Australian cadastres: the role of adverse possession of part parcels.

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ABSTRACT
A comprehensive land information management system should ideally disclose the complete legal status of all land with disclosure of all public and private rights and restrictions, including rights acquired under adverse possession. Recognizing trends to develop national spatial data sets, if a national cadastre is ever to be considered, a basic requirement will be a unified national law regarding land ownership. In turn this will require a unified approach to the issue of adverse possession of registered title land and particularly adverse possession of part of a land parcel, which is, in the authors’ view, a major obstacle in achieving this vision.

With this in mind a review is given of current Australian (particularly Victorian and NSW) schemes regarding adverse possession of part of a registered title land parcel to indicate those fundamental differences requiring possible resolution.

INTRODUCTION
Arising out of a forecast of the future of cadastral systems (Kaufmann and Steudler, 1998), one feature of the projected future vision calls for “a methodically arranged public inventory of data concerning all legal land objects in a certain country or district, based on a survey of their boundaries.” Thus the proposed future cadastre “will show the complete legal situation of land” such that “[p]rivate and public rights and restrictions on land will be systematically documented” with the consequence that future “surveyors must consider more juridical aspects than they do currently.” The complete legal situation of land necessarily involves legal rights including those, if
any, derived from occupation including occupation adverse to the true or documentary landowner.

Thus it is important to discuss and understand adverse possession (as one aspect of the complete legal situation of land) and the effect that adverse possession has on the land markets operating in each Australian jurisdiction. In addition it is important to understand the effect of adverse possession on a possible national Australian cadastre formed out of the several state-based cadastres currently existing in Australia. That a consequence of the projected future cadastre will require surveyors to consider more juridical aspects than they do currently, points toward the importance of proprietary rights based upon adverse possession in future cadastral surveying and the definition of boundaries.

The present differing approaches taken toward adverse possession in the various Australian jurisdictions present a possible obstacle to the adoption of a single Australian cadastre or a common approach to cadastral surveying and the definition of boundaries. It is the authors’ view that the different state-based approaches will prove to be a major, if not the greatest, obstacle to a single national cadastre. In order to appreciate the difficulty presented by the different state-based approaches it is necessary to fully understand the scope of and the differences between those current approaches.

Adverse possession as a subject is likely to inflame the passion of its supporters and detractors alike (VPLRC, 1998a; 1998b: 127-8). It is an important concept to the legal and land surveying professions because both are concerned with land (or real property) law and both desire that their data be accurate and reflect reality.

An example where accurate and up-to-date information is essential is the next Commonwealth census (due in 2001) which is directly related to the state digital cadastral data bases (DCDBs) upon which it is founded, as was the last (1996) census.

The importance of adverse possession is underscored by the attention recently paid to it by the Victorian Parliamentary Committee on Law Reform Inquiry into that state’s Fences Act 1968. Although it is an area which the Committee had acknowledged to be apparently outside the present scope of the Fences Act, the Committee “quite
wittingly” determined to include within its inquiry a review of adverse possession of land in Victoria (VPLRC, 1998a; 1998b: 127). Consequently the Committee’s terms of reference including the adequacy of the *Fences Act* in dealing “with all situations associated with separating the lands of different occupiers …” (VPLRC, 1998b: xvii, 127) required a broad interpretation to conclude that a review of the *Fences Act* could extend to matters already covered by the Victorian *Subdivision Act* 1988, and the *Property Law and Transfer of Land Acts*. Interestingly, the Committee’s report recommended against any changes to the law relating to adverse possession in Victoria.

The utility of adverse possession has long been recognized judicially (Megarry and Wade, 1975: 1003 ff; Hallmann, 1994; para 9.45 ff), and as recently as 1994 the Queensland Parliament enacted provisions for the adverse possessor to gain recognition as the registered proprietor of Torrens land in that state. In 1979 the NSW Parliament legislated to permit the adverse possession of Torrens land reversing an eight-decade policy of prohibiting acquisition of title based on adverse possession.

Further, adverse possession has been utilized to regularize the position where a person has been in occupation for many years and there is no active registered proprietor who wishes to revive the claim (QLRC WP 32, 1989: 63; NSW RGO WP, 1976: 5-6). In general terms this paper explores the role of adverse possession as to part parcels in maintaining Australian cadastral systems.

