THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 44

Alteration of Ground Levels

REPORT

FEBRUARY 1986

To: **THE HON J M BERINSON MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the Law Reform Commission Act 1972-1978, I am pleased to present the Commission's report on Alteration of Ground Levels.

J A Thomson
Chairman

25 February 1986

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

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Part I: Introduction

Chapter 1
TERMS OF REFERENCE AND SCOPE OF THE PROJECT

1. TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on the rights and obligations of adjoining owners when one alters the ground level on his land, and to recommend such changes to the law as it considers desirable.

1.2 The reference arose from the concern of some local authorities that they did not have adequate power to control excavations 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 terms of reference also extend to consideration of both common law and statutory remedies available to the adjoining owners.

1.3 An alteration of ground level may affect the natural drainage of water. Questions of safety to adjoining owners and passers-by may also arise, as when a safety fence around a swimming pool is rendered inadequate by filling on adjoining land. These matters are also dealt with in this report.

1.4 However, the terms of reference are not intended to cover broader problems arising from the alteration of ground levels such as the general aesthetic amenity of an area including privacy, views or traffic safety. Such matters are most appropriately dealt with in the context of town planning.[1] Further, although the recommendations in this report would apply to alterations of ground levels brought about by activities such as quarrying, they are not intended to supplant any regulations which give additional protection to adjoining owners in such cases.[2]

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1 See paras 4.4 and 4.5 below.

2 See, for example, Local Government Model By-laws (Extractive Industries) No 9 (Government Gazettes of 8 November 1962, 8 February 1965 and 21 June 1974). Under by-law 11(1)(a) a licensee may not, except by agreement with the owner of the adjoining land, excavate within 20 metres of the boundary of his land.

2. AN OVERVIEW OF THE PROBLEMS

(a) The nature of the problems

1.5 An owner may alter the level of his land by either excavating or filling it and, in so doing, affect his neighbour's land. Excavation may cause that land to subside, and may also cause damage to improvements such as buildings on that land. Filling without providing an adequate retaining wall or other measures[3] may result in soil falling onto the neighbour's land damaging dividing fences or buildings.

(b) Cause and frequency of the problems

1.6 Alterations of ground levels have apparently taken place more frequently since the advent of the concrete slab-on-ground method of construction of small buildings. 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, and the site therefore must be filled or excavated, or both. The method is now normally used in the construction of houses and is common in the construction of medium density strata title developments. The excavations required for modern high-rise buildings also create difficulties because they may threaten the support of adjoining buildings.[4]

1.7 The Parliamentary Commissioner for Administrative Investigations drew the Commission's attention to various cases concerning withdrawal of support, fall of soil and drainage problems which his office has encountered in recent years. These confirmed the views of local authorities that there was a growing problem in this area and that the powers of local government authorities are unduly limited. The Builders' Registration Board has also informed the Commission that problems involving withdrawal of support, fall of soil, and fencing are from time to time drawn to its attention.[5]

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3 These may include sheet piling or ensuring that the soil at the boundary remains at its angle of repose so that it does not affect the neighbour.

4 This is most likely to occur where the adjoining building does not have foundations which are self-sufficient within its own site: para 2.20 below.

5 These matters may come within the jurisdiction of the Board by virtue of s 12A of the *Builders' Registration Act 1939-1984* which empowers the Board to order a builder to remedy unsatisfactory building work. Ancillary works such as retaining walls and fencing may in some circumstances come

1.8 Of course it is not only building activity which may give rise to such problems. Changes to ground levels are sometimes carried out without building being involved.[6]

3. THE PRESENT APPROACH TO REGULATION

1.9 The problems outlined above result in difficulties of varying significance for the parties who have an interest in the matter. At present the law provides various methods of control for dealing with alterations of ground levels and the consequences which flow from them. Each of these operates in quite distinct ways. They are -

(a) Private law remedies;
(b) Various statutory controls including the Uniform Building By-laws;
(c) Planning schemes.

These are briefly outlined as follows -

(a) Private law remedies

1.10 The common law at present provides a remedy in some instances to an adjoining owner.[7] In some cases he can obtain an injunction to prevent damage taking place. Often he can only sue for damages. Both proceedings are relatively expensive, particularly where the problem is of a comparatively minor nature. In addition, section 391 of the *Local*

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within the Board's jurisdiction. This was confirmed in *Builders' Registration Board v Amesz Holdings Pty Ltd* Perth Court of Petty Sessions complaints Nos 11363 and 11364/82 where site works were held to be included within its jurisdiction. The powers of the Board will normally be exercised following a complaint by an owner against his builder but sometimes the complaint will follow upon, or be intended to avoid, an 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.

6 In these cases, except where a retaining wall is being constructed, a building licence is not required and the provisions in the Uniform Building By-laws 1974-1985 (hereinafter cited as the "Uniform Building By-Laws") governing alteration of ground levels do not apply:paras 1.11, 5.9 to 5.19 and 6.1 to 6.5 below. The definition of "building" in the *Local Government Act 1960-1985* (hereinafter cited as the "*Local Government Act*") 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. In practice, the local authority usually has no prior knowledge of the intention to carry out the earthworks and, particularly where the adjoining lot is vacant, problems may not come to light until an application to develop the adjoining land is received.

7 See chs 2 and 4 below.

Government Act provides a statutory procedure whereby private rights of adjoining owners may be adjusted in cases in which building is proposed to take place.

(b) Local Government controls

1.11 As part of general local government control over buildings, some controls are contained in the *Local Government Act* itself[8] while others are contained in the Uniform Building By-laws made under that Act.[9] In the latter case alterations of ground levels for purposes other than buildings are not controlled.

(c) Planning schemes

(i) Metropolitan Region Scheme

1.12 Under the *Metropolitan Region Town Planning Scheme Act 1959-1985* no "development" of any land within the metropolitan region may be commenced or continued without the written approval of the "responsible authority" (normally the local authority).[10] Under the Scheme, the approval of the authority is not in practice required for alterations of ground levels carried out as part of the building works for a single dwelling house on a lot. In cases not falling within this exemption, approval of the responsible authority can be required for excavation or filling of land. However, 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.[11]

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8 For example, s374(1) of the *Local Government Act*: para 6.1 below.

9 Paras 5.9 to 5.19 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. These by-laws are reproduced in Appendix II. Although most of these by-laws are concerned with the structural soundness of slab-on-ground buildings, some 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.

10 Metropolitan Region Scheme, cl 10. There are exceptions in the case of "reserved" land owned by or vested in a public authority: id, cls13 and 16. The scheme was published in the *Government Gazette* of 9 August 1963.

11 *Claude Neon Limited v City of Perth and The Metropolitan Region Planning Authority* [1983] WAR 147; *Parramatta City Council v Shell Co of Australia Ltd* [1972] 1 NSWLR 483.

(ii) Local authority schemes

1.13 The town planning schemes of various local authorities also require an application to be lodged with the local authority before any "development" is commenced within the district covered by the scheme. Owners are normally exempted from the obligation to lodge an application in respect of the construction of a single dwelling house on land zoned residential (including any earthworks in preparation for building). As in the case of the Metropolitan Region Scheme it seems that minor alterations to ground levels do not require approval.

(iii) Purpose of schemes

1.14 Both the Metropolitan Region Scheme and individual town planning schemes are concerned with the general amenity of the area rather than with the physical effect an alteration of the ground level would have on the land or buildings of the adjacent owners. As such they are essentially outside the Commission's terms of reference and thus will not be discussed further in this report.[12]

4. DISCUSSION PAPER AND PUBLIC COMMENTS

1.15 The Commission issued a Discussion Paper in September 1984 on the issues raised by the terms of reference. The Paper attracted comment from a wide range of persons and organizations including a number of local authorities, the Royal Australian Institute of Architects (WA Chapter),[13] the Institution of Engineers, Australia (Western Australia Division),[14] the Master Builders' Association of Western Australia[15] and the Law Society of Western Australia.[16]

1.16 The Commission is grateful to all those who commented or otherwise assisted it. All the views expressed have been taken into account in preparing this report.

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12 Also excluded for the same reason are the powers given to a local authority by s 248 of the *Local Government Act* to make town planning by-laws for any of the purposes mentioned in the Second Schedule to the *Town Planning and Development Act 1928-1985*.

13 Hereafter called "the Institute of Architects".

14 Hereafter called "the Institution of Engineers".

15 Hereafter called "the Master Builders' Association".

16 A list of commentators is set out in Appendix I.

5. APPROACH OF THE COMMISSION

(a) The legal framework

1.17 The present legal framework provides a mixture of private rights and public controls to regulate problems in this area. It is clear from the Commission's own research and from the comments it received that both the private rights and public controls require to be extended if the interests of the parties are to be satisfactorily balanced. In summary, the Commission recommends -

(a) An extension of the existing common law rights by means of statutory amendment so as to provide a right of support for buildings as well as land.

(b) An extension of the scope of section 391 of the *Local Government Act* which provides a mechanism for resolution of disputes when an adjoining owner intends to excavate for the purposes of building. The Commission's main recommendation is that the section should also apply to excavation for other purposes.

(c) Fuller regulation through the Uniform Building By-laws and other regulatory provisions.

1.18 The following chapters set out these recommendations in detail.

(b) Technical matters

1.19 In addition to questions of legal principle, a number of technical matters arise, for example precisely how retaining walls, sheet piling or foundations should be constructed to ensure that no damage to an adjoining owner's land or buildings takes place. The Commission has not attempted to make any recommendations on technical matters. Accordingly, translation of a number of the principles set out in this report into precise statutory requirements will require the assistance of persons with the necessary engineering or architectural qualifications.

Part II: Private law remedies

Chapter 2
WITHDRAWAL OF SUPPORT: THE COMMON LAW

1. INTRODUCTION

2.1 In this chapter the Commission outlines the common law position and recommends certain changes. In the following chapter it deals with section 391 of the *Local Government Act*, which the Commission considers should be revised so as to complement the additional private law remedies it recommends below.

2. THE COMMON LAW

(a) General

2.2 The right of adjoining land owners to support from adjacent land has long been recognised by the common law. The right applies with respect to land but not buildings.[1]

(b) Natural right of support to land by adjoining land

2.3 The common law right to support of land from neighbouring land is a natural right attaching to real property, and does not need to be created by easement.[2] The right entitles a landowner to have his land remain in a natural state unaffected by any excavation on the adjoining land.[3]

2.4 However, 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.[4] If subsidence

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1 Subject to the exception mentioned in para 2.7 below.
In some cases an easement of support may give protection to buildings: paras 2.8 to 2.10 below.

2 *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"), para 702.

