF A CIVIL DUTY OF CARE

2.18 An alternative suggestion, following developments of the common law in New Zealand, is that an owner in excavating the soil on his land should be placed under a duty to take reasonable care to avoid damaging his neighbour's building.

2.19 In New Zealand, the courts have departed from the view confirmed in *Dalton v Angus*<sup>36</sup> that in the case where withdrawal of support causes damage to a building, and no easement of support has been acquired, the affected landowner will have no right to sue for damages, even if in carrying out the excavation the landowner responsible was acting negligently or recklessly. In *Bognuda v Upton & Shearer Ltd.*,<sup>37</sup> the New Zealand Court of Appeal held that an owner who conducted excavations on his land owed a duty to take care not to cause damage to his neighbour's buildings. In so holding, the Court said that the development of the law of negligence since *Donoghue v Stevenson*<sup>38</sup> rendered *Dalton v Angus* out of date. More importantly, they said that *Dalton v Angus* was based on a prescriptive right

---

<sup>34</sup> As mentioned in para 2.12(ii) above, in the Shire of Kalamunda, for instance, there have been a number of examples of excavations close to the boundary which although they have not caused subsidence of the adjoining land and have made it necessary for the position of a proposed building to be altered due to lack of support.

<sup>35</sup> The relevant by-laws (31.3 and 31.6(1)) are discussed in paras 3.33 and 3.34 below. It appears that they require the excavating owner only to support the existing improvements on the adjoining land.

<sup>36</sup> (1881) 6 App Cas 740. See paras 2.10 and 2.11 above.

<sup>37</sup> [1972] NZLR 741.

<sup>38</sup> [1932] AC 562.

to support and that all prescriptive rights to support had since been abolished in New Zealand by the Land Transfer Acts. Turner J said:<sup>39</sup>

“The theory of prescriptive acquisition assumes (in England, where prescriptive acquisition is possible) a right in the proprietor of adjoining land to excavate on his own land so as to interrupt the period of enjoyment. And he must be free from any duty, in the conduct of such an excavation, which the law of negligence might otherwise impose upon him. But in New Zealand, where the conditions are totally different, and it is impossible by virtue of the statute for such rights to be acquired by prescription, there would seem to be no reason, if logic and convenience recommend such a course, why the law of negligence should not be held to apply to excavation.”

The Court was particularly influenced by the law in the United States and Canada, where the courts had recognised that in such circumstances a duty of care exists.<sup>40</sup>

2.20 In Western Australia, as in all other Australian States, easements of support can still be created by prescription. It therefore seems that *Dalton v Angus* is still good law in Australia, as it is in England.<sup>41</sup> However, as Stephen J pointed out in the Australian High Court in *Stoneman v Lyons*,<sup>42</sup> the rule is ill-adapted to conditions in modern cities; and one of the judges in *Dalton v Angus*, Lord Penzance, said that he would have recognised a cause of action had there been no previous decision settling the matter.<sup>43</sup> Bradbrook and Neave suggest that the Australian High Court might follow *Bognuda v Upton & Shearer* when the opportunity arises.<sup>44</sup>

2.21 If the ordinary law of negligence is applied, the excavating owner will not automatically be liable for damage caused by withdrawing support to his neighbour's building. He would be liable if he failed to exercise reasonable care in effecting the excavation. Thus, for example, conformity with the general practice of professional engineers will usually absolve him from liability for negligence.<sup>45</sup> The imposition of liability in

---

<sup>39</sup> [1972] NZLR 741, 761.

<sup>40</sup> See particularly *Walker v Strosnider* (1910) 67 SE Rep 1087; *Wilton v Hansen* (1969) 4 DLR (3d) 167.

<sup>41</sup> In *Ray v Fairway Motors (Barnstaple) Ltd* (1968) 112 *Solicitors' Journal* 925, Willmer LJ said that if the rule were to be abolished, it should be for the House of Lords to do so.

<sup>42</sup> (1975) 133 CLR 550, 567.

<sup>43</sup> (1881) 6 App Cas 740, 804.

<sup>44</sup> Bradbrook and Neave, § 726.

If the landowner is not liable in negligence to the adjoining owner, this may prevent other persons, such as an engineer, being liable in negligence to the adjoining owner - though engineers and other professional men would ordinarily owe a duty not only to their client but also to other persons affected by their negligence: see J H Holyoak and D K Allen, *Civil Liability for Defective Premises* (1982), paras 4.77-4.99; RM Jackson and J L Powell, *Professional Negligence* (1982), paras 2.11-2.23.

<sup>45</sup> Fleming, 113.

negligence would in this respect, bring the position of an excavating owner into line with that of an owner who causes a fall of soil onto the adjoining land.<sup>46</sup>

2.22 There is therefore an important distinction between this proposal, and section 179 of the Queensland *Property Law Act 1974-1982*. Instead of the excavating owner being strictly liable for damage caused to his neighbour's building while excavating, the excavating owner would be liable in negligence. With this exception, the proposal would achieve the same benefits as those indicated in paragraph 2.13 in respect of the Queensland provision.

2.23 Despite implementation of the proposal, it would be possible for existing prescriptive easements of support to continue and for the ability to acquire an easement of support by prescription to remain.<sup>47</sup> An owner who withdraws support where an easement of support has been acquired by prescription is subject to absolute liability.

2.24 The Commission seeks comment on whether the law of negligence should be extended to impose a duty of care on an owner in excavating the soil on his land not to cause damage to buildings on adjoining land by the withdrawal of support. It also seeks comment on the question whether, if the common law of negligence is made to apply, prescriptive easements should be abolished, at any rate as regards their future creation.

---

<sup>46</sup> See para 4.2 below.

<sup>47</sup> However, if that ability remained, an owner would be liable in damages if he stopped the period of enjoyment running by excavating on his land and thereby withdrew support from the new building on the adjoining land: paras 2.6 and 2.11 above. His rights to stop the period would thus be affected.

## **CHAPTER 3 -WITHDRAWAL OF SUPPORT - STATUTORY PROTECTIONS**

### **1. INTRODUCTION**

3.1 As foreshadowed in paragraph 2.1 above, one approach to problems associated with withdrawal of support is to look to amendments to the remedial protections of the common law. Another is to seek to prevent such problems arising by the development of statutory mechanisms. Some of these mechanisms are already in effect in Western Australia and are now described.

### **2. SECTION 391 OF THE LOCAL GOVERNMENT ACT**

#### **(a) Outline of the section and its effect**

3.2 Section 391 of the *Local Government Act 1960-1984* set out in Appendix I to this paper imposes certain duties on an owner of land in relation to alteration of ground levels<sup>1</sup> where that owner intends to erect a building or structure. The section is of particular relevance where excavations are to be effected for multi-storeyed buildings.

3.3 The section only comes into operation where the owner (A) intends to erect a building or structure within three metres of a building belonging to an adjoining owner (B) and part of that building or structure within the three metres extends to a level lower than the foundations of the adjoining building. At least thirty-five days before he starts to excavate, A must serve a notice on B stating whether he proposes to underpin or otherwise strengthen the foundations of B's building.<sup>2</sup> The notice must be accompanied by the plan showing the site of the building and the depth to which it is proposed to excavate. If B within fourteen days after being served with the notice gives a counternotice that he disputes the necessity of the underpinning or strengthening, or that he requires it, the matter must be determined by two referees appointed under Part XV of the Act.<sup>3</sup> The referees are empowered to determine the time and manner of

---

<sup>1</sup> A number of provisions in the Act are ancillary to s 391. These include s 389 (settlement of difference between adjoining owners) and ss 394, 395 and 397 (relating to accounts between the parties).

<sup>2</sup> An owner who contravenes s 391 is guilty of an offence: ss 670 and 671.

<sup>3</sup> Ss 391(3) and 389. One of the referees is appointed by the Governor and the other by the local authority concerned: s 423. The difference may, of course, be settled by mutual agreement between the parties before the referees make their determination.

executing the work and such other matters as arise out of or are incidental to the difference.<sup>4</sup> The determination of the referees would be binding on both parties. If B does not give a counternotice, A can proceed with the work in the way indicated in his notice to B.

3.4 Under section 390, the building owner, his agents and servants can enter the adjoining owner's premises and carry out work which he is entitled or required to carry out under section 391.<sup>5</sup>

3.5 Under section 391, A is liable to compensate B (and the occupier of his land) for inconvenience, loss or damage which results by reason of the exercise of the powers conferred on A under the section. Thus a building owner would be liable for inconvenience, loss or damage caused to the adjoining owner or occupier while underpinning pursuant to the section.

3.6 Section 392 of the Act contains provisions under which one owner can seek security for the payment of expenses, costs and compensation from the other.

3.7 There is a significant difference between section 179 of the Queensland *Property Law Act 1974-1982* and sections 390 and 391 of the Western Australian *Local Government Act*.<sup>6</sup> Section 179 provides a remedy by way of an action for damages after the event and the prospect of an injunction to prevent work which may cause loss of support. On the other hand sections 390 and 391 in certain cases enable, and if the adjoining owner desires, require, the building owner to enter upon the adjoining owner's land and carry out the work necessary to underpin or strengthen the foundations of the building on that land. Relying only on a provision such as section 179 of the Queensland *Property Law Act*, without the consent of the neighbour the building owner would not be entitled to do these things<sup>7</sup> and would have to rely on methods used on his own land such as sheetpiling to prevent withdrawal of support to the building.

---

<sup>4</sup> S 389.

<sup>5</sup> Except in the case of an emergency, fourteen days' notice is required: s 390.

<sup>6</sup> There is no comparable provision to s 391 in Queensland.

<sup>7</sup> *Stoneman v Lyons* (1975) 133 CLR 550; *Johns v Delaney* (1890) 16 VLR 729; *Kirby v Chessum* (1914) 30 TLR 660.

3.8 A provision such as section 391 may help to ensure that the development of land is not discouraged by a neighbouring owner's right of support.<sup>8</sup> This is particularly so if the right of support is extended along the lines of section 179 of the Queensland *Property Law Act* to include the support of buildings as well as land.<sup>9</sup>

3.9 The local government legislation which preceded the *Local Government Act 1960-1984* did not contain a provision along the lines of section 391.<sup>10</sup> The Commission is not aware of any reported court decision relating to section 391 or equivalent provisions in other jurisdictions.

**(b) Limitations of the section**

3.10 Section 391 of the *Local Government Act* only applies where it is desired to erect a building or structure. Hence, for example, it would not apply where an owner is excavating or levelling land with a view to subdividing it into smaller lots for subsequent sale.<sup>11</sup>

3.11 Further, the section only applies where the owner intends to erect a building or structure within a very limited distance, namely three metres, of a building belonging to an adjoining owner.<sup>12</sup> In some circumstances, according to information given to the Commission there may be a need for a provision such as section 391 to apply where the distance is greater than three metres, particularly where the land concerned is on a slope.<sup>13</sup>

---

<sup>8</sup> The neighbouring owner is not able to refuse to sanction interference with the support of his building but is bound (without prejudice to his rights if any damage is actually caused) by the referees' award which would specify any precautions the developer must take to safeguard the support of the building whilst the excavations are in progress.

This point was also made by the English Law Commission when putting forward a similar proposal: para 3.18 below.

<sup>9</sup> See paras 2.13 to 2.16 above where this proposal is discussed.

<sup>10</sup> S 391 was based on s 39 of the South Australian *Building Act 1923-1953*. The only difference was that in South Australia the notice needed to be only of one month's duration, not thirty-five days. The South Australian section was based on s 119 of the *London Building Act 1930* (UK). S 39 of the South Australian *Building Act 1923-1953* has been repealed but s 49 of the South Australian *Building Act 1970-1982* referred to in para 3.15 below and set out in Appendix III to this paper has similarities to s 39.

<sup>11</sup> However, in granting conditional approval to an intended subdivision the Town Planning Board may approve the proposed subdivision on condition that the land is filled and graded to the specifications of the local authority.

<sup>12</sup> Where the owner wishes to erect his building within three metres of a retaining wall as distinct from a building on the adjoining land, it may be that s 391 does not apply. However, it may be that a retaining wall is a "building" within the meaning of s 391 so as to make the section applicable.

<sup>13</sup> The provision, of course, does not apply if there is no building on the adjoining land.

3.12 The section only comes into operation where the building will extend to a lower level than the foundations of the building on the adjoining land. There are situations where the building on adjoining land can be affected without this occurring. If the building on the adjoining land has, say, two levels of underground parking, the wall of that building will be placed under pressure if a building is later constructed next to it without a basement. The reason is that the new building will exert pressure not only on land immediately underneath it but outward at an angle of roughly forty-five degrees, thus placing pressure on the wall of the existing building on the adjoining land. Furthermore, the wall of a building on the adjoining land can be placed under stress by simply pushing a large quantity of soil against it.

3.13 Enquiries made by the Commission of a number of builders indicate that the provisions of section 391 where they apply are not generally used by building owners where dwelling houses are being constructed. They are, however, often used where multi-storeyed buildings are being constructed in the central city area of Perth.

3.14 In contrast to section 179 of the Queensland *Property Law Act 1974-1982*, section 391 does not in terms create a right of support to buildings on adjoining land, maintainable at the suit of the adjoining owner. However failure to comply with the statutory procedures coupled with damage to buildings on adjacent land resulting from excavation or building work may create a civil right of action.<sup>14</sup>

**(c) Comparable provisions elsewhere**

*(i) Australia and New Zealand*

3.15 Of the Australian States, only Tasmania has a statutory provision in the same terms as section 391 of Western Australia's *Local Government Act 1960-1984*.<sup>15</sup> However, New South Wales has by-laws, and South Australia and Victoria have statutory provisions, which have similarities with section 391. These by-laws and statutory provisions are set out in Appendix III of this paper together with some commentary by the Commission on them. Points which are of particular interest are that the South Australian and Victorian provisions apply irrespective of whether there is a building on the adjoining land; that in Victoria the procedure

<sup>14</sup> See paras 3.50 and 3.51 below.

<sup>15</sup> The provision is contained in s 10 of the *Town Building Act 1962*. However, the notice need only be of one month's duration, not thirty-five days as in the case of s 391.

aimed at ensuring protection to adjoining property only operates "if and when required by the building surveyor" of the local authority; and that the time for the giving of notice by the building owner before commencing work varies from seven days in New South Wales to three months in Victoria.