**WHAT EXACTLY IS ADVERSE POSSESSION?**

Unfortunately it has been the case that, in the past, various commentators have been unable to agree on what constitutes adverse possession and whether it is applicable in any particular jurisdiction. Another problem is the imprecision with which the term adverse possession is used. Historically adverse possession no longer requires strict compliance with the old forms of action: disseisin, abatement, intrusion and discontinuance which barred the bringing of actions to recover possession (Sykes, 1973: 748) and which has (since 1833) extinguished title. However the term can be and is used today to refer to registration of title based on possession wherein the registered proprietor is indifferent to the trespasser’s usurpation of the owner’s rights.
The term can also be used to describe the re-organisation of occupational boundaries of long standing where they differ from the technical legal boundary and thus can be brought to bear in regularizing past survey errors based on past policy, ordinary surveying errors and other errors in locating a boundary. It is within this context that Lambden (1977) distinguished between whole parcel adverse possession (as presenting purely a legal problem) and part parcel adverse possession (which will necessarily concern a surveyor).

With a view to a uniform definition the authors propose the adoption of the following legal definition of adverse possession:

Adverse possession is the occupation of land inconsistent with the rights of the true or documentary owner. Such adverse possession entitles the occupier’s possession to be protected against all who cannot show a better title; and, if the occupier remains in possession for a sufficient period of time, the occupier’s possession is protected against the true owner who is barred or deprived of his right of action to recover his property, and consequently, the occupier becomes the owner (adapted from Jowitt, 1977: 60).

WIDESPREAD VARIATION BETWEEN THE AUSTRALIAN JURISDICTIONS
Given the different approaches to adverse possession adopted by the Australian states, it is proposed to set out the various schemes pertaining to the Australian jurisdictions. It is further proposed to classify those schemes as to whether each jurisdiction does in fact permit adverse possession of registered title land and any particular features pertaining to that particular jurisdiction. The different approaches to adverse possession by the different Australian jurisdictions can only inhibit the development of a single Australian cadastre (if ever contemplated) by preventing the adoption of a single unified law relating to land ownership. This is one of the necessary bases for the development of a single national cadastre. A resolution of the different approaches requires an appreciation of what it is that constitutes the different approaches. For completeness, the NZ scheme will also be described where necessary to accentuate particular provisions of the Australian schemes.

Also of importance, the differing state schemes affect differently the boundaries of individual land parcels, cadastral surveying practices and the status of the digital
cadastral data base which is based upon those distinct land parcels. This in turn affects the operation of the land market in each state, which in turn affects those participating in the land market - the proprietors (vendors and purchasers), selling agents and the legal, surveying, and banking professions.

WHY IS ADVERSE POSSESSION TO PART ONLY OF A WHOLE PARCEL IMPORTANT TO CADASTRAL SURVEYING and DCDBs?

Lambden (1977: 8) suggested that the principle of adverse possession presents purely a legal problem when it covers the whole of a defined parcel. It remains the same principle but also concerns a surveyor when it involves directly adjoining lands of only a limited extent.

The bundle of proprietary rights related to land holdings is an important subset of the data held within a comprehensive cadastre. Proprietary rights arising from adverse possession are no less important. Further, most jurisdictions, except NSW, permit proprietary rights arising from adverse possession of part only of whole land parcels. Thus, adverse possession of such lesser portions can affect the boundaries between adjacent parcels by creating a newer boundary displaced from the older boundary. While it is important that cadastral surveyors should be aware of old or past boundaries it is equally important that they be aware of the possibility that another, newer and different boundary may have replaced the old.

As noted below, an up-to-date DCDB is desirable and this requires the acquisition and incorporation of new data and information as soon as it becomes available. Conversely, to retain misleading and out-of-date information in a DCDB may be worse than having no data at all.

Of the six principles for a future cadastre enunciated by Kaufmann and Steudler (1998), the present authors suggest the first is the most important requiring that the complete legal situation of land, including public rights and restrictions be documented. Similarly, one of the seven necessary features of a title registration system enumerated by Simpson (1976: 17 - 18) was “[c]ompleteness of record” meaning a title registration system “complete and up-to-date.” As has been previously argued, these necessary features extend beyond legal aspects of ownership to a title
survey system (Williamson and Holstein, 1978: 37); and consequently completeness of record requires a complete and up-to-date title survey system. It is noted that over 100 years ago, Richard Gibbs, a witness before the Victorian 1885 Royal Commission on Land Titles and Surveys, advocated that the interest of the adverse possessor (and other encumbrances on title) be shown on the register and on the foot of every certificate of title (Royal Commission, 1885: 20).