3 *Byrne v Judd* (1908) 27 NZLR 1106.

4 *Taylor v Auto Trade Supply Limited* [1972] NZLR 102, 108 per Perry J.

is prevented by the use of artificial means of support, no cause of action arises.[5] A new cause of action will arise whenever a fresh subsidence occurs.[6]

2.5 When damage occurs as a result of the withdrawal of support, the person affected may claim damages in the tort of nuisance.[7] Alternatively, or in addition, he may seek 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).[8] 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.[9]

2.6 There is no right to have land supported by water, and such a right cannot be acquired by prescription. Accordingly, 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.[10] This rule does not apply to cases in which the withdrawal of support was brought about by the pumping out of wet sand, silt or other liquid material.[11]

(c) No natural right of support to buildings by adjoining land

2.7 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.[12] 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.[13] 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

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5 S G Maurice and R Wakefield, *Gale on Easements*, (14th ed 1972) (hereinafter cited as "Gale") 290.

6 *Byrne v Judd* (1908) 27 NZLR 1106, 1107-1108; *Thynne v Petrie* [1975] Qd R 260, 262.

7 J G Fleming, *The Law of Torts*, (6th ed 1983) (hereinafter cited as "Fleming") 392 and 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.

8 R W M Dias (general ed), *Clerk and Lindsell on Torts*, (15th ed 1982) (hereinafter cited as "Clerk and Lindsell"), paras 7-03 to 7-06 and 7-08; Fleming, 412-413; Bradbrook and Neave, para 1872.

9 Clerk and Lindsell, paras 7-07 to 7-08; Fleming, 413.

10 Clerk and Lindsell, para 23-57; Bradbrook and Neave, paras 710-712. However, a landowner does have the right to support of underground water against anyone except a neighbouring landowner: Bradbrook and Neave, para 712*; Perth Corporation v Halle* (1911) 13 CLR 393.

11 Clerk and Lindsell, para 23-57; Bradbrook and Neave, para 714.

12 Bradbrook and Neave, para 715; *Dalton v Angus* (1881) 6 App Cas 740, 791-792 per Lord Selborne; Public Trustee; *J A McDonald v Hermann* [1968] 3 NSWR 94, 108 per Isaacs J.

13 *Dalton v Angus* (1881) 6 App Cas 740, 804 per Lord Penzance; Clerk and Lindsell, para 23-59. But see footnote 33 to para 2.15 below.

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.[14]

(d) Acquisition of easement of support to buildings by adjoining land

2.8 A right of support for buildings by the soil of the adjacent plot of land can, however, be acquired as an easement.[15] 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[16] and thus if damage occurs as a result of the withdrawal of support, the person affected may claim damages in the tort of nuisance.[17]

2.9 The methods by which an easement of support to a building can be created are by -

(a) an express or implied grant or reservation;
(b) prescription.

2.10 Little need be said about creation of an easement of support by grant or reservation.[18] However, its creation by prescription needs some explanation. 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".[19] Easements may be acquired by prescription under -

(i) the doctrine of lost modern grant; or
(ii) the *Prescription Act 1832*.[20]

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14 Public Trustee; *J A McDonald v Hermann* [1968] 3 NSWR 94.

15 *Dalton v Angus* (1881) 6 App Cas 740.

16 Id, 809 per Lord Blackburn.

17 For the measure of damages available see F A Trindade and P Cane, *The Law of Torts in Australia*, (1985) 419-420. Alternatively, or in addition, an injunction may be requested: para 2.5 above.

18 An owner may grant to the adjoining owner a right to have any buildings on the latter's land supported by the former's land. An owner of two contiguous plots may reserve the right to have the building on the remaining plot supported by the other plot when he sells it.

19 English Law Reform Committee, *Acquisition of Easements and Profits by Prescription*, Report No 14 (Cmnd, 1966) 5.

20 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.

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 subsequently lost.[21] The doctrine of lost modern grant was not affected or repealed by the *Prescription Act 1832* which did little more than restate the doctrine in statutory form.[22]

(e) Rules of negligence do not apply

2.11 Where a natural right of 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.[23] This is consistent with the principles generally adopted in the tort of nuisance.[24]

2.12 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

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Easements of support by prescription can be acquired not only in respect of land under the old system but land registered under the *Transfer of Land Act 1893-1982*: *Transfer of Land Act 1893-1982*, ss 4 and 68. See *Di Masi v Piromalli* [1980] WAR 57. An appeal to the Full Court was allowed but on other grounds: *Piromalli v Di Masi* [1980] WAR 173.

The registered proprietor of land under the *Transfer of Land Act 1893-1982* takes subject to any easement of support which has been created by prescription against the land, even though it is not notified as an encumbrance on the certificate of title: *Transfer of Land Act 1893-1982*, s 68. See *Di Masi v Piromalli* [1980] WAR 57.

21 *Dalton v Angus* (1881) 6 App Cas 740. For a more detailed description of the law in this area see footnote 3 to para 2.9 of the Discussion Paper.

22 The differences are explained in Bradbrook and Neave, paras 533-549.

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.

23 *Johns v Delaney* (1890) 16 VLR 729, 732.

24 Fleming, 391-393. Persons other than the landowner could also be liable, if they were responsible for the creation of the nuisance. 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.

carelessly or recklessly.[25] This was confirmed in *Dalton v Angus*.[26] In that case, the House of Lords said that until the adjoining landowner 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.

2.13 The law of prescription thus actually encourages a landowner to withdraw support to buildings newly erected on adjoining land. The landowner can stop the twenty year period running by excavating on his own land so as to withdraw support from the new building on the adjoining land.[27] The notion that an owner can in certain instances deliberately cause damage to his neighbour in these ways without liability is insupportable in modern times, although there seems little evidence of its occurrence.[28]

2.14 In New Zealand on the other hand, the rules of negligence do apply. This was so held by the New Zealand Court of Appeal in *Bognuda v Upton and Shearer Ltd.*[29] The Court argued that, since prescriptive rights to support had been abolished in that jurisdiction by the *Land Transfer Act 1952*, there was no reason why the ordinary rules of negligence should not apply. Turner J said:[30]

> "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

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25 This statement is subject to the exception mentioned in para 2.7 above. (See also footnote 33 to para 2.15 below.)
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; R M Jackson and J L Powell, *Professional Negligence*, (1982) paras 2.11-2.23.

26 (1881) 6 App Cas 740.

27 He will, however, be liable for withdrawing support to the land, as distinct from the building on it: para 2.7 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: ibid.

28 Where an excavating owner is engaged in building activity s 391 of the *Local Government Act* and the Uniform Building By-laws (in particular By-law 12) provide some protection. It may be that failure to observe these requirements can result in civil liability: see para 2.19 below.

29 [1972] NZLR 741.

30 Id, 761.

> 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."

2.15 In Western Australia, as in all other Australian jurisdictions, easements of support can still be created by prescription,[31] so that the New Zealand position is not comparable.[32] It seems therefore that *Dalton v Angus* is still good law in Australia as to the inapplicability of the rules of negligence.[33]

3. COMMON LAW ALTERED IN QUEENSLAND

2.16 In Queensland the common law has been altered by section 179 of the *Property Law Act 1974-1982*, which extends the natural right to support owed by one plot of land to adjoining land to include buildings on that land. The section 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 taken this step. The section implements a recommendation made by the Queensland Law Reform Commission.[34] The Queensland Commission argued that with advances in engineering techniques, an owner both can and

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31 Para 2.10 above.

32 *Stoneman v Lyons* (1975) 133 CLR 550, 567 per Stephen J.

33 The only Australian authority directly in point is *Johns v Delaney* (1890) 16 VLR 729, a decision of the Victorian Supreme Court. It should be noted that Stephen J in *Stoneman v Lyons* (1975) 133 CLR 550, 567 in obiter has thrown doubt on this view. He said that the law as laid down in *Dalton v Angus* was ill-adapted to conditions in modern cities and that "it is at least arguable that, as the law of negligence now stands, the threatened burdening of land with an easement of support in favour of a building next door does not entail the consequence that the owner of the land thus threatened may excavate up to his own boundary regardless of the effect upon his neighbour's building." Accordingly, the High Court may, when the question comes directly before it for decision, qualify the rule in *Dalton v Angus* or even hold that it is no longer applicable.

34 Queensland Law Reform Commission, *Report on Property Law Reform* (QLRC 16, 1973) (hereinafter cited as the "Queensland Report") 101-102.
The recommendation of the Queensland Law Reform Commission was itself based on an earlier tentative proposal of the English Law Commission: Law Commission *Appurtenant Rights*, (Working Paper No 36, 1971). The English Law Commission has not yet submitted a final report on this issue.

should, and in practice almost invariably does, take precautions against damage to his neighbour's building caused by subsidence arising from excavations on his land. Its approach was therefore that good building practice should be converted to a legislative requirement. It also pointed out that the section would have the incidental practical advantage of avoiding the necessity of attempting to distinguish between support for land and support for buildings upon it.

2.17 The new provision also has a further important effect. Before section 179 came into operation, the law in Queensland, as in Western Australia, was that there was no right of support of land by water. Thus, if the effect of drainage on neighbouring land was to cause settlement of an owner's land with consequent damage to buildings, no right of action existed. The Queensland Commission was of the opinion that a right to have land naturally supported by water should be recognized.[35] Although not expressly stated in section 179, the effect of the section is to implement this recommendation.[36]

4. THE COMMISSION'S RECOMMENDATION AS TO RIGHT OF SUPPORT

2.18 The Commission agrees with the arguments advanced by the Queensland Commission and considers them to be equally relevant in Western Australia. This was also the view of most of the commentators.[37] The Commission accordingly recommends the enactment in this State of a provision similar to section 179 of the *Queensland Property Law Act 1974-1982* to extend the right of support which presently exists for land of an adjoining owner to buildings and other structures erected upon that land. In effect, the enactment of such a provision would abolish the present twenty year period at the end of which adjoining owners acquire a right of support to their buildings by prescription.[38] Following Queensland, the provision should be included in the *Property Law Act 1969-1985* of this State.

2.19 There is in Western Australia an additional argument in favour of enacting such a provision. Unlike Queensland, section 391 of the *Local Government Act* already requires an owner of land in prescribed circumstances to take certain steps to prevent a building on

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35 Queensland Report, 102.

36 As the Queensland Commission pointed out, the provision also has the advantage of avoiding the necessity of attempting to distinguish between support derived from water and support derived from silt: ibid. See para 2.6 above.

37 That is, twelve of the sixteen who expressed an opinion on this issue. These included eight local authorities and the Law Society of Western Australia.

