

**The effect of adverse possession  
on part  
of a registered title land parcel**



# **The effect of adverse possession on part of a registered title land parcel**

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**... that it is a system of title by registration, not a system of registration of title**

*Breskvar v Wall* (1971),  
p 385 *per* Barwick CJ

**It is registration that gives or extinguishes title**

*Lutz v Kawa* (1980),  
pp 24–25 *per* Laycraft JA

**... the fact of registration and registration alone that confers title. This is entirely in accordance with the fundamental principle of a conclusive register which underpins the Bill.**

Law Commission and Her Majesty's Land Registry,  
*Land registration for the Twenty-first century:  
a conveyancing revolution* (2001),  
page 4, ¶ 1.10

# **Abstract**

This thesis began as an investigation of the effect of adverse possession upon the land market where the adverse possession extends only to a small portion of the abutting parcel and the subject land is under a title registration scheme. The consequence of such adverse possession on part only of a parcel is that the location of the boundary demarcating the limits of the respective domains of two adjoining land parcels may be displaced.

If part parcel adverse possession effectively transfers ownership of a small portion of an abutting parcel, the boundaries are shifted consequent to long term occupation, and will prevail over the strict technical legal boundary. In a registered title land system the occupational boundary then prevails over the legal boundary as certified in the register notwithstanding that registered title schemes purport to confer conclusiveness upon register entries. Alternatively, the registered proprietor's estate is not paramount where any part of the proprietor's parcel has been adversely occupied. Consequently the occupier has an interest in the proprietor's land that is not disclosed in the register. Inspection of the register and reliance upon the inspection is insufficient to ascertain the complete legal status of the particular land holding. Inspection with consequent reliance upon the register is the major function of a registered title scheme. Alternatively, if part parcel adverse possession is ineffective to transfer ownership of registered land, the technical legal boundary prevails over the occupational boundary despite the fact that it is not the boundary accepted by the parties involved as governing.

Both alternatives present a problem to the orderly conduct of the land market. Where occupations prevail, the prudent market participant takes precautions besides relying on inspection of the register. Where the legal boundary prevails, the participant seeks confirmation that the occupational and legal boundaries coincide.

Another alternative utilised in some registered title jurisdictions empowers a court to transfer small sections to an adjoining landholder where a building or similar improvement is erected so that it encroaches upon the adjacent holding. This alternative was included within the ambit of the thesis as it developed.

The aim of this research was the formulation of the best solution suitable for a registered land system with particular reference towards a uniform solution suitable for adoption in all Australian jurisdictions. The existing systems utilising adverse possession and statutory encroachment were evaluated against three recent law cases that illustrate the workings of these systems including perceived shortcomings. These lawsuits serve as a test against which the existing systems are compared and evaluated and were also used to evaluate the proposed solution. The results suggest that adverse possession alone should not override the purpose of the register which is to fully disclose the proprietary interests in land parcels. It was concluded that a necessary step in acquiring title to land through adverse possession involves the registration of the interest acquired. Whereas the present modes of dealing with the boundary problem are adequate, it is concluded that the best mode is that of *statutory encroachment* because it best serves several competing interests. Adopting the proposed solution would involve change and compromise in some of the Australian jurisdictions; these being necessary to adopt a uniform scheme throughout Australia. The proposed solution has added benefits of removing an illogicality from some of the present systems, eliminating encouragement for an off-register land market, and fosters an accurate public land register.

# Declaration

This is to certify that

- (i) the thesis comprises only my original work towards the PhD;
- (ii) due acknowledgment has been made in the text to all other materials used;
- (iii) the thesis is less than 100,000 words in length, exclusive of tables, maps, bibliographies, and appendices.

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Malcolm McKenzie PARK

for *Mardi*

... who held my hand when I was afraid of the dark



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I hesitate to name specific individuals who have assisted if only for the reason that an inadvertent omission may incorrectly detract from the contribution by that unlisted person: an inadvertent omission may be mistakenly construed as a deliberate snub. Another practical reason for shying away from listing and acknowledging assistance from individuals is the length of such a list — those who have assisted are many.

Consequently I acknowledge the assistance of the many who have contributed and made my task that much easier. However, among the many librarians from many jurisdictions who have assisted my research I particularly wish to thank Marion Boyd of the Library of the High Court of Australia who was able to provide assistance and offer advice with regard to tracking down the most obscure and rare references. It is also incumbent upon me to acknowledge the assistance and valuable time offered up to me by the many public servants in the various Australian and international jurisdictions. Deserving of special mention is Peter Burns (now retired) of *Land Victoria* who provided advice, commentary, and valuable insight and much enthusiasm in an area of law that is not commonly perceived of as generating excitement and enthusiasm.

Finally I acknowledge the moral guidance provided during my candidature by my good friend Michael Houlihan although that moral guidance did not extend so far as to persuade me into joining him in his Lenten temperance.



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# Abbreviations

[Note: because the subject of this thesis is registered land title which was introduced in South Australia, a state of the Commonwealth of Australia; and also because this thesis is concerned mostly with the Australian jurisdictions, the SA abbreviation represents South Australia and South Africa is abbreviated as Sth Afr, thus, South Australian Law Reports = SALR and South African Law Reports = Sth Afr LR.]

ABAJ	American Bar Association Journal
AC	Appeal Cases (English)
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
ALR	Australian Law Reports
Alta LR	Alberta Law Reports
Alta L Rev	Alberta Law Review
ANZ Conv R	Australian and New Zealand Conveyancing Reports
APLB	Australian Property Law Bulletin
APLJ	Australian Property Law Journal
App Cases	Appeal Cases (English)
BCC	Butterworth's Company Cases (English)
BCR	British Columbia Reports (Canada)
Bing	Bingham's English Common Pleas Reports
BPR	Butterworth's Property Reports
Cal App	California Appellate Reports
Cal Rptr	California Reporter
Cal 3d	California Reports (3 <sup>rd</sup> Series)
Ch	Chancery (Law Reports)
CLR	Commonwealth Law Reports
DLR (3d)	Dominion Law Reports (3 <sup>rd</sup> Series) (Canada)

ECE	Economic Commission for Europe
ER	English Reports
Esp	Espinasse's (English Nisi Prius) Reports
Exch	Exchequer Reports (English)
Fed Law R	Federal Law Review
FIG	International Federation of Surveyors
Hore's Tas Dig	Hore's Tasmanian Digest
Jac & W	Jacob & Walker Reports (English)
KB	King's Bench (Law Reports)
LGRA	Local Government Reports of Australia
LR	Law Reports
LR CP	Law Reports Common Pleas (English)
LRCS	Law Reform Commission of Saskatchewan
LRCT	Law Reform Commissioner of Tasmania
LRCV	Law Reform Commission of Victoria
LR Eq	Law Reports Equity (English)
LR HL	Law Reports House of Lords (English)
LR QB	Law Reports Queen's Bench (English)
MLJ	Malaysian Law Journal
MOLA	Meeting on Officials on Land Administration (established by the United Nations Economic Commission for Europe)
MULR	Melbourne University Law Review
NE(2d)	North Eastern Reporter, 2 <sup>nd</sup> Series (USA)
NSWLEC	New South Wales Land and Environment Court (Reports)
NSWLR	New South Wales Law Reports
NWLR	North-Western Law Review
NZLJ	New Zealand Law Journal



NZLR	New Zealand Law Reports
NZULR	New Zealand Universities Law Review
OAR	Ontario Appeal Reports
P & CR	Prideaux & Cole Reports (English)
QB	Queen's Bench (Law Reports)
Q Conv R	Queensland Conveyancing Reports
Qd R	Queensland Reports
QLRC	Queensland Law Reform Commission
QLSJ	Queensland Law Society Journal
QSC	Queensland Supreme Court
QSR	Queensland State Reports
QWN	Queensland Weekly Notes
SALR	South Australian Law Reports
SASC	South Australian Supreme Court
SASR	South Australian State Reports
SCR	Supreme Court Reports (Canada)
SIRC 98	Spatial Information Research Centre Conference, 1998
SJLS	Singapore Journal of Legal Studies
Sth Afr LJ	South African Law Journal
Sth Afr LR	South African Law Reports
Sth Afr LR (App D)	South African Law Reports (Appeal Division)
Sth Afr L Rev	South African Law Review
SR(NSW)	State Reports (New South Wales)
SRQ	State Reports Queensland
Tas LR	Tasmanian Law Reports
Tas SC	Tasmanian Supreme Court
Tas SR	Tasmanian State Reports

UCQB	Upper Canada Queen's Bench (Reports)
UN-FIG	United Nations - International Federation of Surveyors
UQLJ	University of Queensland Law Journal
V Conv R	Victorian Conveyancing Reports
VLR	Victorian Law Reports
VPLRC	Victorian Parliamentary Law Reform Committee
VR	Victorian Reports
VSb	Victorian Surveyors Board
VSCA	Victorian Supreme Court Appeals (Reports)
VSC	Victorian Supreme Court (Reports)
WA	Western Australian (Reports)
WAR	Western Australian Reports
WASC	Western Australian Supreme Court
WLR	Weekly Law Reports (English)
WWR	Western Weekly Reports (Canada)
WYSIWYG	What you see is what you get

# Table of Cases

[Note: because the subject of this thesis is registered land title which was introduced in South Australia, a state of the Commonwealth of Australia; and also because this thesis is concerned mostly with the Australian jurisdictions, the SA abbreviation represents South Australia and South Africa is abbreviated as Sth Afr, thus, South Australian Law Reports = SALR and South African Law Reports = Sth Afr LR.]

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# **Chapter 1**

## **Introduction**

### **1.1 Introduction**

Two underlying bases of any land market are security of tenure and confidence in title to land. In fact the two may be but two aspects of one underlying base. Such security and confidence require the efficient and equitable elimination or resolution of doubts or errors or discrepancies in any aspect of title to any land parcel in the land market. The resolution and the manner of resolution may affect the operation of a land market. One aspect of title is the location of a land parcel boundary which in fact defines the parcel. Adverse possession of a portion of a parcel is but one method of resolving errors and discrepancies in the boundary position irrespective of the cause or origin of such error. An analysis of resolving such discrepancies and the possible readjustment of boundary location entails investigating the effects and the interrelationship between several topics usually dealt with separately in studies on land law. These are registration of land title, adverse possession, and the amendments introduced by early nineteenth century English law reform which enabled the adverse possession of part only of a land holding,

Adverse possession is the bar against the pursuit of stale (or long dormant) claims through the legal system and is an important concept assisting in the resolution of disputes and ambiguities associated with interests in real property law. It is well recognised that land and other property interests can be the subject of competing meritorious claims. The difficulty lies with distinguishing between the just and the unjust claims and also determining when a just claim may become unjust. Adverse possession permits the resolution of such disputes and provides certainty of title and security of tenure in the interest of public peace and order (Pollock and Wright 1888). All legal systems recognise some form of adverse possession in relation to interests in land (Megarry and Wade 1975; Butler 1980). Under the English legal system the form of adverse possession is founded wholly on statute law. Adverse possession is the limitation statute applied to real property interests. Limitation statutes are 'statutes of repose' providing for composure, harmony and tranquillity. Additionally, adverse possession can provide security of tenure where land has been

abandoned and there is no competing claim raised against the person in possession who is otherwise unable to establish a proprietary interest sufficient to provide a basis for security of tenure. The resolution provided by limitation statutes arises by operation of law and the passage of time and does not require the intervention of human agency. Consequently the interests created by adverse possession can arise and continue to exist without necessarily being recorded. It is this lack of record that can offend against what has been described as a “fundamental principle” (Dowson and Sheppard 1956, p 131) of the most widespread land titling system: registered title land. Another commentator offers that “the possibility of defeat by adverse possession of a flawless documentary title” is an inimical concept to registered title land (Cooke, 1994).

Registered title land is widespread throughout Australia and the English common law world. Such registration is even more widespread and is found in jurisdictions outside the English common law world. Registration of land title is the basis of the envisaged “cadastral systems in some twenty years” (Kaufmann and Steudler 1998). Title registration is the public recording of factual details related to individual land parcels and the basis of the record is the parcel. The lot or parcel is usually specified by its boundaries and their location. An important characteristic of title registration is the maintenance of the register by continual updating and integration of register information that dispenses with the necessity of reviewing and investigating all but the most recent information. Ruoff (1957, 8) introduced the “mirror” and “curtain” principles to describe this characteristic. Title registration provides for certainty of title and security of tenure in that the factual details relating to the parcel are open to all through inspection of the register. The mirror characteristic of the register correctly reflects the legal status of the lot in question and the curtain principle dispenses with the necessity of investigation of that legal status beyond that displayed in the register by hiding from view and investigation any transactions prior to the issue of the certificate or register entry. Consequently the information contained in the register must be accurate, current, and conclusive (Ruoff, 1957). The factual details in the register will include the identity of the land parcel and that identity necessarily includes the location of the boundaries of the parcel. Any variation in the location of those boundaries will affect the specifications of the

parcel. There does exist some confusion in Ruoff's mirror principle in that he states that the then refusal in New Zealand to allow adverse possession claims against registered title land is a disregard of the mirror principle (Ruoff, 1957, 44; Ruoff, 1952, 229). As will be discussed below, permitting the acquisition of registered title land by adverse possession can result in the register incorrectly retaining the dispossessed documentary title holder as the proprietor after that proprietor's title has been extinguished. Thus it would seem that permitting adverse possession claims is a disregard of the mirror principle.

The resolution of competing claims provided by the limitation statutes arises without the intervention of human agency and consequently may not be recorded. However, the resolution provided by a system of land title registration requires the establishing and maintenance of a record. Therein arises the possibility of conflict. In fact, the possibility of conflict is certain where unrecorded proprietary rights based upon adverse possession are in opposition to those recorded proprietary rights entered into the register. Both of these opposing proprietary rights support certainty of title and security of tenure. How the conflict between these opposing proprietary rights is resolved requires either determining which is to prevail or providing for their coexistence.

Before 1833, "adverse possession" bore a highly technical meaning in English law (Megarry and Wade 1975, 1013). The legislative reforms enacted that year had the effect of permitting adverse possession of less than a complete land holding thereby introducing the possibility of boundary adjustment by adverse possession. All the law systems relating to proprietary interests in land provide for boundary adjustment. These provisions are evidence supporting the desirability of boundary adjustment. Surveying is an 'art' and even where high levels of precision are possible, the economic justification for such precision may not be present (FIG, 1995). Even where the boundary has been located with precise surveying techniques, errors or discrepancies in location may arise through the agency of others such as those erecting a building or a dividing fence. Consequently, occupations do not always accord with title boundaries shown on the deeds or in the register. The resolution of

the discrepancy between title and occupation boundaries can, in time, be performed by adverse possession of part only of a land parcel.

The resolution of boundary discrepancies or errors removes some of the ambiguities and uncertainties associated with investment in the land market. Doubts regarding the investment and its associated security should be either resolved or a decision made regarding the acceptance of risk regarding the security. Usually the acceptance of such a risk is commensurate with a discounted purchase price for the investment. The cost of resolving the doubt or the reduced purchase price may inhibit the land market. This market, in its current form, has only recently been brought into existence with the acceptance of land as an object of commercial transactions. This recognition of land as a commodity began in the eighteenth century with a large increase in private ownership of land through land reform in the old world and settlement of the new through emigration from the old. Private ownership meant that the demarcation of the extent of private holdings became important. That is, the location of boundaries assumed a greater importance with increased private ownership. Uncertainty or ambiguity giving rise to a possible future dispute involving land may inhibit the land market in one of two ways. It can cause the participants either to incur additional expense and expend additional time in title investigation or to seek alternative investments that do not carry the associated uncertainties and ambiguities. The alternative investments are not necessarily also from within the land market. Additionally it may promote the deferral of an investment decision. An uninhibited market requires the reduction or elimination of such uncertainties or the amelioration of the possible disputes that can arise from those uncertainties. The elimination of such uncertainties is in accord with one of the desired properties of a modern cadastral system: the complete legal situation of land will be shown with public and private rights and restrictions systematically documented (Kaufmann and Steudler 1998).

The present Australian cadastre is in fact seven different cadastres administered by five states and two territories. This is despite the interstate nature of Australian commerce and the freedom of travel between the states. These current cadastres are ‘single purpose’ cadastres existing to serve each of the land markets. Although the



Roman Empire utilised a cadastre for state administrative and taxation purposes, such administrative cadastres fell into disuse with the decline of the Empire and their use was not revived until the Renaissance (Kain and Baigent 1992). Middle Ages cadastres recorded limited private proprietary interests for the limited purpose of the administration and management of individual estates: *ibid*. One of the earliest and perhaps the best known, the *Domesday Book* ‘stocktake’, was such a cadastre and was limited in its extent to cover the King’s demesne lands and those held by his tenants-in-chief. Any sub-tenancies of the King’s tenants-in-chief were outside the terms of reference for the survey and this cadastre served only the purpose of the King (Galbraith 1974). Any sub-cadastre serving the purposes of the tenants-in-chief in the administration and management of their individual estates was a matter for the individual barons.

In contrast, the modern multi-purpose cadastre seeks to fulfil the role of the traditional cadastre and other roles in supporting a wider range of social policies such as economic development and continued growth, sound environmental management and social stability in both developed and developing countries (UN-FIG 1996; UN-FIG 1999). This cadastre may be utilised (in different ways) by different users leading to economies of scale (through cost sharing or the reduced defrayal of expenses) *and* effective translation between different users (Williamson 1983, pp 21 *ff*; Davies *et al* 2001). Because the modern cadastre will be utilised by users other than participants in the land market, for example, utility companies, service providers, and emergency services, the modern cadastre will include land not available to that market. An example of such land to be documented in a modern multi-purpose cadastre is publicly held land for public use such as national parks, public recreational facilities, water catchment areas and other lands that are not subject to the private land market.

Despite suggestions of uniformity in the current Australian systems, cost reduction and effectiveness will encourage a single uniform Australian cadastre, which will conform to that of the modern multi-purpose cadastre (Davies *et al* 2001: Bradbrook *et al* 1997, ¶4.07).

Further, adopting uniformity between the various state cadastres will better facilitate the integration of those cadastres into a single national cadastre. The national cadastre can be based upon the state cadastres only if those state cadastres have a consistency between themselves.

## **1.2 Statement of the research problem and hypothesis**

The hypothesis to be investigated in this research is that those jurisdictions permitting adverse possession as to part only of a registered title land parcel (or other forms of adjustment of boundary locations) allow a more effective and efficient land market to arise. Conversely, an alternative but equivalent statement of the hypothesis is that those jurisdictions that do not permit part parcel adverse possession impose an unnecessary hindrance upon the operation of the land market.