3.16 Also of interest are the circumstances in which the South Australian provisions apply. They apply to building work prescribed under The *Building Regulations 1973* and described by means of formulae which determine –

- (a) when a building owner who excavates land is obliged to take precautions to protect adjoining land or premises, and
- (b) when a building owner is obliged to take precautions to protect adjoining land from fill on the building owner's land and it seems from pressure which would be exerted by the building on the adjoining land.<sup>16</sup>

3.17 New Zealand does not have a provision under which notice must be given to adjoining owners before excavating.<sup>17</sup>

(ii) *England*

3.18 Section 50 of the United Kingdom *London Building Acts (Amendment) Act 1939* is similar to section 391 but only operates with respect to London. The English Law Commission in its working paper on Appurtenant Rights<sup>18</sup> saw merit in the provision as

---

<sup>16</sup> South Australian *Building Regulations 1973*, by-law 12.5(1). The by-law provides that pursuant to s 49 of the *Building Act 1970-1982* the following are deemed to be building work of the prescribed nature:

- "(a) any excavation which penetrates a plane sloping downwards at a slope of one vertical to two horizontal into the site from a line 600 mm beneath the existing ground level at the boundary of an adjoining site; and
  - (b) any building work on the site in the nature of a building or structure or of filling, which involves a load factor for stability of the foundation of less than 1.5, reckoning any or all of the adjoining sites to have plane unloaded surfaces
    - (i) sloping downwards at a slope of one vertical to two horizontal into the adjoining site or sites, from lines 600 mm beneath the existing ground levels at the boundaries of the adjoining sites; or
    - (ii) sloping with the existing downward slope,
- whichever is the steeper."

<sup>17</sup> Regulatory control is imposed through the methods described in paras 3.61 and 3.69 below.

<sup>18</sup> Working Paper No 36, 1971.

complementing its proposal to provide a statutory right of support to buildings,<sup>19</sup> and proposed that the section be extended to the country generally. It considered that it was not sufficient to provide the statutory right of support mentioned above<sup>20</sup> and to leave the resulting problems to be dealt with under the general law. It saw the provision as a means of ensuring that the stability of an existing building was not put in unnecessary danger. The Law Commission however did not settle a particular formula for bringing the provision into operation although it would seem that, unlike the Western Australian provision, the Law Commission's proposal is not limited to excavation for building.

3.19 Both the Law Commission and the Queensland Law Reform Commission<sup>21</sup> proposals followed an earlier examination of the question of support of buildings by the land of an adjoining owner by the English Law Reform Committee in its *Fourteenth Report (Acquisition of Easements and Profits by Prescription)*.<sup>22</sup> It considered that having regard to modern building densities the common law was unsatisfactory.

3.20 The Law Reform Committee favoured a system whereby a person who proposed to build should be able to acquire a right of support before he started. Under the procedure which it recommended, the builder would serve on his neighbour a notice of his intention to build. If the matter were not then disposed of by agreement, the servient owner would either -

- (i) give a counter-notice of objection; or
- (ii) give no such notice.

In the latter case, the dominant owner should be free to proceed with his building and would immediately acquire all such rights of support against the servient owner as the building might require. However, if the neighbour served a counter-notice in reply to the notice of intention the matter would be referred to the Lands Tribunal. The Tribunal could either award the right of support, on payment of compensation if it thought fit, or declare that the building would damage the neighbour's property to an extent which could not be compensated adequately. If the builder proceeded to build in the face of the latter declaration, or if he built without invoking this procedure at all, he would acquire no right of support to the building.

---

<sup>19</sup> Id, 30, 31, 40, 66 and 67. The English Law Commission's proposed statutory right of support was the same as that which became s 179 of the Queensland *Law of Property Act 1974-1982*: para 2.13 above.

<sup>20</sup> Para 2.13. See also the immediately preceding footnote.

<sup>21</sup> Para 2.13 above.

<sup>22</sup> Cmnd 3100 (1966).

Nor would he obtain one by prescription, for the Law Reform Committee considered that prescription should not apply to a right of support.

3.21 Under this approach the parties would be given the opportunity of themselves resolving any conflict of interest and if they were unable to do so the issue would be referred to a Tribunal. Unlike section 391 of Western Australia's *Local Government Act*, the proposal does not focus on a right of support for the adjoining owner but on the right of support or lack of it for the building owner.

3.22 One disadvantage of the proposal is that it could lead to disputes by creating an issue between neighbouring owners of land which might never have arisen. An adjoining owner, although he has no intention of building in the foreseeable future, might be advised to serve a counter-notice rather than voluntarily agree to the notice and thereby give up his rights. By serving a counter-notice he could delay a development whether he had good reason for objecting to it or not; possibly merely in order to obtain an offer of undeserved compensation. The basis upon which compensation is to be assessed (bearing in mind the variety of different uses to which the adjoining land might be put) could also give rise to difficulties.<sup>23</sup> Furthermore some owners because of ignorance, absence, ill health or illiteracy will fail to object who perhaps ought to do so. At this stage, this commission does not favour the Law Reform Committee's proposal.

### **3. THE UNIFORM BUILDING BY-LAWS**

#### **(a) General**

3.23 In outlining the present position under these by-laws the Commission has not attempted to separate precisely the requirements relating to maintaining the support of adjoining land and buildings from those regulating the filling of land so as to prevent soil falling onto adjoining land. Reference is made in Chapter 4 below to those by-laws which relate particularly to fall of soil.

---

<sup>23</sup> The English Law Commission in its Working Paper on *Appurtenant Rights* (1971) criticised the recommendation of the English Law Reform Committee on this and the other grounds set out earlier in this paragraph (3.22).

An added complication is that it would be desirable to devise a procedure under which a right of support when granted would be noted on the titles of the servient and dominant tenements.

**(b) Relevant enabling provisions**

3.24 Sections 433(1), (22), (27) and (38) of the *Local Government Act 1960-1984* give councils power to make by-laws connected with the alteration of ground levels. Those provisions empower a council to make by-laws:

“(1) for regulating the plans and levels of sites for buildings;

(22) for prescribing precautions to be taken during the construction or demolition of a building or the performance of any other building work;

(27) for making any provision, restriction or prohibition relating to the construction of foundations, footings, piling, caissons, walls, masonry, floors, roofs and ceilings...;

(38) for making any special provision, restriction or prohibition in relation to a prescribed building or structure or prescribed class of building or structure.”

Section 433 is preceded by a heading “By-Laws relating to Building and Buildings”.<sup>24</sup>

3.25 These powers provide a medium through which the common law on alteration of ground levels can be supplemented by the making of administrative controls rather than through civil remedies. The primary aim of by-laws made pursuant to these powers is to lay down requirements which will reduce the likelihood of problems arising. Compliance with the by-laws is promoted by making contravention an offence punishable by the imposition of a penalty. Proceedings are taken by the local authority.

3.26 However, paragraph (1) of section 433 relates only to the plans and levels of sites for buildings. It does not give power to make by-laws in respect of excavations and embankments which do not relate to the levels of sites for buildings. Similarly, paragraph (22) of section 433 does not give any power to make by-laws in respect of alterations of ground levels which

---

<sup>24</sup> Councils may also make by-laws pursuant to the *Local Government Act* s 248 for carrying into effect all or any of the purposes mentioned in the Second Schedule to the *Town Planning and Development Act 1928*. The Second Schedule to the *Town Planning and Development Act*, for example, gives power to make by-laws prescribing requirements so far as is reasonable for the purpose of securing the amenity of the area to which the by-laws are to apply and also for prescribing and determining requirements in regard to new subdivisions including drainage. These provisions may give limited powers to make by-laws in relation to alteration of ground levels.

do not relate to precautions to be taken during the construction or demolition of a building or the performance of other building work. Paragraph (27) of section 433 only gives power to make by-laws relating to the construction of the items referred to in that paragraph. Paragraph (38) only gives power to make by-laws relating to a prescribed building or structure or prescribed class of building or structure.

3.27 Thus by-laws made under the *Local Government Act* cannot be used to control the alteration of ground levels not relating to levels of sites for buildings, foundations, or precautions to be taken during building work.<sup>25</sup> At present, it would not be possible to make by-laws to control such alterations without enlarging the enabling powers in the *Local Government Act*.

**(c) The by-laws**

3.28 The relevant by-laws contained in the *Uniform Building By-laws* are by-laws 12.3, 12.4, 31.1, 31.3, 31.6, 31.7 and 44.3.<sup>26</sup> All of these by-laws are set out in Appendix II to this paper but it is proposed to describe here those which are particularly relevant to the alteration of ground levels.

*By-laws 12.3 and 12.4*

3.29 By-laws 12.3 and 12.4 are contained in Part 12 (Precautions During Construction) of Group III (Buildings in Course of Erection or Demolition) of the *Uniform Building By-laws*.

3.30 By-law 12.3(1) provides that where an excavation for or demolition of a building is to be effected in proximity to an existing building, the walls of that existing building must be shored or underpinned or both and be so protected as will ensure stability. Under by-law 12.4, an excavation for a building must be properly guarded and protected and where necessary sheetpiled to prevent caving in of the adjoining earth or pavement.

---

<sup>25</sup> S 210 of the *Local Government Act* empowers local authorities to make by-laws regulating the manner of construction, dimensions and materials of fences and walls and their maintenance. However, it is not clear whether the power extends to retaining walls as such and, in any event, it does not extend to the making of by-laws requiring their erection.

<sup>26</sup> These by-laws do not apply in the districts of certain country shires and in parts of the districts of certain other country shires: Orders in Council published in *Government Gazettes*, 31 January 1975, 271 and 272. 30 May 1975, 1593; and 27 June 1975, 2092.

*By-laws 31.1, 31.3, 31.6 and 31.7*

3.31 By-laws 31.1, 31.3, 31.6 and 31.7 are contained in Part 31 (Excavation, Earthwork, and Retaining Walls) of Group VI (Structural Provisions) of the By-laws.

3.32 Under by-law 31.1, excavations and backfilling must be carried out in a safe and workmanlike manner. The by-law also requires excavations to be properly guarded and protected to prevent them from being dangerous to life or property.

3.33 By-law 31.3 provides that wherever the soil conditions so require or the excavation is permanent with a slope steeper than the angle of repose or natural slope of the soil, retaining walls or other approved methods of preventing movement of the soil must be provided and adequate provision made for drainage. Retaining walls must be of durable material of sufficient strength to support the embankment "together with any superimposed loads". The latter would appear to include existing improvements on the land of an adjoining owner but not improvements which may be effected in the future.

3.34 By-law 31.6(1) requires all filling, embankments and sides of excavations to be stabilised and protected against erosion by wind and water where the structural safety of a building could be affected. It also requires that filling, embankments and sides of excavations should be capable of supporting any reasonable loads that may be exerted on them from within the site or from any required support to adjoining ground. It seems that, if the adjoining land is not built on, the by-law does not require that the side of an excavation should be capable of supporting anticipated improvements.<sup>27</sup>

3.35 Under by-law 31.6(3), the height of any newly formed embankment or newly excavated face may not be greater than one metre unless otherwise approved by the council of the local authority. By-law 31.6(2) provides that filling must be deposited in layers and must not be placed unless all deleterious rubbish and vegetable matter has been removed from the filling and from the area to be filled.

3.36 By-law 31.7 empowers the council of the local authority to determine guidelines in relation to earthwork referred to in any of the provisions of Part 31. It provides that such

---

<sup>27</sup> It should, however, in this situation be capable of supporting the adjoining ground.

earthwork must be carried out to the satisfaction of the council and in accordance with the guidelines (if any) determined by the council to be appropriate to the local conditions applying in the district or in the part of the district in which the site is located.

3.37 The Shire of Mundaring, for instance, has determined guidelines under by-law 31.7. For example, where a building is to be erected close to a boundary line and there will be a difference of ground level in that area due to the fact that the ground on the building owner's side has been built up or excavated near the boundary, the Shire will require a retaining wall to be constructed. If the retaining wall exceeds 600 millimetres in height, an engineer's design is required, in order that the Shire can be assured of the wall's effectiveness. If the alteration of ground level is away from the boundary and will not affect neighbouring land, it is sufficient if the bank or excavated face is stabilised, for example, by stones. However, the bank or excavated face has to be stabilised at an angle which is no greater than the angle of repose.<sup>28</sup> These guidelines are also applied by the Shire where an alteration of ground levels is unconnected with the building as, for example, when an owner brings more soil onto the block after building has been completed.<sup>29</sup>

3.38 A person who breaches any of the provisions in by-law 31 is liable to a penalty not exceeding four hundred dollars.<sup>30</sup>

#### *By-law 44.3*

3.39 This by-law is contained in Part 44 (Drainage of Building and Site) of Group VII (Health and Amenity).

3.40 The by-law provides that if paving, excavation, or any other work carried out or proposed to be carried out on the natural surface of the site causes or in the opinion of the council may cause undue interference with the existing drainage of rainwater falling on any part of the site external to the building, the council may require a system of drainage to offset

---

<sup>28</sup> The angle of repose is the angle at which soil will settle. The angle is lower for sand than for gravel. Another guideline determined by the Shire of Mundaring is referred to in para 4.6 below.

<sup>29</sup> This paragraph is also relevant to fall of soil onto adjoining land: see ch 4 below.

<sup>30</sup> *Uniform Building By-laws 1974*, by-law 4.1. The same maximum penalty applies by virtue of by-law 4.1 for breach of by-law 12.3 or 12.4 or failure to comply with a direction under by-law 44.3. As this maximum penalty of \$400 was fixed in 1974, the amount may need to be reconsidered.

any problems arising or which in its opinion may arise, from the interference. The provision applies whether or not the existing drainage is natural.

*Power to require a certificate*

3.41 Where a council is not able to satisfy itself beyond doubt that the whole or part of a proposal to build is acceptable, it may require the submission to it of a certificate from a practising structural engineer, or other person or body approved by it.<sup>31</sup>

*On whom duty is placed*

3.42 The by-laws set out in Appendix II (including those referred to in paragraphs 3.31 to 3.40 above) do not identify the person on whom the duty is placed.<sup>32</sup> In *Stoneman v Lyons*,<sup>33</sup> the High Court had to consider whether a very similar by-law to by-law 12.3(1) of the *Uniform Building By-laws* imposed a duty on the building owner. The Court held that the duty was imposed not on the building owner, but on the builder. Stephen J said that in the regulation:

“...the duty is to shore, underpin or protect 'as may be necessary to ensure stability'; the words of this regulation suggest that it is addressing itself to the person in fact undertaking the building operation and that it is he who must, as the works progress, judge what is necessary for stability.”