38 Paras 2.8 to 2.10 above.

adjoining land from being damaged due to excavation preparatory to building. Breach of the requirement contained in the section for notice to be served on the adjoining owner is an offence[39] but does not in terms impose a civil liability on the adjoining owner. However, it may well be that civil liability is thereby created indirectly.[40] In the Commission's view it is preferable to create the civil obligation directly. Section 391 is discussed in the following chapter.

2.20 Four commentators were opposed to the adoption of the Queensland provision,[41] namely the Institute of Architects, the Institution of Engineers, the Local Government Department and the Master Builders' Association. The Master Builders' Association did not give reasons for its view but the argument of the other bodies was in essence that its adoption would not encourage sound building practice. In their view, buildings should be self-contained within their own site. By this they meant that the footings of a building should be so constructed that the building does not rely for its stability on support from the adjoining land.[42] The Commission does not disagree with the suggestion that self-sufficiency of buildings within the site should be encouraged, but considers that this should be done by appropriate building by-laws and not by the indirect means of absolving the adjoining owner from civil liability whatever the circumstances. Further, the concept of self-sufficiency is a modern one and it would be unfair to impose it on owners of older buildings. In any case the Commission does not consider that adoption of the Queensland provision would be likely to discourage sound building practice. Indeed, in respect of buildings where a prescriptive right of support has been acquired, the position is the same as that proposed.

2.21 An incidental feature of the Queensland provision should be noted. Adoption of the section would not only provide a right of support of buildings by land but also a right of support of buildings by buildings. However, its practical effect in the latter case would be limited, since it would be rare for a building to be supported by a building on adjoining land in a situation where an easement of support did not exist in any case. As Bradbrook and

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39 *Local Government Act*, ss 670 and 671.

40 *Anderson v MacKellar County Council* [1968] 2 NSWR 217 esp 218-219.

41 See para 2.16 above.

42 The Institution of Engineers suggested that it would not be inappropriate to place on an excavating owner the responsibility of maintaining support against the lateral pressure of an adjoining building as distinct from its vertical pressure. However, it may be difficult to determine in a given case the extent to which damage was caused by removal of support to the building's lateral pressure as distinct from its vertical pressure.

Neave point out,[43] in the majority of cases the land and buildings would have been originally owned by one person, resulting in the creation of an implied easement of support on the subsequent subdivision and sale.[44] Where the land was in separate ownership initially, modern building practice and local authority requirements make it most unlikely that a building would be constructed nowadays so as to rely on another building for support.[45]

2.22 The Queensland provision would therefore normally be of significance only in relation to older buildings constructed on separate sites. Even in these cases an easement of support by prescription could in fact have been acquired[46] but it may be difficult to determine whether this was so in a particular case.[47] Accordingly, the Commission considers that it would be simpler, and may avoid costly disputes, to create a right of support of buildings by buildings as well as of buildings by land. Adoption of the Queensland provision would achieve this.

2.23 It is also to be noted that the Queensland provision is limited to creating a right of support to existing buildings. In the Discussion Paper the Commission invited comment on the question whether the object of reform should be to provide support adequate for any building or other improvements which could reasonably be expected to be built on the adjoining land.[48] If the excavating owner is only required to take into account the adjoining land in its existing state, he is advantaged by building before his neighbour. Despite this, the difficulties which would be caused if owners had to anticipate improvements on adjoining land clearly outweigh this consideration. In the interests of simplicity and certainty the

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43 Para 730.

44 In such cases, the law would imply an easement in the absence of an express grant or reservation. It appears that easements implied by law can be created in respect of land under the *Transfer of Land Act 1893-1982* as well as old system land: see *Stevens and Evans v Allan and Armanasco* (1955) 58 WALR 1 and Bradbrook and Neave, para 1137. It also seems that easements implied by law bind the land in the hands of any registered proprietor even though they are not notified as an encumbrance on the certificate: see *Di Masi v Piromalli* [1980] WAR 57 and Bradbrook and Neave, para 1135.
Under modern practice, of course, express easements of support would have been granted and registered at the time of the subdivision. Present day examples are terrace houses involving party walls.
In the case of strata title units, the *Strata Titles Act 1985* expressly creates a statutory easement of support: s 11.

45 The Uniform Building By-laws require the building to be confined within the lot and its external walls to have a prescribed fire rating: see by-laws 1.3 (definition of "site"), 8 and 16. Their effect is to prohibit a building being constructed so as to rely on a building on an adjoining lot for support.

46 Para 2.10 above. An easement of support of one building by another can be acquired by prescription in the same way as the support of a building by land can be acquired: Bradbrook and Neave, paras 504 and 729.

47 Alternatively, there could be argument as to whether the adjoining owners had agreed to create an easement. This was at issue in *Milne v James* (1910) 13 CLR 168, a case involving two adjacent buildings in Murray Street, Perth.

48 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 have made it necessary for the position of a proposed building to be altered due to lack of support.

Commission recommends that excavating owners should only have to support existing improvements on adjoining land.[49] This was also the view of the majority of commentators.

2.24 To some extent, at least, the adoption of the Queensland provision would obviate the need for prescriptive rights of support and it could be argued that they could therefore be abolished. The Commission is reluctant to recommend the abolition of one kind of prescriptive right without considering it in the context of prescriptive rights generally. This is a large and complex subject which extends far beyond the Commission's terms of reference. Accordingly, the Commission makes no recommendation for abolition of prescriptive rights of support. The fact that such rights continue to exist and to be acquired will not in any way be inconsistent with the recommendations made in this report.

5. MAINTENANCE OF RETAINING WALLS

2.25 Withdrawal of support to adjoining land is only actionable when damage occurs as a result of the withdrawal of support. If subsidence is prevented by the use of a retaining wall no cause of action arises.[50] If the owner who constructed the retaining wall later sells his land and the purchaser fails to keep the retaining wall in repair and subsidence occurs due to lack of maintenance by him, he will not be liable to the adjoining owner.[51] The original owner will be liable to the adjoining owner, but may be difficult to find or have no assets.[52]

2.26 The Commission considered whether a provision should be enacted requiring the owner for the time being of land to carry out such repairs as are necessary for the maintenance of support of adjoining property. The requirement could impose an onerous duty of uncertain extent on that owner and go well beyond a duty not actively to withdraw support. The Commission is not satisfied that a change to the common law is justified.[53]

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49 The relevant Uniform Building By-laws, (31.3(2) and 31.6(1)) are discussed in paras 5.14 and 5.15 below. It appears that they require the excavating owner only to support the existing improvements on the adjoining land.

50 Gale, 290.

51 *Byrne v Judd* (1908) 27 NZLR 1106.

52 New Zealand Property Law and Equity Reform Committee, *Report on Positive Covenants Affecting Land*, (1985) 3.

53 It should be noted that some local authorities have made by-laws under s 210 of the *Local Government Act* imposing obligations on owners to maintain fences and walls. However, it is not clear whether the section applies to retaining walls as distinct from free standing walls and fences.

2.27 In any case the adjoining owner is not without remedy. Where a right of support for buildings by the soil of the adjacent plot of land has been acquired as an easement whether by prescription or otherwise,[54] the owner of the buildings is entitled to enter on his neighbour's land and carry out such repairs to the retaining wall as are necessary for the maintenance of the support.[55] The same principle would no doubt apply to the existing natural right of support for land and the statutory right of support for buildings proposed by the Commission above.[56]

54 See paras 2.9 and 2.10 above for the methods by which an easement of support can be acquired.
55 14 Halsbury, *Laws of England*, (4th ed 1975) 89; Bradbrook and Neave, para 153.
56 Para 2.18.

Chapter 3
WITHDRAWAL OF SUPPORT: STATUTORY REQUIREMENTS FOR THE GIVING OF NOTICE

1. SECTION 391 OF THE LOCAL GOVERNMENT ACT: INTRODUCTION

3.1 As pointed out above,[1] section 391 of the *Local Government Act*[2] already provides some protection to the owner of a building against withdrawal of support for the building by an adjoining owner.[3] If the Commission's recommendation above[4] is adopted, namely that a right of support for buildings, maintainable by the owner of the building, be created, section 391 of the *Local Government Act* as amended in accordance with the Commission's recommendations below would be available as a most useful adjunct to that right. In the absence of section 391 an adjoining owner who thought his right of support was likely to be endangered would have the option either to seek an injunction from the court or to allow the works to proceed and sue for any damages which resulted. Section 391 and its associated sections[5] would assist the parties to resolve their differences before the work takes place.

3.2 The Commission outlines below the present scope of section 391 and certain associated sections. It then sets out what it considers to be their limitations and makes recommendations for improvement.

2. OUTLINE OF THE SECTION AND ITS EFFECT

3.3 The section imposes certain duties on an owner of land in relation to alteration of ground levels where that owner intends to erect a building or structure. The section is of particular importance where major excavations are to be effected for multi-storeyed buildings.

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1 Para 2.19.

2 S 391 (reproduced in Appendix III below) was based on s 39 of the *Building Act 1923-1965 (SA)* which in turn was based on s 119 of the *London Building Act 1930 (Eng).* S 39 of the *Building Act 1923-1965 (SA)* has been replaced by s 49 of the *Building Act 1970*-1982 *(SA)* which is in broadly similar terms.

3 Part XV (ss 373 to 435) of the *Local Government Act* does not apply to areas outside cities, towns or townsites: *Government Gazette* of 7 September 1984, 2886. It is unlikely that withdrawal of support would be a practical problem in rural areas.

4 Para 2.18.

5 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).

3.4 The section only comes into operation where an owner (A) intends to erect a building or structure within three metres of a building belonging to an adjoining owner (B) and part of the proposed 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.[6] The notice must be accompanied by a 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 counter notice 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.[7] The referees are empowered to determine the time and manner of executing the work and such other matters as arise out of or are incidental to the difference.[8] The determination of the referees is binding on both parties. If B does not give a counter-notice, A can proceed with the work in the way indicated in his notice to B.

3.5 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.[9]

3.6 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. THE NEED FOR A PROVISION LIKE SECTION 391

3.7 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 and so avoid any potential damage. The adoption of a provision similar to section 179 of the *Queensland Property Law Act 1974-1982* alone would not permit an owner without the consent of his

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6 An owner who contravenes s 391 is guilty of an offence: *Local Government Act*, ss 670 and 671.

7 *Local Government Act*, 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.

8 *Local Government Act*, s 389.

9 Except in the case of an emergency, fourteen days' notice is required: *Local Government Act*, s 390.

neighbour to take these steps[10] and such an owner would have to rely on methods confined to his own land, such as sheet piling, to prevent withdrawal of support to the adjacent building.