Of course there exists a fundamental defect in any attempts to quantitatively measure such a hypothesis because of the difficulty in operating both a base model and the test model. There is likelihood of opposition to the testing of any proposed model coupled with the possibility that the testing of such a model may affect the results because the market participants may elect not to participate in such testing or their participation is distorted because of their knowledge that such testing is being undertaken. Further, there is also the difficulty of interpreting the results of any testing. For example, in comparing the New Zealand *Land Transfer* Act of 1870 with the prior statute it replaced (the *Land Registry* Act of 1860), Whalan concluded that the success of the later statute may have been a consequence of the economic prosperity of the 1870s in New Zealand as well as the possible superiority of the later Act over the earlier (Whalan 1967).

Thus it is concluded that the mode of assessment can at best be qualitative in that the functioning of the land market and the security of tenure is in line with community expectation. Even community expectation may be difficult to assess with recent investigations suggesting that the law of adverse possession is not widely known (LRCT 1995; VPLRC 1998; Law Commission 2001).

Another inherent difficulty in testing any hypothesis is the time span involved. The limitation periods for the recovery of land in the Australian jurisdictions range from twelve to fifteen years and have recently been reduced to ten years in England and the Canadian province of Alberta. Thus the effect of any alteration in the law to be tested is unlikely to be apparent until a period in excess of the limitation period has passed. The effect of the length of the time span involved is increased by the usual practice of permitting a transitional period where major alterations to the law are introduced. Thus, in summary the difficulties are the impracticability of carrying out the testing necessary, the interpretation of the results if the tests were able to be conducted, and the time span involved in such testing. As a consequence the effectiveness and efficiency of any proposed changes can only be assessed with regard to community confidence and satisfaction.

Accordingly, the broad question addressed by this thesis may be framed as:

What is the best and most efficient method of dealing with the problems arising from an occupational boundary diverging from the legal boundary [in any jurisdiction utilising registration of title but particularly in the Australian jurisdictions] where the effectiveness of the solution is to be gauged by the community's confidence in the administration and functioning of the land market?

This second formulation includes the investigation of other possible methods, besides that of part parcel adverse possession, for dealing with discrepancies between the occupational and legal boundaries of a registered land title parcel.

### *The significance of the research*

Registered title land systems have now been in use for over one hundred years. During that time there have been a number of comprehensive comparative studies of the different Australian land titles systems (Whalan 1982; Francis 1972; Kerr 1927; Hogg 1905; Hogg 1920). Because of marked changes to the systems none of these studies are current. More recent studies have been in the context of the general law of property and the coverage of the different land title systems has been necessarily generalised and presented in summary form (Sackville and Neave 1975; Jackson 1967). Consequently the authors of these recent studies have taken a broad view with the consequence that their conclusions are only correct in general terms. Thus a

Queensland commentary can, within the context of several pages covering the whole Australian landscape, assert that all the states are now uniform in permitting title acquisition based upon long occupation adverse to the registered proprietor or adverse possession (Brown 1980, 56). Only upon closer investigation does the inaccuracy of this generalised statement become apparent. The differing approaches were referred to by one author who expressed the belief that his work was a compromise between the two approaches – the broad treatment of principle as opposed to the narrowly annotated statute specific to the single jurisdiction (Baalman 1951, Preface iii).

Detailed coverage of adverse possession has been included in specialised conveyancing texts but these have been targeted at practitioners of a single jurisdiction. Similarly the coverage of adverse possession has been within the general law of property with the consequence that the studies are necessarily generalised and in summary form. The existing studies are broad-based and do not explore the interrelationship between adverse possession and the system of registered title land. The existence of the interrelationship is recognized and the possible conflict within that relationship is commented upon but otherwise the subject is not examined critically.

The subject of part parcel adverse possession is included within adverse possession generally and this fails to acknowledge that the problem arising from non-permanent boundary locations is distinct and separate from that of general adverse possession. This failure may in part be attributed to the existing studies being written from the legal viewpoint as opposed to that of the surveyor. The legal writer treats the issue of part parcel adverse possession as wholly within the topic of adverse possession whereas the surveying professional recognizes that the physical representation of the boundary will, all too often, diverge from that of the legal boundary. The legal approach may be justified in that part parcel adverse possession creates a new and distinct parcel rather than an accretion to an existing parcel. Thus, for example, a detailed study of the Australasian registered title schemes acknowledges (in passing) that whereas part parcel adverse possession by an adjoining landholder is recognised in Victoria, the acquired rights (to the part parcel) do not pass upon transfer of the

landholder's original parcel except where expressly stated to do so (Francis 1972, 22).

Again, the narrow purpose of a specialised commentary is insufficient to encompass changing attitudes to accepted practice; an example being that of a text for English registered title land (Ruoff *et al* 1986). All editions from the first (published in 1958) to the fifth (1986) have been written by registry officers for the use of legal practitioners conducting land conveyancing. Consequently, the view that the registry could be utilised as a repository for a wider range of information than that required to support only conveyancing and the land market does not find favour with the authors (*ibid* 104-105). This view has remained unchanged through all editions (including the current edition) although it is not consistent with the modern multi-purpose cadastre.

The significance of the research may be further appreciated by noting the belated recognition of land title registration as a radical alteration to traditional English real property law. Until recently the majority of commentators had held to the belief that title registration effected a procedural alteration in the conveyancing process with little effect on the substantive law of real property. This was evidenced in earlier editions of a renowned real property treatise wherein title registration was accorded the seventeenth place in the nineteen chapter publication (Megarry and Wade 1975). This approach resulted in traditional real property concepts being discussed followed by an addendum relating the implications of registered title. Today the title registration chapter has been elevated to sixth position in the most recent (twenty-two chapter) edition (Megarry and Wade 2000) with the consequence that a thorough understanding of the principles of title registration are broached before such traditional real property concepts of easements, mortgages, covenants, and leases and tenancies. The same observation may be made with regard to other real property texts.

Another similar illustration is that provided by the English law reform body. In its 1970s and 1980s reports, any proposed reform of the law of real property was impracticable because the reform was required to apply equally to unregistered land

(that is, land not subject to title registration) as it was to registered title land (Law Commission 1971; Law Commission 1987). Within three decades the same body has recognised that the two systems of unregistered and registered land are fundamentally different and that the former system was in the process of being phased out (Law Commission 1998; Law Commission 2001). As a consequence, there was no necessity for the reform of registered title land law to be hobbled by a no longer needed consistency with an outmoded system of land law.

As noted above, there is inevitable conflict between the undocumented proprietary interests founded on adverse possession and those recorded in the register unless the recorded interests are accorded legal priority over the undocumented off-register interests. Previous studies have not fully considered this conflict. Some studies physically separate their discussion of the benefits of a comprehensive register from that of the necessity for a limitation period and neglect to comment upon the conflicting principles. Other commentators view the conflict as inevitable and offer various rationalisations that seemingly eliminate or minimise the conflict. An example being that the defect (if the conflict is a defect) is not peculiar to registered land and that other systems of land tenure (including those replaced by the registered land title scheme) also suffer the defect. Other rationalisations are that such overriding interests can usually or normally be ascertained by inspection of the land (West 1975; Wallace 1999; Williams, 1967–68). Another rationalisation seeks to equate the divestiture of the documentary owner's title through adverse possession as similar to (and of no worse consequence than) divestiture as a consequence of failing to pay property taxes (Mapp 1978). The interpretation that no land system can include all information relating to the land is also proffered as justification (West *ibid*). Simpson's seminal study of international registration schemes offers that the documentary owner of a registered title lot should not expect to enjoy a more privileged tenure than the owner whose title rests on ordinary title deeds (Simpson 1976, 153). As will be discussed below, these rationalisations appear to be founded upon dubious premises and they do not reconcile the inherent conflict between the two competing principles — at best they provide means by which some possible disadvantageous outcomes can be prudently avoided. Otherwise they rely on other equally detrimental outcomes as somehow excusing the particular loss of title

through adverse possession. Another aspect of these rationalisations is that they are all directed at whole land holdings and do not hold up in the case of small segments of holdings such as those involved in the boundary location problem. In the context of this research this last aspect is most crucial.

Further, previous research has not recognized the consequences of the coming together of a number of disparate factors each exerting an influence upon the other. Thus, there has been a failure to appreciate that the ultimate result of these combined factors is more marked than would be expected by an accumulation of the individual results of each factor. For example, improved survey techniques, land reforms which increased the private ownership of land, reforms to land law, the encouragement of mass settlement of the New World colonies and the allocation into private ownership of large tracts of unmapped and unsettled land in the New World colonies were all juxtaposed in the eighteenth and nineteenth centuries. As a consequence England, one of the past colonial powers, has *general* (or descriptive) boundaries and its one-time colonies mostly enjoy *fixed* (or numerically defined) boundaries.

This research is confined to the role of adverse possession in the narrow context of registered title land systems and with particular emphasis on part parcel adverse possession as a means of resolving problems arising from the divergence of occupational boundaries from legal boundaries. However, the research will not be confined to Australia. Valuable insight is available from the United States, a jurisdiction sharing the legal heritage of Australia but untouched by the 1833 English reforms. Similarly, Canada is able to provide a differing view. Additionally, it should be recognized that the changes introduced into the various jurisdictions were not confined to England determining the future direction of its colonies — the traffic in ideas and innovation was two-way. In addition to proposing a model scheme suitable for the future need of Australia (and perhaps other jurisdictions), one aim of this research is to provide an authoritative account of adverse possession of registered title land (both whole and part parcel adverse possession) and not necessarily restricted to Australia.

The introduction of uniformity into the differing registered title schemes in Australia, of which there are eight, adds significance. After a century of federation, and at a time when national businesses and the affairs of the citizens straddle state borders, there is no inherent reason why there should be different schemes. The financial institutions necessary to provide assistance for the conduct of the land market have grown to a national stature in the last century or so. Despite unheeded proposals for uniformity in the past, the present cost conscious times may be opportune for settling on a single common scheme with a possible benefit that uniformity may reduce transaction costs significantly (Bradbrook *et al* 1997, ¶ 4.07; Davies *et al* 2001). Since the inception of title registration there have been calls for a single uniform scheme (*Breskvar v Wall* 1971, *per* Barwick CJ at 386; Whalan 1971b, 265–6; Whalan 1982, 12; Hogg 1920, 109; Hogg writing in the preface to Kerr 1927, vii; Neave 1993; Butt 1992, 34; Kerr 1993; MacCallum 1993) and some commentators offering that the major impediment to such a unified system is the disparate approach to adverse possession (Hogg 1920, 10; Irving 1994, 119). A further benefit flowing from the adoption by the states of a uniform scheme is the ease of creating a national cadastre by the integration of the state cadastres.

There is some irony in regard to the early adoption of registered land title in Victoria and New South Wales in 1862. Initially these colonies had already prepared their own legislation which was thereafter abandoned in favour of the South Australian scheme because the two colonies were of the view that uniformity between the colonies was desirable (Hogg 1905, 45–6).

### *Extent of the problem*

With few exceptions most of the jurisdictions utilizing land title registration have included some means of adjusting or “repairing” the boundaries of a land holding. The means is not confined to part parcel adverse possession and includes a statutory scheme to adjust boundary locations of all parcels including those not within a title registration scheme. Notable exceptions to those jurisdictions including some means of resolving boundary location discrepancies are the Australian Capital Territory and the city states of Singapore and Hong Kong. It may well be that these small and highly developed affluent jurisdictions are better able to utilise modern surveying



techniques to the extent that such boundary discrepancies do not arise or arise less often. The history of such discrepancies in the Australian jurisdictions owes much to poor surveying techniques in the nineteenth century (Arter 1960–61, 112).

The problem studied in this thesis may arise in a variety of ways. In 1998 the Victorian Parliamentary Law Reform Committee considered the increasing risk of encroachment arising from the modern practice of creating title prior to the building of multi-density developments (“off the plan” strata title sales) wherein advantages accrue to both the developer and the purchasers (VPLRC 1998, 125). This prompted the Law Reform Committee to recommend that consideration be given to the adoption of legislation in Victoria similar to that of the NSW *Encroachment of Buildings Act 1922*.

Summarising the submissions received by the Law Reform Committee the Committee made the observation that boundary fence disagreements make a significant category of neighbourhood disputes which are highly charged, emotional, and angry and lead to acrimonious and prolonged litigation (*ibid* 127).

In the Victorian context, statistics provided by the Victorian Land Registry to the Committee indicated that out of more than a half million dealings *per annum* in the late 1990s, there are approximately two hundred adverse possession applications each year of which some eighty (or so) were for part parcel adverse possession applications (*ibid* 143). A qualification to these statistics provided by the Victorian Registrar is that very few objections are taken to adverse application applications possibly because of the potentially high cost of litigation compared to the value of the land in issue (*ibid* 141). Another possible and partial explanation of the few objections in Victoria may be that affected proprietors, upon receipt of legal advice as to the law of adverse possession in Victoria, elect not to proceed with an objection they have been advised against taking. An added complication arising from the Victorian Land Registry figures is that the law operating in Victoria does not require the adverse occupier to apply to be entered upon the register. An example being that provided by the inability of persons whose land has been encroached upon to take action to “shake off” that portion of their land to which their title has been

extinguished (*ibid* 148). Thus there are instances of successful acquisition of title by adverse possession which are not necessarily known to the registry office or not known at this time.

The benefit flowing to the Victorian community is that check surveys are rarely undertaken, unlike in NSW where “a check survey is virtually mandatory for a purchase of property” adding at least several hundred dollars to the cost of conveyancing (Registrar of Titles, Submission Number 21 dated 13 March 1998, *ibid* Appendix A). This conclusion was in accord with an earlier conclusion of the Law Reform Commission of Victoria in its 1987 report (LRCV 1987, 10).

Outside of Victoria and Western Australia, with the exception of the two Federal territories, the remaining states have been required to consider the issue of boundary location discrepancies. Western Australia, in adopting the 1866 Victorian Act as the basis for its 1874 Act, allowed for adverse possession of registered title land, including part parcel adverse possession.

In New South Wales, the long-standing prohibition against adverse possession of registered title land prompted the curial *dicta* from Justice Harvey in a lawsuit involving a disputed boundary location:

It is to my mind one of the great flaws in the system of the *Real Property Act* that there is no provision analogous to the *Statute of Limitations* by which long-continued possession crystallises a title. The result under the *Real Property Act* is this, that if at any length of time you can get a sufficient number of surveyors sufficiently positive to come and make a case to the Court to re-establish old surveys, no matter how long and how uninterrupted the possession may be, the Court may have to tell the proprietor, "You have been in possession of the wrong land all these years, and you have not got a title by possession because the Act does not allow you to have a title by possession."

*Turner v Myerson* (1917) 18 SR(NSW) 133, at 136.

Although the issue of whole parcel adverse possession was not addressed for another six decades, the NSW legislature shortly thereafter enacted the *Encroachment of Buildings Act* 1922. This statute provided limited relief to the inadvertent trespasser who has unknowingly erected a building or other valuable improvement in a way that encroached upon an adjoining owner's land parcel. The relief was not founded upon

adverse possession and was designed to permit a fair and just solution to such inadvertent encroachments.

The motivation of the legislature may be inferred from the Parliamentary Debates wherein the Attorney-General made reference to inadvertent encroachments and the evil that was associated with the encroached upon neighbour determined to “gouge” or exploit the trespasser’s inadvertence. The Attorney provided examples in the Sydney suburbs of Arncliffe and Balmain where in each instance, a one inch encroachment over land valued at one or two pounds per foot was the subject of a demand of one hundred pounds, that is, a rate of twelve hundred pounds per foot (NSW Legislative Council, Parliamentary Debates, 1 December, 1922, 2287 *ff*). Similar examples occurring in Five Dock, Sydney, Drummoyne, and Redfern were provided with the Honourable J H Wise commenting that “the measure had been absolutely necessary for years past” (*ibid* 2293),

The persuasiveness of the debate is however called into question by the Attorney’s assertion that New Zealand had passed a similar Act in 1908, and that Victoria had a somewhat similar law in force that “works very well”. Victoria has never enacted a statute providing for ‘statutory encroachment’ and New Zealand only introduced its encroachment provisions in 1952. The NSW 1922 Act provided the relief sought without permitting adverse possession of registered title land.

Later in 1979, when the NSW legislature was debating the introduction of a limited form of whole parcel adverse possession to provide certainty of title for the large number of uncontested but informal and uncertain titles (NSW Legislative Assembly, Second Reading Speech by the Minister for Lands, 28 February, 1979, 2602), The Minister continued, assuring the House that the proposed Bill had “no application to the numerous trifling cases of adverse possession strips of land along the boundary occasioned by a fence being located off the actual boundary” (*ibid* 2603). The Member for Bathurst, Mr Osborne, also referred to this restriction against the acquisition of title for small strips of land (*ibid* 2611; see also the Legislative Council Second Reading Speech by the Minister for Planning and Environment, 3 April, 1979, 3472).

Thus it may be seen that in 1922 and in 1979 the NSW legislature was fully aware of the problems posed by boundary discrepancies. Worthy of comment however, is the failure of the participants in the debates to express any view as to the need for part parcel adverse possession when NSW had already provided a means of resolving the problem for more than sixty years. Similarly, at the time of writing the report upon which the 1979 adverse possession provisions were introduced unto the NSW *Real Property Act*, the report's author was at pains to justify the inapplicability of his recommendations to less than whole parcels, providing four arguments supporting his conclusion (Grimes 1976b, 25-27). It is surprising that the report's author failed to argue that the existence of the 1922 *Encroachment of Buildings Act* removed any necessity of applying the proposed adverse possession provisions to part parcels. The arguments advanced by the author opposing part parcel adverse possession were laboured and lacking the force that could be conveyed by a reference to the existence of the 1922 statute.

This apparent disconnection between the encroachment legislation and prohibition against part parcel adverse possession provisions is not confined to NSW. It exists in New Zealand and South Australia and was in existence in Queensland for four decades prior to the passing of the 1994 *Land Titles Act*. In two jurisdictions, Western Australia and Alberta, the encroachments provisions together with part parcel adverse possession provide a surfeit of solutions to the boundary discrepancy problem.

Similarly to NSW the South Australian, Queensland, Western Australian, Northern Territory and New Zealand parliaments have passed legislation conferring jurisdiction on the courts in cases of inadvertent encroachment to ameliorate the only remedy available under common law — demolition of the offending encroachment.

Thus it may be concluded, with the exception of the Australian Capital Territory and (since 2001) Tasmania, all Australian jurisdictions have passed legislation allowing for adjustment or repair of erroneously located boundaries by way of part parcel adverse possession or statutory encroachment or both.

Another means of assessing the extent of the problem is the importance attached to it by the community. A legal issue that may only directly affect very few members of the community may inflame the passion of those unaffected members. In 1994 there arose much public disquiet in Tasmania following upon the decision handed down in *Woodward v Hazell* (1994). The public disquiet extended beyond Tasmania because of nationwide television coverage by current affairs programmes. The NSW Land Titles Office was subjected to enquiries from land holders seeking reassurance with regard to adverse possession in that state (Wallis 1998). Echoes of the Tasmanian case surfaced in Western Australia in 2000 when evidence of the concern it engendered in a Western Australian land holder was before the court in *Holdsworth v Holdsworth* (2001). The public disquiet in Tasmania saw the establishment of a Law Reform Commissioner's inquiry into adverse possession. The Commissioner's report included several proposals to amend the law which culminated in the 2001 amendments effecting major changes to the law of adverse possession in that state.