With regard to those jurisdictions other than NSW, as already noted, adverse possession of less than a whole land parcel can create a newer boundary displaced from the older boundary. The plain fact is that occupation seldom accords with title dimension (Toms and Lewis, 1974: 262) and these jurisdictions allow boundary adjustments by way of adverse possession.

WHY IS ADVERSE POSSESSION OF ONLY WHOLE PARCELS ALSO IMPORTANT TO CADASTRAL SURVEYING and DCDBs?

The present writers are of the view that Lambden’s suggestion that whole parcel adverse possession presents purely a legal problem is no longer current for two reasons. First, a modern day surveyor is concerned with the management of a comprehensive cadastre requiring more than the recording of changing title boundaries. Secondly, the particular scheme in operation in NSW, wherein adverse possession of less than a whole parcel is prohibited, means that a surveyor will be concerned in all or most instances of adverse possession. These instances include those covering the whole of a defined parcel if only to confirm that it is a whole parcel that is the subject of a possessory application in NSW.

Further, the NSW scheme may require a determination whether occupation of part of a land parcel is occupation of a sufficiently substantial part of the whole parcel thus determining whether the occupier can make a possessory application for the whole parcel or is precluded from bringing any possessory application. That the NSW provisions do not cater for mere boundary adjustments (Woodman and Nettle, 1996: para 11020) does not preclude the modern surveyor from being concerned with whole parcel instances of adverse possession.
THE DIFFERING MODES OF ADVERSE POSSESSION OF REGISTERED TITLE LAND IN THE AUSTRALASIAN JURISDICTIONS

Two essential sections to the various Torrens legislation throughout the Australasian jurisdictions are that the estate of the registered proprietor is paramount and the certificate of title is conclusive evidence of the registered proprietor’s title (Victoria, 1958: ss 42(1) and 41; New South Wales, 1900: ss 42(1) and 40(1); Australian Capital Territory, 1925: ss 58 and 57; Western Australia, 1893: ss 68 and 63; Queensland, 1994: ss 37, 38, 46, and 184; South Australia, 1886: ss 69, 70, and 80; Northern Territory: ss 69, 70, and 80; Tasmania, 1980: ss 39 and 40; New Zealand, 1952: ss 62, 64, 75, and 78).

With the exception of Western Australia and New Zealand, all the Australasian jurisdictions introduced title registration legislation in the 1850s and 1860s. Western Australia, adopting title registration in 1874, was alone in expressly addressing within its initial Torrens statute the issue as to whether adverse possession of registered title land should be permitted. It is conjectured that Western Australia adopted the Victorian statute, which after 1866 permitted adverse possession, as a model for its own (Whalan, 1971: 11) and thus has always permitted adverse possession of registered title land since the introduction into WA of such land in 1874. All the other jurisdictions were forced to address this issue in later amendments to their title registration statutes, their initial legislation being silent in this regard.

THE VICTORIAN MODEL – “FULL-BLOWN” ADVERSE POSSESSION - IN USE IN VICTORIA, WESTERN AUSTRALIA, TASMANIA & (SINCE 1994) QUEENSLAND

Within four years of introducing title registration in 1862, Victoria passed the 1866 Transfer of Land Statute. This legislation introduced the forerunner of the present section 42 (including the provision excepting the interests of the adverse possessor from the paramountcy of the registered proprietor’s estate). Thus from 1866 Victoria has expressly permitted adverse possession of registered title land. As already noted WA has always permitted adverse possession of such land from the introduction of the registration scheme into that state.
The other jurisdictions were not moved to pass legislation dealing expressly with the possibility of adverse possession giving rise to proprietorship of registered title land with the consequence that two of those jurisdictions took opposite directions after Supreme Court determinations. The Tasmanian Supreme Court utilized the same reasoning as the Privy Council (Belize Estate, 1897) in holding that the title registration legislation merely added to the body of law relating to real property. Consequently, anything less than an express abolition of that body of law meant that adverse possession, as applying to general law land, applied to all land including registered title land (Featherstone, 1886).