3.8 A provision such as section 391 may also help to ensure that the development of land is not discouraged by a neighbouring owner's right of support,[11] particularly as the Commission has recommended that the right be extended to include the support of buildings as well as land.[12]

3.9 Section 391 is most often used where multi-storeyed buildings are being constructed in the central city area of Perth. Enquiries made by the Commission of a number of builders, architects and arbitrators indicate that the provisions of section 391 are not generally availed of where dwelling houses are being constructed, possibly because builders of residential housing are not aware of the provisions.

4. RECOMMENDATIONS

(a) General

3.10 The section at present applies to all developments which come within its terms, whether residential, commercial or otherwise. In the Commission's view this should continue even though the section's main field of use will continue to be in the central business district of Perth and other areas where owners are permitted to build up to the boundary line. While its provisions may seem unduly elaborate for most residential situations the problems which may arise are similar and warrant the same solution.

3.11 There are, however, a number of ways in which section 391 could be improved, as follows.

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10 *Stoneman v Lyons* (1975) 133 CLR 550, 562; *Johns v Delaney* (1890) 16 VLR 729, 739; *Kirby v Chessum* (1914) 30 TLR 660.

11 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 while the excavations are in progress.

12 Para 2.18 above.

(b) Section should apply even if excavator does not propose to engage in building activity

3.12 At present section 391 only applies where the excavating owner intends to build. The same problems and risk of damage to the adjoining owner's building can arise irrespective of the purpose of the excavation.[13] Accordingly, the Commission recommends that the section be extended to cover excavations where the excavator is not engaged in building activity.

3.13 However, as at present, section 391 should not apply where there is no existing building on the adjoining land. The damage which might be done to vacant land can be remedied much more readily than damage to an existing building and the procedures required under section 391 are not warranted in those circumstances.

(c) Distance from adjoining building and depth of excavation

3.14 Section 391 presently applies only where a building owner intends to erect within three metres of a building belonging to an adjoining owner a building or structure a part of which extends to a lower level than the foundations of the adjoining building. The Commission considers that the conditions under which the mechanism provided by the section comes into operation need re-examination.[14] This would in any case be desirable if, as the Commission has recommended above, the section is amended to apply to excavations not associated with building operations. However, the appropriate distances and depths which should be specified in the section are engineering rather than legal questions, in respect of which regard should be had to modern construction practices. The Commission accordingly suggests that the Government obtain expert advice on the question to assist it in determining the most appropriate formula.[15]

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13 Land may be excavated or levelled for other purposes, for example with a view to subdivision for subsequent sale.

14 Submissions to the Commission suggested that in some instances there was a need for the section to apply where the distance was greater, for example, on sloping land.
In conducting the examination, the effect of by-law 33.4(1) of the Uniform Building By-laws should be considered. This by-law (see Appendix II below) regulates the level at which the footings of a new building can be placed in relation to those of an adjoining building. It appears to be aimed at preventing the new building exerting undue pressure on the other, an effect which may otherwise occur even though the foundations of the new building are higher than those of the other.

15 *Building Regulations 1973* (SA), reg 12.5(1) may be a useful starting point, since it covers both cases where the excavation is associated with building activity and cases where it is not. See also s 50 of the *London Building Acts (Amendment) Act 1939 (Eng)* (reproduced in 20 Halsbury's *Statutes of England* (3rd ed 1970) 177).

(d) Fences on adjoining land not to be regarded as buildings

3.15 Section 391 was designed to protect buildings as normally understood and not fences or retaining walls. However, doubt has arisen because of section 6 of the *Local Government Act* which defines building to mean "a structure erected or placed on land, . . . but in any case includes a fence erected in the district of a city or town or in a townsite". Section 391 may therefore apply in the case of a proposal to build within three metres of, or beneath, the level of a fence or retaining wall. The issue accordingly arises as to what should be regarded as a building for the purposes of this section.

3.16 In the Commission's view, fencing should not constitute a building for this purpose, as damage to fencing would usually be of a minor nature and not justify the procedure under section 391.[16] Retaining walls should however be included since, if support for the wall is withdrawn, or the wall is undermined, serious damage to buildings on the adjoining property as well as to the wall could result.[17] The Commission accordingly recommends that section 391 be redrafted to make it clear that "buildings" include retaining walls for the purposes of the section, but not fences.

(e) Length of notice

3.17 Section 391(2) requires "at least thirty-five days notice" to be given to the adjoining owner and this is therefore the minimum delay which may be involved in complying with the section. In the Commission's view this period is unnecessarily long and it recommends that it be shortened to twenty-one days.

(f) Arbitration of disputes

3.18 Where a dispute arises the matter must be resolved in accordance with section 389 which provides as follows -

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16 An owner whose fence is damaged or threatened can still, of course, seek damages or in appropriate circumstances an injunction.

17 It is not clear at present whether a retaining wall is a building within the meaning of s 391.

> "Where between a building owner and an adjoining owner a difference arises in relation to a work in respect of which notice has been given under this Division, the difference is determinable only by referees mentioned in Division 19 of this Part, who have power, by their award, to determine the right to execute, and the time and manner of executing the work, and generally to determine such other matters as arise out of, or are incidental to the difference; but the referees shall not, unless the parties agree otherwise, appoint for the commencement of the work, a time before the expiration of the period which by this Division is prescribed for the notice in the particular case."

3.19 Under section 423 one of the referees is to be appointed by the Governor (on the recommendation of the Department of Local Government) and one by the relevant local authority. This is a time-consuming procedure and seems inappropriate to a private dispute between adjoining land owners.[18] In the Commission's view arbitration of a difference under section 391 should be conducted by an arbitrator agreed to by the parties. Failing agreement within seven days each party should be required to appoint an arbitrator.[19] The arbitrators should in turn be empowered to appoint an umpire. Following the *Commercial Arbitration Act 1985*, the umpire should not be required to sit with the arbitrators[20] and should only become involved if the arbitrators fail to make an award within time or fail to agree on a matter.[21] The Commission recommends accordingly.

(g) Plans which must be served

3.20 Section 391 does not require a person proposing to build to show how he proposes to underpin or strengthen the foundations of the adjoining building. He is only required to serve on the adjoining owner a plan and sections showing the site of the proposed building and the depth to which he proposes to excavate.[22] Accordingly, following Victoria,[23] the Commission recommends that the details to be provided should show the method by which the

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18 The persons with whom the Commission discussed the matter, including an official of the Local Government Department, could not recall the need to appoint such arbitrators having arisen. However, the procedure should be as streamlined as possible should the need to arbitrate arise.

19 The arbitrators would have all the powers of an arbitrator under the *Commercial Arbitration Act 1985* (to come into force on 1 April 1986): *Local Government Act*, s 425(b). The arbitrators would also have power to award costs: id, 430(1)(b).

20 *Commercial Arbitration Act 1985*, s 12(2).

21 Id, s 16.

22 *Local Government Act*, s 391(2).

23 S 147(1)(b) of the *Building Control Act 1981-1984* (Vic) requires service of "details of the protection works to be carried out".

underpinning or strengthening of the foundations of the adjoining building or other means of supporting of the adjoining owner's land and buildings is to be carried out.

(h) Is the *Local Government Act* the appropriate place for section 391?

3.21 The Commission has recommended above that the proposed statutory easement of support for buildings be included in the *Property Law Act 1969-1985*. Section 391 and its associated sections would be an adjunct to this new provision. They have nothing to do with local government as such. Accordingly it recommends that these sections, amended in accordance with the recommendations above, should be transferred to the *Property Law Act 1969-1985*.[24]

[24] If, in the future, the Government considers that legislation dealing with building should be consolidated in one enactment, the provisions could be incorporated in that legislation.

Chapter 4
FALL OF SOIL, DRAINAGE PROBLEMS AND OTHER MATTERS

1. FALL OF SOIL - THE COMMON LAW

4.1 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,[1] and also probably in nuisance where the inconvenience to the adjoining owner is unreasonable and substantial.[2] A banking up of soil against an adjoining building may also be a trespass even though the soil does not actually fall on to the neighbour's land.[3] This would provide a remedy in the city where an adjoining owner's building is on the boundary. Thus, unlike the common law in relation to excavation, the common law in this area appears generally to be adequate. However, its enforcement in small and isolated cases may make it inconvenient, slow and relatively expensive. The question of the by-law making powers of local authorities to deal with fall of soil is dealt with in chapter 5 below.

2. DRAINAGE - THE COMMON LAW

4.2 As mentioned in chapter 1, the flow of natural drainage water may be altered by the alteration of ground levels, whether by excavation or by filling. Diversion of water onto an adjoining owner's land is actionable at common law. Whether it is actionable to add filling to one's land so as to cause subterranean water to be forced out of it onto adjoining land[4] would appear to depend on whether or not the act of filling was a natural use of the land.[5] It seems that filling of land in such a way as to stop the movement onto it of surface water which has fallen on adjoining land, and thereby flooding the adjoining land, is not actionable.[6]

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1 That is, if the owner either intended to move soil onto the adjoining owner's land or if soil was deposited on that land because of his negligence: Fleming, 36-39.

2 Fleming, 384-388.

3 *Westripp v Baldock* [1938] 2 All ER 779. The special case of a fall or bank-up of soil damaging a dividing fence is also dealt with in para 7.10 below.

4 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.

5 34 Halsbury, *Laws of England*, (4th Ed 1980) para 317. The act of filling may only be actionable if it was not a natural use of the land. There do not appear to be any decided cases on the point.

6 Clerk and Lindsell, para 8-19.

4.3 In chapter 5 below, the Commission recommends an extension of the by-law making powers of local authorities to allow them to regulate the alteration of ground levels to overcome drainage problems.

3. PRIVACY, VIEWS, SUNSHINE, TRAFFIC HAZARDS AND OTHER PROBLEMS

4.4 An alteration of ground levels - whether by excavation or by filling - can affect the views and privacy of adjoining owners. The filling of the block of land, or part of it, to gain a view for one owner, can obstruct the views from, or diminish the privacy of, the adjoining land.[7] The direct flow of sunshine onto the adjoining land could also be affected.[8] The common law does not provide any remedy to the adjoining owner in these situations.[9] However, a landowner may through negotiation with a neighbour obtain a restrictive covenant which in effect protects views or privacy or other attributes.[10]

4.5 These matters are outside the Commission's terms of reference, as are questions of traffic hazard, aesthetic appearance and similar problems which may arise from such alterations of ground level.[11] In the Commission's view all these matters are better controlled through town planning schemes, and to some extent this is already occurring.[12]

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7 *The Daily News*, 10 September 1985 and the *Melville Gazette*, 28 October 1985 reported separate incidents where the placing of fill on land resulted in a loss of privacy to the owners of adjoining land.