In the United Kingdom, the Law Commission reports record "hostile public criticism" (1988, 24), "growing public disquiet" (2001, 30), and "considerable public disquiet" (2001, 301) with regard to adverse possession.

The conclusion is drawn that the extent of the problem is small in the number of persons affected but large in the amount of heat generated.

### **1.3 The objectives of the research**

The objectives of this research may be identified as

- to review and understand the operations of the registered title land system and its variants and the strengths and weaknesses of these variants;
- to review and understand the operation of the statutes of limitation in their various forms and their application to the registered title land systems particularly with regard to the variation of boundaries together with the strengths and weaknesses of the various forms;
- to review and understand other alternative methods of dealing with variation of boundaries and the strengths and weaknesses of these methods;

- to formulate a method to best deal with the problem of boundary variation and suitable for uniform adoption throughout Australia and possibly in other registered title land jurisdictions, the formulated method being such that the participants can have confidence in its working; and
- to assess the value (or utility) of the proposed method by testing the method against the present methods with regard to the application of the methods to several recent lawsuits representing recognized difficulties associated with the present methods;

within the context of, and the fostering of, the efficient functioning of the land market.

#### **1.4 The scope of the research**

The scope of this research is to cover both the practice and law of the existing methods of dealing with the problem of boundary location variation including analyses of the formation of those laws and practices. A thorough understanding of the existing laws and procedures and how they arose will provide valuable insight for formulating a new model or method to better deal with the problem. Any proposed new model or method should not inhibit the land market, and preferably should promote the efficient operation of the land market with the efficiency to be assessed. Objective assessment will not be readily available and it is proposed to test the performance of any proposed new model in its resolution of some recent known and well-documented lawsuits where the court system was invoked to resolve the dispute and remove remaining doubt. A proposed “successful” new model will ideally resolve disputes and doubts without resort to the courts because the operation of the legal regime would be clearly understood, and, most importantly, would command the respect of all members of the community so that the resolution provided is accepted by the community.

This research is directed at formulating a legal framework which strikes a fair balance between the various participants in the land market. This is a question of law making by the legislative arm of government. If such a legal framework exists, a court system is still required that will properly uphold the legal framework. This is a question of legal interpretation by the judicial arm of government. Lastly, there is the

requirement of upholding and enforcing the law as interpreted by the court. This is a question of enforcement by the administrative and executive arm of government. This thesis is concerned only with the provision of a legislative framework conducive to the efficient operation of the land market. It does not canvas the lack of security associated with a failure of the judicial system or the arm of government responsible for enforcing the law.

The scope of this thesis is confined to providing a solution to those instances where a discrepancy is found to exist between the location of the boundary as it was laid out and the actual occupational boundary currently in use. Where there are several available solutions the thesis aims to evaluate these with a view settling upon the best solution. Consequently, this thesis is not concerned with survey investigation and the redetermination of boundaries. Survey investigation and boundary redetermination are the province of the professional cadastral surveyor. Survey investigation and boundary redetermination are conducted according to well established principles and procedure (Willis 1982; Ticehurst 1994). Only after proper survey investigation and boundary redetermination by a professional surveyor whose report discloses a discrepancy in the boundary location is the ambit of this thesis reached. How the discrepancy is resolved is a matter for the laws and practices of the jurisdiction. Whether the original boundary is to be restored or the boundary is to be redefined in a different location from its original location is the subject of this thesis.

Where any discrepancies are within acceptable limits there is no necessity for resolving a discrepancy. A discrepancy within the allowable margin of error permitted by Victorian legislation does not require resolution. For example, Part VII of the *Property Law Act* 1958 provides for an error margin of 50 millimetres or one in five hundred for longer boundary lines: section 272. In effect, such an allowable margin of error redefines that which would otherwise be a discrepancy requiring resolution. That is, the discrepancy has been redefined as not being a discrepancy.

That a later and more accurate survey discloses errors in the original survey is immaterial, because the duty of the surveyor is to locate the lines exactly as run by the original surveyor (Ticehurst 1994, ¶¶ 3.1, 13.13, and 13.16). Where there is no

discrepancy between the original survey boundary as laid out on the ground and a later survey to redetermine that boundary, then there is no scope for the application of the legal principles and practices covered by this thesis. This is so even where there is a discrepancy between the boundary as located on the ground during the original survey and the technically correct position of where the boundary *should* have been located on the ground during the original survey (*South Australia v Victoria* 1914; *Turner v Myerson* 1917; Grimes 1976a, § 62).

Similarly outside the scope of this thesis is the “provisional” boundary associated with a limited title over “old law” or unregistered land that is provisionally permitted to be converted to registered title land in New South Wales under provisions in that state’s registered land title statute. Until the provisional boundary is defined to the Registrar’s satisfaction, the limited title land does not carry with it the usual benefits of registration including the guarantee of title (Butt 2001, 698). The provisions pertaining to both limited title and qualified title (*ibid* 693) permit unregistered land to be brought into the registered land system provisionally pending acceptance by the Registrar without limitation or qualification with that acceptance being based upon a limitations defence (adverse possession) arising from the passage of time. That the boundary of a limited (or qualified) title parcel may differ in its location from the boundary ultimately accepted by the Registrar is entirely consistent with traditional real property law related to unregistered land. Adverse possession of part parcels of unregistered land is outside the scope of this thesis except for the insight provided by a historical review of the development of modern land law including registered title land.

An important restriction on the research is that it cannot be conducted in isolation from the current movements towards cadastral reform including the adoption or creation of a multi-purpose cadastre. As an example, it would be pointless to devise a solution to the single problem of boundary discrepancies suitable for the English land registration system while in the interim the English parliament has effected major changes to all aspects of that system by passing the *Land Registration Act* 2002.



## **1.5 Summary of research methodology**

The research into the existing laws and procedures in seeking to ascertain the general rules governing the manner in which current boundary location discrepancies are dealt with was necessarily inductive by generalising from specific examples. The analysis to which the proposed method was subjected required a deductive approach including an assessment of the performance of the model by applying the model to the specific examples being those specific lawsuits used to analyse and evaluate current models already in use.

### *1.5.1 Literature review*

An ongoing literature review was conducted to enable an understanding to be reached of the various registered title land systems in the common law world. A study of the various statutes of limitations and the interplay between the statute of limitation and the registered title land statute for each of the jurisdictions researched was also undertaken.

Research into the United States' jurisdictions was limited in extent by two factors; the first being that the requirements to establish adverse possession differ significantly from those in Australia and England; and secondly, only a small number of those American states have registered title land systems. With regard to these jurisdictions, there exists a body of law to the effect that registered title systems do not permit the acquisition of title through adverse possession (Brown *et al* 1986, 20; Brown *et al* 1981, 99 and 329). Of course, the Australian experience is that such express assertions that adverse possession is not permitted within a registered title system are not necessarily of permanent validity. This is evidenced by the adoption of restricted forms of adverse possession in many of the jurisdictions that had previously expressly prohibited the acquisition of title founded upon long-term adverse occupation because of the necessity of retaining a semblance of order over abandoned lands with long disappeared registered proprietors.

Similarly the Canadian provinces provided much insight into registered title land law but, excepting Alberta, none of the registered land title provinces permit adverse possession. The review of Canadian registered title land jurisdictions provide further

insight into a mode of varying boundaries to accord with occupation pursuant to statutes which have counterparts in some of the Australian jurisdictions under those statutes relating to improvements to land under mistake of title or encroachment.

Another purpose served by the literature review was to elicit a number of noteworthy cases and instances involving possible boundary variations to serve as a yardstick against which the formulated model can be tested and measured. These case studies serve to illustrate the workings of the current methods including perceived shortcomings of those methods. Additionally the economic theory of markets with particular emphasis on the land market and private ownership of land was studied with regard to determining those factors which influence the operation of the market. Of particular concern are those factors considered to inhibit the market operation with the desirability of ensuring that those factors are not present in any proposed model or method of dealing with the problem of boundary location and variation of location. Of course, if these factors cannot be eliminated it is desirable that their effect is minimized.

#### *1.5.2 Formulation of the proposed model*

An understanding of the strengths and weaknesses of the existing methods may permit a proposed replacement that incorporates the strengths without the weaknesses. On the basis that the present methods are considered to be effective by their respective administrators, particular attention will be paid to the elimination of the perceived shortcomings of the existing methods. With the same object in view, the introduction of added benefits will assist the acceptance of any proposed replacement method.

#### *1.5.3 Analysis of the proposed model*

This involved an attempt to ascertain whether there existed any impediments to the introduction of the proposed method into the various Australian jurisdictions and the likely effects of introducing the model with an analysis of the likely benefits to be provided by such a model. The analysis is reinforced by applying the proposed method to the case studies previously used to illustrate the workings of the existing schemes. A perceived impediment to introducing a proposed replacement method is

that the proposed method must be an improvement upon current practices without supplementing current disadvantages.

### **1.6 The procedure and organisation of this thesis including an outline**

It was sought to provide a logical order with a desired feature being that the ending of one chapter should foreshadow the next. A simple basis for this was the chronological order reflecting the evolution and development of the law of real property in the common law countries inheriting their legal systems from the English.

The research question is posed in the first chapter: this can be briefly described as seeking the ideal model to provide for boundary adjustments within a broad *spatial data infrastructure* which includes within its functions those currently provided by the single purpose land title registration system. The hypothesis is set out together with the possible benefits flowing from this research. These benefits are not confined to the Australian jurisdictions. The chapter includes a description of how the problem which requires boundary adjustment or variation arises.

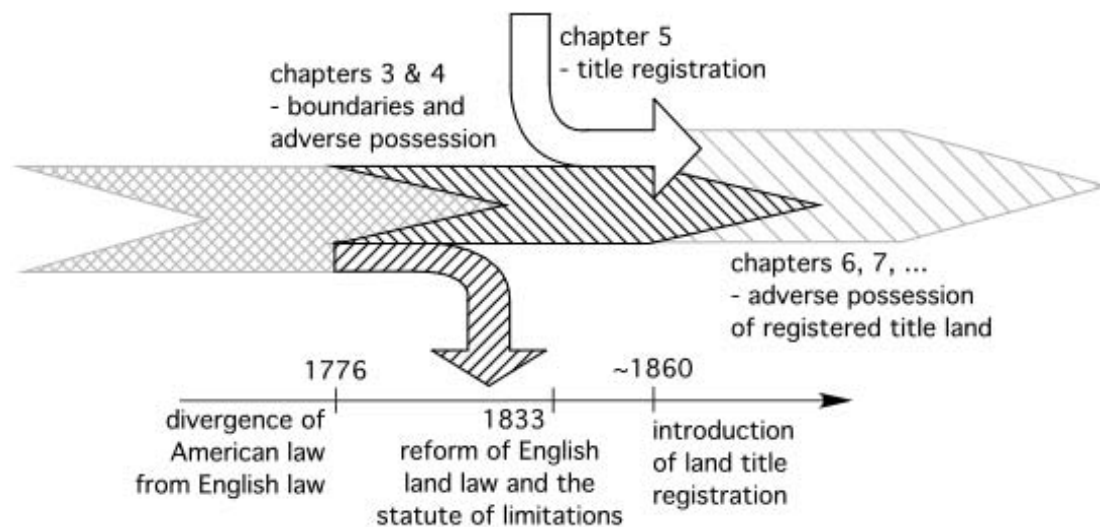
The second chapter deals with the land market, its evolution, and its close connection with the concept of private ownership of land. Within this study the contribution of an efficient land market towards sustainable development is discussed. The development of the modern multi-purpose cadastre from the traditional single purpose cadastre is considered. This chapter also includes reference to the evidentiary aspects of land ownership and its evolution leading to the current widely used land title registration and the changes and improvements introduced with registration of title. Because the operation and existence of the land market requires a consistent and systematic approach to ownership of land this is dealt with in the first substantive chapter following the introductory chapter. The chapter is confined to those characteristics of the land market, which have a direct influence upon the location of boundaries. This restriction has been imposed with a view to keeping the research to a manageable size.

A possible anomaly is the third chapter discussing boundaries. The importance of “fixed” boundaries is most commonly associated with the advent of the registered title systems which awaits chapter five for its comprehensive treatment. However, the importance of boundaries is necessarily related to the private ownership of land and the operation of the land market. Thus it was felt the chapter is better placed following the land market (chapter 2) and preceding that of adverse possession (chapter 4) which introduces part parcel adverse possession which can have the effect of altering the location of land parcel boundaries. This boundaries chapter dealing with a necessary component of private land ownership could be considered as an essential component of the preceding land market chapter which deals with the establishment of private ownership over land. The chapter order is based upon chronology, with private land ownership and the land market only recently acquiring wide social importance during the Industrial Revolution. Thus the land market (chapter two) and its necessary boundaries (chapter three) only came into existence in the eighteenth century narrowly in advance of land title registration (chapter five) and the modern law of adverse possession (chapter four) which are the subjects of the next chapters.

The delimitation of the extent of a land holding is covered in chapter three. These limits are defined by boundaries and the various styles of boundaries are considered with their establishment and re-establishment. The chapter includes an analysis of the reasons why the legal and occupational boundaries may diverge despite recent advances in technology permitting high levels of accuracy in surveying.

Because title registration was a new concept in the nineteenth century almost contemporaneous with the “modern” law on limitations and land law reform in 1833, the order of the chapters dealing with these subjects of adverse possession and title registration is not important. Both however should necessarily precede that chapter (six) melding the two into adverse possession of registered title land as shown in Diagram 1.1 (on the following page) which sets out the relationship between chapters 3, 4, 5, and 6.

Whereas the ordering of this thesis depicts *title registration* as joining the main stream of *boundaries* and *adverse possession*, it could have just as easily been ordered as depicting *title registration* as the main stream with *boundaries* and *part parcel adverse possession* as joining tributaries. Further, the diagram also depicts the divergence of United States' real property law prior to the English law reforms of 1833 and the mid-nineteenth century introduction of registered title. The divergence of US law from that of England followed upon the 1776 war of independence and provides a partial explanation of the small contribution to this thesis from the United States of America.



**Diagram 1.1:** the ordering of chapters 4 (adverse possession) and 5 (title registration) need not necessarily be in that order *but* both must precede chapter 6 (adverse possession of registered title land).

The concept of boundaries is a necessary adjunct to private ownership of land (which itself underpins the land market). A means by which disputes over land ownership may be resolved is also ancillary to the land market and its operation. Similarly, disputes over the ownership of smaller parcels or slivers of land where, although the identity of the landholders or owners is not in dispute, the limits of where one landholder's domain ends and that of another landholder begins also requires resolution. Adverse possession is a traditional means of resolving disputes over the ownership of land and it has a long history. Chapter 4 provides an overview of the advent of this legal remedy up to its current form and its relationship to title registration and foreshadows the inherent contradiction of permitting adverse possession in a registered title regime. The comparatively recent change to the law of adverse possession which gives rise to the change of ownership of a small portion of

a land holding is also discussed. This chapter necessarily discusses adverse possession as the most widely used mode of coping with the divergence between legal and occupational boundaries. However, other means of dealing with the problem are also discussed. These alternative procedures for dealing with the problem of resolving boundary divergence and adjustment are the encroachment statutes, section 272 of the *Property Law Act* and sections 99, 102, and 103 of the *Transfer of Land Act* in Victoria and their equivalents in other jurisdictions.

The next chapter (five) provides an historical discussion of the advent of registration of land title in Australia and its ramifications with respect to traditional real property law of which some aspects have little relevance in the twenty-first century.

The following chapter six seeks to combine the preceding chapters (four and five) by applying adverse possession, particularly part parcel adverse possession, to registered title land. This chapter includes a theoretical analysis of the approaches taken by the different jurisdictions in seeking to deal with disputes arising out of questions of land ownership including doubtful cases of that land immediately at or near the dividing boundary of two adjoining landholders. The chapter investigates the proposition that some means of resolving parcel ownership and boundary discrepancy disputes is necessary even if there be a logical inconsistency with a registered land title system.

The conflict between the registration system seeking to record details of land ownership and the dispute resolution process that recognises unrecorded land ownership is discussed. This conflict is commonly referred to as “overriding” in that the unrecorded interests arising from dispute resolution are said to override those interests recorded in the register. To provide an objective basis for assessment, a ranking or marshalling scheme is introduced so that the different approaches taken in the jurisdictions can be ordered or ranked according to the ease with which title based upon adverse possession is recognised and tolerated. The ranking scheme is a qualitative measure of the extent to which a jurisdiction permits unrecorded proprietary interests to override registered proprietary interests recorded in the register.

In addition to the theoretical analysis provided in chapter six, three recent actual cases of litigation are used to provide a practical illustration of the workings of the various jurisdictional approaches in the following chapter seven. This chapter provides an interlude from the theoretical analysis of real property law, including land title registration, by introducing three recent law cases that are the basis of case studies. These law cases provide a backdrop upon which the workings of the particular law regarding registered title and adverse possession in different jurisdictions are displayed. These cases demonstrate the workings of the law in the jurisdiction from which they arose and, with some small amount of creative imagination and comment, can also be used to illustrate the law as it applies in other jurisdictions. The commentary is extended so that as well as demonstrating the differing approaches adopted by the various jurisdictions, these cases serve as vehicles for critical commentary on these approaches. The insight gained from these cases will permit the later formulation of a proposed model suitable for adoption as an improved and better or optimised approach. These law cases will also provide a means of assessing and evaluating the different approaches in current use as well as providing a means of comparative evaluation of the proposed model.

The practical illustration provided by the case discussions is enhanced by considering how each of the three cases would have been determined in each of the different jurisdictions. This provides a comparative illustration of the current adverse possession procedures in the Australian jurisdictions with particular reference to those of NSW and Victoria, which are offered as representing the extremes of the range of those procedures.

Chapter eight considers other possible alternative means of resolving the problems arising from boundary location divergence and adjustment as they have been adopted in a number of jurisdictions utilising registration of land title with particular reference to the Australian jurisdictions.

This is followed by the introduction of a proposed “optimum” solution for the boundary divergence problem in a registered land title regime in chapter nine. Before introducing the proposed model there is a discussion of those features thought to be

desirable in a model proposed to replace the existing current models. The analysis includes applying the proposed model to the case studies to illustrate and demonstrate its performance. The proposed model should be available for incorporation within any proposed uniform Australian cadastre and ought to be suitable in any jurisdiction. The introduction of this model requires justification which is provided by an analysis of those features associated with the model and the practical application of the model to the three case studies — these are evaluated and assessed in the chapter.

