

Alteration of Ground Levels

Terms of Reference

In 1973 the Commission was invited to examine and report on the rights and obligations of adjoining owners when one alters the ground level of their land, and to recommend such changes to the law as it considered desirable.

Background of Reference

The reference arose out of the concerns of some local authorities that they did not have adequate power to control excavations that 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. The terms of the reference, however, extended to include consideration of both the common law and statutory remedies available to the adjoining owners.

Alterations of ground levels have taken place more frequently since the advent of the concrete slab-on-ground method of construction. On sloping sites the ground on which the slab is to be laid must be levelled first. This means the site must be filled or excavated, or both. Excavation can withdraw support from adjoining land, whilst filling may cause the fall of soil to adjoining land or damage to dividing fences. Excavations required for modern high-rise buildings also create difficulties because they may threaten the support of adjoining buildings. Damage in these situations can be considerable in monetary terms. In addition, alteration of ground levels may affect the natural drainage of water and may also threaten the safety of adjoining owners if, for instance, a safety fence around a swimming pool is rendered inadequate by filling on adjoining land.

In September 1984 the Commission issued a discussion paper to obtain information about the problems resulting from alteration of ground levels and details of the inadequacies in the existing law. The paper discussed possible reforms and invited public comment.

Nature and Extent of Consultation

The discussion paper was distributed as widely as possible amongst interested groups and the general public. The paper attracted comment from a range of persons and organisations including a number of local authorities, the Royal Australian Institute of Architects (WA Chapter), the Institution of Engineers (WA Division), the Master Builders' Association of Western Australia and the Law Society of Western Australia. In preparing its final report the Commission considered all the views expressed. The final report containing the Commission's recommendations was delivered in February 1986.¹

Recommendations

After extensive examination of the issues and consideration of the public submissions, the Commission concluded that both the existing private rights and public controls needed to be extended. The Commission made a number of recommendations summarised as follows:

- The enactment of a provision to extend the common law right of support for adjoining land to include buildings and other structures on that land. This provision should be included in the *Property Law Act 1969* (WA).
- Amendment of s 391 of the *Local Government Act 1960* (WA) to:
 - (a) include excavations not associated with building activity;

¹ Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Project No 44 (1986).

- (b) make it clear that a retaining wall is to be regarded as a building for the purposes of the section but a fence is not;
 - (c) reduce to twenty-one days the period of notice which the excavator is required to give to the adjoining owner;
 - (d) provide that the excavator must inform the adjoining owner of the method by which the excavator proposes to underpin or strengthen the foundations of the adjoining building; and
 - (e) provide for arbitration of disputes.
- Section 391 and its associated sections should be transferred to the *Property Law Act*.
 - The clarification and amendment of the *Uniform Building By-laws 1974 (WA)*. Amendment of the *Local Government Act 1960 (WA)* to extend the powers of local authorities to regulate the alteration of ground levels which could affect the drainage or water table of adjoining land and where the safety, stability and use of adjoining land or buildings could be substantially and adversely affected. As with building by-laws, any by-laws made under the powers recommended above should be uniform general by-laws.
 - If an owner raises the level of their land so that the safety fencing around a swimming pool on adjoining land no longer complies with safety requirements, the obligation to rectify the fence should remain on the owner of the swimming pool, but that owner should have the right of indemnity from the owner who altered the ground level. The *Local Government Act 1960 (WA)* should be amended to empower local authorities to impose safety requirements, whether of fencing or otherwise, in relation to alteration of ground levels generally. Amendment of the *Dividing Fences Act 1961 (WA)* to provide that where 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.
 - Amendment of the *Dividing Fences Act 1961 (WA)*² to:
 - (a) extend s 15(7)(c) to cover all cases where one owner would be liable at common law for any damage to a dividing fence; and
 - (b) 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 needs or as to the degree of benefit each will receive from the type of fence to be constructed.

A comprehensive outline of the Commission's recommendations may be found in chapter eight of the final report.

Legislative or Other Action Undertaken

The Minister representing the Attorney-General confirmed receipt of the final report during Parliamentary proceedings on 12 June 1986.³ There has, however, been no legislative action to implement the Commission's recommendations.

In September 1992 a Working Party, comprised of representatives from private industry and state and local government, reported to the Minister for Local Government in respect of a proposed Integrated Building Act.⁴ The Working Party did not adopt the recommendations of the Commission that the

² This confirmed the Commission's recommendations in its final report on dividing fences, see Law Reform Commission of Western Australia, *Dividing Fences*, Project No 33 (1975).

³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 June 1986, 238 (Mr Peter Dowding, Minister representing the Attorney-General)

⁴ Integrated Building Act Committee, *Integrated Building Act: Report of the Working Party*, 1992.

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common law right of support for land should be extended to buildings. In August 2000 the Department of Local Government released an issues paper on the Review of the *Dividing Fences Act*⁵. The paper identified the issue of alteration of ground levels as a significant and increasing area of concern to be considered further during the review process. The paper represents the most recent statement on the issue of alteration of ground levels and the Commission's recommendations. Proposals have been submitted to the Minister for Local Government with regard to a new Building Act. Whether any of the Commission's recommendations will be implemented in this new legislation is yet to be determined.

Currency of Recommendations

The Department of Local Government has acknowledged that the significant legal and practical problems identified and examined by the Commission in the mid 1980s are continuing and increasing, particularly in large urban areas.⁶ The recommendations of the Commission therefore remain current.

Action Required

The *Property Law Act 1969* (WA) and the *Dividing Fences Act 1961* (WA) should be amended to implement the Commission's recommendations. Drafting instructions may be found in chapter eight of the Commission's final report. The *Local Government (Miscellaneous Provisions) Act 1960* (WA)⁷ should be amended to widen the regulatory powers of local authorities to deal with alteration of ground levels according to the Commission's recommendations. Further consideration may be necessary in relation to these local government recommendations and the possibility of these reforms being implemented as part of the new Building Act.

Priority – Medium

The problems identified by the Commission in its final report are continuing and apparently increasing. Improvement upon the current situation may be attained with relative ease by amending the *Property Law Act 1969* (WA), the *Dividing Fences Act 1961* (WA) and the *Local Government (Miscellaneous Provisions) Act 1960* (WA) in accord with the Commission's recommendations.

5 *Review of the Dividing Fences Act 1961: Issues Paper*, Department of Local Government, 2000.

6 *Ibid.*

7 The *Local Government Act 1960* (WA) was amended and renamed by the *Local Government Act 1995* (WA).