8 A special town planning amendment in the Shire of Wanneroo will protect certain rights to sunshine in a new housing estate: *The Australian*, 13 December 1985.

9 Aldred's Case (1610) 9 Co Rep 57b, 58b; *Palmer v The Board of Land and Works* (1875) 1 VLR(E) 80; *Browne v Flower* [1911] 1 Ch 219. The common law did enable the acquisition of a prescriptive easement to light (as distinct from sunshine) but this has been abolished: *Property Law Act 1969-1985*, s 121.

10 A subdivider may also place restrictive covenants on each lot which would have the effect of protecting views or privacy of purchasers.

11 Problems about privacy, views, appearance, sunlight etc between adjoining owners are not of course confined to alterations of ground levels. The placing of a second storey on a single-storey residence raises the same issues as raising the ground level by a similar height.

12 Clause 5.7 of the City of Nedlands Town Planning Scheme No 1 (*Government Gazette* of 8 April 1983, 1137) was used by the City in 1983 to reject the building plans for a proposed three-storeyed house in Jutland Parade, Dalkeith. Under this clause the council in determining an application for development in specified parts of the City of Nedlands was required to 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 was empowered to refuse approval, or impose conditions, if it considered the amenity of the area might be detrimentally affected by the proposal. Further, the council could not permit a change in natural ground level or a retaining wall of more than 2 metres in height, unless it was satisfied that the change in level would not affect the amenity of the area or the neighbouring properties. Similar provisions now are to be found in the new town planning scheme: City of Nedlands Town Planning Scheme No 2 (*Government Gazette* of 18 April 1985), clauses 5.5 and 5.10.

Under the City of Subiaco's Town Planning Scheme No 3 (*Government Gazette* of 30 March 1984, 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 their height to preserve views, privacy on adjacent lots or preventing 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).

Part III: Regulation by local authority

Chapter 5
BY-LAWS

1. INTRODUCTION

5.1 The common law right of support of land from neighbouring land gives remedies which normally only arise when damage has occurred as a result of the withdrawal of support.[1] This will continue to be the case if the right of support is extended to buildings by the adoption in this State of a provision in terms of section 179 of *Queensland's Property Law Act 1974-1982*, as recommended above.[2] Similarly, common law remedies in relation to the fall of soil on adjoining land can normally only be exercised after the fall has taken place and damage suffered.

5.2 As pointed out in chapter 3,[3] one of the aims of section 391 of the *Local Government Act* is to impose requirements which will reduce the likelihood of problems arising in the first place. However, even if section 391 is amended in accordance with the recommendations set out in chapter 3, practical reasons, such as the failure of the excavating owner to give the required notice, may prevent the provision operating in a particular case. Moreover, the section applies only where there is a building on the adjoining land.[4]

5.3 In the Commission's view there is also a need for more detailed regulation by local authorities in this area, both to complement the remedies referred to above and to provide specific requirements where appropriate. The *Local Government Act* confers on local authorities certain powers to make by-laws which can affect adjoining property. Further, in some circumstances ground levels may not be altered until the local authority has issued a building licence.

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1 Para 2.4 above.
2 Para 2.18 above.
3 Para 3.7.
4 In para 3.13 above the Commission recommends the continuance of this limitation. It also recommends that fences (as distinct from retaining walls) should not be deemed to be "buildings" for the purposes of the section: para 3.16 above.

5.4 This chapter outlines existing by-law making powers and the uniform general by-laws made under those powers. It then recommends certain changes to the by-law making powers and to the by-laws themselves. The question of the circumstances in which a licence should be required before ground levels may be altered is dealt with in chapter 6.

2. EXISTING BY-LAW MAKING POWERS

(a) Powers of local authorities

5.5 Section 433 of the *Local Government Act* gives local authorities certain powers to make by-laws governing alterations of ground levels.

5.6 Section 433 is preceded by a heading "By-laws relating to Building and Buildings". The relevant subsections of that section are (1), (22), (27) and (38) which 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."

5.7 Although these provisions do give local authorities some power to make by-laws controlling alteration of ground levels and, in the process, to protect adjoining property from the effects of excavation or filling, the power is limited. Section 433 is confined to matters arising out of the construction or demolition of a building or the performance of other

building work, and thus does not give power to make by-laws regulating alterations of ground levels not related to building.[5]

(b) Uniform Building By-laws

5.8 Under section 259A of the *Local Government Act* the Governor may, if authorised by a section of that Act, make uniform general by-laws for any of the purposes mentioned in the authorising section. When such by-laws are made they apply throughout the State except in those districts, or parts of districts, which the Governor may by order specify, and override any inconsistent by-laws made by a local authority. Section 433A of the *Local Government Act* authorises the Governor to make uniform general by-laws for any of the purposes for which by-laws may be made under Part XV of the Act. This has been done and the by-laws are known as the Uniform Building By-laws.[6] They apply throughout the State except in certain rural areas.[7] It is important to note that the scope of the Governor's power to make uniform general by-laws under section 433A is no greater than that available to local authorities themselves.

3. EXISTING UNIFORM BUILDING BY-LAWS

5.9 The Uniform Building By-laws contain by-laws governing alterations of ground levels in the context of building operations. Depending on the circumstances of the particular case the application of a particular by-law may or may not affect an adjoining owner. The relevant by-laws are 12.3, 12.4, 31.1, 31.3, 31.6 and 31.7.[8] These are outlined in the following paragraphs.

(a) By-laws 12.3 and 12.4

5.10 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.

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5 S 248 of the *Local Government Act* may empower a local authority to make a town planning by-law which would incidentally regulate alteration of ground levels: see footnote 12 to para 1.14 above.

6 The Commission has assumed that these by-laws are within the power conferred by s 433 of the *Local Government Act*.

7 They do not apply at all in the districts of certain country shires and do not apply in parts of the districts of certain other country shires: Order in Council published in *Government Gazette* of 7 September 1984, 2884.

8 These by-laws are set out in Appendix II.

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 is necessary to ensure stability. Under by-law 12.4, an excavation for a building must be properly guarded and protected and where necessary sheet piled to prevent caving in of the adjoining earth or pavement.

5.11 A person who breaches any of the provisions of by-law 12.3 or 12.4 is liable to a penalty not exceeding $400.[9]

(b) By-laws 31.1, 31.3, 31.6 and 31.7

5.12 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.

5.13 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.

5.14 By-law 31.3(1) 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. According to by-law 31.3(2) 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.

5.15 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 bads that may be exerted on them from within the site or from any required support to adjoining ground. It seems that, if the

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[9] Uniform Building By-laws 1974, by-law 4.1. The same penalty applies by virtue of by-law 4.1 for breach of by-laws 31.1, 31.3, 31.6 or 31.7. As the penalty of $400 was fixed in 1974, the amount may need to be reconsidered.

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.[10]

5.16 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.

5.17 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. Such 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.[11]

(c) Power to require a certificate

5.18 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.[12]

(d) On whom duty is placed

5.19 The by-laws set out in Appendix II below (including those outlined above[13]) do not identify the person on whom the duty is placed.[14] In *Stoneman v Lyons*,[15] the High Court held

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10 It should, however, in this situation be capable of supporting the adjoining ground.

11 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. (The angle of repose is the angle at which the soil will settle. The angle is lower for sand than for gravel.)

12 Uniform Building By-laws, by-law 43.2. The certificate must certify that when completed the construction will be structurally sound and must set out in detail the basis 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.

13 That is paras 5.10 and 5.12 to 5.17.

14 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".

15 (1975) 133 CLR 550.

that a regulation[16] very similar to by-law 12.3(1) of the Uniform Building By-laws imposed a duty on the builder, not the building owner. Stephen J said (at 568) 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."

It seems therefore that the duty created under by-law 12.3(1) of the Uniform Building By-laws is imposed on the builder. Indeed, all the duties created by the by-laws set out in Appendix II seem to be primarily imposed on the builder though some appear to impose a duty on the building owner as well.[17]

4. SUGGESTED IMPROVEMENTS TO EXISTING UNIFORM BUILDING BY-LAWS

(a) When a retaining wall should be built

5.20 The Shire of Mundaring informed the Commission that in some cases builders do not inform clients of the need for retaining walls before a building contract is signed, and that later when the Shire imposes on the building licence a condition that retaining walls be constructed, the owner may not immediately have available the extra funds needed for their construction. As a result, the owner and builder often agree that construction of the dwelling will proceed but that the owner will provide the retaining wall at a later date. However, in many such cases the wall is not subsequently built or the owner builds one "which cannot be approved or is not suitable for the purpose intended, for example, railway sleeper construction".[18] The Shire of Kalamunda made a similar complaint.

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16 *Uniform Building Regulations* (Vic), reg 1604.

17 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.
Under s 401 of the *Local Government Act* the local authority can require either the builder or the owner to rectify anything in the construction of the building which is not in conformity with the approved plans, the Act or relevant by-laws.

18 The local authority may ultimately construct the retaining wall itself and sue for the expenditure: *Local Government Act*, s 401. However, the procedure involves a number of steps, including the obtaining of an order of a court of petty sessions.

5.21 In the Discussion Paper, the Commission sought comment on whether local authorities should have power to require the construction of a permanent retaining wall (or the provision of another approved method to prevent movement of the soil) before construction of the building is commenced. Whether a local authority at present has this power is not clear. It could be argued that the fact that a local authority has power to require temporary sheet piling under by-law 12.4 of the Uniform Building By-laws indicates that those by-laws do not empower the authority to require the construction of a permanent retaining wall at that stage, even to prevent possible future damage to the adjoining owner's land.[19] However, a local authority may have power, under section 374 of the *Local Government Act*, to impose a condition on the building licence that a retaining wall be built at a specified stage.[20]

5.22 The majority of those who commented on the issue considered that local authorities should have power to specify the stage at which retaining walls should be constructed or other methods to prevent movement of soil utilised. The Master Builders' Association and the Institute of Architects were among those who opposed the suggestion. The Master Builders' Association argued that there were sometimes strong practical reasons why construction of retaining walls should not proceed in advance of other building work, for example, where access to the site would be restricted by their early construction, thus adding to time or cost. The Institute of Architects submitted that such a provision would impose undue constraints on the builder by requiring work to be done in a specific order and could result in retaining walls being constructed to a much greater strength to accommodate the building operations rather than the finished soil loadings only.

