FACT **SHEET**

Section 177 of the Conveyancing Act 1919 (Law of Support)

In 2000 the NSW *Conveyancing Act 1919* was amended by the introduction of section 177. The amendment was in response to Report No. 84 of the New South Wales Law Reform Commission.

Section 177 imposes a duty of care on any person not to do anything on land, which supports other land, which may cause damage by removing the support provided.

For the purposes of section 177 of the *Conveyancing Act 1919*, 'supporting land' includes the natural surface of the land, the subsoil of the land, any water beneath the land and any part of the land that has been reclaimed.

What is the duty of care?

As noted above, section 177 places an obligation on any person not to perform any action which would cause the loss of support provided to the land being supported.

How does the duty of care relate to the common law of negligence?

The duty of care exists in addition to the common law of negligence. At common law, each person has a general duty to take reasonable care not do anything that might cause harm to anyone else.

Section 177 forms part of the common law of negligence and as such it has the benefit of any modifications made to that duty, as declared by the Courts from time to time.

It is therefore necessary to understand the common law of negligence to fully understand the application of section 177.

Anything done on the supporting land that removes support for the buildings on the supported land is in breach of the duty, imposed by section 177.

However, where the support for the supported land comes not from the adjacent land itself, but rather from a building on that adjacent land, then the duty of care does not extend to the support provided by that building. The only exception is where the supporting building has replaced the support that the supporting land in its natural state formerly provided.

Can the duty be excluded or modified?

The duty of care imposed by section 177 may be excluded or modified by agreement between the owners of the supporting and the supported land.

For example, the owner of the supporting land may wish to do work on that land that will result in removing support to the supported land. The owner of the supported land may agree to relinquish the right to be supported in exchange for money to be paid by the other owner.

However that agreement will not bind any subsequent owner of the supported land unless it is embodied in an 'easement for removal of support' that is registered on the title of the supported land.

Schedule 8 of the *Conveyancing Act 1919* contains a standard form of words which may be used to create an 'easement for removal of support'.

Does a remedy in nuisance still apply?

The remedy for breaching the general duty of care for the support of land imposed by section 177 is an action in the tort of negligence. This remedy also applies for breaches of all other duties of care.

Since 1 August 2000 the remedy for removal of support has been an action in negligence and not nuisance, except where proceedings in nuisance were commenced before the introduction of section 177.

Where can I get a copy of the section 177?

All NSW legislation can be viewed and downloaded at www.legislation.nsw.gov.au, a service provided by NSW Parliamentary Counsel's Office.

Legislation can also be viewed and downloaded at www.austlii.edu.au the site of the Australasian Legal Information Institute (AustLII) which provides free access to Australian legal materials.