Having proposed and created a proposed model, chapter ten deals with the practical considerations necessary to implement the model within the various Australian jurisdictions. To do so, it will be necessary to demonstrate those benefits accruing to each of the Australian jurisdictions with a minimisation of detrimental ramifications. Implementation of the model may require some compromises to be accepted in some of these jurisdictions. The chapter includes an attempt to foresee possible difficulties and obstacles to the adoption of the model and how those obstacles may be overcome by an emphasis on the advantages of the model and those flowing from a uniformity of law throughout Australia.

The final part of chapter ten includes the conclusions that may be drawn from the overall thesis including observations for the introduction of the proposed model into any jurisdiction including those which are creating a new registered title system as well as those jurisdictions that already have an existing registration system.

## **1.7 Summary**

This chapter sets out the existence of a recognised problem where the location of the dividing boundaries between different land holdings can diverge from the boundary as originally laid out by survey and the current methods of resolving the problems arising from that divergence. The question to be determined by the research is then formulated as:

will the land market exhibit improved efficiency if the legal boundaries are aligned with the actual occupation boundaries where they do not coincide?



Given the research hypothesis, the objective and scope of the research is identified. This is followed by a description of the proposed research which is necessary to enable the formulation, identification, and testing of a proposed method of dealing with the problem in the “best manner” (that is, seeking an optimal outcome) where, included within the best manner, there is an aim towards the least disruption of the involved parties.

# Chapter 2

## Land Markets

### 2.1 Introduction

The land market is central to this thesis because it can provide a measure of efficiency in comparison to other markets including other land markets. It is essential to appreciate the position occupied by the land market and the role it plays in an economic society. The characteristics of the current land market are discussed followed by a description of the evolution of that land market. A preliminary conclusion offered by economic theory is that market forces will favour investment in the least contentious properties with minimal cost, that is, the greatest return for the least investment with the greatest security (or least risk). The cost of investigating a proposed dealing is included in the transaction costs and these costs are reduced by the availability of a reliable register (Larsson 1991, 69) because the information needed to investigate the dealing is contained in an easily accessible register. The lack of a recognised system which supports an economically efficient market stifles economic growth because capital which might otherwise be used to fuel such growth is frozen within the *de facto* system that arises in the absence of a legitimate recognised system. Whether the system of governance provides such a recognised system or not, the community demands a system and the demand will produce the *de facto* system where the legitimate system is absent. With regard to the evolution of the current land market a number of independent factors affecting each other, both in England and its colonies, brought about the liberalization of the market commencing about the early eighteenth century.

### 2.2 Characteristics of land markets

Land is ultimately the principal source of the material prosperity of every nation (Hinde 1965, 77; ECE 1996; Dale and McLaughlin 1988, 1). The efficient use and management of land is the basis for economic development (Munro-Faure 1999), and the private use and management of land is the basis of a land market. Land is ideally suited to be the basis of a market because it is immovable, indestructible, and of value (Dowson and Sheppard 1956, 10 and 81). As with all market commodities, it assumes an enhanced value where demand exceeds supply because of its finite nature

(Dale and McLaughlin 1988, 20). Land is also an ideal subject of security rights, that is, property charged with a debt in the sense that the enforcement of the debt is facilitated or made more certain (Burke 1977, vol ii, 1624). In fact, land is the premier security because if it fails then the whole edifice of debt raising is rendered unstable. Every investment is in some way dependent on land and real property (Dale and McLaughlin 1999, 4; Feder and Nishio 1998; Barnes *et al* 2000).

### **2.3 Features of the land markets of particular relevance to boundaries**

The characteristics of the current land market are directly related to and result from the concept of private property rights. Without permitting private property rights there could be no markets and certainly no land market. Where there is no market there is an impediment to economic growth and development (Burns and Eddington 1996, 7; Grant 1996, 1–2; de Soto 1989; Barnes *et al* 2000, 33). Of the eleven “incidents of ownership” (Honore 1961, 113); the rights to exclude others, to alienate, and to subdivide are important features of the land market which are directly related to the creation and maintenance of boundaries including the location. These features, coupled with the supposed economic efficiency arising from private ownership and the incentive to acquire information in order to maximise the economic value and return from that ownership, are the basis of a land market. These three features necessarily involve the concept of a boundary wherein the rights of private ownership begin and end. A private owner cannot exercise or enjoy any of these features on land over which the owner has no dominion, and similarly, a private owner cannot be prevented by a neighbouring owner from exercising or enjoying any of these features on land over which the owner has dominion. The extent of an owner’s dominion is delineated by the boundary of that owner’s land.

#### *2.3.1 The right to exclude*

Private property is a recognised system by which a single party is vested with the right to exclude others from exercising or enjoying the rights attached to that property (Dolan 1974, 210). The necessity for excluding others arises from the relative scarcity of the subject matter (Kain and Baigent 1992, 5). The right to exclude others from exercising or enjoying those property rights associated with land

necessarily entails the demarcation of the private owner's domain to allow others to recognise that from which they are excluded. The limit of the owner's domain is defined by the boundary and the physical manifestation of the boundary could be a fence or other physical object. If the boundary and the dividing fence between two adjoining or abutting properties do not coincide then there are different ways of resolving this boundary discrepancy. The location of the boundary prevails over that of the fence; or the fence location, being the line of occupation, prevails over the boundary and becomes, in effect, the new boundary. That the location of the physical manifestation of the boundary (the occupational boundary) is not necessarily the ultimate lawful boundary requires the resolution of the discrepancy in a manner acceptable to society.

### *2.3.2 Economic efficiency of private property rights*

The rewards of exercising private property rights are that people are prepared to risk investing further resources because ownership encourages investment (and even better, long-term investment) as the future owner derives the benefit of long past investment (and risk ventures) (Kemp 1974, 126). The nexus between investment and reward is amply illustrated by the example of the wasteful practices arising from the unregulated common ownership over the vast East Texas oil and gas fields in the early twentieth century which led to the later development of the cooperative unitised recovery of petroleum to maximise the efficient production from deposits throughout the world. Thus, enlightened economic self-interest coupled with government regulation can provide a higher return with greater certainty. It can also be seen in the recent past with those resources previously considered so infinite as to be incapable of ownership. As more demands are placed upon the resource, each individual has the incentive to use up the resource to most benefit before its depletion by everyone responding to the incentive of short-term gain at the risk of permanent depletion or destruction of the resource. This can be overcome by regulating the common ownership of the resource, by passing environment pollution laws for example, or by permitting private proprietary rights over the subdivided resource as was done in England by enclosure of the commons land in the eighteenth and nineteenth centuries. Private ownership permits the exclusion of others having the

incentive to use up the resource and, by eliminating the threat of depletion by others, the private owner no longer has the incentive to use it up. The incentive of the private owner is to utilise their portion of the resource for maximum benefit over the long-term. Consequently the future expectations of the present owner are conducive to present investment only if the present owner is confident that those future expectations benefit him or herself or their progeny. Without secure land and property rights there can be no sustainable development, for there will be little incentive to make long-term investment by the property owner or those willing to lend to the owner. Countries in transition will, in particular, find it difficult to obtain foreign investment where the security of land and property rights is unsettled (ECE 1996). Secure property rights result in an increased market value of the land parcel, higher productivity of the land parcel, increased investment, increased development and improvement, and the allocation of more resources into production (Dale and McLaughlin 1999, 4; Feder 1988, 174; Feder and Nishio 1998; Barnes *et al* 2000). A secure land market is one in which an investor and other participants can have confidence in the security of their investments and proprietary rights. The existence of a secure land market contributes to confidence in society and governance and leads to the avoidance of civil unrest which in turn further enhances the security of the market and makes capital available for further development (de Soto 1989; de Soto 2000).

### 2.3.3 *The right to alienate property rights*

A basic tenet of economics is that in a free market, resources will be bid into their most productive use; thus a prohibition against alienation may lock the resource into unproductive use. Certainty of ownership and security for credit also support the land market in that an investor or financier desires the assurance that the borrower has the right to alienate the property rights attached to the land. The right to alienate property includes the right to pledge the property as security to raise loans. The right to alienate property is contingent on secure ownership and is but one of a bundle of rights associated with ownership.

#### 2.3.4 *The right to subdivide*

This is no more than the right to alienate some (but not all) of the bundle of rights included with ownership. The options available to the owner are extended and the value of the property increased where the division of property rights are permitted (Kemp 1974, 126–7). For example, an owner may transfer the rights to remove timber or minerals from his land without surrendering the ownership of that land. The commodity traded in is a *real property right* (Harvey 1981).

Again, the right to subdivide property is contingent on secure ownership. The division of rights can be by time (hire or leasehold) or space. Such subdivided rights can be the subject of adverse occupation with the eventual extinguishing of the true holder of the rights being unable to legally enforce those rights against the adverse occupier. This thesis is concerned with the division of space and the boundaries delimiting the spatial extent of the subdivided lot.

#### 2.3.5 *Acquisition of information and decision-making based upon acquired information*

Ownership without the necessity of accounting to another fosters good and prompt decision-making. Effective decision-making coupled with the rights of ownership fosters the gathering of information to aid decision-making – the owner and decision-maker bears the consequences of those decisions whether they be gains or losses (Kemp 1974, 127).

The land market is contingent upon private ownership and the right to buy and sell freely and otherwise deal with the rights associated with land. Effective land information is an important prerequisite for an effective land market. Collecting and disseminating relevant information about the land market will make the market more efficient, bringing faster market corrections, reducing risk to developers and balancing profits (Dowall 1994, 25; Dale and McLaughlin 1988, 26). Any institution or government action which serves to make knowledge better or more readily available is likely to be beneficial (Harvey 1981). Given that the land market fosters the gathering of information, the cost of gathering that information is part of the transaction cost; and the market functions more efficiently when transaction costs are low relative to the value of the traded commodity (Kemp 1974, 132). Another means

of restraining the level of transaction costs is to spread such costs over a wider number of users. This may be accomplished by utilising the multi-purpose cadastre with more users than only the participants in the land market, this being an aspect that will be considered further in chapter three.

The accepted guidelines for land administration recognise a requirement that the public register should contain all essential juridical information allowing anyone viewing the system to identify third-party rights as well as the name of the landowner (ECE 1996; Kaufmann and Steudler 1998; Whalan 1971b). Of interest in this context is Whalan's discussion of the failure of the 1860 New Zealand land registration statute comparing it to the success of the replacement 1870 statute where the former provided for dealings not being required to be entered in the register (Whalan 1967, 424). Such off-register transactions are generally unknown to market participants and may not even be ascertainable. Consequently prudent lenders may well seek to place their investments in an area less shrouded in uncertainty because defects (or the possible defects) in ownership title affect the value of a particular parcel because the defects constitute a risk (Munro-Faure 1999, 135).

It is in this context that the adverse occupation of land leading to the acquisition of title based upon such adverse occupation is a property interest that is not necessarily disclosed upon the register and any uncertainty can only be displaced by investigation with an attendant increased transaction cost. For example, unless a proposed participant in the market can safely accept the boundary as it appears on the ground, then the prudent participant may seek expert survey corroboration that it corresponds with the boundary shown in the register. The expense of the survey sought by the purchaser is added to the transaction cost (Simpson 1976, 155; Davis 1971, 92). A prudent and knowledgeable purchaser will be unwilling to pay full value for a property attended with doubt; such a property may not be insurable with a title insurance company and may be unmarketable until the doubt is removed which can only be done through adjudication by the court. Such a purchaser is seeking to acquire the property, not possible future litigation (Brown *et al* 1981).

## **2.4 The rule of law**

The existence and operation of the land market also affects the sustainable development of a jurisdiction. Sustainable development and land administration are linked in a way that adopting the former holds implications for land administration (Munro-Faure 1999, 136) including the modern coordinated and integrated land administration system or multi-purpose cadastre.

Sustainable development is not confined to ecological conservation. Sustainable development also includes the development of a civil society and the avoidance of civil unrest which necessarily entails economic and political considerations (Munro-Faure 1999; Ting and Williamson 2000; de Soto, 1989; de Soto, 2000). Just as an efficient land market requires secure land and property rights, full enjoyment of those rights require confidence in the ability to uphold those rights, their enforcement and confidence in the rule of law. A sophisticated system of property rights without assurance of those rights being upheld is not a secure system of property rights (Simpson 1976, 23). Thus an effective land market founded upon security of property rights is also dependent on the ability to be able to enforce those rights which in turn requires a legal system able to uphold the rule of law. There are two aspects contributing to the rule of law being upheld (Munro-Faure 1999, 136). Both are political and not legal. The first is the legal system's ability and resolve to render decisions according to the laws in place; the second is the ability and resolve of the government to uphold and enforce the decisions of law provided by the legal system. Thus, an efficient land market requires the existence of law striking a fair balance between the interests of those participating in the market — a question of law (Munro-Faure 1999, 136). The absence of such law is costly because both transaction and policing costs are increased (Kemp 1974, 130). The responsibility for the existence of such law rests with the legislative arm of government. Required next is confidence in the fair application of the law in place and finally, confidence that the fairly applied law will be upheld and enforced — these last two being questions of politics. Responsibility for the fair application of the law rests on the judicial arm of government with the executive arm responsible for upholding judicial decisions. This thesis is only directed at the first of the three necessary elements: the provision of law striking a fair balance between the interests of the participants in the land market.



The cost of enforcing property rights are policing costs borne by the holder of the rights and also the community because confidence in effective enforcement reduces the reliance on enforcement with the community benefiting from reduced policing costs. As with transaction costs, minimising the policing costs extends property rights increasing the property value and the efficiency of the market (Kemp 1974, 126 and 132). A modern multi-purpose cadastre, being parcel-based and serving the needs of sustainable development including the maintenance of an efficient land market will necessarily require a consideration of the boundaries of the individual land parcels making up the cadastre.

## **2.5 Evolution of the current land market**

Although feudalism is generally acknowledged to have already been in existence for more than 500 years prior to the eleventh century, English feudalism is held to begin with the Norman Conquest in 1066 and there existed only a restricted market in land subject to the approval of the landed nobility. Notwithstanding the Norman discouragement of all but hereditary transfer there arose a limited land market where families could relieve temporary financial problems by the sale of land to be repurchased with improved times. Consequently the land market was limited and localised and not “open” with “strangers” participating in transactions at “arm’s length”.

Feudalism declined over the subsequent centuries influenced by the agricultural and industrial revolutions and the royal courts’ recognition of the acquisition of rights accorded to the people (Blanchard 1984, 250; Harvey 1984, 339). Further, the latter medieval plagues further eroded the manorial tenure system. The end of feudalism removed the restrictions limiting the ownership of and dealing with land (restraints against alienation) permitting the market in land that exists today.

In addition to the changes in the community of the British Isles, the large scale emigration from the old world and settlement of the new favoured the emergence of a market in that the colonial powers held out the promise of freehold ownership of land (Kain and Baigent 1992, 265 and 317). This was at a time when there still

existed impediments to alienation and land transfer in England where it is estimated that less than 7000 persons owned four-fifths of the land and did not wish to sell: they wished to retain and increase their land holdings (Whalan 1967, 421-3; Powell 1972; Kain and Baigent 1992, 261). Consequently the English colonies were thriving land markets while the English market was quiet and was to remain so until the effects of the First World War and the introduction of death duties were to force the breakup of the large English estates (Sutherland 1988, 46 and 73). The land markets of those jurisdictions that were colonised and settled by the British in the last 500 years owe little to the domestic English land market. The influence of the English land market upon the newer countries was but indirect in that that land market may have influenced the English law of real property which was transplanted into the overseas colonies and affected the evolution of the colonial land markets. The development of the colonial land markets were also influenced by the introduction of title registration, the desirability of alienating supposedly “unowned” lands, and the introduction of improved surveying techniques in the nineteenth century (Simpson 1976, 131–134). Further, it could be said that each of these influencing agents was also subject to the mutual influence of the other agents and the developing land market. A consequence of these was the adoption of fixed boundaries in the colonies. The distinction between the colonial cadastres and that of the colonial power is also heightened by the jealous preservation of privacy by the English landowners (Simpson 1976, 50 and 142) which can be contrasted with the zealous record keeping of the colonial service bureaucracy (Christopher 1988, 12).

## **2.6 Summary**

Characteristics pertaining to and the theory of land markets based upon private ownership of land are discussed with the conclusion that economic and market forces will favour less contentious properties with lower transaction and policing costs which in turn require the readily available information regarding those properties being marketed and confidence in the workings of the market. The evolution and features of the land markets in the colonies in the nineteenth century introduced some topics to be considered in later chapters (boundary location in chapter three and title registration in chapter five). The importance of the land market is that it can provide an effective measure of “efficiency” of a land administration system. A “healthy”

land market is a reflection of a healthy land administration system. Such a “healthy” land market is a direct reflection of the security of tenure and title under which the subject land is held which is a function of the land administration system.

A land market of vendors and purchasers necessarily entails private ownership of land. Private ownership of land requires some demarcation denoting that point where the dominion of one private owner stops and that of another commences. This point or series of points making a continuous line or boundary is the subject of the next chapter.

# Chapter 3

## Boundaries

### 3.1 Introduction

The content of this chapter is essential to that of the preceding chapter — a land market is an aspect of private land ownership and wherever there is private land ownership it is essential to mark out the limits of such private ownership. The characteristics of the land market such as the rights to exclude and alienate and subdivide all require a clearly defined “parameter” of private ownership. That parameter of private land ownership is the boundary separating one private landowner’s holding from that of the adjoining private landowner. This chapter could have been included as part of chapter two because of the important linkage between private land ownership and the delimiting of that ownership. The relationship between this chapter and adverse possession, the subject of the next chapter is that adverse possession can effect a change in the ownership over a land holding. One aspect of adverse possession is that of part parcel adverse occupation where such occupation may “create” a new smaller parcel out of an existing holding and a change of ownership of this smaller parcel may alter the bounds of an owner’s total land holdings. It follows that part parcel adverse possession does not actually alter the boundary of the occupier’s original land parcel, but by adding the smaller parcel to the original holding of the occupier, the boundary of the whole holding is changed.

Although not an uncommon word the meaning of “boundary” is confused by its different usages including an abstract legal concept. Further, there exist variations where the boundary need not be determined with precision. This can lead to possibly misplaced confidence in those boundaries that are apparently precisely determined. As indicated in the previous chapter the concepts of the market in land, private proprietary interests in land, and the boundaries of those interests are inextricably linked. The modern manifestation of the cadastre — the multi-purpose cadastre — being based upon land parcels, because of the relationship between parcels and boundaries, is also based upon boundaries. To define a parcel is to specify its boundaries and defining the boundaries will specify the parcel. The development of the new world by colonisation imported many of the customs, practices, and laws of

the old world with the major colonising nation being England. The exploration and settlement of the new world led to the adoption of a different form of boundaries to those left behind in the old world — the distinction between fixed and general boundaries with the former being mostly adopted in the settlement of the undeveloped and apparently vacant new world.