Because of *Stoneman v Lyons*, it can be safely said that the duty created under by-law 12.3(1) of the *Uniform Building By-laws* is imposed on the builder, and not the building owner. Indeed, all the duties created by the by-laws set out in Appendix II seem to be imposed on the builder.<sup>34</sup> In addition, some of the by-laws probably impose a duty on the building owner as well as the builder.

---

<sup>31</sup> *Uniform Building By-laws*, by-law 43.2. The certificate must certify that when completed the construction will be structurally sound and set out in detail the bases on which it is given and the extent to which the author has relied on relevant specifications, codes of practice or other publications in preparing the certificate: *ibid*.

<sup>32</sup> By-law 1.3(1) defines 'builder' in terms which include the owner or occupier of the land on which the building is or is intended to be constructed, but none of the by-laws in question use the term 'builder'.

<sup>33</sup> (1975) 133 CLR 550.

<sup>34</sup> It is, of course, not uncommon for an owner to be his own builder in respect of part of a development or even of the whole development.

**(d) Limitations of the Uniform Building By-laws**

3.43 Subsections 433(1), (22), (27) and (38) of the *Local Government Act* do not confer a general power to make by-laws relating to alteration of ground levels. The power exists only in respect of the matters set out in those subsections.<sup>35</sup> Alterations not falling within the ambit of those provisions could affect the support provided to adjoining land, or could cause a fall of soil onto the adjoining land or a loss of natural drainage from the adjoining land.<sup>36</sup>

3.44 In particular, the provisions do not enable local authorities to make by-laws controlling alterations of ground levels which do not relate to levels of sites for buildings or precautions to be taken during the performance of building work.<sup>37</sup> In addition, filling of areas of land in low lying areas can cause drainage problems or flooding affecting adjoining land. Except where the filling involves levels of sites for buildings or precautions during building work are concerned, local authorities are unable to make by-laws dealing with these aspects.<sup>38</sup>

3.45 By-law 31.3(1) of the *Uniform Building By-laws* requires the provision of retaining walls or other approved methods of preventing movement of the soil "wherever the soil conditions so require or the excavation is permanent with a slope steeper than the angle of repose or natural slope of the soil".<sup>39</sup> The City of Stirling complained to the Commission that if a person can maintain the angle of repose, it will not normally be able to enforce the

---

<sup>35</sup> These sub-sections are set out in paragraph 3.24 above.

<sup>36</sup> Under s 91 of the *Health Act 1911-1982*, it is an offence for an owner or occupier of land to deal with it in such a manner that the free flow of storm water through or across the land is so interfered with as to be likely to cause a collection or pool of stagnant or offensive water. This provision is somewhat limited in its scope.

<sup>37</sup> S 433(1) and (22). As to the need for approval under the *Metropolitan Region Scheme* and town planning schemes, see paras 3.64 to 3.66 below.

<sup>38</sup> S 433(1) and (22). However, see footnote 1 on page 30 above. See also *Local Government Act 1960-1984*, s 220(c). Also, the manner in which ground levels are altered when land is levelled in preparation for subdivision can later affect a purchaser of one of the subdivided lots. For example, part of the natural support to his lot may have been withdrawn. Local authorities have no powers under the *Local Government Act* to make by-laws governing alteration of ground levels on land in broadacres which is being prepared for subdivision, except those granted pursuant to s 248: see footnote on page above.

<sup>39</sup> Under by-law 31.3(2) a retaining wall must be of durable material of sufficient strength to support the embankment together with any superimposed loads. The Commission is aware of one case where a retaining wall constructed of new jarrah sleepers with creosoted uprights was accepted by a local authority as satisfying this provision, although admittedly the local authority had required an engineer's certificate. The adjoining owner had submitted that timber was not acceptable. Prior to 1973, the *Uniform Building By-laws* required retaining walls to be built only of masonry or reinforced concrete: by-law 1803 of *Uniform Building By-laws 1965*. In 1973 the relevant by-law was changed to its present form. The case raises the question whether the present requirement under the by-laws that retaining walls should be made of "durable material" should be more specific as to which materials should be permitted.

building of a retaining wall.<sup>40</sup> However, sometimes after the building is completed, the owner cuts the angle sharper or fills in the slope placing pressure on the fence. The Commission would appreciate advice on the extent to which this is a problem both in relation to withdrawal of support and fall of soil.<sup>41</sup>

**(e) Comparable by-laws**

3.46 New South Wales, Victoria, Queensland and South Australia have building regulations relating to alteration of ground levels which have similarities with Western Australia's *Uniform Building By-laws*. These regulations are set out in Appendix IV to this paper.

3.47 In each of these States retaining walls or other approved methods of preventing movement of the soil must be provided and adequate provision made for drainage "wherever the soil conditions so require". In Western Australia, this provision also applies "where the excavation is permanent with a slope steeper than the angle of repose or natural slope of the soil": by-law 31.3(1).<sup>42</sup>

3.48 In Tasmania, regulation 222A of the *Building Regulations 1978* is also similar to Western Australia's by-law 31.3(1), although in relation to soil conditions, the regulation casts on the local authority's building surveyor the responsibility of determining whether a retaining wall or other approved method of preventing movement of the soil is required. Regulation 222A provides as follows:

"(1) A retaining wall or other approved method of preventing lateral displacement of the ground shall be provided in the case of all permanent excavations and fillings, where –

- (a) the slopes of the excavation or filling are steeper than the retained material will naturally sustain with safety; or
- (b) the surveyor determines that, having regard to the loading and ground conditions, such a wall or other approved method is necessary."

<sup>40</sup> *Uniform Building By-laws 1973*, by-law 31.3(1). This statement must, of course, be subject to by-laws 31.1(1) and 31.6 (set out in Appendix II).

<sup>41</sup> See ch 4 below as to fall of soil.

Although the *Local Government Act* provides a local authority with administrative procedures by which it can enforce compliance with the provisions of the *Uniform Building By-laws*, enforcement consumes the time of local authority officers and can also involve it in expense. The administrative procedures are described in para 3.67 below and Appendix V.

<sup>42</sup> Appendix II and para 3.33 above.

The structure must be of approved material of sufficient strength to support the retained material together with any load that is reasonably likely to be superimposed on the wall.<sup>43</sup> The structure must be drained to the satisfaction of the building surveyor.<sup>44</sup>

3.49 In New Zealand, section 684(26) of the *Local Government Act 1974-1983* empowers local authorities to make by-laws regulating or prohibiting the construction of earthworks. The Commission enquired of the City of Wellington as to whether it had made any by-laws under these provisions and was informed that it had not. However, there is a by-law adopted under the *Town and Country Planning Act 1977* and operative in the City of Wellington relating to earthworks. The by-law is outlined in paragraph 3.69 below and is set out in full in Appendix III under the heading "D. City of Wellington".

**(f) Civil liability under the by-laws**

3.50 Breach of a duty imposed by the *Uniform Building By-laws* results in the imposition of a criminal penalty.<sup>45</sup> Whether such a breach would also give rise to civil liability is a matter of interpretation of the statutory provision concerned. A number of different considerations must be taken into account in determining whether breach of statutory duty carrying a criminal penalty gives rise to an action for damages in tort.<sup>46</sup> However, it seems that an action will lie against a builder for non-compliance with the building by-laws at the suit of any person for whose benefit or protection the by-law was made.<sup>47</sup> In cases concerned with excavation affecting the buildings of a neighbouring owner, it has been held that breach of the by-laws made under the Local Government Acts of other States gives rise to civil liability.<sup>48</sup> Thus, it seems more likely than not that such liability would be imposed in Western Australia.<sup>49</sup>

---

<sup>43</sup> Reg 222A(3). As to the loads which a retaining wall should be able to support under Western Australia's by-law 31.3, see para 3.33 above.

<sup>44</sup> Reg 222A(3).

<sup>45</sup> *Uniform Building By-laws*, by-law 4.1.

<sup>46</sup> Bradbrook and Neave, § 727; Fleming, 117-122; H Luntz, D Hambly and R Hayes, *Torts: Cases and Commentary* (1980) Ch 10.

<sup>47</sup> *Anns v London Borough of Merton* [1978] AC 728, 759 per Lord Wilberforce.

<sup>48</sup> *Anderson v MacKellar County Council* [1968] 2 NSW 217; *Stoneman v Lyons* [1974] VR 97. On appeal to the High Court ((1975) 133 CLR 550), the latter decision was reversed because the Court held that the duty was directed to the builder, not to the building owner against whom the action had been brought. It is unclear from the judgments whether the High Court would have imposed liability on the builder had the action been brought against it.

<sup>49</sup> The *Uniform Building By-laws* do not specify the person on whom the duty is placed and hence on whom liability might fall. However, the by-laws would probably be interpreted to impose a duty on the builder and in the case of some of them on the building owner as well: para 3.42 above.

3.51 It is probable that the same principle would apply in the case of other statutory duties discussed in this paper, including some of the provisions<sup>50</sup> of section 374 of the *Local Government Act 1960-1984* discussed below which impose statutory duties breach of which results in the imposition of a criminal penalty. The possible extension of powers of local authorities discussed in paragraphs 3.68 to 3.81 below may raise the same implication.

#### **4. BUILDING LICENCES: LOCAL GOVERNMENT ACT, SECTION 374**

##### **(a) Outline of the section and its effect**

3.52 Where it is required, the building licence provides a further measure of regulatory control. A primary aim of the requirement is to reduce the likelihood of problems arising. Under section 374(1) of the *Local Government Act 1960-1984*, a person may not lay out land for building, commence building or alter an existing building, until he has submitted, and the council of the local authority has approved by the issue of a building licence, a copy of the specifications of the building and a plan showing the proposed building and the area of land to be occupied by the proposed building or alteration.<sup>51</sup> A building licence can be relevant not only in the context of withdrawal of support to adjoining land but also to fall of soil onto adjoining land. The latter aspect is referred to in the next chapter.<sup>52</sup> It is relevant to observe that even laying out land for building requires a building licence. Thus, for example, an owner who carries out earthworks on a site as a first stage in the construction of a house should have obtained a building licence to do that work, even though he may not intend to build the house for some time. A person who contravenes section 374(1) commits an offence and is liable to a penalty.<sup>53</sup>

3.53 The *Uniform Building By-laws* provide that the drawings submitted to the council must, among other things, show the levels of ground.<sup>54</sup> They also provide that where any alteration is proposed to the existing conformation of the ground on the site involving earthworks of any description the local authority may require the drawings to show all levels, both

---

<sup>50</sup> For example, those referred to in para 3.55 below.

<sup>51</sup> There is a right of appeal against a refusal to approve the submitted plans and specifications: *Local Government Act 1960-1984*, s 374(2).

<sup>52</sup> Para 4.12 below.

<sup>53</sup> *Local Government Act, 1960-1984*, s 374(1).

<sup>54</sup> *Uniform Building By-laws 1974*, by-law 8.2(1)(a).

new and old, clearly marked or indicated by contour lines or in such other manner as the council may direct.<sup>55</sup> Because of the advent of the slab-on-ground method of building and the cutting and filling often associated with it, it may be more satisfactory if the by-laws specified circumstances where levels must be provided.

3.54 The specifications and plans submitted to the local authority should comply with the *Uniform Building By-laws*. In addition, local authorities can use the mechanism of the building licence to require work necessary to fulfil those guidelines as to earthworks which the council is empowered to determine under the by-laws.<sup>56</sup> It can use the building licence as a means of requiring compliance<sup>57</sup> with stipulations laid down by it as necessary to meet standards required under various by-laws. It seems that a council cannot refuse to issue a building licence unless the plan or specifications are in contravention of an Act, a lawful by-law or regulation, or a provision of a town planning scheme operating in its district.<sup>58</sup>

3.55 Under section 374(5) a person who, without the written approval of the building surveyor, does, or causes to be done, any work in connection with the construction or alteration of a building which is not in conformity with the approved specifications and plans, commits an offence which renders him liable to a penalty. Any conditions specified in the building licence must also be complied with.<sup>59</sup>

3.56 Thus the building licence is a means by which the local authority can regulate, within limits, alteration of ground levels within its district.

---

<sup>55</sup> Id, by-law 8.2(5).

<sup>56</sup> Under by-law 31.7 (para 3.36 above), the council can fix guidelines, for earthwork referred to in Part 31, determined by it to be appropriate to local conditions.

<sup>57</sup> For example, under by-law 12.3 of the *Uniform Building By-laws* where an excavation or demolition is to be made in proximity to an existing building the walls of the building must be shored or underpinned, or both, and be so protected as may be necessary to ensure stability. The local authority could specify in the building licence the additional measures to be taken to ensure stability.

There is, however, a right of appeal: footnote 4 on page 40 above.

<sup>58</sup> *West Australian Trustee Co v Perth Road Board* (1929) 31 WALR 91; *The Queen v The Tynemouth Rural District Council* [1896] 2 QB 451; *R v Mayor and Corporation of Newcastle-on-Tyne* [1889] 60 LT 963.

<sup>59</sup> *Local Government Act 1960-1984*, s 374(1).

Under s 374(3) a person who, having contravened s 374(1), occupies or permits a person to occupy or use a building or part of a building before the plans and specifications relating to the building or an alteration to the building have been approved by the council commits an offence.

**(b) Limitations of the section**

3.57 The Shire of Mundaring informed the Commission that in its experience builders often do not inform owners of the need for retaining walls before the building contract is signed. Later when the Shire imposes on the building licence a condition that retaining walls be constructed, the owner may find that he will not have the extra funds needed for their construction.<sup>60</sup> Often the result is that the owner and builder agree that upon occupying the dwelling, the owner will provide a retaining wall. In many cases the walls are not built, and in others the owners attempt to provide “a retaining wall which cannot be approved or is not suitable for the purpose intended, for example, railway sleeper construction”. The Shire of Kalamunda made a similar complaint.<sup>61</sup>

3.58 A local authority can only require a builder to construct a retaining wall before the commencement of construction of a building where the circumstances are such that this is necessary in order to comply with the provisions of the *Uniform Building By-laws*.<sup>62</sup> With respect to other situations, the problems referred to in the previous paragraph raise the question whether a local authority should be able to require a builder before commencing construction of the building to construct a retaining wall or use other approved methods to prevent movement of the soil.