Later, Tasmania in 1932 opted to give statutory support to the law as previously interpreted by the Supreme Court and enacted the Real Property Act 1932 adding sections 146 - 156 to the Real Property Act 1862. The effect of the 1932 Tasmanian legislation was to permit the adverse occupier to apply for a vesting order and subsequent registration as the registered proprietor of the registered land. A necessary step in extinguishing the title of the dispossessed registered proprietor was to apply for such a vesting order (section 156). Prior to the lodging of such an application, the registered proprietor’s title was paramount (even if the statutory period had run in favour of the occupier). The registered proprietor could convey his land notwithstanding the long-term occupation by the adverse possessor. It follows that any dealings by the registered proprietor prior to the lodging of such an application by the adverse possessor “wiped the slate clean” (Hunter, 1875: 102; Wilkinson, 1957: 135). The effect was that time recommenced to run again from the date of the dealing in favour of the occupier and against the interests of the registered proprietor (Ford, 1953).

Since the enactment of the 1980 Tasmanian Land Titles Act, occupation by the adverse possessor for the statutory period does not extinguish the registered proprietor’s title. The registered proprietor is deemed to hold the land on trust for the adverse possessor and such adverse occupation extinguishes the equitable (but not the legal) title of the registered proprietor. An adverse possessor can then apply for a vesting order to substitute his name on the register as the registered proprietor.
It is noted that the 1980 Tasmanian enactment purports to eliminate a longstanding objection to adverse possession of registered title land - that is, the title should be in accord with the “mirror” and “curtain” principles (Ruoff, 1957: 8), and faithfully reflect those interests associated with the land parcel referred to in the certificate. Adverse possession, an “overriding” interest associated with the land, is not referred to in the certificate. The creation of a trust would appear to satisfy these principles in that the owner of the legal title is faithfully disclosed on the certificate as the registered proprietor while the adverse occupier’s interest is the beneficial or equitable title and is not disclosed on the certificate.

Following the 1980 Tasmanian change there is now less incentive for an adverse occupier to apply to have the register changed to reflect the extinguishing of the registered proprietor’s title. The consequence of the change being that inertia alone can render the cadastre more out-of-date than when there was a positive incentive for an adverse occupier to apply for registration. Prior to 1980, application to be registered was a necessary step to complete acquisition of title by adverse possession. Such an application prevented the registered proprietor from dealing with the land in a manner sufficient to “wipe the slate clean.”

Thus from the survey point of view, the 1980 enactment was retrograde because of its effect on the updating of the cadastre. It is suggested that there is no effective legal benefit in having the certificate correctly reflect the interests in the land held by the owner of the legal title while leaving the interests of the beneficial owner wholly undisclosed on the certificate. Form has been permitted to dominate over substance. It is noted with interest that a 1994 recommendation of the Law Reform Commissioner of Tasmania would restore the ability of the dispossessed registered proprietor to “wipe the slate clean” (LRCT, 1995: 5).

The Queensland Supreme Court took the opposite approach (Miscamble, 1936). It held that the title registration legislation was of such a radical departure from previous real property law that it must be inferred that the intent of the legislature was to abolish every aspect of previous real property law and start anew. Further the doctrine of adverse possession offended against the very base upon which title registration was founded: indefeasibility of title. In 1952 Queensland adopted a restricted form of
adverse possession - along the lines of that adopted in South Australia (discussed below) and for the same reasons. In 1994 Queensland enacted the *Land Titles Act* and adopted adverse possession (without restriction) - although there are suggestions that only the adverse possessor (and not those claiming through or under an adverse possessor) can take advantage of the 1994 Act (Bradbrook *et al*, 1997: 16-53).

**EXPRESS AND ABSOLUTE PROHIBITION - ACT and NT**

Initially most jurisdictions did not legislate regarding adverse possession of Torrens land and were only forced to rectify this omission afterwards - New Zealand, South Australia and New South Wales then expressly prohibited the acquisition of title to registered land by way of adverse possession. These jurisdictions have since legislated to permit (to varying degrees) limited forms of adverse possession. These later enactments permitting adverse possession, however, became law after SA and NSW ceased to exercise jurisdiction over the NT and ACT respectively. Consequently the NT and ACT remain as the only jurisdictions in Australasia where adverse possession, as a means of obtaining registration as the proprietor of such land, is prohibited.