With time, the divergence between the occupational boundary and the actual legal boundary is possible. The non-permanent nature of boundaries, or at least the non-permanence of the physical evidence of their location gives rise to competing proprietary interests in those parts of any land parcel that are subject to competing claims. The utility of the cadastre is dependent upon its accuracy. To ensure the accuracy of the cadastre it is necessary to resolve any divergence between the occupational boundary and the boundary as recorded in the cadastre. This can be achieved by correcting the cadastral boundary to conform with the occupational boundary, or by restoring the occupational boundary to conform with the cadastral boundary.

Proponents of the resolution where the occupational boundary prevails over the cadastral boundary are of the view that this mode of resolution is of great practical convenience in that the *status quo* is retained and litigation discouraged. Thus, the proponents rely on adverse possession of part of the land parcel as justification for this mode of resolution. Other alternatives to the reliance upon adverse possession are also considered in the later chapter eight — these being the statutory acceptance of encroachments and the power conferred upon the registrar to rectify errors in limited circumstances as well as the remedy opposed to adverse possession, that is, the upholding of the legal boundary over the occupational boundary with the restoration of the legal boundary as the proper occupational boundary.

The use of part parcel adverse possession to effect necessary repairs to boundary location discrepancies is considered in the following chapter although it is necessary to precede the particular description of part parcel adverse possession with a general consideration of adverse possession.

### 3.2 Definition of *boundary*

A boundary has been defined as “... the imaginary line which divides two pieces of land from one another...” (Burke 1977, vol i, 243), and “... every separation, natural or artificial, which marks the confines or line of division of two contiguous properties” (Black 1979, 169). In one sense a boundary is an abstract legal concept and consequently its definition may prove difficult (Simpson 1976, 125).

A leading American treatise on *[t]he Law of Surveying and Boundaries* neglects to define “boundaries” in its section headed “The legal concept of boundaries” (Grimes 1976a, 4). Similarly, an English treatise *Boundaries and Easements* also fails to define the term (Sara 1991). One commentator has adopted the first definition provided above with the proviso that the word “invisible” is preferable to “imaginary” to describe the line (Simpson 1976, 125–6; see also Lambden and de Rijcke 1989, 107). This definition is questionable because a boundary is a legal concept and the description of “invisible” connotes a physical presence albeit not visible.

The “invisible” or “imaginary” nature of the boundary is a consequence of the lack of obligation on a landowner to fence his land, there being no requirement to mark the limits of his land for the limits of his land are bounded as a consequence of law (Cumbrae-Stewart 1931; Powell-Smith 1975, 3). Although there is no general obligation to fence a land parcel, the obligation may be imposed by other legal requirements such as the restraint of farm animals or the protection of passers-by. Conversely in other instances, there may even be an obligation to refrain from fencing a parcel in certain modern open-plan residential estates.

It should be recognized that the purpose of a fence is not always to demarcate a boundary. Consider the compulsory fencing of domestic swimming pools, the agricultural necessity of keeping animals within an area or the protection of crops from outside entry by other animals — none of these fences are boundary fences.

Of course, a boundary may be marked by physical features and the physical features may be referred to as “the boundary”. That the term may be used to refer to an

abstract legal concept and also the physical features that mark out that concept does not reduce the possibility of confusion and ambiguity. Where the boundary is physically marked, a cautionary note is that the purpose of a fence is not always to mark out the boundary. Not all fences are erected for that purpose, and a fence is only a physical manifestation of a boundary when it is intended to be so (Powell-Smith 1975, 2 ff; VPLRC 1998, 135 ¶ 6.23).

In summary of the above, a boundary is the manifestation of different interests in or characteristics of land. It has been variously defined as the imaginary line marking the confines or line of division of two contiguous estates (Davis 1971, 53) with the further explanation that the term may be used to refer to the physical objects marking the boundary [*ibid*].

While boundaries may be left as undetermined, they are not approximate: a boundary is the exact point of the beginning of one parcel and the ending of another (Allred 1989, 474). The choice of “indefinite” or “uncertain” (Dowson and Sheppard 1956, 82 and 125) as euphemisms for “general” boundaries does not find favour with a later commentator (Simpson 1976, 135). The choice of “indefinite” or “uncertain” is unfortunate because these words do not necessarily elucidate the issue of general boundaries and may add to the confusion. Perhaps it can be observed that the different users of the word are seeking to describe different things when the one word is used.

The previous chapter described how private ownership of land gave rise to the land market. Similarly, private ownership gives rise to land boundaries — it is only where there be a change of characteristic of the land that it need to be delimited — in this case a change in property rights associated with the land.

### 3.2.1 *Fixed boundary*

Colonial surveying practices were to enable the alienation of vast tracts of undeveloped land that were considered at the time to be subject to no proprietary interests other than that of the Crown, that is, “vacant” or wholly unoccupied land (Cumbrae-Stewart 1931, 179). In many instances the parcels were of straight sides

(Simpson 1976, 132) and with few or no physical features to serve as reference points these parcels were by necessity described by measurement and direction. The surveys required in the new colonies were to precede the allocation of land parcels whereas those in the colonial power (England), were to record long-standing and long-settled existing proprietary interests (Christopher 1988, 194–198 and figure 8.2 at pp 196–7; Kain and Baigent 1992, 329 *ff* ; Simpson 1976, 114 *ff* and 146). That boundaries in Australia were described numerically by measurement and direction is a consequence of the land being alienated by the Crown granting land by reference to area in default of other possible means of apportioning the land (Williamson 1983, 201; Simpson 1976, 133). The granting of land by colonial bureaucrats not present and not inspecting the land rendered them unable to make grants with reference to natural features and natural boundaries. These natural boundaries are more closely associated with *general* boundaries which are discussed in the following section.

In fact, conditions similar to England did not exist in the colonies and thus English practice was unsuitable for the Australian and other colonies (Barrie 1976a, 9–11 and 51; Barrie 1976b, 256; Lyall 1994, 790). Toms has also noted the differing demands of English practice compared to that of the colonies (Toms 1976, 191 and 194). Such “fixed” boundaries can also be seen in the state and province boundaries of the Australian and North American colonies. Of particular interest are the boundaries of the most recently settled provinces of Canada and the states of the United States and even the Canadian-US border. These regular boundaries stand in contrast to those of the original thirteen American colonies and the earlier Canadian provinces (Ontario and Quebec) with irregular boundaries associated with natural geographic features (Brown and Robillard *et al* 1981, 167). Similar examples of regular cadastral boundaries unrelated to natural features have been noted in the Western division of NSW (Ting *et al* 1999, 93).

There is a danger with fixed boundaries that they may be interpreted as “precise” or even “guaranteed”. One such claim described by Kelly (Davis 1971, 91) involved nine-sixteenths of an inch. In this context, claims of excessive precision are misleading: certificates of title showing dimensions with a precision of 0.001 metre are recorded in NSW, and 0.0025 metre in New Zealand (Simpson 1976, 138).



Another commentator provides examples of such zeal for precision (Arter 1960–61, 116). In the Australasian context of title registration it is generally accepted that land parcel boundaries are fixed. A consequence of such fixed boundaries may be that undue confidence and expectation are based on the boundary dimensions shown with the possibility of boundary disputes arising from a scheme that does not provide the accuracy apparently depicted within itself and was never intended to do so. The numerical descriptions of boundaries of a registered title parcel were intended as no more than descriptive of the parcel itself to permit identification of the particular parcel (VPLRC 1998, 128-9). These false expectations of precision do not arise in the case of general boundaries. This is possibly the most valuable attribute of general boundaries.

Australian surveyors have demonstrated some confusion in respect of registered title boundaries by interpreting the numerical boundary description *and* the title indefeasibility provisions as justifying the conclusion of what has been described as the myth of guaranteed boundaries (Barrie 1976a, 18; Barrie 1976b, 260).

The mistaken confidence in the accuracy of registered title fixed boundaries extends beyond Australian practitioners. It has been erroneously adopted in the most recent edition of an authoritative English real property text wherein it states that a distinguishing feature of the Australian Torrens systems is their “guaranteed boundaries” (Megarry and Wade 2000, footnote 20 at 203) with the assertion that the English title registration scheme does not guarantee boundaries. This error is further compounded by the assertion in a recent English law reform report that fixed boundaries in that country are guaranteed by Her Majesty’s Registry and citing the *Land Registration Rules 1925* (Law Commission 2001, footnote 29 at 185). Consequently, when the House of Commons Standing Committee D was debating clause 60 of the English *Land Registration Bill* 2001 (now the *Land Registration Act* 2002), it did not question the proposition that fixed boundaries under the proposed Act will be guaranteed by the Registry Office (House of Commons Parliamentary Debates 11 December, 2001).

It should not be surprising the lay landholders have expressed high expectations with regard to the precision of the location of the boundaries of their holdings (Hoogsteden *et al* 1990; Stock 1998; Bentley 2002) if the surveying professionals and practitioners are capable of error.

That registered land title boundaries are not necessarily fixed is demonstrated by the decision in the case of *Verrall v Nott* (1939). In this case the NSW Maritime Services Board held the Torrens (registered) titles to the bed of Sydney Harbour (“as bounded by high water mark”) and an adjoining landowner held four lots under the general law whose holding was bounded by “North Harbour”. The adjoining landowner benefited from accretion to his holding (at the expense of the MSB) because it was held that the “high water mark” did not refer to the position of the HWL at the time of issuing the certificate, but as it existed from time to time. That is, the boundary is *ambulatory* or, at least, accretion overrides the fixed boundary. It may be concluded in this instance that the registered title boundary was neither fixed nor static, but is ambulatory, and the boundary does not become fixed or static merely because a certificate of title has issued and a corresponding entry made in the register. In this instance the boundary of “high water mark”, being a natural boundary, is ambulatory (Ticehurst 1994, ¶ 4.4).

Another example of registered land title boundaries not being fixed is that of strata title flats or apartments where, in many instances, such boundaries are said to be general boundaries (Barrie 1976b). There can be no doubt that such boundaries, although not determined numerically, are fixed. The distinction between fixed and numerical boundaries has been described previously along with the conclusion that numerical survey information is not essential to define title (Dale 1976, 25 and 167). Although the usage of the terms “general” and “fixed” boundaries is perhaps by now too far entrenched (Williamson 1983, 191), an alternative usage of “undetermined” (or “descriptive”) and “determined” (or “numerical”) boundaries is preferable to the terms “general” and “fixed”. The distinction between the two types of boundaries is akin to that between “qualitative” and “quantitative” attributes.

### 3.2.2 General boundary

Whereas one commentator ascribes the foundation for general boundaries to the failure of nineteenth-century title registration in England (Dale 1976, 29), another (Simpson 1976, 135) states that general boundaries were merely the sensible reintroduction of centuries old rules of law governing boundaries. These rules apply in the absence of specific provisions to the contrary. The English 1862 title registration statute sought to introduce fixed boundaries in relation to those parcels sought to be registered under the statute. The difficulty and expense of converting existing general boundaries to the fixed boundaries required for title registration was one of a number of factors contributing to the failure of the 1862 title registration statute to gain wide approval and acceptance in England.

That general boundaries were the only boundaries until the introduction of fixed boundaries by the demands of colonial land administration and surveying is in accord with Simpson (*ibid*). Thereafter, the old boundaries were necessarily described as general boundaries to distinguish them from the newer fixed boundaries. Simpson concluded that the surveying of an existing layout (“as built”) differs from setting out a new layout on the ground (prior to building) with the consequence that fixing the boundaries is not necessary and may even be retrograde (Simpson 1976, 146). The setting out of a new layout on the ground was the method adopted to sub-divide the large tracts of “empty” land in the new colonies and is referred to as fixed boundaries. Thus, the current term “general boundaries” is a *retronym*<sup>1</sup> satisfying the need for a description of what was formerly described as “boundaries” and distinct from the newer “fixed boundaries” (Ruoff *et al* 1986, 61–2).

The proposition that boundaries might be more accurately referred to “numerical” and “descriptive” boundaries instead of fixed and general boundaries has support from some commentators (Cumbræ-Stewart 1931; Ruoff 1957, 50–51).

Cumbræ-Stewart takes up the distinction between descriptive boundaries and metes and bounds and writes that the original surveyor was a person whose duty it was to

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<sup>1</sup> **retronym** [*noun*]: A word or phrase created because an existing term that was once used alone needs to be distinguished from a term referring to a new development, as acoustic guitar in contrast to electric guitar or analog watch in contrast to digital watch. *American Heritage Dictionary of the English Language* (4<sup>th</sup> ed., 2000) 227 [URL: <http://www.bartleby.com/61/91/R0199150.html> accessed April 11, 2002].

keep an eye on the boundaries of an estate in days when boundaries were a matter of reputation: *ibid.*

### **3.3 The modern cadastre**

Simpson (1976, 4) wrote that the term “cadastre” has long been widely, if imprecisely, used to denote a survey of the boundaries of the land units of a country irrespective of any connection with the raising of taxes. The modern cadastre is parcel-based and whereas the definition of “boundary” requires that the subject — the land parcel — also be defined (Lambden and de Rijcke 1989, 108); the converse, defining the parcel requires that the boundary also be defined (Simpson, 1976, 131).

Although the desirability of the multi-purpose cadastre is widely accepted today, one commentator has dismissed the idea of the register being the repository of all information relating to a parcel (Ruoff *et al* 1986, 104–105). That the commentator has approached the issue from the viewpoint of the lawyer and conveyancer administering the English land title registry may explain this approach which is heretical to the modern day land administrator intent upon fostering the widespread use of comprehensive geographic information systems (GIS) and spatial data infrastructures (SDI). To justify the retention of a limited single purpose cadastre to avoid cluttering the register is to neglect the advantages of modern electronic data processing: the modern electronic on-line multi-purpose cadastre need only disclose those layers of particular relevance to the particular user for which the user is charged a fee calculated with reference to the layers accessed. A further explanation may lie with the origin of the comment in the 1958 first edition of the commentary and its retention in subsequent editions including the current sixth edition (1991). That this view is today outmoded is amply demonstrated by the reports jointly prepared by the English law reform body and the title registry (Law Commission 1998; Law Commission 2001) and the consequent passage of the *Land Registration Act* 2002. These reports and the recently passed Act recognise the role of the multi-purpose cadastre in modern society.

The purposes of the multi-purpose cadastre (as well as the original registered land title register) are best served by a public register. That the English land title register

has only recently been opened to public inspection might provide further insight into why a narrow single purpose register was advocated and retained for so long in the English context. The opening of the register to public inspection in 1990 has been recorded in the most recent edition of an authoritative English real property text which also describes the envisaged use of the register as a foundation for a national land information system (Megarry and Wade 2000, 203).

### **3.4 Boundary variation**

As observed in one comprehensive commentary (Simpson 1976, 152), the “law of prescription and limitation vitally affects boundaries.” The ensuing discussion of adverse possession is unhelpful in that it appears to be directed towards the adverse possession of whole parcels of land. This interpretation is supported by the manner chosen to describe the then New Zealand and Queensland partial concessions to the *Statute of Limitation*, or adverse possession of land (*ibid* 148 and 158). The New Zealand and Queensland registered land title legislation provided for applications to be entered in the register as a proprietor of land based only on long-term occupation (adverse possession). Because both the Queensland and New Zealand statutes providing for these partial concessions expressly prohibited all but whole parcel adverse possession it is apparent that Simpson cannot have been considering boundary variation or adjustment pursuant to adverse possession. Thereafter, in a smooth transition from “a whole parcel [being] lost or won” he considers that the “most useful and by far the most common application of the doctrine of adverse possession [to be] in stabilising occupation lines, where genuine error has led to ... a change of boundary,...” (*ibid* 155).

Differences between *de jure* and *de facto* boundaries are well recognised in the literature (Dale 1976, 22–23; Dale and McLaughlin 1999, 51). Similarly the prevalence of such discrepancies is also well recognised (Simpson 1976, 141–142; Dale 1976, 22–23; Wallace 1994). Dowson and Sheppard (1952, 81) estimated that five per cent of land parcels can be expected to change materially in outline, shape, and area annually. These changes do not give rise to the compensation provisions of the registered land title schemes as the assurance fund does not compensate for the loss of a land parcel through adverse possession even where the loss is occasioned by

reliance upon the register. Further, the assurance fund does not “guarantee” against shortfalls in the actual area or dimensions being wrongly shown in the register or the certificate of title (Sim 1971, 141–142).

An important aspect of boundary variation is the possibility that the inclusion of another parcel within the total holding of an owner will change the boundary of that whole holding without effecting any change to the boundaries of individual parcels.

### **3.5 Overcoming boundary variation**

The discrepancy between occupational and register boundaries is widespread. If the cadastre is to be relied upon, it must be maintained and it becomes necessary to continually update and maintain the accuracy of the register by removing any such discrepancies. To fail to do so may give rise to a waste of those costs expended to establish the cadastre. Worse still would be the false confidence engendered in a register known to be inaccurate. There have been several methods adopted to deal with the discrepancy.

#### *3.5.1 Adverse possession — occupation prevails*

The two alternatives are described by Simpson (1976, 155): the rule of adverse possession is of great practical convenience permitting the acceptance of the boundary as it appears on the ground without obtaining a possibly expensive expert survey corroboration that the boundary corresponds exactly with that shown on the registry plan. This is “what you see is what you get” (WYSIWYG) (Barrie 1976b, 257; Wallace 1994; Ruoff 1957, 38). Wallace writes of “repair” as a secondary function of possessory titles and adverse possession. Otherwise the prudent purchaser may possibly incur further expense in calling for a survey to show that what he sees on the ground is in accord exactly with the plan. The “considerable expense” is an added transaction cost that may well inhibit the land market. It is clear that Simpson favours the advantage of long-term occupation supported by adverse possession with regard to boundary variations. However, in the Australian state of Victoria, a jurisdiction benefiting from adverse possession and its repair function with its consequent WYSIWYG, that state’s Surveyors Board (a government body) has recently recommended that a property boundary survey be performed “when buying,

selling, investing in or developing property;...” (SBV, undated brochure). This recommendation may possibly be explained by the fact that reliance upon WYSIWYG is only applicable in cases of long established occupations: it would be imprudent not to seek survey corroboration where the occupational boundary is a recently erected fence. If this recently erected fence is not located on the actual boundary, the location of the fence will not prevail over that of the actual boundary because any adverse occupation has not matured for the required limitation period necessary to extinguish the title of the landholder over that land portion lying between the actual and occupational boundaries.

### 3.5.2 *Reliance upon survey by the purchaser — the certificate prevails*

The other approach is to rely on an accurate survey (Davis 1971, 92), a solution also made in an earlier edition of the Davis text that was dismissed as “complacent” by Simpson (*ibid* 156). That the advice regarding accurate surveys remained in the second edition (published after New Zealand introduced the partial concessions in favour of adverse possession in 1963) shows the necessity of an accurate survey where the introduction of adverse possession in that jurisdiction was restricted to whole parcels only.