**(c) Comparable provisions elsewhere**

*(i) Building licences*

3.59 In each of the other Australian States and also, for example, in the City of Wellington, a building licence is required from the council of the local authority before building work can commence.<sup>63</sup>

---

<sup>60</sup> The Shire of Mundaring suggested to the Commission that where a builder signs a contract with an owner to build a house, he should be responsible for any additional costs he has not allowed for when he is aware that a retaining wall will be required.

<sup>61</sup> See para 4.7 below for a proposal to deal with the situation described in this para (para 3.57).

<sup>62</sup> Thus, for example, if a proposed excavation when effected will withdraw support to the adjoining land, the local authority could require the retaining wall to be built as soon as the excavation was made: by-laws 31.6(1) and 31.3(1).

As to the power of a local authority to refuse to issue a building licence, see para 3.54 above.

<sup>63</sup> *Local Government Act 1919-1983* (NSW), s 311(1); *Building Control Act 1981* (Vic), s 20; *Building Act 1975-1981* (Qld), s 30A; *Building Act 1970-1982* (SA), ss 8 and 9; *Building Regulations 1978* (Tas), reg 9(1).

3.60 In some of the States, there are separate provisions dealing expressly with the issue of whether a licence is required for a retaining wall. For example, in South Australia, a licence for a retaining wall is required if a wall will be retaining a difference in ground levels exceeding one metre.<sup>64</sup> In Tasmania, a licence is required if a retaining wall will be retaining a difference in ground levels exceeding one metre or is within 1.5 metres of a boundary.<sup>65</sup>

3.61 In the City of Wellington, anyone wishing to erect a building, add to an existing structure or build a retaining wall in excess of 1.2 metres in height must first obtain a building licence.<sup>66</sup> The licence must show the ground level before the commencement of building operations and the intended ground level on completion. If the council considers that the adjoining land might be affected by a proposed alteration of ground levels, it will insert a condition in the building licence requiring the builder to construct a retaining wall. The prime consideration in deciding whether retaining walls are required or not is whether or not the lateral support to the adjacent ground has been preserved. In regard to adjoining land, the council's consideration relates only to existing buildings or those which are to be immediately erected. Its attitude is that future buildings can be so designed, by way of deeper foundations or other means, to accommodate the conditions then in existence.

3.62 Under the South Australian *Building Regulations*, the council of a local authority may permit an owner to apply for approval of any major building work in one or more stages as follows –

- (a) approval of the classification of the building;
- (b) approval of the siting and general arrangements;
- (c) approval to excavate or fill;
- (d) approval to the substructure;
- (e) approval of the superstructure.<sup>67</sup>

---

<sup>64</sup> The *Building Regulations 1973* (SA), reg 8.2

<sup>65</sup> *Building Regulations 1978* (Tas), reg 592 (ba).

<sup>66</sup> s 1900 The *Model Building by-law* (NZ) clauses 1.1.1 and 2.1. The *Model By-law* has been adopted by the City of Wellington. A building permit will also be required where the retaining wall is 1.2 metres or less in height if it supports a surcharge or its height exceeds its horizontal distance from the boundary of any public place: *ibid*.

<sup>67</sup> By-law, 8.4(1). Permission to apply in stages may not be unreasonably withheld by the council: *ibid*.

An application under this provision to excavate or fill on the site of a proposed building must be accompanied by plans and specifications showing clearly the nature and extent of the excavation or filling.<sup>68</sup>

(ii) *Drainage of land*

3.63 In New South Wales, the council of a local authority, in respect of an application for approval to build, must take into consideration the question of whether the erection of the building would adversely affect the drainage of adjoining sites.<sup>69</sup>

## 5. PLANNING SCHEMES

### (a) Metropolitan Region Scheme

3.64 Under the *Metropolitan Region Scheme* made pursuant to the *Metropolitan Region Town Planning Scheme Act 1959-1982*, no development of any land within the metropolitan region may be commenced or continued without the written approval of the "responsible authority".<sup>70</sup> The responsible authority is normally the local authority, although in respect of certain areas and certain developments the responsible authority is the Metropolitan Region Planning Authority itself.<sup>71</sup> Under the scheme the approval of the responsible authority is, however, not as a general rule necessary for the erection on a lot of a single dwelling house which will be the only building on that lot.<sup>72</sup> The exemption is interpreted to include the levelling or building up of a block done as part of the building work for a particular house.

3.65 For the purposes of the scheme, "development" means "the use or development of any land and includes the erection, construction, alteration or carrying out, as the case may be, of

---

<sup>68</sup> By-law, 8.4(4).

<sup>69</sup> *Local Government Act 1919-1983* (NSW), s 313. Also in New South Wales, the council of a local authority is empowered to control and regulate the draining of any land whether built on or not: id, s 403. This provision would probably allow a council to exercise control over earthworks which could affect the drainage of an adjoining site. There does not appear to be a provision along the lines of s 403 in the Western Australian *Local Government Act*.

<sup>70</sup> *Metropolitan Region Scheme*, clause 10. There are exceptions in the case of land owned by or vested in a public authority: id, clause 16. The scheme was published in the *Government Gazette* of 9 August 1963.

<sup>71</sup> *Metropolitan Region Town Planning Scheme Act 1959-1982*, s 19; *Metropolitan Region Scheme*, clause 5; delegation published in *Government Gazette* 1 November 1963, p 3340; *Metropolitan Region Scheme* clauses 18, 29 and 32.

<sup>72</sup> Where land is zoned under the scheme, approval of the responsible authority is not necessary for such a dwelling house unless the land is subject to a notice under clause 32 of the scheme: *Metropolitan Region Scheme*, clause 24.

any building, excavation or other works on any land".<sup>73</sup> Building up or excavation of land which does not fall within the exemption referred to in the previous paragraph can require the prior approval of the responsible authority. However, in the case of the building up of land, it would seem that there would need to be a significant physical change to the land with a degree of permanence before approval is required.<sup>74</sup> This could also be the situation in the case of an excavation.<sup>75</sup>

## (b) Town planning schemes

3.66 While a town planning scheme made under the *Town Planning and Development Act 1928-1983* could deal with alteration of ground levels,<sup>76</sup> in practice, town planning schemes do not deal with this in detail. The view has been expressed to the Commission by an officer of the Town Planning Department that the appropriate place for provisions governing alterations of ground levels is not in town planning schemes but in the *Uniform Building By-laws*.<sup>77</sup>

---

<sup>73</sup> *Metropolitan Region Town Planning Scheme Act 1959-1982*, s 3; *Town Planning and Development Act 1928-1983*, s 2(1).

In *The University of Western Australia v City of Subiaco* (unreported) Supreme Court of Western Australia No 2085 of 1979, Burt CJ explained this definition as follows:

"In my opinion the definition of 'development' in the *Town Planning and Development Act* makes use of and encompasses two ideas. The first is the 'use' of the land which 'comprises activities which are done in...or on the land but do not interfere with the actual physical characteristics of the land' and the second being 'activities which result in some physical alteration to the land which has some degree of permanence to the land itself'. See *Parkes v Environment Secretary* [1978] 1 WLR 1308 at 1311 per Lord Denning MR."

In *Kazim v Shire of Kalamunda*, (1981-1983) 6 Australian Planning Appeal Decisions 32, the Town Planning Appeal Tribunal held that super-6 asbestos fencing which had been set two feet six inches in the ground was an activity resulting in some physical alteration to the land which had some degree of permanence to the land itself and thus constituted "development" within the meaning of the definition.

<sup>74</sup> See *Parramatta City Council v Shell Co of Australia Ltd* [1972] 1 NSWLR 483; also *Claude Neon Limited v City of Perth and the Metropolitan Region Planning Authority* [1983] WAR 147.

<sup>75</sup> *Ibid.*

<sup>76</sup> In fact, many town planning schemes require an application to be lodged with the local authority before any development is commenced within the district covered by it. Building up of land or excavation of land could constitute "development": see para 3.65 above. However, it is normally not necessary under these town planning schemes to lodge an application in respect of the construction of a single dwelling house on residential zoned land. Exemptions under the schemes seldom extend far beyond the single dwelling house.

<sup>77</sup> Under s 31 of the *Town Planning and Development Act 1928-1983*, the Governor is empowered to make uniform town planning by-laws. No by-laws dealing with alteration of ground levels have been made under s 31.

## 6. REMEDIAL POWERS OF LOCAL AUTHORITIES

3.67 In addition to powers given to them to lay complaints for breaches of the *Local Government Act* and by-laws, local authorities are given certain remedial powers under sections 401, 403 to 405 and 411 of the *Local Government Act*. These provisions are aimed at enabling them to have work carried out in relation to buildings or building works which are dangerous or do not otherwise comply with legislative requirements. As alteration of ground levels can incidentally be involved, the powers are described in Appendix V below. The powers are of an administrative nature and include powers to require work to be removed or rectified as appropriate.

## 7. POSSIBLE EXTENSION OF LOCAL AUTHORITY POWERS

### (a) Possible extension of existing powers

3.68 If further limits are to be imposed on the right of a landowner to excavate, or to fill,<sup>78</sup> his land, one possibility is for those limits to be controlled by the local authority. This could be done by requiring a person to obtain a licence from the local authority before he alters a ground level and empowering the local authority to make its permission subject to conditions.<sup>79</sup>

3.69 Such a by-law operates in the district of the City of Wellington.<sup>80</sup> The by-law provides that no work involving the disturbance of the land surface or the excavation of land may be carried out in connection with any existing or proposed use of land except with the approval of the local authority and on the conditions lawfully imposed on it. "Disturbance of land surface" is defined in the by-law to include removal of topsoil and dumping of fill material. The work need not be associated with building. Under the by-law adequate protection must be provided against damage occurring or likely to occur to any property or to any person as a result of an excavation. Compaction tests certified by a registered engineer to ensure the

---

<sup>78</sup> Fall of soil is discussed in ch 4 below.

<sup>79</sup> This would require amendments to the *Local Government Act*. There should, of course, be a right of appeal against a refusal to grant a licence and also against any conditions imposed. The Commission seeks comment on where the appeal should lie to. When a local authority refuses to grant a building licence an appeal lies to the Minister: s 374(2).

<sup>80</sup> The by-law is a provision (Ordinance 17.5) contained in the City of Wellington's town planning scheme and was adopted by it under the *Town and Country Planning Act 1977*.

stability of any fill must be provided where the local authority reasonably requires them. The by-law is set out in Appendix III under the heading "D. City of Wellington".

3.70 An advantage of the proposal is that it might prevent many of the problems which presently arise from occurring in the future. A licence would only be granted where the interests of the adjoining owner in maintaining the support of his land and buildings and against encroachment by fall of soil were adequately protected. A further rationale for this approach would be that although some problems which at present arise for adjoining owners can be resolved by an action in a civil court,<sup>81</sup> the cost and inconvenience involved may in many cases make such proceedings unrealistic. The extension would not of course affect civil rights where they already exist, and there may even be created rights of civil action arising by virtue of breach of duty to comply with the by-laws or licence.<sup>82</sup>

3.71 The terms of the licence and the relevant by-laws would be enforced by the local authority. Contravention by the owner would render him liable to a penalty and the local authority would be granted the powers at present available to it to enforce compliance with a building licence and building by-laws.<sup>83</sup> The emphasis of this approach is prevention of practical problems and enforcement of conditions by quasi-criminal proceedings rather than action by individuals through the civil courts.

3.72 The proposal if implemented would represent an extension of the provisions of section 374 of the Act which require the issue of a building licence before the laying out of land for building or the commencement of building. It is already well known throughout the community that it is necessary to obtain a licence before constructing or altering a building<sup>84</sup> and a similar provision in relation to alteration of ground levels would also become well known, particularly as the matter would be under the control of the relevant local authority in each area.

3.73 A provision requiring that a licence be obtained before altering ground levels could be so drafted as to enable a local authority also to protect reasonable claims in respect of the drainage of adjoining land.

---

<sup>81</sup> See paras 2.2 to 2.4, 2.7 to 2.9, 3.50, 3.51, 4.2 and 4.8 above.

<sup>82</sup> See paras 3.50 and 3.51 above.

<sup>83</sup> See para 3.67 above and Appendix V.

<sup>84</sup> *Local Government Act 1960-1984*, s 374; *Uniform Building By-laws*, Part 8.

3.74 It would be necessary to specify matters which the local authority should take into consideration when deciding to grant a licence. These could include, in addition to matters such as withdrawal of support and fall of soil, the following –

- (a) the effect on drainage from adjoining land;
- (b) the effect on the water table of adjoining land;<sup>85</sup>
- (c) the effect on the likelihood of adjoining land flooding.

3.75 As pointed out above, the present by-laws make some provision for the protection of the adjoining owner. For example, at present, an excavation associated with building work must support the adjoining ground and any existing improvements on it.<sup>86</sup> By-laws contained in the *Uniform Building By-laws* in respect of alterations of ground levels associated with building could be extended to cover other excavations and embankments.<sup>87</sup> The local authority would not issue a licence in respect of a proposed alteration of ground level unless it complied with such by-laws.

3.76 Details of the circumstances in which a licence would be required, the form of application, the information and material which should be provided with the application form, the conditions which could be imposed by the local authority and the period of validity of the licence could be set out in by-laws; most conveniently in the *Uniform Building By-laws*. In appropriate cases, the local authority could have power to require the submission of a report from an engineer with appropriate qualifications.

**(b) Possible objections to extension of powers**

*(i) Administrative complexity*

3.77 It may be that problems associated with alterations of ground levels not connected with building are not so great as to justify provision for a licence from the local authority. In

---

<sup>85</sup> The Commission understands that where, for example, there is a clay base a short distance below the surface soil, the deposit of a large amount of soil on a low lying site may cause displacement of water resting on the clay base into adjoining land.

<sup>86</sup> Paras 3.30, 3.33 and 3.34 above. As to whether the excavation should also be able to support any load that is reasonably likely to be superimposed on it, see para 2.17 above.