**NEITHER FISH NOR FOWL - THE GRADUAL AND CAUTIOUS ADOPTION OF ADVERSE POSSESSION BY THOSE JURISDICTIONS PREVIOUSLY PROHIBITING THE PRACTICE**

The South Australian model - limited adverse possession in the absence of objection by the registered proprietor - has been in use in SA since 1945 and in New Zealand since 1963. Between 1952 and 1994 Queensland used a similar scheme.

Eventually those jurisdictions not favouring adverse possession were forced to recognize possessory rights in limited circumstances. These circumstances were similar to the motivation for the Tasmanian *Real Property (Special Vesting Orders) Acts*. They were concerned with informal, incomplete or unregistrable transfers or the abandonment of registered title land by the registered proprietors. In 1945 South Australia created a regime wherein occupation could give rise to a registrable title where the occupier had been in occupation for a period of time sufficient to satisfy the *Limitation of Actions Act* 1936 and there was no objection to the occupier’s
application (for registration) by the registered proprietor or persons claiming through or under the registered proprietor.

In the strict sense this regime is not what is properly described as adverse possession in that an application cannot be successful where the registered proprietor objects to the application. Perhaps it could be said that the Statute of Limitations only runs in favour of the occupier in the absence of an objecting registered proprietor.

Lambden (1977) has cited as a principle relevant to adverse possession that there can never be an abeyance of seisin of a freehold estate. He further explained that there must be no interruption in the succession of title while ownership is resolved. He states this in feudal terms as “nulle terre sans seigneur” and provides the translation of “no land without a lord”. Whalan (1963: 527), in discussing the then Queensland model (based on the SA scheme), adopts the terminology of the Swiss Civil Code – “chose sans maître” - to describe things without an apparent owner. Thus, adverse possession is utilized to regularize the position where a person has been in occupation for many years and there is no active registered proprietor who wishes to revive the claim (QLRC WP 32, 1989: 63; NSW RGO WP, 1976: 5-6).

Possible confusion caused by Whalan’s adoption of a term from Swiss law is here noted. In borrowing the Swiss equivalent to *bona vacantia* in English law, Whalan’s use of the term may mistakenly suggest that the Queensland model then under discussion by Whalan incorporated *bona vacantia* into Queensland real property law.

Queensland had adopted a model similar to that of SA in 1952 which had the effect of permitting applications of the kind previously refused by the Queensland Supreme Court (*Miscamble*, 1936) where the registered proprietor could not be traced. The Queensland scheme was repealed in 1994 and replaced with true adverse possession.

New Zealand introduced a similar legislative scheme in 1963 except that the applicant occupier was required to show occupation for twenty years instead of the twelve years required by the New Zealand Statute of Limitations to bar the land-owner from bringing suit against an occupier. In NZ it could be said that the Statute of Limitations only runs in favour of the occupier in the absence of an objecting registered proprietor and it also runs eight years more slowly.
It should be noted that these jurisdictions expressly provided that title claims based on adverse possession pursuant to the various limitations statutes were prohibited and possessory title could only be acquired pursuant to the scheme incorporated within the registered land title statutes.

It is because these statutory schemes permit applications to alter the register only in the absence of objection by the registered proprietor that they ought not to be described as instances of “adverse possession”. Such applications are bound to fail if exception is taken by the registered proprietor.

Additionally, such schemes do not necessarily regularize occupational boundaries except in the sense that the legal boundary will belatedly conform to the existing occupational boundary. In fact, it may well be that, upon successful objection by the registered proprietor, the legal boundary overrides an occupational boundary of many years standing. Further, these particular schemes have the disadvantage of uncertainty in that interested persons such as the applicant, the Registrar, financial institutions and the like are unable to foresee if a registered proprietor will appear to revive or assert their registered title in response to the application.