5.23 After taking into account the views expressed by commentators, the Commission has concluded that in some instances the only way a local authority can in practice ensure that an adequate retaining wall is constructed is to require that it be built first. In order to clarify the matter, the Commission considers that the Uniform Building By-laws should make express provision in this regard. Accordingly, the Commission recommends that the by-laws should be amended expressly to empower a local authority to require the construction of a retaining wall (or the provision of another approved method to prevent movement of the soil) at

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19 The Commission has been informed that local authorities differ among themselves as to whether they have power to determine the stage at which the wall must be built.

20 It would seem that under the New South Wales *Local Government Act* 1919-1985, a local authority can impose such a condition if it is a reasonable requirement: *Smith v Wyong Shire Council* [1970] 1 NSWR 23. The Commission has been unable to find any decision of a Western Australian court on this point.

whatever stage the authority specifies.[21] However, in making a determination pursuant to this power, the local authority should be required to have regard to the question whether the retaining wall or other approved method of retaining the soil would unduly impede access to the site or otherwise unreasonably increase the cost of the project.

5.24 Another proposal made to alleviate the problem was that the Uniform Building By-laws be amended so as expressly to place on the builder the responsibility to ensure that a required retaining wall is constructed, whether or not he had contracted to construct it.[22] Most commentators on the suggestion were opposed to it. The proposal would result in some builders being forced into expense which they might not be able to recover from the owner and the Commission does not recommend its adoption.

(b) The load to be supported

5.25 In paragraph 2.23 above, the Commission expressed the view that an owner who excavates his land should be required to support existing improvements on adjoining land but not possible future improvements. The Uniform Building By-laws express the same principle in respect of by-laws governing excavations.[23]

5.26 The Commission recommends that the By-laws be amended to make this clear. It also recommends that the same principle be adopted in by-laws which it proposes below should govern excavations not relating to building.[24]

(c) By-law 31.3(1) to be extended to embankments

5.27 As mentioned above, by-law 31.3(1) 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. Embankments are not expressly covered by by-law 31.3(1) and it may not apply to them. The Commission

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21 This recommendation is not intended to effect any change in the law as to the circumstances in which a local authority can require a retaining wall to be built. The recommendation is directed merely towards the stage at which that requirement can apply.

22 Discussion Paper, paras 3.58, 4.1, 4.7 and 7.1(9)(c),

23 Paras 5.14 and 5.15 above.

24 Paras 5.34 to 5.39.

recommends that the by-law be redrafted so that it expressly refers to these embankments in the same way that it refers to excavations.[25] This is to ensure that soil used as filling does not extend over the boundary or damage dividing fences.[26]

(d) By-law 31.3(2) to be clarified as to durability of retaining walls

5.28 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.[27] A commentator drew attention to a case in which the adjoining owner had constructed a timber retaining wall[28] which the commentator claimed was not of sufficient durability. The local authority had, nevertheless, approved the wall.[29]

5.29 A local authority should, of course, have regard to the length of time for which the wall will be required, and no doubt would normally do so. However, there would seem to be advantage in clarifying the by-law to make this a specific requirement to overcome any dispute as to the meaning of durability in this context. The Commission accordingly recommends that the by-law should be amended to require the local authority, in making a determination as to the durability of material proposed to be used as a retaining wall, to have regard to the likely period for which the wall will be required.[30] The authority should be expressly empowered to require the submission of a certificate as to durability from a structural engineer or other appropriate person.

(e) By-law 31.6(1) to be extended to cover erosion from other causes

5.30 A building owner using the slab-on-ground method may initially comply with the requirement as to the angle of repose on the side of an embankment or on the face of an

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25 It could be argued that the phrase "wherever the soil conditions so require" would empower a local authority to require the provision of a retaining wall or other approved method to prevent movement of soil down the slope of an embankment. However, it seems preferable to clarify the by-law in the manner recommended.

26 Many complaints have come to the Commission's notice of improperly contained filling causing such damage.

27 Prior to 1974, the Uniform Building By-laws 1965 required retaining walls to be built either of masonry or reinforced concrete.

28 The wall was constructed of new jarrah sleepers supported by creosoted uprights.

29 The local authority had obtained an engineer's certificate before approving the wall.

30 The Shire of Wanneroo suggested that the local authority should have power to control the aesthetic appearance of retaining walls. It said that adjoining properties have sometimes been devalued because of the ugliness of the style or the materials used. This aspect is outside the terms of reference. The matter might, however, be appropriately dealt with in the context of town planning: para 4.5 above.

excavation,[31] but through lack of maintenance or due to pedestrian or other traffic permit sand from the embankment or excavation to be forced up against a dividing fence or onto adjoining land. In some cases sand fill has been a metre high against the side of an asbestos fence.

5.31 By-law 31.6(1) already requires 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. To overcome the problem outlined in the preceding paragraph the Commission recommends that the by-law be extended so as to empower the local authority also to require the embankment or the excavation to be protected from erosion through any other cause. Since the word "building" in the *Local Government Act* includes a fence[32] the amendment would enable the local authority to ensure that boundary fences were adequately protected against damage.[33]

(f) Circumstances in which information as to ground levels should be supplied to the local authority

5.32 By-law 8.2(1)(a) provides that the drawings submitted to the local authority's building surveyor must, among other things, show the levels of ground. By-law 8.2(5) provides that, where any alteration is proposed to the existing conformation of the ground on the site involving earthworks, the local authority may require the drawings to show all levels, both old and new, clearly indicated by contour lines or in such manner as the council may direct. The Discussion Paper sought comment on whether, because of the advent of the slab-on-ground method of building and the cutting and filling often associated with it, it would be more satisfactory if the by-laws themselves specified the circumstances where levels must be provided.[34]

5.33 After further consideration in the light of the comments the Commission is of the view that no sufficient case for change can be made out, and that it should continue to be left to the discretion of the local authority whether to require detailed information as to levels. However, the Commission adopts the suggestion of the Master Builders' Association that by-law 8.2(5) should refer to "existing" and "proposed" levels rather than to "old" and "new"

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31 See by-law 31.3(1) discussed in para 5.27 above.
32 *Local Government Act*, s 6.
33 Most commentators agreed with this proposal.
34 Discussion Paper, paras 3.53 and 7.1(7).

levels to avoid confusion with earlier alterations to levels. The Commission recommends accordingly.

5. THE EXTENT TO WHICH EXISTING POWERS TO MAKE BY-LAWS SHOULD BE WIDENED

5.34 In the Discussion Paper, the Commission sought comment on whether the existing powers of local authorities under the *Local Government Act* should be widened to empower local authorities to make by-laws regulating all excavation or filling of land and, if so, whether there should be any limitation on that power.[35] If the powers were extended the aim would be to permit regulation of alterations of ground level outside the building context.

5.35 Fourteen commentators, including eight local authorities, were of the view that the existing powers should be widened, though some suggested limitations. The Shire of Harvey, for example, submitted that there should only be power to make by-laws regulating excavation or filling of land where the excavation or filling exceeds 600 millimetres or will affect an adjoining lot.

5.36 Only two commentators, the Institute of Architects and the Law Society, opposed any extension. The Institute expressed concern at the escalating responsibilities being placed on local authorities and argued that disputes resulting from alteration of ground levels not covered by existing by-laws should be determined in civil litigation between the landowners involved. The Law Society's submission was on similar lines. In its view, the main role of local authorities should be to ensure good urban management.

5.37 In the Commission's view, these submissions have some force. However, by-laws present a practical means of reducing the likelihood of disputes arising and, to that extent, have a proper role. Nevertheless, the power to make by-laws should not be unlimited. The Commission considers that the power should be confined to cases where the use of adjoining land or buildings may be impaired, where the safety of those using adjoining property or members of the public could be endangered or where the stability of any building, fence or structure could be affected.

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35 Discussion Paper, para 7.1(6).
The Commission is concerned in this report with alterations of ground level which have a physical effect on the adjoining land. Alterations which affect the view or privacy of adjoining owners are outside its terms of reference: paras 4.4 and 4.5 above.

5.38 The Commission accordingly recommends that the *Local Government Act* be amended to empower the making of by-laws regulating alterations of ground levels where -

(a) the safety of adjoining land (including any buildings, structures or erections on it) either for users of that land or to the public;

(b) the stability of any building,[36] structure or erection on the adjoining land; or

(c) the use of adjoining land or buildings

could be substantially and adversely affected.

5.39 This approach is based on the Commission's view that there should be power in local authorities (derived either through uniform by-laws[37] or by-laws made by the local authority itself) to regulate excavation or filling but only where the interests of adjoining owners are likely to be substantially affected.[38] It would be undesirable for local authorities, and may unduly strain their resources, if they were given responsibility to safeguard against minor incidents. These should remain in the province of private law.

6. SPECIAL CASE OF DRAINAGE

5.40 The private law remedies available to an adjoining owner in matters of drainage are set out above.[39] These are limited.[40] The question therefore arises as to the powers of local authorities to regulate excavating or filling which affects the drainage of adjoining land, and

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36 The word "building" is intended to include a fence: para 5.31 above. A by-law could thus be made to regulate the filling in of the area between an embankment and a boundary fence after the building has been completed. The Commission received a number of complaints that the building owner or subsequent purchaser, by subsequent filling in, had caused the boundary fence to lean in an unsightly way or even become potentially dangerous. Local authorities appear to lack power under the Uniform Building By-laws to regulate subsequent filling in.

37 The Commission recommends in para 5.43 below that such by-laws should where feasible be made as uniform general by-laws.

38 The State Planning Commission's power to approve new subdivisions may take care of some of the problems associated with alteration of ground levels. However, the Commission considers that specific by-laws should be promulgated to enable local authorities to regulate alterations of ground levels where subdivision is not involved.

39 Para 4.2 above.

40 Adoption of the Commission's recommendation in para 2.18 above would give an adjoining owner additional protection where subterranean water is withdrawn so as to cause his land to subside.

whether those powers should be extended. There are a number of provisions in the *Local Government Act* relating to drainage,[41] but these appear to relate principally to the power of local authorities to construct drains or prevent obstruction to drains. In particular, none appear to give local authorities specific power to regulate alterations of ground levels where the alteration would prevent water draining from adjoining land, or cause the water table of adjoining land to rise.[42]

5.41 Section 433 of the *Local Government Act* empowers local authorities to make by-laws in connection with building construction. Subsection (28) of that section empowers a local authority to make by-laws for requiring, and prescribing, the method of storm water drainage from a building or building site. However, this would not appear wide enough to enable a local authority to require the building owner to construct a drain to carry away surface water which would otherwise accumulate on adjoining land.[43] Further, it would not cover alteration of ground levels not associated with building.