<sup>87</sup> The by-law making power of local authorities under the *Local Government Act* would need to be extended to accomplish this because at present local authorities only have power to make by-laws controlling alterations of ground levels connected with building: paras 3.24, 3.26, 3.27 and 4.3.

many residential areas of the State, problems do not arise or if they do they are only minor in nature. The fact that the applicant will have to prepare an application and may be put to expense in doing so and that time of the officers of the local authority will be utilised in dealing with applications also has to be taken into account in considering whether there should be provision for a licence. One possible way to reduce the administrative complexity would be to provide for a blanket exemption for alteration of ground levels of a relatively minor nature, for example, embankments below a certain height or excavations less than a certain depth, where the embankment or excavation is a specified distance from the boundary.<sup>88</sup>

(ii) *Legal liability of local authorities*

3.78 A further difficulty is that increased power carries the possibility of increased liability. The local authority when issuing a licence would need to exercise reasonable care. An adjoining owner or a subsequent purchaser of the owner's land who suffered damage because the local authority had acted negligently when issuing the licence may be able to recover damages from the local authority.

3.79 In *Anns v London Borough of Merton*,<sup>89</sup> the House of Lords held that when a local authority causes damage by the negligent exercise of a power conferred on it by statute, an action in negligence will lie against the authority, unless the acts or omissions complained of fall within the area of legitimate discretion or policy entrusted to it. The Court held that negligent exercise of a power given by by-laws to inspect foundations would give rise to liability. It is therefore reasonable to suppose that negligent exercise of the power proposed would likewise make the local authority liable.<sup>90</sup>

(iii) *Proper extent of local authorities' powers*

3.80 A further and more fundamental objection concerns the extent to which local authorities should be empowered to regulate the activities of one owner with a view to protecting the interests of adjoining owners.

---

<sup>88</sup> The circumstances in which a licence is not required could be set out in the *Uniform Building By-laws*.

<sup>89</sup> [1978] AC 728. See also *Sutherland Shire Council v Heyman* [1982] 2 NSWLR 618 - there has been an appeal to the High Court of Australia in this matter.

<sup>90</sup> Presumably the local authority building surveyor would be given power to enter and inspect the site to ascertain whether the terms of the licence are being complied with. If such a power was granted it is reasonable to suppose that negligent exercise of that power would make the local authority liable.

3.81 One view may be that areas such as rights of support or encroachment of soil are essentially private disputes properly regulated through legal principles enforced in the ordinary courts. It is tempting to argue that local authorities should be given the responsibility of safeguarding an owner's interests whenever the cost of taking civil action outweighs the seriousness of the matter involved. However, the final result might be that local authorities would become embroiled in minor neighbourhood disputes or exercise unreasonable powers over the use of land.

## **8. DETAILS OF INADEQUACIES SOUGHT**

3.82 This chapter has set out a number of the areas of existing law which are relevant to the withdrawal of support from adjoining land by the alteration of ground levels. The Commission seeks comment on problems which have arisen, details of any respect in which the existing common law, statutory provisions or by-laws are inadequate, and details or comment on possible remedies.

## CHAPTER 4 - FALL OF SOIL

### 1. INTRODUCTION

4.1 This chapter sets out the existing laws dealing with the fall of soil. Many of these have already been considered in the context of withdrawal of support since both problems are tackled by certain common remedies. Fall of soil does however raise different considerations from those raised by withdrawal of support. In terms of its practical significance, the Shire of Kalamunda has pointed out that the most common problem resulting from the use of a sand pad to allow a concrete slab-on-ground construction is that the sand is permitted to encroach on the adjoining land during the construction phase of the building. In most cases the retention of the sand fill is left for the owner to carry out after occupation of the building, even though a condition on the building licence issued to the builder requires that the sand be retained as specified in *Uniform Building By-laws 1974*.<sup>1</sup>

### 2. COMMON LAW

4.2 Where an owner raises the level of his land with the result that the soil falls on the adjoining land, the owner is liable to the adjoining owner in trespass,<sup>2</sup> and also probably in nuisance where the inconvenience to the adjoining owner is unreasonable and not of a trifling nature.<sup>3</sup> He can also be liable in the tort of negligence.<sup>4</sup>

### 3. STATUTORY PROTECTIONS

#### (a) Local Government Act and by-laws

4.3 There are no provisions in the *Local Government Act* specifically dealing with the fall of soil on adjoining land. Local authorities appear to have power to make by-laws relating to the fall of soil onto adjoining land in only two circumstances. Firstly, under section 433(1),

---

<sup>1</sup> The Shire's ability to have retention of the fill expedited is restricted, as a building licence is valid for two years: *Uniform Building By-laws*, by-law 8.7(1) but note para 3.58 above. The Shire of Mundaring added that sub-letting these works to the owner should not limit the builder's responsibility of providing support when sand pads will encroach across boundaries or affect adjoining fences.

<sup>2</sup> See para 4.7 below, for a proposal to deal with the problem.

<sup>3</sup> If the owner either intended to move soil onto the adjoining owner's land or was negligent in allowing it to fall onto that land: Fleming, 36-39.

<sup>4</sup> Fleming, 384-388.

<sup>4</sup> Fleming, 97-100.

they are empowered to make by-laws for regulating the plans and levels of sites for buildings. Secondly, under section 433(22), they may make by-laws prescribing precautions to be taken during the performance of building work.<sup>5</sup>

4.4 By-laws made under the *Local Government Act* which affect the fall of soil are contained in by-laws 31.6 and 31.7 of the *Uniform Building By-laws 1974*.<sup>6</sup>

4.5 Under by-law 31.6(1), all embankments must be stabilised and protected against erosion by wind and water where the structural safety of a building could be affected. In addition, embankments must be capable of supporting any reasonable loads that may be exerted on them from within the site or from any required support to adjoining ground. The height of any newly formed embankment may not be greater than one metre unless otherwise approved by the council.<sup>7</sup> Under by-law 31.7, the earthwork must be carried out to the satisfaction of the council and in accordance with the guidelines (if any) determined by the council to be appropriate to the local conditions applying in the part of the district in which the site is located.

4.6 The Shire of Mundaring told the Commission that a guideline determined by it under by-law 31.7 can have one consequence which is unsatisfactory. The Shire has a building policy which requires that where a sand pad, on which it is intended to lay a concrete slab-on-ground, exceeds 900 millimetres in height, the pad must extend 2.4 metres beyond the extremities of the parts of the slab concerned.<sup>8</sup> Where this height is exceeded, either a retaining wall has to be built to hold back the embankment or the building has to be erected at a distance from the boundary which allows the soil to slope to the boundary at an angle no greater than the angle of repose. If the latter course is adopted, then after some time, through the lack of maintenance to the embankment, or due to pedestrian traffic, the support system to the building can become very weak. Within one or two years of construction, the sand pad may have eroded and sand from it may have fallen against the side fences which might start to lean dangerously. There have been instances where sand fill has been known to be a metre high adjacent to the sides of an asbestos fence. The Commission seeks comment as to whether

---

<sup>5</sup> However, see footnote I on page 30 above, as to by-law making powers under s 248.

<sup>6</sup> These by-laws insofar as they deal with excavations have already been referred to in the context of withdrawal of support: paras 3.34 to 3.36 above. As to the person on whom the duties created by by-laws 31.6 and 31.7 are imposed, see para 3.42 above.

<sup>7</sup> By-law 31.6(3).

<sup>8</sup> Other guidelines determined by the Shire of Mundaring are referred to in para 3.37 above.

by-law 31.6(1) should be extended to encompass protection against factors other than erosion by wind and water and to require safeguards where erosion is likely to affect the stability of boundary fences.

4.7 Because the gravelly soil in much of the Shire of Mundaring cannot be compacted, often the owner arranges with the builder to do his own earthworks. After the owner has provided the fill through a sand supplier, the council requires the builder to construct a retaining wall. The builder claims that this is not his responsibility because the earthworks did not form part of his contract and were carried out by the owner who should provide the retaining wall. The Shire suggested that in such cases the builder should be responsible for constructing the retaining wall.<sup>9</sup> The Commission accordingly seeks comment on whether the by-laws should be amended so as expressly to place the responsibility on the builder to ensure that the wall is constructed, whether or not he has privately arranged with the owner that the latter should construct it.<sup>10</sup>

#### *Civil liability*

4.8 It seems more likely than not that breach of a duty laid down by by-laws 31.6 or 31.7 which resulted in fall of soil causing damage to an adjoining owner would give rise to civil liability.<sup>11</sup>

4.9 The comments which the Commission made earlier in this paper<sup>12</sup> in relation to the negligent exercise by a local authority of its powers also apply to fall of soil.

### **(b) Planning schemes**

#### *(i) Metropolitan Region Scheme*

4.10 It has already been observed<sup>13</sup> that under the scheme, the approval of the responsible authority is not necessary for the erection on a lot of a single dwelling house which will be the

---

<sup>9</sup> See footnote 1 on page 43 above.

<sup>10</sup> See also paras 3.57 and 4.1 above.

<sup>11</sup> This issue is considered in para 3.50 in relation to withdrawal of support. In para 3.51, the same question is discussed in relation to s 374 of the *Local Government Act*.

<sup>12</sup> Para 3.79 above.

<sup>13</sup> Para 3.64 above.

only building on that lot. The exemption is interpreted to include the levelling or building up of a block effected as part of the building work for a particular house. Building up which does not fall within the exemption can require the prior approval of the responsible authority. However, it would seem that there would need to be a significant physical change to land with a degree of permanence before approval is required.<sup>14</sup>

(ii) *Town planning schemes*

4.11 The role of town planning schemes in regard to alteration of ground levels, including the position in relation to fall of soil, is discussed in paragraph 3.66 above.

(c) **Building licences**

4.12 It has already been observed that under section 374(1) of the *Local Government Act*, a person may not layout land for building, commence building or alter an existing building until a building licence has issued.<sup>15</sup> It has also been noted that local authorities can use the mechanism of the building licence as prescribed by section 374 of the *Local Government Act 1960-1984* to require work necessary to fulfil guidelines which the council is empowered to determine under the *Uniform Building By-laws* and to comply with stipulations laid down by it as necessary to satisfy compliance with standards required under various by-laws.<sup>16</sup>

#### 4. POSSIBLE EXTENSION OF LOCAL AUTHORITY POWERS

4.13 The previous chapter discussed a number of possible solutions to existing problems in relation to withdrawal of support. One proposal considered by the Commission in chapter 3 was that a person should be required to obtain a licence from the local authority before he alters a ground level and that the local authority should be empowered to make its permission subject to conditions. This proposal relates to both withdrawal of support to the adjoining land and to fall of soil onto it. By-laws contained in the *Uniform Building By-laws* in respect of alterations of ground levels associated with building could where appropriate be extended to all excavations and embankments. The terms of the licence and the by-laws would be

---

<sup>14</sup> Para 3.65 above.

<sup>15</sup> Para 3.52 above.

<sup>16</sup> Para 3.54 above.

enforced by the local authority. The emphasis of this approach would be to prevent problems arising rather than action by individuals through the civil courts.

4.14 The arguments for and against such a proposal are outlined in paragraphs 3.70 to 3.81 of chapter 3.

## **5. DETAILS OF INADEQUACIES SOUGHT**

4.15 The Commission asks not only for comment on actual problems concerning fall of soil and on possible remedies but also for details of inadequacies in the existing common law, statutory provisions or by-laws.

## CHAPTER 5 - FENCING

### 1. SWIMMING POOL FENCE REQUIREMENTS

5.1 Where an owner raises the level of his land so that the adjoining owner or occupier is no longer complying with swimming pool fence requirements under the *Uniform Private Swimming Pool By-laws*,<sup>1</sup> it is the adjoining owner or occupier who is obliged under those by-laws to carry out the work necessary to ensure compliance with the by-laws.<sup>2</sup>

5.2 The Commission's tentative view is that this responsibility should instead be placed on the owner raising the level of his land. The Commission, however, seeks comment.

### 2. FENCING FOR OTHER SAFETY REASONS

5.3 The *Local Government Act* contains provisions relating to fencing for safety purposes. Under section 377, a person may not make an excavation on land abutting or adjoining a street, except when authorised under an Act to do so, unless he has first obtained a licence from the local authority and securely fenced off the area concerned from the street.<sup>3</sup> Under section 375, a person may not commence to make an excavation in connection with the construction or alteration of a building, unless he has given three days notice in writing to the local authority and has put up a proper fence to the satisfaction of the local authority. There appears to be no requirement in the *Local Government Act* for fencing where an excavation is not associated with building and is on part of the site which does not adjoin or abut a street.

5.4 Under the *Uniform Building By-laws*, excavations associated with building must be properly guarded and protected to prevent them being dangerous to life or property.<sup>4</sup> However, the By-laws do not make provision for cases where an alteration of ground levels not connected with building makes desirable the provision of a fence for safety reasons.<sup>5</sup>

---

<sup>1</sup> This could occur, for example, where the swimming pool is situated in the rear portion of premises and that portion has been completely enclosed by a building and fencing (including boundary fencing) of the height prescribed under the *Uniform Private Swimming Pool By-laws* but a neighbour pushes sand up against a boundary fence so that it is no longer of the prescribed height.

<sup>2</sup> *Uniform Private Swimming Pool By-laws*, by-laws 4 and 5. The By-laws are reprinted in *Government Gazette* 23 March 1983, 1021.

<sup>3</sup> Any conditions upon which the licence is granted must be complied with: ss 377 ( 1) and (2).

<sup>4</sup> By-laws 31.1(2) and 12.4: see Appendix II.

<sup>5</sup> A local authority can make a by-law requiring an area where it is proposed to conduct an extractive industry, eg quarrying for stone, to be fenced: s 235. Under the Draft Model By-laws for Extractive

5.5 The Commission seeks comment on the circumstances in which an alteration in ground levels not associated with building should require the owner of the land concerned to provide fencing in order to protect the safety of adjoining owners and occupiers.

---

Industries (*Government Gazette* 8 November 1962, 3655-3659) where the local authority considers it to be necessary as a safety precaution, a licensee may be required to fence, to the local authority's satisfaction, the area proposed to be excavated. The Commission is not aware of any other by-laws or regulations which make provision for cases where an alteration of ground levels, not connected with building, necessitates the provision of a fence for safety reasons.