THE NSW MODEL - LIMITED ADVERSE POSSESSION RESTRICTED TO WHOLE PARCELS ONLY (IN USE SINCE 1979)

With similar motivation, the NSW parliament legislated in 1979 to repeal the then section 45 prohibiting adverse possession of registered title land and introduced a scheme to permit occupiers in possession to apply for registration. The ill sought to be cured was again the occupier being in possession through having purchased or otherwise acquired from the registered proprietor pursuant to an informal, incomplete, unregistrable, or even non-existent transfer. Such occupiers are said to have a “holding” title. Although there is no possible means whereby [the occupier] can obtain for registration an instrument of disposition from the person still shown on the Torrens title as the registered proprietor thereof, there is equally little likelihood of his occupation being disturbed by that registered proprietor, or by anyone claiming through or under him (NSW RGO WP, 1976: 5 - 6). Occupiers with such a holding title were a more deserving group of persons who had entered into possession under
colour of right (*ibid.*) than trespassers who, without colour of right, had entered into occupation.

Following upon a report prepared by Grimes of the NSW Land Titles Office, the cure recommended and adopted was adverse possession. That neither Grimes nor the NSW parliament considered those schemes adopted in SA, Queensland, and NZ or even the Tasmanian *Real Property (Special Vesting Orders) Acts* is a matter for regret.

Also regretted is Grimes’s recommendation that possessory applications for only part of a land title be not permitted on the assertion that such applications would impose serious disruption to the normal activities of the Titles Office (NSW RGO WP, 1976: 26). Further, to not impose a restriction against part parcel possessory applications would confer a benefit upon the occupier-applicant unavailable to other proprietors in occupation who were already registered. Additionally, presumably such a benefit accruing to the occupier-applicant would be at the expense of an adjoining registered proprietor. The whole rationale of the NSW proposed amendments was to introduce a possessory title system into [the] existing Torrens system without disrupting the security of existing Torrens titles (NSW RGO WP, 1976: 26 ff.). To not impose a restriction against part parcel possessory applications would disrupt the security of existing Torrens titles by permitting possessory applications by registered proprietors (or unregistered occupiers) as to adjoining land registered to their neighbours. Such possessory applications had previously been prohibited and were not necessary to effect the parliament’s will in conferring title on those who entered into possession under colour of right.

Further, it was recommended that “[i]t should be presumed, subject to rebuttal, that occupation of a substantial part of an established parcel (the balance of which is unoccupied) is occupation of the whole parcel.” (NSW RGO WP, 1976: 27). It is noted that the 1979 legislation which adopted this recommendation did not provide for its displacement upon rebuttal as recommended. This consideration was coupled with the desirability of discouraging possessory applications for part of a parcel thus breaching good town planning guidelines (NSW RGO WP, 1976: 25 ff.). These four considerations were the genesis for the current prohibition against all but whole parcel possessory applications.
Thus the NSW regime was introduced to cure defects in the title of honest occupiers possessing only holding titles and to rectify, or bring up to date, the register. It was not intended to confer any benefit upon any person other than the more deserving honest occupier. To give effect to this end, the NSW legislation adopted a limited form of adverse possession without incorporating the basis of the presumption that occupation of a substantial part of a parcel is occupation of the whole, that is that the balance is unoccupied.

The result of this legislation was to introduce a regime that conferred a benefit upon persons other than the more deserving honest occupier and could, in theory at least, displace a registered proprietor who remained in occupation of the balance of his parcel. It is here suggested that the NSW amendment did not introduce a possessory title system into [the] existing Torrens system without disruption to the security of existing Torrens titles and thus failed to satisfy the whole rationale of Grimes’s report.

It is suggested that by resorting to adverse possession to cure the ills suffered by the honest occupier, the legislature knowingly introduced the previously prohibited adverse possession into NSW registered title land. Thus it is submitted that the cure could have been better if based upon those adopted in SA, Queensland and NZ, or even a little-known Victorian statutory scheme effective from 1904 to 1914.

This Victorian legislation arose following the case of *Bree v Scott* (1903) and the Victorian legislature sought to provide certainty where Chief Justice Madden had doubted the legal efficacy of what had previously been thought to be the law. In rectifying the possible defect exposed in the case, the Victorian parliament also sought to add some ancillary administrative tidying up provisions (Hansard, 1904: 1689) and provoked debate upon the desirability of adverse possession as applied to registered title land in Victoria.