The argument favoured by those of the view that the certificate should prevail is that overriding interests — the interest held by the adverse possessor is such an “overriding interest”— are a blemish on the principle of registration where all interests should be disclosed on the register (Simpson 1976, 190). Such undisclosed interests offend against the basic underpinning of title registration — that it is a system of title by registration, not a system of registration of title (*Breskvar v Wall* 1971, ¶ 15 *per* Barwick CJ), or “it is registration that gives or extinguishes title” (*Lutz v Kawa* 1980, p 25 *per* Laycraft JA). To permit the overriding interest of the adverse possessor is to permit title by means other than registration.

On the other hand, those favouring correcting the register to conform to occupation rely on the arguments that “some such principle [as adverse possession] is necessary to every system of law” (Megarry and Wade 1975, 1003); to “a person whose possession deserves to be ‘quieted’ it can make no difference whether the title of the

true owner rests on a register of title or on ordinary title deeds which may be just as good evidence of legal ownership” (Simpson 1976, 153); title by possession has a long legal pedigree (Wallace 1994); and, any ills associated with adverse possession may be avoided by inspection of the property by the proposed market participant (Wallace 1999, 314; Simpson 1976, 18). Another supporting argument is that alterations to the status quo should not result in any discrimination between holders of registered and unregistered land (Wallace 1999, 313).

Each of these points in favour of permitting adverse possession of registered title land do not withstand close scrutiny. This is even more so in the case of part parcel adverse possession. Where the title of the true owner rests on a register, it rests upon a register entry made only after investigation by the registry, and the correctness of the register entry is guaranteed by the registry with that guarantee being ultimately backed by a statutory fund or indemnity insurance to compensate for losses suffered through reliance upon an incorrect register entry. Conversely, ordinary title deeds record the private transactions between two parties and such transactions are binding only upon those immediate parties to each transaction. The legal efficacy of such a private transaction has not been investigated by a public authority which is prepared to certify that the proprietor has an unassailable title, and further, that there is a public fund available to indemnify losses suffered by those acting on the strength of the registrar’s certification should it come to pass that the register entry is incorrect. While title by possession does have a long legal pedigree, that pedigree is founded from a time when illiteracy was common and written records were not extensive (Petersson 1992, 1296). Such a pedigree was of necessity rather than good practice.

The proponents of adverse possession have fallen into error. One error into which the advocates of adverse possession applying to registered land have fallen is that, in the main, their defence of the practice is based upon a comparison of the advantages and disadvantages enjoyed and suffered by the two principals: the true registered (or “documentary”) owner and the trespassing adverse occupier. Their analysis neglects another important party, that is, the unrelated third party entering into a transaction and relying upon the register. Another error is the failure to recognise that the time for unregistered land has passed. This is usually expressed as a reluctance to attach to



registered land a privilege or benefit not extended to unregistered land. In support of the Bill that was to become the English *Land Registration Act 2002*, Baroness Scotland of Asthal said that “registered land is entitled to a life of its own and ...the dying hand of unregistered conveyancing should not hold back the future” (House of Lords Parliamentary Debates 30 October, 2001).

The whole purpose of the introduction of any registered title scheme was to move away from title by possession and, as already described, the schemes are founded upon title *by* registration, not title *by* possession (*Breskvar v Wall* 1971, ¶ 15 *per* Barwick CJ; see also *Lutz v Kawa* 1980, *per* Laycraft JA at page 25: “It is registration that gives or extinguished title”).

The Law Reform Commission of Saskatchewan concluded that the importance of possession as a basis for title had been eroded since the introduction of title registration and that the notion that possession can create an interest in land ought to be abandoned (LRCS 1989, 25). Tradition and “a long legal pedigree” did not add sufficient weight to the arguments in favour of retaining possession as a basis for title.

Inspection of a property to investigate and discover overriding interests not entered on the register has been proffered by some commentators as justification for title based on possession (Ruoff *et al* 1986, 118–9 and 364–5; Wallace 1999, 314; Simpson 1976, 18). Such inspection does not justify title based solely on possession in a registered title system and is offered as a means of avoiding the pitfalls inherent in schemes that recognise title by possession with the title being unrecorded in the register. Further, there exist instances where such inspection has failed to uncover the interests of occupiers (*Hodgson v Marks* 1971; *William & Glyn's Bank Ltd v Boland* 1981; *Kingsnorth Trust Ltd v Tizard* 1986). One of the champions of inspection as justification for title by possession expresses less than absolute confidence in the effectiveness of inspection revealing occupation (Wallace 1999, 314). Another commentator concludes that inspection will disclose a squatter in the course of acquiring title but may not necessarily disclose one who has already acquired title (Williams 1967-68, 76).

These arguments favouring title by possession are of even less value when applied to the adverse occupation of part only of a land holding. This is particularly so with regard to the proposition that inspection will usually disclose the fact of adverse occupation. The discrepancy between occupational and registered boundaries is directly related to the occupation of part only of a land holding and prior inspection of a property is not a strong protection for the purchaser or investor or financier of the purchase.

With regard to the lack of equity where there is discrimination between the holders of registered and unregistered land, the future is that unregistered land is being dispensed with. All remaining unregistered land within Australia derives from land grants prior to the introduction of registered title in the mid-nineteenth century. This writer offers as plausible conjecture that at that time it was believed that the benefits of registration would impel holders of unregistered land to voluntarily convert their holdings to registered title. That belief was misplaced. It is now recognised that compulsion to change is necessary unless the existence of the two systems is to continue indefinitely. That there still is unregistered land in existence is no reason to burden the registered title system which includes almost the whole of the land in Australia. To insist upon catering to the inertia of holders of unregistered land is to permit the tail to wag the dog. It is only the belated recognition that the two systems are fundamentally different and that the older system should not govern the administration of the new that has allowed major reform to the English registered land system (Law Commission 1998; Law Commission 2001; *Land Registration Act* 2002).

While each of these points in favour of permitting adverse possession of registered title land do not withstand close scrutiny, there does exist instances where occupational boundaries differ from the location of the legal boundaries and these differences have existed for such long periods that the restoration of the legal boundaries would present great difficulty. A recent article cites a sub-division located in Brisbane where all of the occupational boundaries of all the parcels differ from their correct location (McClelland 2001). It may be that the best argument

favouring occupational boundaries over true legal boundaries is the immense practical difficulties of restoring the true legal boundaries. This pragmatic argument is the one least advanced by the proponents of possession as a basis of title in a registered title land system.

Support for the retention of occupation as a basis for title is possibly based upon a misapprehension with regard to the logical bases of our system of law. There may be aspects of the legal system that are founded upon pragmatic expedience rather than logic and scientific method. If this is the case, attempts to clothe the operation of the law with strained justifications are neither necessary nor of any assistance.

Further, the apparent need for the strained justification is fuelled by the retention of the replaced system well past its usefulness. That the Australian jurisdictions still retain the old system of recording land ownership some 140 years after the introduction of registered title is a consequence of complacency and a favourable reliance upon voluntary conversion to the new system rather than a forced changeover. It may well be that the benevolent retention of the old system was a political concession or “sop” proffered by the proponents of registration in the face of fierce opposition by those favouring no change.

A recent commentator on the introduction of titling concludes there are four stages to a sophisticated land tenure system — with the ultimate fourth stage being the systematic compulsory registration of titles (Larsson 1991, 23). The Australian experience has been the acceptance of the third stage without progression to the final stage. While remnants of the old system are retained, justification for the operation of the old system will remain. That justification will disappear with the disappearance of the old system. An example is provided by the misplaced opposition to the *Land Registration Act 2002* in the English parliament. The opposition was based upon the premise that the benefits which the Act will provide to the owners of registered title land ought also to be provided to the owners of unregistered land. Further, if these benefits are unable to be provided to owners of unregistered land, then they ought not be provided for the benefit of the owners of registered land. The opposition was withdrawn after it was drawn to the attention of the debater that the benefits are a

direct consequence of registration and cannot (without registration) be attached to unregistered land. Further, the Bill will eliminate unregistered land with the consequence that there will be no owners (of unregistered land) not being provided with the benefits of the Bill (House of Lords Parliamentary Debates July 3, 2001, column 795 *per* Lord Kingsland).

The retention of adverse possession is justified on pragmatic grounds without the need to justify its retention despite perceived inconsistencies with the principles of registered land title. So long as title based upon long-term adverse occupation has no legal effectivity until entered into the register, there is no conflict with registered title principles. Once such title is entered upon the register there is no need for strained interpretations purporting to justify title based upon adverse possession. The resulting registered title effectively protects the outside third party entering into a dealing on the strength of the register. With regard to the benefit attaching to registered land which does not apply to unregistered land, the benefit is a consequence of registration and does not arise from adverse possession — the benefit is available to any owner of unregistered land who avails themselves of the procedure permitting conversion to registered land.

Further, the retention of the outdated unregistered land system alongside that of registered land title has continued for too long and has added to the confusion with regard to adverse possession of registered land. That acquisition of title to unregistered land is based upon possession alone is because there exists no procedure for registering the acquired title short of bringing the land within the registered land system by conversion. It does not follow that because possession alone without registration applies to unregistered land then possession alone without registration equally applies to registered land.

### 3.5.3 *Statutory alternatives – encroachment, presumptions, and rectification by the Registrar*

An alternative to part parcel adverse possession has been adopted in many of the jurisdictions that do not permit adverse possession, either whole or part parcel. It is noteworthy that several jurisdictions that allow part parcel adverse possession also permit statutory encroachment and the Australian Capital Territory permits neither.

This involves encroachment across a boundary by an improvement to the bare land parcel.

The relevant differences are that encroachment does not depend upon the passage of a time period; the court administering the statute is empowered to award compensation to the landholder whose parcel is diminished by the encroachment, the encroachment is required to be more substantial than mere occupation and the court administering the statute is provided with wide discretionary powers to do justice between the parties according to the circumstances of each case. A factor to be considered by the court is a consideration of the circumstances leading up to the building of the encroachment. Thus an honest but mistaken belief in the location of a boundary will be looked upon more favourably than a cavalier disregard of the proprietary rights of another landholder — a neighbour.

Another alternative is the statutory recognition of the *de minimis* rule (“the law does not concern itself with trifles”) where, in Victoria pursuant to the *Property Law Act* 1958, the dimensions of the boundaries of a land parcel are construed as though the phrase “a little more or less” was appended to the dimension unless expressly negatived: section 272. The section imposes a limit such that a deviation less than the limit will not permit litigation arising from the deviation. The limit is 50 mm for boundaries of length less than 40.30 metres and a ratio of one in 500 of a boundary of length exceeding 40.30 metres. This provision is not wholly satisfactory in that the bar against litigation is confined to vendor and purchaser and the parties may agree to dispense with the provision. South Australia has a similar provision in its registered title statute permitting the Registrar to make amendments to the register without the need for consulting with the affected parties. The Registrar cannot proceed where the proposed amendments exceed these limits unless the affected parties are notified and permitted to make representations. These provisions are not directly relevant to the resolution of discrepancies in boundary location — these provisions are founded upon redefining the possible problem so that it is no longer a problem, the discrepancy being sufficiently small that there does not exist an unacceptable discrepancy.

Other provisions in the Victorian *Transfer of Land* Act 1958 permit an application by a proprietor to have the relevant certificate of title amended to show the boundaries on the certificate coincide with the land actually and *bona fide* (“in good faith”) occupied by the proprietor: section 99. Additionally sections 102 and 103 confer upon the Registrar the power to correct entries in the register to rectify boundary discrepancies arising from errors in measurement. These latter powers of correction are not sufficiently wide to encompass the common boundary errors or discrepancies where a boundary fence has been mistakenly erected off-boundary. Similar powers of correction are conferred upon the registrars in the other jurisdictions with registered land title schemes.

### **3.6 Summary**

The difficulties and ambiguities associated with the word “boundary” are described as are the two styles of boundaries used and recognised. That the occupational boundary, being a physical manifestation of the abstract legal boundary, may often diverge from the abstract legal boundary is recognised. Maintenance of the cadastre requires the resolution of this divergence by either permitting the occupational boundary to prevail over the legal boundary or vice versa. The former relies on using adverse possession, particularly, part parcel adverse possession with a recognition that the *de facto* boundary will become the *de jure* boundary.

Other possible ways of overcoming the discrepancy were introduced where the public officer administering the title registry is empowered to effect minor amendments to correct errors; there is statutory recognition of errors or misdescriptions of such small magnitude that litigation arising from the error or misdescription is prohibited. An alternative to adverse possession is that of statutory encroachment which is similar to adverse possession but differs in significant aspects and empowers the administering court to utilise a wider range of discretionary remedies than are available under adverse possession. This chapter describes the occurrence of the occupational boundary differing in location from its proper or legal position. This can and does occur in both registered and unregistered land systems. The discussion prepares the ground for an early method of resolving these discrepancies. As in other instances of disputes over ownership, long-term

possession, or adverse possession, has been utilised to provide a means of resolution. Adverse possession with particular reference to part parcel adverse possession is covered in the next chapter (chapter four). This chapter does not draw any distinction between the registered and unregistered systems. The following chapter (chapter five) introduces registered land title and the subsequent chapter (chapter six) draws the two threads together to consider the application of part parcel adverse possession to registered title land as a means of resolving boundary discrepancies.

This chapter has amplified an essential part of the previous chapter on land markets — a land market recognises individual private land ownership and such ownership requires some demarcation between different lots subject to the private ownership of different individuals. The chapter is preparatory to the consideration of land ownership disputes which are covered in the next chapter where the most widely favoured resolution of disputes has been founded upon a limitations statute — a claim for land recovery must be commenced within a timely period or otherwise the community will not assist in such recovery. The following chapters will introduce land registration and the application of dispute resolution to the land covered by registration.

# Chapter 4

## Adverse Possession

### 4.1 Introduction

This chapter builds on the previous two in that the land market and private land holdings are inextricably linked and private land holdings require some boundary or border so that passing from one holding to another is marked. This chapter deals with an aspect of resolving doubts and disputes over ownership of land. This mode of dispute resolution originates from a time prior to the introduction of registration of land title which is the subject of the next chapter (chapter five) and it survived the introduction of title registration and will be applied within the context of title registration in the following chapter six.

Proprietary interests are subject to doubt and challenge. One of the tools utilised to resolve disputes is that of limitation wherein there is a presumption of prejudice being suffered by the respondent to a legal action after the passage of time. Consequently such a respondent may reasonably assume that any liability attaching to them had terminated (*Brisbane South Regional Health Authority v Taylor* 1996).

The need for a means to quieten “old” disputes and some of the rationalisations offered for a statute of limitations generally, and specifically those applied to disputes involving land holdings, is described. Although such limitations date from antiquity, with regard to English law, they begin afresh to be applied shortly after the Norman Conquest and are anchored to a point in time. Some centuries later a period of time is substituted for the fixed point in time and the law remains unchanged until the major reforms in 1833 from which the present law of adverse possession is the result.

Although the statute provides for resolution only upon the passage of the statutory limitation period it becomes necessary to consider the possible accrual of rights where the statute has not been wholly satisfied because some limited rights may be capable of being transferred to others who are able to take advantage of the accumulation of such rights. Originally based upon the feudal theory of land tenure



where none but the monarch has absolute property rights, relativity of title remains relevant today even though property rights are recognised as akin to absolute or allodial rights. Relativity of title enables the ranking of lesser proprietary rights which still exist or can arise even within a registered title scheme of land tenure. Adverse possession, the limitations statute applied to land holdings, is based upon the relativity of title which in turn rests upon the rights arising from possession.

With regard to the modern law of adverse possession the irrelevance of the state of mind of the adverse possessor is discussed with particular regard to a common misconception that one cannot be an inadvertent adverse possessor. The adverse possession of less than a whole land parcel is then discussed with the observation that adverse possession of part only of a land parcel only arose with the 1833 reforms except for the special cases of encroachment upon the commons. A comparison of whole and part parcel adverse possession discloses that while they both utilise the same procedure and are thus superficially related, the basis for the two forms are different.

As an alternative to part parcel adverse possession, some statutory alternatives are introduced and their later analyses are foreshadowed. The chapter concludes with an observation that adverse possession — as a means of resolving the problems associated with boundary location — is not the sole means of resolving the issue nor the inevitable solution.

## **4.2 A statute of repose**

In English law adverse possession is no more than the statutory restriction placed upon the time period within which a legal action must be brought or proceedings taken. Proceedings commenced after the statutory period has expired will not be entertained by a court: the door of justice is closed to the party seeking to bring the proceedings and he cannot be heard to show his title (*Cholmondeley (Marquis) v Lord Clinton* 1820, 139–140). Typical is the Victorian *Limitation of Actions* Act 1958 imposing time limits upon actions founded upon contracts, torts, and other legal actions including the recovery of goods and chattels and the recovery of land and

rent arrears. Additionally, some criminal prosecutions must be commenced within a limited period after the commission of the offence.

The rationale offered for the restriction are diverse, not always logical, and sometimes contradictory. It is accepted that time is a great enemy of truth, so that it becomes undesirable for courtroom arguments and witnesses to be concerned with events in the distant past (Slapper 2000). It is doubted that adverse possession is a punishment to be inflicted upon the negligent owner who has permitted an adverse trespasser to move into occupation as has been offered as a possible rationale (Brown 1980, 34; Sackville and Neave 1975, 510). Also doubtful is the rewarding of the occupier for putting the land to “good use” (Dale 1983). With the recent recognition of sustainable development is the associated realisation that not all land use and development is beneficial to the community or society in general (Petersson 1992, 1319–1320; *Finley v Yuba County Water District* 1979, 427). That a neglectful owner is not so punished without the presence of an adverse occupier would negate these rationalisations (Ziff 1996, 95). Nor is an owner who neglects his land holding to the detriment of his and his neighbours’ holdings to be punished by depriving him of his holding in the absence of a trespasser-occupier (Brown 1980, 33).

Further, a number of jurisdictions permit acquisition of title by adverse possession and yet allow a dilatory registered proprietor to veto an application by the adverse occupier. This negates the proposition that title based upon adverse possession is a reward for utilising land that would otherwise be unused. These jurisdictions are New Zealand and South Australia and, until recently, Queensland. The recently enacted *Land Registration Act* 2002 has introduced similar provisions into the registered land system of England.

The punishment and reward rationale would appear to have little foundation given the effect of the passing of the statutory limitation period. The trespasser utilising the land neglected by its owner can be ejected by that owner after many years of such trespass despite the neglect of the owner if the length of the period is insufficient to invoke the statute. Nor is it a fitting penalty to be exacted from the imprudent purchaser who fails to inspect and discern the occupation enjoyed adversely to the

vendor (Wallace, 1999, 314), when lack of knowledge does not avail the surface owner unaware of his subterranean trespasser (*Halsbury* 1979, ¶ 772, 346; *Halsbury* 1997, ¶ 983, 508; *Rains v Buxton* 1880). Megarry and Wade describe two instances where inspection of the property failed to unearth the equitable interests of the occupier (Megarry and Wade 1984, pp 206–208). In fact, inspection of the property will not necessarily uncover the encroaching adverse occupier of part only of the parcel but only the adverse occupier of the whole land holding. Thus, while reliance upon inspection to discern the interests of occupiers is not certain with regard to whole parcels, such inspection will rarely uncover the interests of those occupiers of part parcels.