## CHAPTER 6 - PRIVACY AND VIEWS

6.1 An alteration of ground levels can affect the view and privacy of adjoining owners. The filling of one block of land or part of it can result in the obstruction of the view from the adjoining land, or in the land overlooking the adjoining land thus affecting the privacy of the owner of the adjoining land.<sup>1</sup> The common law does not provide any remedy to the adjoining owner in these situations.<sup>2</sup>

6.2 On this issue, the English Law Commission in its working paper on *Appurtenant Rights* said:

"We are of the clear opinion that if a landowner wishes his land to have the benefit of a right not to be overlooked he should take steps to obtain it expressly, by getting his neighbour to accept a restrictive obligation. It would be hopelessly unrealistic to suggest that an absolute right to privacy should be an incident to the ownership of land, and we do not think that it would be practicable to provide by legislation for a qualified right of that kind."<sup>3</sup>

6.3 However privacy and views are matters which can be controlled through town planning schemes.<sup>4</sup> Further, a provision requiring that a licence be obtained before altering ground levels could be so drafted as to enable a local authority to protect claims in respect of

---

<sup>1</sup> The direct flow of sunshine onto the adjoining land could also be affected.

<sup>2</sup> *Aldred's Case* (1610), 9 Co Rep 57b, 58b; *Palmer v Board of Land and works* (1875) 1 VLR 80; *Browne v Flower* [1911] 1 Ch 219, 225.

<sup>3</sup> English Law Commission working paper on *Appurtenant Rights* (1971), para 71.

Normally, a restrictive covenant will only be obtained where both pieces of land are in the one ownership and one of the pieces is subsequently sold and as part of the transaction, a restrictive covenant is granted by the purchaser. A restrictive covenant may be removed or modified pursuant to agreement between the parties having an interest in the covenant or pursuant to an order of the Supreme Court: *Transfer of Land Act 1893-1983*, ss 129B and 129C.

<sup>4</sup> Clause 5.7 of the City of Nedlands town planning scheme was used in 1983 by the City to reject the building plans to a proposed three-storeyed house in Jutland Parade, Dalkeith planned to be built on seven levels. Under clause 5.7 *Government Gazette*, 8 April 1983, 1137), the council in determining an application for development in specified parts of the City of Nedlands must consider the effect of the development on a number of matters including the amenity of the area, any other properties in the vicinity and the visual effect of the proposal as perceived from the Swan River. It is empowered to refuse development approval or impose conditions where it considers the amenity of the area may be detrimentally affected by the proposal. Under the clause, the council may not permit a change in natural ground level or a retaining wall of more than 2 metres in height, unless it is satisfied that the change in level will not affect the amenity of the area or the neighbouring properties. Natural ground level is to be determined in accordance with contours shown on certain Lands and Surveys Department plans. Under the City of Subiaco's *Town Planning Scheme No 3*, published in the *Government Gazette* of 30 March 1984 at 873, in considering an application for approval to commence development, the council is to have regard to and may impose conditions relating to a number of matters. These include the desirability of locating buildings or limiting the height of buildings to preserve views, privacy on adjacent lots and the prevention of another building or part of a building being continually or substantially in a shadow: clause 3.16. The applicant may be required to provide the council with shadow drawings as at mid-June and mid-December for any development over a single storey: clause 3.17, 2(c).

the privacy of adjoining land and in respect of the view from it and of the flow of direct sunlight to it.<sup>5</sup>

6.4 However, as mentioned at the commencement of this paper, these are not matters which the Commission's terms of reference were intended to include and as presently advised the Commission does not intend to pursue them further.

---

<sup>5</sup> Paras 3.68 to 3.81 above.

## CHAPTER 7 - MATTERS ON WHICH INFORMATION AND COMMENT SOUGHT

7.1 The Commission would welcome comment, with reasons wherever possible, on any of the issues arising out of its terms of reference and in particular on the following matters –

### Main issues

(1) Should there be attached to land (as there is in Queensland), an obligation not to do anything which will withdraw support not only from any other land but also from any building, structure or erection which has been placed on it? If so, should there be any qualifications to the principle?

(paragraphs 2.13 to 2.15)

(2) If so, where an owner excavates his land should the support which he provides to the adjoining land be sufficient only to support existing improvements on the adjoining land or should he be required to provide support for any building or other improvements which can reasonably be expected to be built on it?

(paragraphs 2.16 and 2.17)

(3) Alternatively, should the law of negligence be extended to impose a duty of care on an owner in excavating the soil on his land not to cause damage to buildings on the adjoining land by the withdrawal of support?

(paragraphs 2.18 to 2.22 and 2.24)

If so, should existing prescriptive rights of support and the ability to acquire a right of support by prescription be abolished?

(paragraphs 2.9, 2.23 and 2.24)

(4) In any event, should section 391 of the *Local Government Act 1960-1984* be extended or altered and if so, in what respects?

(paragraphs 3.2 to 3.18)

- (5) Alternatively, should the proposal of the English Law Reform Committee, whereby a person who proposed to build should be able to acquire a right of support before he started, by serving his neighbour a notice of his intention to build and if the matter were not then disposed of by agreement, proceeding to a determination of conditions and compensation, be adopted in Western Australia?
- (paragraphs 3.19 to 3.22)

- (6) Should local authorities be empowered to make by-laws or grant licences regulating all excavation or filling of land? Should there be any exemptions and if so what should they be? In particular what matters should such by-laws or licences deal with and what provisions should be made?
- (paragraphs 3.23 to 3.27, 3.43 to 3.45, 3.50, 3.68 to 3.81, 4.13 and 4.14)

#### **Incidental issues\***

- (7) Should the *Uniform Building By-laws* specify circumstances where it would be obligatory for a building owner when applying for a building licence to supply ground levels, both old and new.
- (paragraph 3.53)
- (8) Should a local authority be able to require a builder to construct the retaining wall before commencing construction of the building?
- (paragraphs 3.57 and 3.58)
- (9) (a) Should *Uniform Building By-law* 31.6(1) which requires that embankments and sides of excavations be stabilised and protected against erosion by wind and water where the structural safety of a building could be affected, be extended to encompass protection against factors other than erosion by wind and water?
- (paragraphs 4.4 to 4.6)

---

\* The questions which follow refer to matters of an incidental nature. They arise out of a study of some of the problems local authorities are experiencing in administering the *Uniform Building By-laws*. The Commission seeks views on these questions, even though questions (1) to (6) above are answered in the negative.

- (b) Should the by-law be extended to require safeguards where erosion is likely to affect the stability of boundary fences?

(paragraphs 4.4 to 4.6)

- (c) Should the By-laws be amended so as expressly to place the responsibility on the builder to ensure that a required retaining wall is constructed, whether or not the builder has privately arranged with the owner that the latter should construct it?

(paragraphs 3.57, 4.1 and 4.7)

- (10) Should an owner who alters the level of his land so that an adjoining owner or occupier is no longer complying with swimming pool fence requirements have the responsibility of remedying, or meeting the cost of remedying, the defect thereby created?

(paragraphs 5.1 and 5.2)

- (11) In what circumstances should an alteration in ground levels not associated with building require the provision of fencing in order to protect the safety of adjoining owners and occupiers?

(paragraphs 5.3 to 5.5)

The Commission would appreciate details of any respect in which it is considered that the existing common law, statutory provisions or by-laws are inadequate and particulars of proposals for dealing with such inadequacies.

**APPENDIX I**  
**LOCAL GOVERNMENT ACT 1960-1984, SECTION 391**

(1) Where a building owner intends to erect within three metres of a building belonging to an adjoining owner a building or structure any part of which within the three metres extends to a lower level than the foundations of the building belonging to the adjoining owner, he may, and, if required by the adjoining owner, shall, underpin or otherwise strengthen the foundations of the building of the adjoining owner to such extent as is necessary.

(2) The building owner shall give at least thirty-five days' notice in writing to the adjoining owner, stating his intention to build within the three metres and whether he proposes to underpin or otherwise strengthen the foundations of the adjoining owner's building and with the notice shall serve a plan and sections showing the site of the proposed building and the depth to which he proposes to excavate.

(3) If the adjoining owner within fourteen days after being served with the notice gives a counter notice in writing that he disputes the necessity of, or that he requires the underpinning or strengthening, a difference is to be regarded as having arisen between the building owner and the adjoining owner.

(4) The building owner is liable to compensate the adjoining owner and occupier for inconvenience, loss, or damage, if any, which results to them by reason of the exercise of the powers conferred by this section.

(5) This section does not relieve the building owner from liability to which he would otherwise be subject in case of injury caused by his building operations to the adjoining owner.

(Where a difference has arisen under section 391(3), it is determinable by two referees appointed under Division 19 of Part XV of the Act: s 389. One of the referees is appointed by the Governor and the other by the local authority concerned: s 423. )

## **APPENDIX II**

### **EXTRACTS FROM THE UNIFORM BUILDING BY-LAWS 1974**

By-laws 12.3 and 12.4 are contained in Part 12 (Precautions During Construction) of Group III (Buildings in Course of Erection or Demolition) of the *Uniform Building By-laws 1974* and provide as follows:

#### **"Protection of Adjacent Property**

##### *Shoring and Underpinning*

12.3 (1) Where an excavation or demolition is to be made in proximity to an existing building the walls of that building shall be shored or underpinned, or both, and be so protected as may be necessary to ensure stability.

##### *Additional Precautions*

(2) Where the foundation of an existing building is of material likely to become unstable as a result of the excavation of adjoining ground, additional precautions, to the satisfaction of the surveyor shall be taken to ensure its stability.

##### *Building Work Affecting Building of Adjoining Owner*

(3) The provisions of section 391 of the Act apply to and in relation to building work described in subsection (1) of that section.\*

##### *Damage by Vibration*

(4) Where any building operations or earthworks involve the use of equipment that may, in the opinion of the council, cause damage by vibration to the property of an owner of land in the vicinity of the land on which such operations or earthworks are carried out, the council may impose requirements as to the manner of carrying out such operations or earthworks for the purpose of minimising such damage, and effect shall be given thereto.

---

\* S 391 imposes duties on the building owner, not on the builder: paras 3.2 and 3.3 above.

## **Protection of Excavation**

12.4 Every excavation for a building shall be properly guarded and protected and shall, where necessary, be sheetpiled so as to prevent caving in of the adjoining earth or pavement, and in any case required by the surveyor, sheetpiling of an approved type shall be utilised to protect the subsoil from damage by scour of subsoil or surface waters."

By-laws 31.1 to 31.3, 31.5 to 31.7 are contained in Part 31 (Excavation, Earthwork, and Retaining Walls) of Group VI (Structural Provisions) of the *Uniform Building By-laws 1974* and provide as follows:

### **"Excavations and Backfilling Safety**

#### *General*

31.1 (1) All excavations and backfilling shall be executed in a safe and workmanlike manner.

#### *Guarding of Excavations*

(2) All excavations shall be properly guarded and protected to prevent them from being dangerous to life or property.

#### *Inspection of Excavations*

(3) Twenty-four hours' notice shall be given to the surveyor, of intention to place footings.

### **Water Removal or Diversion**

#### *Council may Require*

31.2 (1) The council may require water to be removed or diverted from excavations before, during or after concrete or other building materials are deposited therein.

*Pipes etc to be Filled*

- (2) Water and vent pipes and drains, if left in position, shall be filled by grouting, or other means, after the concrete has thoroughly hardened.

*Drainage Work*

- (3) If necessary, provision shall be made on the site for the drainage and diversion of rainwater as required by by-law 44.1 or 44.3 or by or under the *Health Act 1911*.

**Retaining Walls**

*When Required*

- 31.3 (1) Wherever the soil conditions so require or the excavation is permanent with a slope steeper than the angle of repose or natural slope of the soil, retaining walls or other approved methods of preventing movement of the soil shall be provided and adequate provision made for drainage.

*Materials*

- (2) A retaining wall shall be of durable material of sufficient strength to support the embankment together with any superimposed loads.

**Sand-Pads**

- 31.5 Where, for the purpose of constructing a slab-on-ground footing for a Class 1 or 1A building, a sand-pad is formed above a foundation that is not composed of stable soil the sand-pad shall, when consolidated, have a minimum depth of not less than 600 mm or such lesser depth as is approved.

## **Earthwork Generally**

### *Stabilisation of Filling, Embankments, etc*

31.6 (1) All filling, embankments and sides of excavations must be stabilised and protected against erosion by wind and water where the structural safety of any building could be affected and shall be capable of supporting any reasonable loads that may be exerted on them from within the site or from any required support to adjoining ground.

### *Placing of Filling*

(2) Filling shall be deposited in layers and shall not be placed unless and until all deleterious rubbish and vegetable matter has been removed from the filling and from the area to be filled.

### *Height of Embankments, etc*

(3) The height of any newly formed embankment or newly excavated face shall not be greater than 1 m unless otherwise approved by the council.

## **Powers of Council in Relation to Earthwork**

31.7 All earthwork referred to in this Part shall be carried out to the satisfaction of the council and in accordance with the guidelines (if any) determined by the council to be appropriate to the local conditions applying in the district or in that part of the district in which the site is located."

By-law 33.4 is contained in Part 33 (Footings not on Piling or Caissons) of Group VI (Structural Provisions) of the *Uniform Building By-laws 1974* and provides as follows:

### **"Levels of Footings**

#### *Two Footings of a Building Touching or Abutting*

33.4 (1) Where two footings of a building abut or touch one another, the underside of the footings shall be placed at the same level, unless otherwise permitted by the surveyor, but where the footings do not abut or touch one another, the difference of level between the underside of the one footing and the underside of the other footing, shall not exceed the shortest horizontal distance between the two footings, or such other difference as the surveyor may, in any circumstances, direct."

#### *Adjoining Building*

(2) The underside of the underpinning of an adjoining building wall shall be a footing within the meaning of this by-law.

#### *Stepping*

(3) Nothing in this by-law shall prevent the gradual stepping of footings where in long lengths.