5.42 In the Commission's view it is not in the general public interest that adjoining land should be detrimentally affected, or rendered unusable, by an owner excavating or filling his land for whatever purpose.[44] The Commission accordingly recommends that the *Local*

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41 See ss 220 (power to make by-laws prohibiting erection of buildings on specified land which cannot be drained); 277(2) (power to agree with owner of land to construct a drain); 315 (power to construct drains); 338 (power to require person to remove obstruction from a drain); 339 (power to require person to remove obstruction which interferes with natural flow of surface water so as injuriously to affect road or street); 341 (requiring owner to instal pipe to convey water from eaves to approved drain); 365 (power to construct surplus water drains); 366 (creating offence of constructing unauthorised drain); 367 (power to lay drain from private building); 368 (power to drain or fill up land in certain cases); 369 (power to recover cost of drainage works from owner); 370 (power to require owner to make annual payments where value of land is increased due to local authority drainage works).
There are also provisions in the *Health Act 1911-1985*, the *Metropolitan Water Supply, Sewerage and Drainage Act 1909-1985*, the *Land Drainage Act 1925-1985* and other legislation which relate to drainage but none appear to give local authorities general power of the type contemplated.

42 As in the case of other problems referred to in this report arising out of alteration of ground levels, problems associated with drainage could probably be dealt with in the case of new subdivisions by the State Planning Commission imposing suitable conditions on its approval of the subdivision. However, there is a need for a power where no subdivision is involved.

43 There are a number of by-laws in the Uniform Building By-laws which relate to drainage of building sites: see, for example, 31.2(1), 31.2(3), 31.3(1) and 44.3 reproduced in Appendix II.
The Shire of Wanneroo pointed out that large parcels of land are now often recontoured before being subdivided into smaller lots for sale. Where this occurs it is essential that any applicable by-laws be drafted so as to regulate the drainage of the site after recontouring, since this is the relevant level for that purpose. A case of possible ambiguity in this respect is by-law 44.3, which enables a local authority to require a system of drainage of a building site without specifying that this means the recontoured surface. No doubt the draftsman will bear the Shire of Wanneroo's suggestion in mind in any revision of the existing by-laws or in formulating any additional by-laws.

44 Instances have been brought to the Commission's attention where filling of low-lying land has caused water to accumulate on adjoining land.

Government Act be amended to empower the making of by-laws to regulate the alteration of levels of land generally where the drainage, or water table, of adjoining land would thereby be changed so as to affect that land detrimentally to a substantial degree. Such power should enable the local authority to require appropriate drainage works or other action to be undertaken to minimise damage. The power should also extend to enabling the local authority to require an owner to obtain a licence before altering the level of his land.[45] Where a licence is required, there should be a right of appeal to the Minister along the lines of section 374(2)(a) and (b) of the *Local Government Act*.

7. DESIRABILITY OF UNIFORM BY-LAWS

5.43 The Commission recommends that, as with existing by-laws in this area, any by-laws made under the powers recommended in paragraphs 5.38 and 5.42 above should be uniform general by-laws made by the Governor pursuant to the *Local Government Act*.[46]

5.44 The advantage of so doing is that uniform provisions operate throughout the State, or at least in such parts of the State as are desirable. Unnecessary local variations can cause inconvenience and cost and should be avoided.

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45 The Commission does not envisage that a licence should be required for every alteration of a ground level in every part of the authority's district. A licence should normally be required only in cases where drainage is likely to be a significant problem, such as the filling of low-lying land.

46 It would be necessary to ensure that the Governor had power to make uniform general by-laws in the area concerned: para 5.8 above.

Chapter 6
REQUIREMENT OF A LICENCE

1. OUTLINE OF PRESENT REQUIREMENT AND ITS EFFECT

6.1 Under section 374(1) of the *Local Government Act* 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.[1] 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.[2]

6.2 The Uniform Building By-laws provide that a builder may not commence to construct a building or alter, add to, repair or underpin, or commence any earthworks necessary for or incidental to that construction until the local authority has issued a building licence.[3] The By-laws also provide that the plans submitted to the council must, among other things, show the levels of ground.[4] They further 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 new and old, clearly marked or indicated by contour lines or in such other manner as the council may direct.[5]

6.3 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.[6] A building licence can be relevant

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1 There is a right of appeal against a refusal to approve the submitted plans and specifications: *Local Government Act*, s 374(2).

2 *Local Government Act*, s 374(1).

3 By-laws 8.1(1) and 8.4.

4 Uniform Building By-laws 1974, by-law 8.2(1)(a)(vii).

5 These provisions are discussed in paras 5.32 and 5.33 above.

6 Under by-law 31.7 (para 5.17 above), the council can fix guidelines for earthwork referred to in Part 31, determined by it to be appropriate to local conditions.

not only in the context of withdrawal of support to adjoining land but also to fall of soil onto adjoining land.[7]

6.4 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.[8]

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

2. ALTERATIONS OF GROUND LEVELS NOT ASSOCIATED WITH BUILDING ACTIVITY

6.6 In paragraphs 5.34 to 5.39 above, the Commission discussed the extent to which the existing powers of local authorities to make by-laws should be widened. At present, a licence is only required for earthworks associated with building activity. The Commission recommended that in addition to their existing powers, local authorities should be empowered to make by-laws regulating alterations of ground levels where -

(a) the safety of adjoining land (including buildings, structures or erections on it) either for users of that land or to the public;

(b) the stability of any building, structure or erection on the adjoining land; or

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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 a right of appeal to the Minister for Local Government against a refusal to approve the submitted plans and specifications: *Local Government Act*, s 374(2).

7 It seems, however, 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: *West Australian Trustee Executor and Agency Company Ltd 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.

8 *Local Government Act*, 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.

(c) the use of adjacent land or buildings

could be substantially and adversely affected.

6.7 The Commission has also considered whether a licence should be required for those alterations of ground levels not associated with building activity which fall within the extended by-law making powers so recommended.

6.8 Most problems resulting from alterations of ground levels arise in the course of building activity for which a licence is already required. In other cases, as has been seen, the adjoining owner is afforded considerable protection by the common law. This protection will be increased if the Commission's recommendations in Chapters 2, 3 and 5 above are implemented.

6.9 Except in the special case of drainage,[9] the Commission does not consider that a licence for alterations of ground levels not associated with building activity should be required. The requirement of a licence for building activity is well known, and readily accepted, within the community and excavation or filling can be readily controlled through that mechanism. However, to extend the mechanism beyond building would bring a whole new range of activity within that process and would increase significantly the extent of local authority regulation. Moreover, it would place a significant burden on local authorities and raise difficult questions of the minimum level of alteration required before a licence had to be applied for. Accordingly, the Commission does not recommend any change to the present law governing licences for alterations of ground levels.

9 Paras 5.40 to 5.42 above.

Part IV: Miscellaneous matters

Chapter 7
FENCING AND BOUNDARY WALLS

1. INTRODUCTION

7.1 In this chapter the Commission discusses a number of consequential issues in respect to fencing and boundary walls.

2. SWIMMING POOL FENCING

7.2 If an owner raises the level of his land so that the fencing on adjoining land no longer complies with the swimming pool fence requirements under the Uniform Private Swimming Pool By-laws[1] the adjoining owner or occupier is obliged to carry out the work necessary to ensure continued compliance with the by-laws.[2] The Commission's tentative view in the Discussion Paper was that the cost of rectifying the situation should be placed instead on the owner raising the level of his land.[3]

7.3 The overwhelming majority of those who commented on this issue agreed, for reasons of fairness. As the activities of the owner who altered the ground levels had created the situation in which the fence no longer complies with the by-laws it is he who should pay for it to be remedied.

7.4 However, the Institute of Architects thought otherwise. It argued that the owner who altered the level of his land had a right to utilise his land in accordance with the building regulations and should not be affected by the fact that his neighbour had a swimming pool on his property. Accordingly, any fencing requirements arising from the existence of the pool

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1 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.

2 Uniform Private Swimming Pool By-laws, by-laws 4 and 5. The By-laws are reprinted in the *Government Gazette* of 23 March 1983, 1023.

3 Discussion Paper, para 5.2.

should continue to be the responsibility of the pool owner. The owner altering his levels should not be put to any greater expense than he would have been if the pool had not existed.

7.5 The Commission considers that the view of the majority of commentators should be adopted, for the reasons they gave. However, from a safety viewpoint it is important to ensure that the work necessary to rectify the fencing deficiency is carried out as soon as possible. Accordingly the Commission recommends that although the obligation to rectify the fence so that it continues to comply with the Uniform Private Swimming Pool By-laws should remain on the owner of the swimming pool,[4] the swimming pool owner should have a right of indemnity from the owner who altered the ground levels.

3. SAFETY FENCING GENERALLY

7.6 The *Local Government Act* provides for safety fencing in a number of different circumstances.[5] Under section 375, a person may not commence an excavation in connection with the construction 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. The Uniform Building By-laws also provide for excavations in relation to buildings to be properly guarded and protected to prevent them being dangerous to life or property. While these provisions seem to cover excavations for building purposes satisfactorily, it was suggested to the Commission that there was insufficient power to deal with the safety aspect of alterations of ground levels not associated with building. The Discussion Paper sought comment.[6]

7.7 In fact, there are a number of provisions which are not dependent on building. Under section 377, a person may not make an excavation on land abutting or adjoining a street, unless authorised under an Act to do so or unless he has first obtained a licence from the local authority and has securely fenced off the area concerned from the street.[7] This section applies whether or not the excavation is for building purposes. Section 336 is also wider in its scope than building operations. It provides that if "there is an excavation . . . in land adjoining a

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4 The recommendation will benefit the swimming pool owner as he may incur a liability in tort to persons who enter onto the land and are injured in the swimming pool regardless of whose responsibility it was to comply with the relevant Uniform Private Swimming Pool By-laws: *Occupiers' Liability Act 1985*, s 5.

5 There is also power to make by-laws in relation to the maintenance of fences and walls: *Local Government Act*, s 210.

6 Paras 5.3 to 5.5 and 7.1(11).

7 Any conditions upon which the licence is granted must be complied with: *Local Government Act*, s 377(1) and (2).

street . . . and the council of the municipality is of opinion that the excavation is dangerous, the council may -

(a) fill in or fence the excavation; or

(b) cause notice in writing to be served on the owner or occupier of the land, requiring him to fill in or securely fence the excavation."

Both sections are, however, confined to excavations on land abutting a street.

7.8 The commentators were unanimously of the view that local authorities should have adequate power to require adequate fencing or other protective measures whether or not the excavation is associated with building or is on land not adjoining a street.[8] The Institution of Engineers and the City of Gosnells suggested that power to impose protective requirements should also apply to filling as well as excavation.