Another proffered rationalisation, that the memory and recollection of witnesses is considered to deteriorate with the passing of time, carries little significance when considering the public written records of a land registry or its predecessor, the public deeds register.

It is in the public interest that lawsuits be not protracted and that there be a limit to litigation: the limitation statutes are statutes of repose (*Cholmondeley (Marquis) v Lord Clinton* 1820, 139; Jackson 1970, 409; *JA Pye v Graham* 2001). It is more important that an established and peaceable possession should be protected than that the law should assist the agitation of old or stale claims and the limitation statute which effects this purpose is “an act of peace. Long dormant claims have often more of cruelty than of justice in them” (Megarry and Wade 1975; *A’Court v Cross* 1825; *Brisbane South Regional Health Authority v Taylor* 1996; *Halsbury* 1979, ¶ 605; *Halsbury* 1997, ¶ 805).

A rationale advanced by Torrens in the context of the early development of the Australian colonies is based upon equity and fairness. An occupier might have contributed resources to developing the land far in excess of the land value (Torrens 1859, 25–26). Torrens was at pains to emphasise that his rationale for applying adverse possession to undeveloped colonial land of low value was not applicable to long established and developed holdings of greater value.

Another possible rationale for closing off old claims relating to land ownership is the difficulty in reversing a number of related and contingent transactions where a chain of buyers and sellers each sell one property to finance the purchase of another. These transactions were all conducted in good faith and the possibility of long delayed litigation setting at naught a whole series of such transactions would create a vast (and possibly insoluble) conveyancer's difficulty. The difficulty can only be compounded where subsequent dealings were not directly related to the questioned transaction but took place some time removed from that transaction but still contingent upon its validity.

The principle that the litigation of obsolete titles and stale claims be limited by lapse of time and lost if not cherished and diligently pursued is necessary in every system of law in some form or other and is recognised in English (and Victorian) law (*Cholmondeley (Marquis) v Lord Clinton* 1820; *JA Pye v Graham* 2001). An acceptance of a long continued state of affairs is administratively convenient even if the long continued state was commenced on a wrong foundation. Rationalisations founded upon *ex post facto* theories of justification are not necessary and will possibly add confusion to the issue. The pragmatic resolution of disputes by acceptance of the *status quo* is sufficient without the need for logical justification founded upon the science of law — in reviewing the work of an early proponent of the theory that “law is a science”, the eminent American jurist Oliver Wendell Holmes (1880; 1881) offered the dictum that “[t]he life of the law has not been logic: it has been experience”.

#### **4.3 History including the modern law of limitations dating from 1833**

The modern law of adverse possession begins in 1833 following upon the report of the Commissioners who reviewed and made recommendations for bringing limitations of actions legislation into line with contemporary social and economic notions (Butler 1980, 36).

Limitations statutes are variously dated as 1275 AD or thereabouts. The first modern limitations statutes are credited to 1540 (Megarry and Wade 1975, 1010) when time limits for initiating legal proceedings were instituted. Prior limitation statutes

prohibited the disputation of rights enjoyed before a particular date. Any claims founded on rights enjoyed at an earlier time were barred. Thus the *Statute of Westminster I*, 1275 prohibited the enforcement of rights arising prior to September 3, 1189 being the date of the coronation of Richard I. With the passage of time this fixed point in time delimiting what rights could (and could not) be litigated became less effective as a statute of limitations – in 1275 the effective limitation period was 86 years; in 1375 it was 186 years; in 1475 it was 286 years; and in 1539 it was presumably 350 years (Petersson 1992, 1297). Such a statute of limitations was of little effect. The new 1540 statute fixed the period as 60 years.

A principle providing for the extinction of stale claims and obsolete titles is necessary to every system of law (Megarry and Wade 1975, 1003; *JA Pye v Graham* 2001). The Master of the Rolls, Sir Thomas Plumer, referred to the provisions in Athenian and Roman law and that Bracton had described such provisions in the English law of the thirteenth century (*Cholmondeley (Marquis) v Lord Clinton* 1820, 140). Any prior English provisions would in the main have been lost with the importation of the Norman feudal system of tenure with the 1066 Conquest. Thereafter a limited form of limitation was introduced in 1154 pursuant to the *Treaty of Winchester*, 1153 wherein the compromise between King Stephen and the future Henry II allowed the restoration of land to those holding such land on the last day of the reign of Henry I in 1135. Any dispositions by Stephen during his reign were likely to be upset by those who were able to show tenure immediately prior to Stephen's accession (Davis 1990, 120; Holt 1994, 303–304; Hyams 1980, 252). However, as already commented upon, a fixed date, such as the date of the death of Henry I or the later death of Henry II (1189) proved to be intractable and of lesser effect through the passage of time (Hyams 1980, 224).

#### **4.4 Limitation and prescription**

With regard to the modern application of the law and principles of adverse possession, there is a common law “equivalent” to statutory adverse possession that can create confusion between the two. In many jurisdictions the two terms (“prescription” and “adverse possession”) are used interchangeably. The distinction

between the two is of little practical consequence today following the law reforms during the early nineteenth century.

The main distinction arose because adverse possession was originated by the legislature as a means of quieting titles while prescription was devised by the common law courts as an evidentiary rule or presumption consistent with a long enjoyed and undisputed right.

Prescription was where a right, immunity or obligation exists by reason of lapse of time (Burke 1977, 1412). These rights (or obligations) were enjoyed as of right and without interruption for a long period. The theory is that anyone having had a quiet and uninterrupted possession of anything for a long period is supposed to have a just right otherwise that person would not have been suffered to continue enjoying that right.

A right founded upon prescription was a *positive* legal right that could be advanced in the courts and form the basis of legal action. The statute of limitations provided a defence to an action and thus may be viewed as a *negative* prescription. One could not found a lawsuit upon adverse possession; one could only defend against a lawsuit. Consequently, the passage of the limitation period did not extinguish the owner's title; it merely prohibited his right to pursue a legal course of action. If the owner was able to regain possession against the trespasser by means other than legal action, the statute did not preclude such recovery of possession. Similarly, adverse occupation by the trespasser did not confer title upon the trespasser – it merely confers upon that trespasser a defence sufficient to defeat the true titleholder. This was so until the law reforms in England in 1833 which had the effect of extinguishing the titleholder's title after the passage of the required limitation period. Although extinguishing the titleholder's title, the 1833 reforms did not confer title upon the trespasser. With these reforms, the practical distinction between prescription and adverse possession has lost most if not all of its relevance.

## 4.5 Inchoate adverse possession

Possession is so much a part of the English legal system and those derived from it that it forms part of property law even where the doctrine of adverse possession is not applicable or available. Thus, it becomes necessary to consider a number of variations where a period of adverse occupation has not or cannot “mature” into a period sufficient to invoke the limitation statute as a defence against the true or documentary owner. Thus the period of adverse occupation has begun but is not complete, or it can never be completed because the doctrine of adverse possession is not recognised as a foundation of title acquisition. Another variant is where the required statutory time period has tolled but there still remains a further act on the part of the adverse occupier to “perfect” or complete the adverse possession.

### 4.5.1 *Adverse possession not recognised in the jurisdiction*

Possession provides sufficient legal status on the occupier to lawfully exclude others who have a lesser legal right even where the occupier is prohibited from acquiring title because the limitations statute is inapplicable.

The adverse occupier in possession has a better title than all the world except for the true owner. In this case only the true owner can successfully sue to eject the adverse occupier. The point is well illustrated by two related NSW cases involving registered title land at a time when the NSW registered land title statute prohibited adverse possession. In fact, the statute did not prohibit adverse possession; it prohibited the adverse possessor gaining the status of registered proprietor pursuant to the limitations statute: *Spark v Whale Three Minute Car Wash* (1970). Miss Spark and her predecessors had been in possession of registered title land for about two decades. Several years before the litigation Miss Spark had let the premises to a tenant who permitted the defendant company to enter into possession. Miss Spark’s ejectment action against the company was successful because, although she was not the registered proprietor and the statute prohibited acquisition of title by adverse possession, her status as occupier was sufficient to defeat all the world except the true owner, the registered proprietor (a Walter Beed), who could show a better title (an indefeasible registered title). Miss Spark’s possessory title was not registered nor

was it capable of being registered. Consequently her title was not indefeasible. Her title was however better than that of the defendant Whale Car Wash.

The second case arose as a direct consequence of the first. Miss Spark's successful claim to eject the defendant company from land of which she was not the registered proprietor generated sufficient publicity that a Mr Meers (acting on behalf of Beed's descendants) was appointed as administrator of Beed's estate. An action by Miss Spark to restrain Meers from being registered as proprietor failed as the then prohibition against acquiring title by adverse possession also protected the title of Beed from being displaced or extinguished by Miss Spark's long period of adverse possession: *Spark v Meers* (1971). At the present time there remain only two jurisdictions in Australia that prohibit the acquisition of title based on adverse possession. Thus it would seem that in those jurisdictions an adverse occupier has the right to remain in occupation unless and until the registered proprietor (or someone claiming through that registered proprietor) seeks to eject the occupier. If the registered proprietor seeks to eject the occupier, there is no period of occupation sufficient to invoke the limitations statute as the registered title land statute expressly prohibits the application of the limitations statute.

The law is the same in those Canadian provinces with registered land title with the exception of Alberta where Alberta expressly provides for the application of the limitations statute to registered land. The other provinces which have registered title land are Ontario, British Columbia, Manitoba, Saskatchewan, New Brunswick and Nova Scotia and do not permit the acquisition of registered title land through adverse possession. Thus it may be seen that although an occupier cannot acquire an indefeasible registered title in those jurisdictions prohibiting the acquisition of title based upon long adverse occupation, the occupier nonetheless does hold some limited proprietary rights over the property permitting continued occupation until evicted by the registered proprietor.

The statement describing New Brunswick and Nova Scotia as having registered title land should be qualified by the recognition that although registered land title statutes



have been enacted, these statutes has fallen into desuetude in New Brunswick and was never proclaimed in Nova Scotia (Petersson 1992, 1294).

#### 4.5.2 *Period of adverse possession insufficient to invoke the defence where adverse possession is recognised*

Although acquisition of title based upon a sufficient period of adverse possession may be countenanced by the property law in a jurisdiction, the adverse occupier whose period of occupation is insufficiently “matured” to invoke the statute of limitations still has the legal status to lawfully exclude those with a lesser right (Cooke 1994, 4; Wallace 1994). As with the jurisdictions that do not permit acquisition of title based upon adverse possession, only the registered proprietor with an indefeasible title can eject the adverse occupier.

As discussed above in relation to the jurisdictions that do not allow the acquisition of title by adverse possession, the adverse occupier with an inchoate (or incipient) possessory title has a better title than all the world except for the true owner. Of course, the adverse occupier whose possessory title has ‘matured’ for a period sufficient to invoke the statute of limitations has a better title than all the world except for the true owner who is barred (by the statute) from bringing ejection proceedings against the adverse occupier.

In most jurisdictions that permit the acquisition of title through adverse possession, the necessary limitation period may be satisfied by the accumulation or aggregation of the occupation periods of successive occupiers. Thus, if an adverse possessor is dispossessed by another adverse possessor, the latter acquires the rights of the former and so can add the first period of adverse possession to their own for the purpose of defeating the true owner’s right of action. Of course it is essential that the two periods of occupation be continuous or otherwise the dispossession of the true owner would cease and the running of the limitation period ceases to run against that true owner (*Spark v Meers* 1971; *Trustees, Executors and Agency Co Ltd v Short* 1888; *Allen v Roughley* 1955; *Asher v Whitlock* 1865; Petersson 1992, 1305). This “tacking” of successive periods of adverse possess also applies where the former

assigns his interest to the latter by way of sale, devise or gift (Sackville and Neave 1975, 526).

Thus it may be seen that although an occupier has not yet acquired an indefeasible registered title, the occupier nonetheless does hold limited proprietary rights over the property and those rights are capable of being transferred to another person.

Although difficult to quantify, there is some value to be attached to the legal rights of such an adverse occupier whose period of occupation has not yet matured for the period necessary to bar the true owner (*Allen v Roughley* 1955). The occupier who has been in occupation for a period insufficient to satisfy the statute of limitations has acquired a proprietary interest of some marketable value in that the occupier may transfer the interest to a purchaser who takes the benefit of the period of adverse occupation already passed. The first occupier is assigning an accrued period to which the second occupier need only occupy for a further period such that the aggregated sum is sufficient to invoke the limitations statute.

It is argued in one commentary (Bradbrook *et al* 1997, ¶ 16.85) that “tacking” is not available to the adverse occupier in Queensland. This is because an applicant for registration based upon a period of adverse possession can only rely on their own period of adverse possession: 1994 *Land Title Act*, section 185(1)(d). However a reading of the definition of “adverse possessor” in Schedule 2 of that Act does not support this interpretation. The definition appears to only make “tacking” unavailable to the adverse possessor who has dispossessed a prior adverse possessor – thus an adverse possessor who has been assigned the interest of the earlier adverse possessor fits within the definition of the adverse possessor entitled to apply for registration.

Another aspect of the incomplete or inchoate period of occupation is the effect of the issuing of a new certificate (or registering a new entry in the register). The English *Land Registration* statute provides that rights acquired *or in the course of being acquired* (emphasis added) under the *Limitation Act* take effect as overriding interests: section 70(1)(f) of the *Land Registration Act* 1925. This means that where an adverse occupier has been in possession for a period insufficient to extinguish the

registered proprietor's title, the occupier's period of occupation is counted should the proprietor enter into any transaction or dealing with the land. Thus, for example, if T has been adversely occupying R's land for (say) nine years and thereafter R sells to P and T remains (adversely occupying that land holding now owned by P), then T need only remain in adverse occupation of P's land for a further three years to defeat P's right to eject T from the land. The nine years occupation adverse to the vendor R is added to the three years occupation adverse to the purchaser P to provide the twelve years adverse occupation necessary to defeat any proceedings initiated by the purchaser P.

In order to satisfy the twelve year limitation period, the periods of adverse occupation against successive owners is aggregated so that nine years occupation (adverse to R) added to three years occupation (adverse to P) is sufficient to satisfy the twelve year period necessary to defeat any rights of the registered proprietor P. In a manner similar to "tacking" where the aggregated period of occupation (by several successive trespassers) adverse to the registered proprietor can defeat the interest of that proprietor; the aggregated period of occupation (by one trespasser) adverse to several successive registered proprietors can defeat the interest of the last registered proprietor. This mode of "tacking" is permitted in a limited number of jurisdictions having registered land title, namely the two Australian states of Victoria and Western Australia. Until the passage of the *Land Registration Act 2002*, tacking was acceptable within the English land registration system. The law now applicable in England no longer permits an accrued period of adverse occupation to survive a dealing involving a new registered proprietor. That is, a period of trespass adverse to one registered proprietor cannot now be aggregated with a period of trespass adverse to the newly registered proprietor succeeding the previous proprietor in order to defeat the newly registered proprietor. It will be argued later that the survival of the adverse occupier's rights are incompatible with a registered land title system and that those jurisdictions which permit such survival are better described as having a *quasi*-title registered system.

In those jurisdictions where adverse possession is not permitted, for example, the two territories of the ACT and the NT, then no combination of tacking — either the

aggregated periods of several trespassers adverse to one documentary owner or the aggregated periods of one trespasser adverse to a series of documentary owners — is sufficient to overcome the prohibition against title founded upon adverse possession.

Yet another variation when the period of adverse occupation has not yet matured (to defeat the documentary owner) is the provision where the registration of a transaction “wipes the slate clean” and the clock must recommence running again. In the previous example, where T has occupied adversely to R for a time period less than that required to invoke the limitation statute, any registered dealing by R with P will defeat T’s previous accrued occupation and for T to acquire good title against P he must remain in occupation adverse to P for the whole of the limitation period. That is, T’s period of adverse occupation (adverse to P) is measured as commencing at the date of registration of P’s interest with any period of occupation prior to that date not being counted when assessing T’s period of adverse occupation. This is the provision that was adopted in the early Torrens statutes in Australia. For example, before South Australia expressly prohibited the acquisition of title to registered title land, the then statute was interpreted to permit such acquisition only so long as the period of adverse occupation against the present registered proprietor was sufficient to satisfy the limitation statute (*Hunter v Player* 1875; *Ford’s Application* 1953).

The rationale of this interpretation was that a person dealing with the registered proprietor was entitled to rely upon the facts disclosed by the register which must be taken to be true at the time the entry is made. Alternatively the State warrants the title to which the registrar certifies when issuing a new certificate. At the time of issuing the new certificate the title is deemed to be free from blemish and consequently any period of occupation adverse to the registered proprietor can only commence after the date of issue of the new certificate. As a corollary any period of occupation adverse to the registered proprietor which has accrued prior to the issue of the new certificate is disregarded — the “blemish” on the title has been wiped clean from the slate and any accrued rights of the adverse occupier do not survive the issue of the new certificate.

A further corollary is that where the adverse occupier has been in possession for a period sufficient to invoke the limitation period as a defence, but has not taken the necessary steps to have the dispossessed registered proprietor removed from the register, a registered dealing between the dispossessed proprietor and a third party will defeat the occupier's interest. Thus, where T has been in adverse occupation for (say) twenty or twenty-five years, but has not availed himself of the procedure to have himself entered in the register as the proprietor, then any registered dealing between the registered (but dispossessed) proprietor and another party is enough to defeat any accrued interests of T, even matured adverse occupation sufficient to invoke the limitations statute as a defence. In such a case, the registered title of the transferee P will defeat that of the adverse occupier who has neglected to have himself registered as the proprietor.

A variant of the provisions where the accrued or matured period of occupation was "wiped clean" at any time prior to the occupier applying for registration was in force in Singapore prior to that jurisdiction abolishing adverse possession of land in the early 1990s. While adverse possession including part parcel adverse possession of registered land was previously recognised in Singapore, it was not necessary for the registered proprietor to enter into a transaction with a third party in order to wipe the slate clean. The previous registered land statute permitted a registered proprietor to "re-assert" his ownership of the land holding by application to the registrar and such re-assertion was sufficient to destroy any accrued period of occupation adverse to the proprietor.

#### *4.5.3 Uncompleted perfection of adverse possession not recognised in the jurisdiction*

Another aspect of inchoate adverse possession is concerned with the adverse occupier who has been in possession of the land for a period sufficient to comply with the statute of limitations but is not entered in the register as the registered proprietor. In other words, the adverse occupier has not applied to be entered into the register although the length of adverse occupation entitles the occupier to make such an application.