By-law 44.3 is contained in Part 44 (Drainage of Building and Site) of Group VII (Health and Amenity) of the *Uniform Building By-laws 1974* and provides as follows :

### **"Drainage of Land External to Building**

44.3 If paving, excavation, or any other work that has been or is proposed to be carried out on the natural surface of the site causes, or in the opinion of the council may cause, undue interference with the existing drainage of rain-water falling on any part of the site external to the building, whether the existing drainage is natural or otherwise, the council may require the provision of a system of drainage to its satisfaction to offset any problems arising or which in its opinion may arise from such interference."

## **APPENDIX III**

### **STATUTORY PROVISIONS OF OTHER JURISDICTIONS**

The following statutory provisions have similarities with section 391 of Western Australia's *Local Government Act 1960-1983*.

#### **A. NEW SOUTH WALES**

##### **Regulation 31.4 in Part 31 of Ordinance 70 made under New South Wales Local Government Act 1919**

*Regulation 31.4 is contained in Part 31 (Excavation, Earthwork and Retaining Walls)  
of Group VI (Structural Provisions) of Ordinance No 70*

Support for neighbouring buildings.	31.4 (1) Where an excavation extends below the level of the base of the footings of a building on an adjoining allotment of land, the person causing the excavation to be made shall, at his own expense –
Preservation, support, etc. Subclause amended 15/10/76	(a) preserve and protect such building from damage; and (b) if necessary underpin and support such building in an approved manner.
Notices and particulars of work Subclause amended 15/10/76	(2) The person causing the excavation referred to in subclause (1) to be made shall, seven days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, give notice of his intention to do so to the owner of the adjoining allotment of land and shall at the same time furnish to such owner particulars of the work he proposes to do.

#### **Comment by the Commission**

*The major differences between this provision and section 391 of the Local Government Act 1960-1984 (WA) are -*

- (a) *Clause 31.4 applies to excavations generally and not simply where the building owner intends to erect a building or structure within three metres of a building belonging to an adjoining owner.*
- (b) *Only 7 days notice, as distinct from 35 days notice, need be given.*
- (c) *The adjoining owner does not have the right to refer to arbitrators his claim that the underpinning or strengthening of his foundations is not necessary or his wish that underpinning or strengthening take place. The clause simply casts on the building owner an obligation at his expense to preserve and protect the adjoining building from damage and if necessary underpin and support it.*
- (d) *The clause contains no provisions as to the civil liability of the building owner. However the New South Wales Local Government Office has informed the Commission that the intention of the subclause is that it should not intrude unnecessarily into the common law rights of adjoining owners but provide that they should be notified of impending work.*

*It may be that in New South Wales an alteration of ground levels can constitute a "development" within the meaning of the Environmental Planning and Assessment Act 1979-1981 and require planning approval under that Act.<sup>1</sup>*

---

<sup>1</sup> *The approval would be granted by the "consent authority", that is the local authority, or, where an environmental planning instrument specifies a Minister or public authority (other than a local authority) or the Director of Environment and Planning as having the function to determine the application, that Minister, the public authority or the Director as the case may be: Environmental Planning and Assessment Act 1979-1981, ss 4 and 76. Approval is necessary in New South Wales for all development which has been specified in environmental planning instruments: id, s 76. Among the matters which would be considered by the "consent authority" when deciding whether or not to grant an application are the siting and height of the development, whether the land is suitable for the development by reason of its being subject to subsidence or slip, the relationship of that development to development on adjoining land or on other land in the locality, and the existing and likely future amenity of the neighbourhood: Id, s 90.*

## **B. SOUTH AUSTRALIA**

### **Building Act 1970-1982 section 49**

49. (1) Where a building owner proposes to carry out building work of a prescribed nature within a prescribed distance from the land or premises of an adjoining owner, the following provisions shall apply: -
- (a) the building owner shall, at least one month before the building work is commenced, cause to be served upon the adjoining owner a notice of his intention to perform the building work, and of the nature thereof;
  - (b) the building owner shall take such precautions as may be prescribed to protect the adjoining land or premises, and shall, at the request of the adjoining owner, carry out such other building work in relation to the adjoining land or premises as he is authorized by the regulations to require;
- and
- (c) nothing in this section shall relieve the building owner from liability for injury resulting from the performance of any building work.
- (2) If the building owner fails to comply with the provisions referred to in subsection (1) of this section he shall be guilty of an offence and liable to a penalty not exceeding four hundred dollars.
- (3) The building owner may apply to the referees for a determination of what proportion (if any) of the expense incurred by the building owner in the performance of building work requested by the adjoining owner pursuant to subsection (1) of this section should be borne by the adjoining owner, and the building owner may recover an amount determined by the referees from the adjoining owner as a debt due to him in any court of competent jurisdiction.

### **Comment by Commission**

*Section 49 of the South Australian Building Act 1970-1982 is similar in many respects to section 391 of Western Australia's Local Government Act. Unlike section 391 of the Western Australian Act, section 39 of the South Australian Act leaves the building work and the requisite distance to be prescribed. It is not necessary that there should be a building on the adjoining land. The precautions are also prescribed and the building owner at the request of the adjoining owner is obliged to carry out such other building work in relation to the adjoining land or premises as the adjoining owner is authorised by the regulations to require. Where work is carried out pursuant to such a request, the adjoining owner can be required by referees to bear part of the cost of that work.*

## C. VICTORIA

### Building Control Act 1981 Part IX

#### PART IX - PROTECTION OF ADJOINING PROPERTY

- Interpretation. 145. In this Part unless inconsistent with the context or subject-matter-
- “Adjoining occupier”. “ Adjoining occupier” means the occupier or one of the occupiers of an adjoining property.
- “Adjoining Owner”. “Adjoining owner” means the owner of an adjoining property.
- “Owner”. “Owner” means the owner of land on which building work is proposed to be carried out.
- Administration of Part. 146. Save as otherwise expressly provided, the administration and enforcement of this Part within a municipal district shall be carried out by the council of that municipality.
- Owner to give notice of intention to carry out building works. 147. (1) Where an owner is required under the building regulations<sup>1</sup> to provide protection for adjoining property before and during the carrying out of any building works on his land, he shall, not less than three months before commencing the building works, serve on the

---

<sup>1</sup> Regulation 12.1 contained in Part 12 (Precautions During Construction) of Group III (Precautions during Construction or Demolition) of the Victoria Building Regulations provides as follows:

**Protection of Adjoining Property and Public**

*Protection to be provided*

- 12.1 (1) *Before and during the carrying out of any building work –*
- (a) *protection shall be provided if and when required by the building surveyor, and*
  - (b) *within 3 m of any street alignment, precautions shall be taken to ensure the safety of the public using the street and particulars of such precautions shall be approved before any building work is commenced.*

*When protection may be dispensed with*

- (2) *The requirements of sub-regulation (1)(a) shall not apply in the case of underpinning if the building surveyor is satisfied that the foundation of a building on an adjoining property consists of hard stable rock.*

*Notice to adjoining owner*

- (3) *The notice required to be given by the owner to the adjoining owner by section 147(1) of the Act shall be in accordance with Form 6.*

adjoining owner and on the building surveyor of the municipality in which the land is situated notice in the prescribed form of his intention to commence carrying out building works on the land together with-

- (a) drawings and specifications showing the building works proposed to be carried out;
- (b) details of the protection works proposed to be carried out; and
- (c) an undertaking in writing to furnish any further particulars required by notice in the prescribed form.

(2) Within one month after service upon him of the notice and information referred to in sub-section (1) the adjoining owner shall-

- (a) agree to the proposed protection works;
- (b) disagree with the proposal; or
- (c) request amendment of the proposal.

(3) Notwithstanding the three month period specified in sub-section (1), if the adjoining owner agrees to the proposed protection works the owner may proceed with the works upon obtaining any necessary approvals required by this Act or any other Act and the building regulations.

(4) If the adjoining owner disagrees with the proposed protection works the matter shall be referred forthwith to an arbitrator under this Part for determination.

(5) If at the expiration of one month after the service of the notice and information referred to in sub-section (1) the adjoining owner has

not agreed to or disagreed with the proposed protection works or requested any amendment of the proposal he shall be deemed to have disagreed with the proposal and the owner may refer the matter to an arbitrator under this Part for determination.

Arbitrator

148 (1) Except as provided in section 149, the owner and adjoining owner may agree in writing that any nominated person shall act as arbitrator in the matter of any disagreement between them under this Part.

(2) If the person nominated under sub-section (1) consents in writing to act he may act as arbitrator in the event of any disagreement between the parties under this Part.

(3) Where the parties have failed for a period of one month to agree upon the appointment of an arbitrator either party may refer the matter to the Minister who shall appoint a person from a panel of names submitted by the governing body of the Institution of Engineers of Australia, Victoria Division to act as arbitrator in the matter of any disagreement between them under this Part.

Emergency procedures.

149. (1) The director, on the application of any owner, may declare that emergency protection works are required in respect of a particular adjoining property.

(2) The provisions of section 147 shall not apply to any protection works to be carried out pursuant to a declaration made under sub-section (1).

(3) Where there is any disagreement between the owner and the adjoining owner with respect to works to be carried out pursuant to a declaration under sub-section (1), either party may refer the matter to the Minister who shall appoint a person from a panel of names submitted by the governing body of the Institution of Engineers of

Australia, Victoria Division to be the arbitrator in the matter of the disagreement.

Appointment of agent to act for adjoining owner who is absent or incapable of acting, &c.

150. (1) Where an owner is required under the building regulations to provide protection for an adjoining property but the owner adjoining cannot be found or is for any reason unable to act, the owner may make application in writing to the Minister for the appointment of some suitable person to act as agent for the adjoining owner during his absence or incapacity and shall state in his application the circumstances of the case and the grounds of the application.

(2) If the Minister is satisfied that the adjoining owner cannot, after reasonable inquiry and search, be found or that he is incapable of acting in the matter of any agreement or disagreement, the Minister may in writing appoint some person he considers to be suitable to act as the agent of and in the place of the adjoining owner in respect of the protection works required to be carried out on or over the land of the adjoining owner (as the case may be) and may make an appointment subject to such terms and conditions as to the discharge of his duties as agent and as to the payment of fees and otherwise as the Minister thinks fit.

(3) Where the Minister appoints an agent under this section the Minister shall cause the agent to be notified in writing of his appointment, the nature of his duties as the agent of the adjoining owner, the fees to be paid to the agent by the adjoining owner, and any terms and conditions the Minister thinks fit to impose.

Adjoining occupiers entitled to compensation for disruption of activities.

151 (1) An owner is liable to compensate any adjoining occupier for inconvenience, loss or damage suffered by him during the execution of protection works carried out under this Part.

(2) An adjoining occupier who suffers any such inconvenience, loss or damage has the same right to refer a claim for compensation for the

inconvenience, loss or damage to an arbitrator as an adjoining owner has under this Part.

(3) Nothing in this Part shall relieve the owner from any liability to which he would otherwise be subject for injury to the adjoining owner or any adjoining occupier by reason of the protection works executed by him under this Part but he shall have a right to complete the works without being subject to proceedings for an injunction.

Lodgment of plans, &c. after completion of work.

152. Within two months after the completion of any protection works executed under the provisions of this Part the owner shall serve on the adjoining owner and the building surveyor of the municipality in the municipal district of which the land is situated a complete set of drawings and specifications showing the protection works which have actually been executed in respect of the property of the adjoining owner.

Inspection of plans lodged with municipality.

153. At any time after notice of intention to commence the carrying out of building works is given under this Part the building surveyor of the municipality in the municipal district of which the land is situated shall, without any further or other authority than this section, make available to any adjoining owner, at his request, for inspection any drawings and specifications of the proposed building works which are then in the possession or control of the municipality.

Building owner to arrange insurance cover.

154. (1) Before the commencement of any protection works in respect of an adjoining property the owner shall enter into a contract of insurance with a reputable insurer against damage by the proposed protection works to the adjoining property and against any liabilities likely to be incurred to adjoining occupiers and members of the public during the execution of the building works and for a period of twelve months thereafter.

(2) A contract of insurance for the purposes of this section shall be entered into with a company and to an amount agreed to by the parties

or determined by an arbitrator under this Part in the event of dispute, shall be lodged with the adjoining owner before the commencement of the works and shall be renewed or extended as often as may be necessary during the execution of the works and twelve months thereafter.

Adjoining property to be surveyed before commencement of work.

155. (1) Before the commencement of any protection works the owner in company with the adjoining owner or his agent shall make a full and adequate survey of the adjoining property and shall make a record in writing or by any other means any of the parties desires all existing cracks and defects in the adjoining property which shall be signed or otherwise acknowledged as an agreed record of the condition of the adjoining property prior to the commencement of any works.

(2) A record made under sub-section (1) shall be admissible in evidence in any proceedings relating to the adjoining property and shall be evidence of the condition of the adjoining property at the time the record was made.

Work to conform to regulations, &c.

156. (1) All protection works in respect of an adjoining property shall be executed by the owner as quickly as possible in the circumstances and in compliance with the building regulations and with the drawings and specifications agreed to between the parties.

(2) In any proceedings before an arbitrator appointed under this Part with respect to the execution of any protection works in respect of an adjoining property under this Part the statement of the building surveyor of the municipality within the municipal district of which the adjoining property is situated as to whether or not the provisions of any building regulations or of any drawings or specifications have been complied with shall be conclusive.

Entry upon adjoining property for carrying out

157 (1) For the purpose of carrying out any protection works required to be carried out by or under the provisions of this Part or the

protection works. building regulations an owner may by himself or his servants or agents enter between the hours of eight o'clock in the morning and six o'clock in the evening in or upon or into the air space above any adjoining property and execute all such works as are necessary for carrying into effect the provisions of this Part and the building regulations with respect to protection.

(2) Before entering an adjoining property pursuant to the provisions of sub-section (1) the owner shall give not less than 24 hours notice of his intention so do or such other notice as is agreed upon between the parties.

(3) In the course of carrying out any protection works under this Part an owner may without doing any unnecessary damage remove any furniture or fittings in the adjoining property which obstruct the execution of the works.

Penalty for refusal or obstruction.

(4) An adjoining owner or an adjoining occupier who refuses to admit an owner or his servants or agents to his premises in accordance with any notice or agreement under sub-section (2) for the purpose of carrying out any protection works required by or under this Part or the building regulations to be executed or who obstructs or hinders an owner or his servants or agents in the execution of the works shall be guilty of an offence against this Part and liable to a penalty of not more than 10 penalty units and in the case of a continuing offence to a further penalty of not more than 1 penalty unit for every day such prevention or obstruction continues after the day appointed or agreed upon for the entry.