7.9 The Commission agrees with the commentators and recommends that the *Local Government Act* be amended to empower local authorities to impose safety requirements, whether of fencing or otherwise, in relation to alteration of ground levels generally.

4. DIVIDING FENCES ACT 1961-1969, SECTION 15(7)(c)

7.10 Under section 15(7)(c) of the *Dividing Fences Act 1961-1969*, if a dividing fence is damaged by fire or a falling tree due to the owner's neglect that owner is liable. Section 15(8) provides that if the owner liable fails to repair the fence as soon as practicable, the adjoining owner can repair the damage and claim the cost from him. In its report on dividing fences, the Commission recommended that section 15(7)(c) be extended to cover all cases where one owner would be liable at general law for any damage to a dividing fence.[9] Implementation of this recommendation would give an express statutory remedy to an owner in cases where, for

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[8] The Law Society submitted that the existing by-laws and the law as to occupiers' liability provide inadequate protection. It suggested the making of a by-law which would apply where there was a building on adjoining land. In such a case, an owner who excavates to his boundary and supports the adjoining land should be required to erect an adequate safety fence at his own expense.

[9] Western Australian Law Reform Commission, *Report on Dividing Fences*, (1975) paras 50 and 51. The report has not yet been implemented.

example, the adjoining owner has caused or permitted soil to bank up against the fence thereby damaging it.[10]

5. RETAINING WALLS INCORPORATING FENCES

7.11 The *Dividing Fences Act 1961-1969* imposes a liability on adjoining owners whose lands are not divided by a "sufficient fence"[11] or are divided by one in need of repair, to join in or contribute to the construction or repair of the fence. In the event of disagreement there is provision for the court to determine the need for and kind of fence to be constructed and the line upon which it is to be constructed.[12]

7.12 It is sometimes desirable in erecting a dividing fence to build a retaining wall because the soil on one side of the boundary is higher than on the other and then erect the fence on top of the wall. It appears that the *Dividing Fences Act* procedure does not apply to that part of the structure constituted by the wall.[13] In the Commission's view this is unsatisfactory. The Commission accordingly recommends that the *Dividing Fences Act 1961-1969* be amended to provide that where because of the existing or proposed ground levels it is proposed to erect a structure comprising both a retaining wall and a dividing fence so that the two constitute an integral unit, the wall should be deemed to be part of the dividing fence. There may need to be consequential amendments to that Act for this purpose, for example to the definition of "sufficient fence".

7.13 In its report on dividing fences, the Commission recommended that the *Dividing Fences Act 1961-1969* be amended to empower the court to decide on the extent of contribution payable by adjoining owners where there is some imbalance between the parties as to their respective needs or as to the degree of benefit each will receive from the type of fence to be constructed.[14] This would enable the court to determine the contribution by the adjoining owners to the cost of the structure constituted by the retaining wall as well as that of the fence proper.

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10 The owner could utilise the remedy whether or not there was a relevant by-law: see footnote 36 to para 5.38 above. An owner might, for example, have filled the angle of repose of an embankment and thereby put pressure on the fence.

11 See s 7 of *the Dividing Fences Act 1961-1969*.

12 S 9 of the *Dividing Fences Act 1961-1969* lists the matters in respect of which the court may make an order.

13 *Petkovic v Christos* (unreported) Full Court of Western Australia, 21 March 1974, Appeal No 38 of 1973.

14 Western Australian Law Reform Commission, *Report on Dividing Fences*, (1975) para 18

Part V: Summary of recommendations

Chapter 8
SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

CHAPTER 2 - WITHDRAWAL OF SUPPORT: THE COMMON LAW

The Commission recommends that -

(a) A provision be enacted to extend the common law right of support which presently exists with respect to land of an adjoining owner to include buildings and other structures erected on that land.

(paragraphs 2.18 and 2.21 to 2.23)

(b) The provision in (a) above be included in the *Property Law Act 1969-1985*.

(paragraph 2.18)

CHAPTER 3 - WITHDRAWAL OF SUPPORT: STATUTORY REQUIREMENTS FOR THE GIVING OF NOTICE

The Commission recommends that -

(a) Section 391 of the *Local Government Act* be amended to -

(i) Extend it to cover excavations where the excavator is not engaged in building activity.

(paragraphs 3.12 and 3.13)

(ii) Make it clear that, for the purposes of the section, a retaining wall is to be regarded as a building but a fence is not.

(paragraphs 3.15 and 3.16)

(iii) Reduce to twenty-one days the period of notice which the excavator is required to give to the adjoining owner.

(paragraph 3.17)

(iv) Provide for arbitration of disputes under the section by an arbitrator agreed to by the parties and, failing such agreement within 7 days, by arbitrators, one appointed by each party.

(paragraphs 3.18 and 3.19)

(v) Provide that, in addition to the present information which the excavator must give to the adjoining owner, the excavator must show the method by which he proposes to underpin or strengthen the foundations of the adjoining building or otherwise support that building.

(paragraph 3.20)

(b) Section 391 and its associated sections be transferred to the *Property Law Act 1969-1985*.

(paragraph 3.21)

CHAPTER 5 - BY-LAWS

The Commission recommends that -

(a) The Uniform Building By-laws be amended expressly to empower a local authority to require construction of a retaining wall (or the provision of another approved method to prevent movement of the soil) at whatever stage the authority specifies. In making a determination pursuant to this power the local authority should be required to have regard to the question whether the retaining wall or other approved method of retaining the soil would unduly impede access to the site, or otherwise unreasonably increase the cost of the project.

(paragraphs 5.20 to 5.23)

(b) The Uniform Building By-laws be amended to make it clear that an owner who excavates his land should be required to support existing improvements on adjoining land but not possible future improvements. The same principle

should be adopted in by-laws which it proposes should govern excavations not relating to building.

(paragraphs 5.25 to 5.26)

(c) By-law 31.3(1) be clarified so that it expressly extends to embankments.

(paragraph 5.27)

(d) By-law 31.3(2) be amended to require the local authority, in making a determination as to the durability of material proposed to be used as a retaining wall, to have regard to the likely period for which the wall will be required. The authority should be expressly empowered to require the submission of a certificate as to durability from a structural engineer or other appropriate person.

(paragraphs 5.28 and 5.29)

(e) By-law 31.6(1) be extended to empower the local authority to require an embankment or excavation to be protected from erosion from whatever cause.

(paragraphs 5.30 and 5.31)

(f) By-law 8.2(5) be clarified so as to refer to existing and proposed levels instead of "old" and "new" levels.

(paragraphs 5.32 and 5.33)

(g) The *Local Government Act* be amended to empower the making of by-laws regulating alterations of ground levels where -

(i) the safety of adjoining land (including any buildings, structures or erections on it) either for users of that land or to the public;

(ii) the stability of any building, structure or erection on the adjoining land; or

(iii) the use of adjoining land or buildings

could be substantially and adversely affected.

(paragraphs 5.34 to 5.39. See also paragraph 5.26)

(h) The *Local Government Act* be amended to empower the making of by-laws to regulate the alteration of levels of land generally where the drainage, or water table, of adjoining land would thereby be changed so as to affect that land detrimentally to a substantial degree. The power should extend to enable the local authority in appropriate cases to require a land owner to obtain a licence before altering the level of his land.

(paragraphs 5.40 to 5.42)

(i) As with existing by-laws in this area, any by-laws made under the powers recommended in (g) and (h) above should be uniform general by-laws made by the Governor pursuant to the *Local Government Act*.

(paragraphs 5.43 and 5.44)

CHAPTER 7 - FENCING AND BOUNDARY WALLS

(1) The Commission recommends that -

(a) If an owner raises the level of his land so that the fencing on adjoining land no longer complies with the swimming pool fence requirements under the Uniform Private Swimming Pool By-laws, the obligation to rectify the fence should remain on the owner of the swimming pool, but he should have a right of indemnity from the owner who altered the ground levels.

(paragraphs 7.2 to 7.5)

(b) The *Local Government Act* be amended to empower local authorities to impose safety requirements, whether of fencing or otherwise, in relation to alteration of ground levels generally.

(paragraphs 7.6 to 7.9)

(c) The *Dividing Fences Act 1961-1969* be amended to provide that where because of the existing or proposed ground levels it is proposed to erect a structure

comprising both a retaining wall and a dividing fence so that the two constitute an integral unit, the wall should be deemed to be part of the dividing fence.

(paragraph 7.12)

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(2) **The Commission confirms the recommendations in its Report on Dividing Fences that the *Dividing Fences Act 1961-1969* be amended by -**

(a) extending section 15(7)(c) to cover all cases where one owner would be liable at general law for any damage to a dividing fence;

(paragraph 7.10)

(b) empowering the court to decide on the extent of contribution payable by adjoining owners where there is some imbalance between the parties as to their respective needs or as to the degree of benefit each will receive from the type of fence to be constructed.

(paragraph 7.13)

J A Thomson, *Chairman*
H H Jackson
P W Johnston
C W Ogilvie

25 February 1986

Mr R S French was appointed to the Commission on 19 January 1986. As the Commission had by then settled the substantive issues involved in the reference, he considered that it was inappropriate for him to sign the report.

Appendix I

LIST OF COMMENTATORS ON THE COMMISSION'S DISCUSSION PAPER[1]

Australian Bankers' Association (Western Australia)
Boddington Shire Council
City of Bayswater
City of Belmont
City of Gosnells
City of Stirling
Country Shire Councils' Association of WA
Department of Local Government
Law Society of Western Australia
Local Government Association of Western Australia (Inc)
Institution of Engineers, Australia, Western Australia Division
Master Builders' Association of Western Australia
J A McKendry
New South Wales Department of Local Government
J S Purvis
Shire of Harvey
Shire of Irwin
Shire of Kellerberrin
Shire of Murray
Shire of Wanneroo
Shire of Wyndham-East Kimberley
G Stapinski
Country Women's Association of Western Australia (Inc)
Royal Australian Institute of Architects (WA Chapter)
W H Tanner
Town of Albany
Town of Geraldton
Town of Narrogin

[1] One commentator requested anonymity and has therefore not been included in this list.

Appendix II

EXTRACTS FROM THE UNIFORM BUILDING BY-LAWS

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.

Protection of Excavation

12.4 Every excavation for a building shall be properly guarded and protected and shall, where necessary, be sheet piled so as to prevent caving in of the adjoining earth or pavement, and in any case required by the surveyor, sheet piling 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 and 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 an 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 and 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.

Place 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 any adjoining building wall shall be a footing within the meaning of this by-law.

(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 rainwater 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

LOCAL GOVERNMENT ACT, 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.