The Bill was passed in October 1904 and provided for the rectification of the flaw exposed in *Bree v Scott* and additionally the forerunner to what is now section 62 providing a procedure by which an occupier could apply to be registered. The Bill also included section 23, which made provision for the occupier-applicant to pay compensation to the registered owner or in lieu the Commissioner of Titles where the registered owner could not be traced. This last provision, which was repealed by the
Transfer of Land Act 1890 (Amendment) Act 1914 (No 2), was not to compensate the registered proprietor who had lost title through adverse possession. It was to ensure a proper accounting between the registered proprietor/vendor and the occupier/purchaser who was unable to obtain a registrable transfer from an untraceable vendor or to complete term payments of the purchase price without a traceable vendor. A true adverse possessor was not required to pay compensation.

It is the authors’ view that such NSW applications to alter the register to show the occupier as the registered proprietor should not be described as instances of “adverse possession” in that such applications can succeed and confer proprietary rights over land that has never been the subject of adverse occupation by the applicant. Similarly, such an application cannot succeed where the occupier has not adversely occupied sufficient of the land parcel. These features suffice to distinguish the NSW process from adverse possession. Indeed, in an interview with one of the authors, a NSW legal practitioner specializing in real property law was at pains to emphasize that nowhere in the NSW Real Property Act is the phrase “adverse possession” used (Hole, 1998). The NSW approach does nothing towards regularizing an occupational boundary where it diverges from the original legal boundary.

JUSTIFICATION OF ADVERSE POSSESSION

In addition to the previously noted judicial approval of adverse possession (Megarry and Wade, 1975: 1003 ff; Hallmann, 1994; para 9.45 ff), academic commentary favours the incorporation of adverse possession into real property law (Ruoff, 1957). In this regard it is of interest to note that the Victorian Parliamentary Law Reform Committee at one stage considered adopting the restricted NSW form of adverse possession but ultimately concluded that Victoria would be best served by leaving Victorian practice unchanged (VPLRC, 1998b: 127). It is here suggested that the adoption or incorporation of adverse possession into real estate law does not offend against the recent United Nations - International Federation of Surveyors Bogor Declaration on Cadastral Reform (UN-FIG, 1996) advancing support for the development of an efficient land market. Real estate law incorporating adverse possession would support land management and economic development without significantly detracting from the desired protection of land rights and would lead to the simplification of cadastral processes. The declaration recognised that the success
of a cadastre is not dependent on its legal or technical sophistication, but whether it protects land rights adequately and permits those rights to be traded (where appropriate) efficiently, simply, quickly, securely and at affordable cost. This requires a focus on the user and landowner as well as the needs of government (UN-FIG, 1996: para 7.1).

It is the authors’ view that the needs of society as exemplified by the current practices regarding adverse possession show that society is content to define the extent of ownership by occupational boundaries. Not only does the law favour the proposition that purchasers buy what they see; this proposition is in accord with the purchasers’ expectations (Toms and Lewis, 1974: 262).

Further, it is the authors’ view that the acceptance of the need for adverse possession in land law has been amply demonstrated by the historic trend wherein adverse possession, albeit in a limited form, has been adopted in those jurisdictions (such as NZ, SA and NSW) where previously it had been prohibited. The authors’ view is strengthened by the case of Queensland which adopted adverse possession in a limited form in 1952 and forty years later legislated to remove the previously imposed limits.

CONCLUSION
Recent policy suggests a movement toward centralized and uniform law throughout Australia. By itself that is insufficient to justify the desirability of a national cadastre. However, the perceived economic benefits associated with National Competition Policy and other national requirements point towards such a single cadastre. Until such a national cadastre is introduced, national policy making bodies must be fully cognizant of the limitations of relying on a number of differing cadastres in creating national cadastral data sets.

If it is accepted that a move towards a national cadastre is inevitable or even desirable, uniform laws relating to land ownership throughout the national jurisdiction is an essential element. Such uniform laws will require a single unified approach to adverse possession. It is suggested that such an approach to a national cadastre is feasible although it is appreciated that one of the greatest obstacles will prove to be the
differing approaches to adverse possession of registered title land. These differences result in different approaches to cadastral surveying, the definition of boundaries and the operation of land markets in each state. The authors’ conclusion is founded upon the observation that the greatest single differentiating aspect of the various jurisdictions’ real property laws is the approach to adverse possession as to part of a land holding or parcel. A thorough understanding of what constitutes the differing approaches is but one of the initial steps towards a national cadastre.

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