Saving for easements.

158. Nothing in this Part relating to protection (except for overhead protection) shall authorize any interference with an easement of light or other easement in or relating to a party wall or prejudicially affect the right of any person to preserve any right in connection with a party wall which is demolished or rebuilt or to take any necessary steps for that

purpose.

Expenses of adjoining owner.

159. (1) All costs and expenses necessarily incurred by an adjoining owner in supervising the execution of protection works on his property by an owner shall be paid by the owner to such extent and on such terms and conditions as are agreed upon between the adjoining owner and the owner or, in the absence of any such agreement or in the event of disagreement, as are determined by an arbitrator under this Part.

(2) The costs and expenses of an adjoining owner which are agreed to be paid or ordered by an arbitrator to be paid may be recovered in a court of competent jurisdiction as a debt due to the adjoining owner.

### **Comment by the Commission**

*In Victoria, a proposed alteration of ground levels can bring into action a regulatory system established under Part IX of the Building Control Act 1981 and involving the adjoining owner and the local authority. The system only operates where an owner is required under the building regulations to provide protection to adjoining property before and during the carrying out of any building work on his land: s 147(1). The regulations which are contained in the Victoria Building Regulations provide that such protection must be provided "if and when required by the building surveyor" of the local authority: reg 12.1. Where protection is required, the building owner must, not less than three months before commencing work, serve on the adjoining owner and on the local authority's building surveyor written notice of his intention to commence work: s 147(1). The notice must be accompanied by –*

- (a) *drawings and specifications showing the building works proposed to be carried out; and*
- (b) *details of the protection works proposed to be carried out: s 147(1).*

*If the adjoining owner does not agree to the proposed protection works within a month, the matter is referred to an arbitrator: s 147(4) and (5). Where the adjoining owner agrees to the proposed protection work, the building owner may commence work as soon as he wishes.*

*The building owner must compensate the adjoining occupier for inconvenience, loss or damage suffered by him during the execution of the protection works: s 150. He is not relieved from any liability to which he would otherwise be subject.*

*Other provisions in Part IX provide that before commencing the proposed protection works, the building owner must take out liability insurance and in company with the adjoining owner make a "survey" of the adjoining property and a record of all existing cracks and defects in the adjoining property which will be signed by both of them as an agreed record of its condition.*

*The protection works must be carried out as quickly as possible and in compliance with the building regulations and the drawings and specifications agreed to between the parties: s 156.*

*The relevant provisions in the Victoria Building Regulations are set out in footnote 1 on page 75 above and in Appendix IV under the heading "B. Victoria".*

## **D. CITY OF WELLINGTON**

### **ORDINANCE 17.5 ADOPTED BY THE CITY OF WELLINGTON UNDER THE TOWN AND COUNTRY PLANNING ACT 1977**

#### **Earthworks**

17.5.1 No work involving the disturbance of the land surface or the excavation of the land (other than necessary investigative work) shall be carried out in connection with any existing or proposed use of land, whether or not related to a proposed Sub-division or Development (as such are defined in *Local Government Act 1974*) until such excavation or work obtains the approval of the Council, and then upon such conditions as it may hereunder, or otherwise, lawfully impose.

For the purposes of this Ordinance 'disturbance of land surface' means, inter alia, removal of topsoil and the dumping of fill material.

17.5.2 Where excavation or any work involving the disturbance of the land surface shall be carried out other than in accordance with a Development Scheme Plan or Concept Plan and will involve the removal from the site of excavated materials, before any approval is given the Council may require the proposals to be considered in accordance with section 72 of the Act as conditional use. Such approval may be expressed to be subject to such reasonable conditions, including those specified in Ordinance 17.5.3 as the Council may impose, and such shall be complied with to its satisfaction.

17.5.3 Where excavation or any work involving the disturbance of the land surface is carried out either in accordance with Ordinance 17.5.1 or 17.5.2 or otherwise, the following conditions relating to that excavation or such work, involving the disturbance of the land surface shall apply: -

- (1) Adequate protection shall be provided against damage occurring or likely to occur to any property or to any person as a result of the excavation.

- (2) Sufficient silt traps shall be provided to ensure surface water will not damage any property.
- (3) Compaction tests certified by a registered engineer to ensure the stability of any fill shall be provided where the Council may reasonably require the same.
- (4) Restoration (by replanting or other sufficient means) of faces denuded of vegetation shall be carried out to the satisfaction of the Council.

## APPENDIX IV

### BY-LAWS OF OTHER JURISDICTIONS

#### A. NEW SOUTH WALES

**Regulation 31** Regulation 31 is contained in Part 31 (Excavation, Earthwork and Retaining Walls) of Group VI (Structural Provisions) of Ordinance 70 made under the *Local Government Act 1919* and provides as follows:

Excavations and backfilling: safety. 31.1 (1) All excavations and backfilling shall be executed in a safe and workmanlike manner.

Guarding of excavations. (2) All excavations shall be properly guarded and protected to prevent them from being dangerous to life or property.

Water removal or diversion. 31.2 The Council may require water to be removed or diverted from excavations before, during, or after concrete or other building materials are deposited therein.

Retaining walls 31.3 Wherever the soil conditions so require, retaining walls or other approved methods of preventing movement of the soil shall be provided and adequate provision made for drainage.

*31.4 This regulation is set out in Appendix II of this paper.*

**Regulation 44.3** Regulation 44 .3 is contained in Part 44 (Drainage of Building and Site) of Group VII (Health and Amenity) of Ordinance 70 and provides as follows :

Drainage of land external to building. Clause amended, 30/12/77 44.3 If paving, excavation, or other work on the natural surface of the site on which a building is proposed to be erected will, in the opinion of the Council, cause undue interference with the existing drainage of rain-water falling on any part of the site external to the building, whether the existing drainage is natural or otherwise, the

Council may require the provision of a system of drainage to its satisfaction to offset any problems arising from such interference.

## **B. VICTORIA**

**Regulation 12.3** Regulation 12.3 is contained in Part 12 (Precautions During Construction) of Group III (Precautions during Construction or Demolition) of the *Victoria Building Regulations* and provides as follows:

### **Guarding of Excavations**

12.3 All excavations shall be fenced or otherwise guarded against being a danger to life or property.

**Regulations 31.1 to 31.3** Regulations 31.1 to 31.3 are contained in Part 31 (Excavation, Earthwork and Retaining Walls) of Group VI (Structural Provisions) of the *Victoria Building Regulations* and provide as follows:

### **Excavations and Backfilling: Safety**

31.1 All excavations and backfilling shall be executed in a safe and workmanlike manner.

### **Water Removal or Diversion**

31.2 The building surveyor may require water to be removed or diverted from excavations before, during, or after concrete or any other building materials are deposited therein.

### **Retaining Walls**

31.3 Wherever the soil conditions so require, retaining walls or any other approved methods of preventing movement of the soil shall be provided and adequate provision made for drainage.

## C. QUEENSLAND

**By-law 31** By-law 31 is contained in the *Standard Building By-laws 1975* which is a schedule to the *Building Act 1975*. The by-law which is in Part 31 (Excavation, Earthwork and Retaining Walls) of Division VI (Structural Provisions) of the By-laws provides as follows:

31.1 Excavations and backfilling. (1) Safety. All excavations and backfilling shall be executed in a safe and workmanlike manner.

(2) Guarding of excavations. All excavations shall be properly guarded and protected to prevent them from being dangerous to life or property.

31.2 Water Removal or Diversion. The Local Authority may require water to be removed or diverted from excavations before, during, or after concrete or other building materials are deposited therein.

31.3 Retaining Walls. Wherever the soil conditions so require, retaining walls or other approved methods of preventing movement of the soil shall be provided and adequate provision made for drainage.

**By law 44.3** By-law 44.3 which is in Part 44 (Drainage of Building and Site) of Division VII (Health and Amenity) of the By-laws provides as follows:

44.3 Drainage of land external to building. If paving, excavation, or any other work on the natural surface of the site causes undue interference with the existing drainage of rain-water falling on any part of the site external to the building, whether the existing drainage is natural or otherwise, the Local Authority may require the provision of a system of drainage to its satisfaction to offset any problems arising from such interference.

## D. SOUTH AUSTRALIA

**Regulation 10.1** Regulation 10.1 is contained in Part 10 (Materials and Workmanship - Administrative Provisions) of Group II (General Provisions) of the *Building Regulations 1973* and provides :

Buildings to be property constructed 10.1 All building work for which requirements are prescribed in these regulations shall be performed in a good and workmanlike manner to the satisfaction of the building surveyor.

**Regulation 12.5** Regulation 12.5 is contained in Part 12 (Precautions during Construction) of Group III (Buildings in Course of Erection or Demolition) of the Regulations.

Regulation 12. 5(i) is set out in footnote 1 on page 27 of this paper. The remainder of the regulation provides as follows :

Action required of the building owner (2) Where any building work is subject to the provisions of sub-regulation (1) hereof, the owner building may, and if required by the adjoining owner shall, (subject to the provisions of Part IV of this Act).

(a) underpin any building on the adjoining owner's land for which the stability of the foundations is reasonably considered to be rendered no longer satisfactory by reason of the building work;  
or

(b) otherwise strengthen the foundations on the adjoining owner's land as is reasonably considered necessary.

**Regulation 31** Regulation 31 is contained in Part 31 (Excavation, Earthwork and Retaining Walls) of Group VI (Structural Provisions) of the Regulations and provides as follows :

- Excavations and backfilling: safety
- 31.1 All excavations and backfilling shall be executed in a safe and workmanlike manner, and all excavations shall be properly guarded and protected to prevent them from being dangerous to life and property by way of approved shoring, compaction, drainage or other means.
- Water removal or diversion
- 31.2 The council may require water to be removed or diverted from excavations before, during, or after concrete or other building materials are deposited therein.
- Retaining walls
- 31.3 Wherever the soil conditions so require, retaining walls or other approved methods of preventing movement of the soil shall be provided and adequate provision made for drainage.

## APPENDIX V

### REMEDIAL POWERS OF LOCAL AUTHORITIES

(a) **Local Government Act, section 401**

Under section 401(1)(b) of the *Local Government Act 1960-1984*, the council of a local authority is empowered to give notice to the builder or owner<sup>1</sup> of a building of anything in the construction of the building –

- (a) which is not in compliance with, or is a departure from, the approved plans and specifications; or
- (b) which contravenes any of the provisions of the Act or the *Uniform Building By-laws*,<sup>2</sup>

requiring him to remove the cause of the objection. The builder or owner who is served with the notice is obliged to comply with it<sup>3</sup> and if he fails to do so is liable to a penalty.<sup>4</sup> Where he does not within thirty-five days of the service of notice proceed with due despatch to comply with the requisitions in it, a Court of Petty Sessions, on complaint of the council, may order the builder or owner who has been served with the notice to comply with the regulations within a time fixed by the order. If the order is not complied with, the council may enter the land and give effect to the requisitions.<sup>5</sup> It can recover the cost of performing the work from the builder or owner served with the notice in a court of competent jurisdiction.<sup>6</sup>

---

<sup>1</sup> The latter would include a purchaser from the original owner. It is arguable that only the builder or the original owner should be required to do the work concerned.

<sup>2</sup> S 401(1)(b) only refers to a contravention of the "Act". However, "Act" is defined to include by-laws made under it: s 6(1).

<sup>3</sup> S 401(1)(b). There is, however, a right of appeal against the requisition in the notice to the Minister for Local Government: s 401(3).

<sup>4</sup> Ss 670 and 671. See also s 374(5) and *Uniform Building By-laws 1974*, by-law 4.1.

<sup>5</sup> S 401(7).

<sup>6</sup> Ibid.

**(b) Local Government Act, sections 403 to 405**

Sections 403 to 405 of the Act give the council of a local authority remedial powers exercisable against the owner and the occupier<sup>7</sup> in respect of a building which has been certified as being in a dangerous state by its building surveyor or by another competent person. Where a building has been so certified, the council must serve written notice on the owner or occupier of the building requiring him to take down, secure or repair the dangerous building.<sup>8</sup> If the owner or occupier on whom this notice has been served does not within thirty-five days comply with it,<sup>9</sup> a Court of Petty Sessions may order the person served to do the necessary work within a time fixed by it. If the order is not complied with the council may cause the building, or so much of it as is in a dangerous condition, to be taken down, repaired or secured. The owner must pay to the council on demand the costs and expenses incurred by it in obtaining the court order and in carrying it into effect.<sup>10</sup> If the owner does not comply with the demand, the council after giving him thirty-five days notice may sell the dangerous building and deduct its costs and expenses from the proceeds. If the proceeds are insufficient to cover these costs and expenses, the council can recover the balance in a court of competent jurisdiction.

**(c) Local Government Act, section 411**

Section 411 of the Act gives the council of a local authority remedial powers where a person has been convicted of constructing a building in contravention of the provisions of the Act or the *Uniform Building By-laws*. The object of the powers is to have the building brought into conformity with those provisions and a notice procedure similar to that operating under sections 403 to 405 must be followed by the council.<sup>11</sup> If the notice is not complied with, a Court of Petty Sessions may make an order authorising the council, among other things, to do whatever is necessary to bring the building into conformity with the provisions and to sell the materials resulting from the alteration. The council's expenses and costs after deducting the

---

<sup>7</sup> But not the builder.

<sup>8</sup> If the owner or occupier does not comply with the notice within thirty-five days, the council must serve a copy of the notice on the owner and the occupier by registered post at their last known place of residence and affix a copy on the outside of the building: s 403(5).

<sup>9</sup> There is, however, a right of appeal against the requisition in the notice: s 403(6).

<sup>10</sup> This does not prejudice the right, if any, of the owner to recover the costs and expenses from a person liable to pay to him the expense of repairs of the building: s 405(1).

<sup>11</sup> As in the case of ss 403 to 405, there is a right of appeal against the requisition: s 411(3).

Where a council serves a written notice under s 411(1), it must deliver a memorial to the Registrar of Titles: s 412A. The memorial will prevent the registration of any instrument affecting the land, unless the council consents to it, until the contravention ceases: *ibid*.

proceeds of any sale of the materials, are recoverable in a court of competent jurisdiction from the person who committed the offence.