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. TERMS OF

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]

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 adjoinio 6 -20Hcom fr,D 0j -yTj 33 5. comean304.5ature. In0324 Tls an

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)

(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 d8.75 -21

(b)

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 p0 /F0 8lral right

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-

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.

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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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> 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.

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 Commissioners agree with the arguments advanced by Australian, Queensland and

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

Commission recommends that excavating owners should only have to support existing improvements on adjoining land.

2.27 In any case the adjoining owner is not without remedy. Where a right of support for

Chapter 3

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

(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

> "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

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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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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*

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

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

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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

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.

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]

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).

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.

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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7 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).

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*

(c) the use of adjacent land or buildings

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

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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

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)

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

5.

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)

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 *The*

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

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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:

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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

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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