For example, some jurisdictions require the adverse occupier to be in occupation for the period prescribed by the statute *and* to successfully apply to the Registrar to be entered upon the register as the proprietor – until the registration is effected the previous registered proprietor (the “true” or documentary owner) has the better title and may provide a good title to a third party. Thus occupation for the required period *and* registration is required to extinguish the title of the dispossessed registered proprietor. This is the case in the Canadian province of Alberta and the Australian state of NSW. An interesting procedural difference between the Australian state and the Canadian province is that the Registrar acts in an administrative capacity upon the application of the adverse possessor seeking to be registered in NSW while the Alberta Registrar acts pursuant to a filed court declaration resulting from a lawsuit brought either by the registered proprietor seeking to recover the land or a lawsuit brought by the adverse possessor seeking to quiet the title (Petersson 1992, 1301).

In those jurisdictions where registration is necessary to “perfect” the title, a third party dealing with the registered proprietor shown in the register will not take subject to the rights acquired, or in the course of being acquired, by the adverse occupier. That is, the rights acquired by an adverse occupier, but not perfected, will not bind any successor in title to the dispossessed registered proprietor. In the strictest sense, because the right of the adverse occupier is only to apply for registration and the occupier’s title is not perfected until registration is effected, this right, founded upon adverse occupation, is not an overriding right. The right of the dispossessed registered proprietor will not be subject to the right of the adverse occupier until the dispossessed proprietor’s name has been removed from the register and the occupier’s name entered in the register as the new proprietor.

Other jurisdictions do not require the occupier to gain registration and provide for the supremacy of the occupier’s title by holding that, upon the passing of the limitation period, the registered proprietor holds the estate on trust for the occupier. This was the case in England and in Tasmania under the respective registered title statutes in operation there prior to their replacement in 2002 (England) and amendment in 2001 (Tasmania). With the passage of these new laws an adverse occupier will be required to apply for registration in order to defeat the title of the registered dispossessed

proprietor. Failure to apply and obtain registration will leave the adverse occupier's title "unperfected", with the adverse possession incompletely perfected. That is, adverse possession alone, without applying for registration, is insufficient to acquire title.

Similarly, Victoria and Western Australia provide that the rights subsisting under adverse possession are an exception to the indefeasibility of the registered proprietor's title. The passing of the limitation period is sufficient to extinguish the registered proprietor's title and confer title upon the adverse occupier without the necessity of any further action on the part of the occupier. Of course, the occupier may apply to be entered into the register as the registered proprietor, but such an application is not necessary to perfect the occupier's newly acquired title. This procedure carries with it the disadvantage that the actual legal title over the land holding is held by a person other than that entered in the register as the registered proprietor.

#### **4.6 Relativity of title**

In the absence of an absolute (or allodial) title all lesser interests in land are relative. Thus one does not have to show the absolute or best title, one need only show a better title than that of the adversary in a disputed property right. Reference is made to the previous discussion of *Spark v Whale Three Minute Car Wash* (1970) wherein the plaintiff Miss Spark, with a better title than the defendant, was able to prevail. However, in the subsequent case, *Spark v Meers* (1971), Miss Spark's title was insufficient to defeat that of the registered proprietor's title. This case supports the conclusion that relativity of title is only applicable to a controversy between two claimants each with lesser unregistered interests while the title of the registered proprietor of registered title land may be considered as absolute. The UK Law Commission has recently acknowledged that relativity of titles is a concept more consistent with unregistered (or "old law" or "general law") land than with registered title land (Law Commission 1998, 205).

#### 4.7 The state of mind of the adverse occupier

Adverse possession requires, in addition to actual possession, an intention to possess (or *animus possidendi*) (VPLRC 1998, ¶ 6.15 at 131; *Powell v McFarlane* 1979).

“The intention to possess is an intention to exercise control ... [a]nd on that basis an intention to control the land, the adverse possessor believing himself ... to be the true owner, is quite sufficient” (*Petkov v Lucerne Nominees* 1992, 168 *per* Murray J). The intention can be sufficiently established even if both the true owner and the trespasser mistakenly believe that the land belongs to the trespasser, or where the trespasser did not realise that he was trespassing on another’s land (Megarry and Wade 2000, 1310; *Halsbury* 1992, ¶ 909, 397–8; *Halsbury* 1997, ¶ 979, 507).

There are some expressions of opinion requiring a conscious intention to dispossess the true owner. This is incorrect and is possibly founded on a fallacy that the necessary *animus possidendi* (intention to possess) can be equated to a non-existent *animus dispossidendi* (intention to dispossess). The intention to possess is the intention to exclude the world at large (including the true owner) and is not the same as the intention to dispossess the true owner. Some dicta of Eames J (*Monash City Council v Melville* 2000 at 64,450-1) indicating that a “manifest intention to dispossess the owner” is required is thus incorrect. Another possible explanation for the fallacy may lie in the highly technical meaning given to “adverse possession” prior to the 1833 English reforms. The 1833 reforms greatly simplified the definition and the required elements of “adverse possession”. Included in the 1833 reforms was the abolition of the previous distinction between adverse and non-adverse possession (*Lutz v Kawa* 1980, 16 *ff per* Laycraft JA; Petersson 1992, 1302; Megarry and Wade 2000, 1308).

That the law does not require a conscious intention by the trespasser to deprive the true owner of his proprietary rights presents a difficulty where a boundary fence is in an incorrect position and remains so until discovered by chance by one of the landholders, usually, after many years of passive acceptance by both of the unaware adjoining landholders (VPLRC 1998, ¶ 6.22 at 134–135; *Malter v Procopets* 2000, ¶¶ 4–5; *Malter v Procopets* 1998, ¶¶ 26–27). Thus it may be that one landholder, intending to enjoy proprietary rights over that land enclosed between the actual legal



boundary and the physical fence (and without intending to dispossess the true owner), may acquire the proprietary rights over that enclosed strip. This is what we refer to as “part parcel adverse possession”.

The distinction between the necessary intent to possess and the unnecessary intent to dispossess is perhaps best illustrated by an American case (*Van Valkenburgh v Lutz* 1952). The jurisdiction in which this case was decided requires that the adverse occupation must be under “colour of title” and hostile in order to found a good defence of adverse possession; thus inadvertence by the trespasser is not enough. Colour of title is where there exists some evidence explaining why the trespasser may have entered onto the land believing the entry to be legitimate. The weight of evidence supporting “colour of title” need not be great. Thus, the law in the jurisdiction favours a mistaken trespasser having a belief of right founded upon some evidence.

The trespasser Lutz was defending his continued occupation of two disputed strips adjoining his holding and in a ruling that has been subject to criticism, failed in both instances. In one instance, Lutz’s trespass was inadvertent and he was unaware that he was occupying his neighbour’s land. He was held to lack the necessary ‘hostility’ towards his neighbour’s rights. It would seem that his intent to possess did not include an intent to dispossess. In the second instance, Lutz’s trespass was opportunistic as he had occupied an unused portion of his neighbour’s land fully aware that he was trespassing. He was held to lack the necessary colour of title in that his occupation was not believed by him to be legitimate. Under English real property law, there is no requirement that the trespass be hostile and Lutz’s inadvertent trespass would be sufficient to defeat the true owner because of his intent to possess. Similarly with respect to the opportunistic trespass. Under English law Lutz’s occupation exhibited the necessary intent to possess the land along with the unnecessary intent to dispossess. Certainly, the *Lutz* decision is not good law in England and, it is submitted, in America. Its value lies in its illustration of the distinction between an intent to possess and an intent to dispossess.

The law does not favour the wilful trespasser (Callahan 1961; *Lutz v Kawa* 1980, 16 ff; *Malter v Procopets* 2000, ¶¶ 4–5; *Malter v Procopets* 1998, ¶¶ 26–27). Laycraft JA, speaking for the Alberta Court of Appeal, stated that the term “adverse possession” is a misnomer and has been since 1833 when the distinction between adverse and non-adverse possession was abolished by the English Parliament (*Lutz v Kawa* 1980, 16 ff; Petersson 1992, 1302). A consequence of the 1776 revolutionary War of Independence is that the former American colonies did not receive the benefits flowing from the law reforms of 1833 passed by the English Parliament. This has resulted in the American law of adverse possession evolving along a different line to that followed in England, Australia, and Canada and in these jurisdictions “colour of title” is not a necessary foundation for adverse possession.

#### **4.8 Part parcel adverse possession**

Little has been written regarding adverse possession of part only of a parcel. Thus the variation of boundaries associated with part parcel adverse possession has been dealt with, if at all, as within adverse possession generally. See, for example, Powell-Smith (1975, 15) where he observed that “[b]oundaries are frequently varied in this way by minor encroachments upon neighbouring property, often when walls are rebuilt or wooden fences re-erected.” *Halsbury’s Laws of England* (1992, ¶ 909 at pp 397–398) restricts itself to a passing comment. — possibly because adverse possession of less than a single whole parcel was not fully recognised until as recently as 1833. Prior to the 1833 reforms, occupation or possession of less than the whole land holding was deemed to be occupation of the whole where the remainder of the holding was not occupied. Since the 1833 reforms this is no longer the case. The UK Law Commission has recently recognised the role of adverse possession in rectifying misplaced boundaries (Law Commission 1998, 98) as has the most recent edition of a leading English real property text (Megarry and Wade 2000, 235–236). The 1998 Law Commission report asserts that “most cases of adverse possession are in fact boundary disputes” (Law Commission 1998, ¶ 10.15).

The late recognition of part parcel adverse possession and the paucity of commentary and legal decisions mean that rationalising the practice requires speculation and

conjecture. Contributing factors to the belated and recent acceptance of part parcel adverse possession possibly include:

- (a) the English practice of using general boundaries rather than fixed boundaries meant that any divergence of the occupational boundary from the legal boundary was apparent and unlikely to go unnoticed or unchallenged. Alternatively, where such a divergence was undetected, the “newer” boundary was accepted and unchallenged as there were not the means of establishing the old boundary to serve as a reference for comparison.
- (b) the 1833 amendments to the English statutory law regarding limitation of actions and the simplification of the law. Before 1833, “adverse possession” bore a highly technical meaning (Sykes 1973, 748–9; Megarry and Wade 1975, 1013). Today it merely means possession inconsistent with the title of the true owner (Megarry and Wade *ibid*).

Prior to 1833 possession merely inconsistent with the title of the true owner was insufficient to constitute adverse possession unless it also satisfied the highly technical meaning then attached to adverse possession. The legislative change brought in by the 1833 reforms removed the distinction between adverse and non-adverse possession (*Lutz v Kawa* 1980, 16 ff). However the 1833 Act required both that the proprietor be out of possession and that another, the adverse possessor, be in possession, that is, since 1833 there was the twofold requirement that the owner must be out of possession *and* that there be adverse possession exercised by another. This broke down the ability to rely upon acts by the trespasser done on part of the property being regarded as constructive possession of the whole because it was necessarily difficult to show dispossession of the whole where the owner remained in possession of the remaining portion not in the actual occupation or possession of the trespasser.

- (c) the evolving sophistication of English law and its recognition of interests previously unrecognised including apportionment legislation. With

regard to real property, it was recognized as early as the fifteenth century that a single land holding could be held in co-ownership by several proprietors. Although as between themselves such joint tenants have separate rights, as against everyone else they were collectively in the position of a single owner (Megarry and Wade 1975, 391).

The nature of feudal tenancy favoured such joint tenancies whereas equity did not. The certainty and equality of tenancies in common was preferred in the equitable jurisdiction. Thus, a later development in law saw the recognition of tenancies in common wherein the co-owners have quite separate interests. Further, proprietary interests were capable of division in time (present and future interests) and space (horizontal subdivision, and later, vertical subdivision). Added to these factors, the simplifications introduced by the English *Real Property Limitation* Act of 1833 provided additional support for the severance or partitioning of interests.

The general rule of proprietary rights over land is expressed in the maxim *cujus est solum, ejus est usque ad coelum et ad inferos*: the person who has the surface soil also has the cubic [that is, volumetric] space above and below the surface. Such an owner or proprietor can carve out of this all encompassing bundle of rights a lesser bundle of rights over the land — he or she can lease the whole property for a limited period; or sell off a portion of the land by subdividing the surface area of the lot into two or more lots of lesser surface area (horizontal subdivision) or subdividing the various levels or strata over which he or she exercises proprietary rights from the centre of the earth to the stars above (vertical subdivision).

Given that the surface of the land may be owned by one proprietor and various underlying (or overlying) stratum beneath (or above) the surface are owned by others it becomes possible to dispossess or disseise one of the other owners without affecting the legal rights of the proprietor of the land surface. Similarly a dispossession of the owner of the land surface will not

affect the legal rights of those proprietors of those other strata carved out of the whole property.

Once it is accepted that a proprietor can subdivide lesser interests in his land and that these lesser interests can be the subject of adverse possession independent of the other lesser interests it becomes acceptable to subject such a lesser interest to adverse possession independent of other lesser interests even when all the lesser interests are held by the one proprietor, that is, where the proprietor has not subdivided his property and carved out independent lesser interests. An analysis of the case-law permitted Sholl J to derive the following principles (*Symes v Pitt* 1952, 425):

1. acquisition by adverse possession of the surface gives ownership of everything above the surface and of everything below; *ejus est usque ad coelum et ad inferos* (*Corbett v Hill* 1870, 673 per V-C James).
2. the above rule does not apply to strata severed in title before the commencement of the disseisor's possession; and the same must be true of other cubical spaces.
3. the rule does not apply to strata or other cubical spaces below or above the surface of which the disseisee remains in actual possession.
4. a disseisor of minerals or strata under the surface, or of other cubical spaces under the surface, acquires only that of which he takes actual possession.
5. strata above the surface must physically exist as part of a building for it to be the subject of a severance....

Further it would appear that the fourth principle applies notwithstanding that the disseisee remaining in possession of the surface remains unaware of the disseisor's occupation of the underground strata (*Halsbury* 1979, ¶ 772 at p 346; *Halsbury* 1997, ¶ 983 at p 508). These rules relating to vertical subdivision also apply to horizontal subdivision of the land surface. Consequently the law does not recognise actual possession of part as

constructive possession of the whole, particularly where the disseisee remains in possession of the remainder. Prior to the recognition of partial and partitioned interests the law was unable to recognise any interests beyond an “all or nothing” approach with regard to a single property with the consequence that adverse occupation of less than the whole undivided land holding was either insufficient to alter the existing property rights or, because of constructive possession, effected a change of ownership of the whole land holding.

(d) the evolving recognition of proprietary interests at the expense of the theory of feudal tenure in land law. Feudal tenure was the theory that the only absolute land ownership was that of the monarch and all other interests were tenancies at the will of the lord. Consequently the adverse occupation by one tenant of part of his neighbour’s tenancy did not alter the rights of either tenant without the concurrence of the lord and with no security against the lord’s change of mind. English law evolved over many centuries and, culminating in the 1926 statutory reforms of real property law, conferred enforceable proprietary rights upon landholders or tenants. These proprietary rights are now similar to those enjoyed by allodial or absolute ownership with the weakening of the feudal tenure theory of land holding. Thus the adverse occupation by one freeholder of part of his neighbour’s freehold falls to be determined by law and includes the concepts of both trespass and the statute of limitations. Trespass permits the disseisee to eject the disseisor while the statute of limitations bars the right of the disseisee to invoke the aid of a court against a disseisor after the period fixed by the statute has run. The UK Law Commission has recently acknowledged that relativity of titles is a concept more consistent with unregistered (or “old law” or “general law”) land than with registered title land and that registered title land tenure is similar to absolute or allodial ownership (Law Commission 1998, 205).

(e) improved modern survey techniques, coupled with fixed boundaries, mean that boundaries are more likely to be correctly located and later

re-established with discrepancies between the occupational and the legal boundary more likely to be rendered noticeable.

The changes brought about by the 1833 legislation can be seen in the advancement of the rationale for permitting the acquisition of title through long occupation — Lord Plumer in determining a law case in 1820 (before the 1833 reforms) concluded that “[t]he individual hardship will, upon the whole, be less by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, ...” (*Cholmondeley (Marquis) v Lord Clinton* 1820). The author of the Australian registered land title systems also distinguished between excluding (shutting out) and extruding (thrusting out) the rightful owner (Torrens 1881, 23). The first involves preventing a rightful owner from entering into possession while the latter involves the eviction of the rightful owner after that owner has entered into possession.

While it was never essential that the rightful (and eventually barred) owner should never have been in possession; the manner in which the statute of limitations was applied was in those cases where there had been doubt about succession and the interloper was not a total stranger *and* had displaced the rightful heir.

Thus the subject matter of adverse possession cases prior to the 1833 reforms were whole estates where it is clear that discontinuance or dispossession of the owner could be effected without the owner ever having entered into possession, except in the sense that the owner was deemed to be in possession in the absence of evidence to the contrary.

An exception to the general unavailability of part parcel adverse possession was the unlawful occupation or enclosure of common land. Common land (the commons) were those waste lands of the manor upon which every freehold tenant of the manor was entitled to exercise rights of use (in common with the other freehold tenants). Such lands could also be the subject of adverse occupation with the consequences that, with the passage of time, the lord’s proprietary rights or the commoners’ rights of use were lost by adverse possession. Because the adverse occupation of part of the

commons was sufficiently distinctive, such partial occupation adverse to the lord's or the commoners' interests were recognised where the remainder of the commons were not adversely occupied. This adverse occupation of part of the commons was known as "encroachment". It applied equally to adverse occupation by a total stranger or one of the commoners.

With regard to encroachment by a total stranger, the term meant no more than an intrusion upon the rights of the lord and the commoners without any connotation that the stranger be in possession of land coterminous to that part of the commons being adversely occupied. Similarly, in the case of encroachment by a commoner, the term was used without any connotation that the adversely occupied commons land be coterminous with the commoner's holding. This recognition of adverse occupation of less than the whole holding preceded the 1833 reforms (*Halsbury* 1991, ¶ 636; *Doe d Colclough v Mullinar* 1795; *Doe d Challnor v Davies* 1795; *Walker v Broadstock* 1795) and was reputed to be of "considerable antiquity" by the mid- nineteenth century (*Lisburne v Davies* 1866).

The "term" encroachment took on an extended meaning within the context of adverse occupation of the commons to include land not contiguous with the other holdings of the adverse occupier. The use of the term "encroachment" with regard to parcels that were near to or neighbouring the other but were not coterminous or "strictly" contiguous would have ramifications in the late twentieth century when it became necessary to interpret the NSW *Encroachment of Buildings Act* 1922 (*Googoorewon v Ametek* 1991; *Ametek v Googoorewon* 1993). This will be further discussed below under possible alternatives to boundary variation by way of part parcel adverse possession.

#### **4.9 Comparison of part parcel and whole parcel adverse possession**

The antecedents of part parcel adverse possession do not require that there is a similarity between it and whole parcel adverse possession. The factual differences also demonstrate the dissimilarity between the two. With regard to part parcel it is most likely that the relationship between disseisor and disseisee is that of neighbours occupying abutting land holdings. However, as perceived by one commentator (Sara



1991, 48), the distinction between a dispute over the boundary location and a dispute as to ownership of a whole parcel of land may be a fine one: is a claim amounting to half the defendant's land a dispute about a parcel of land or only about the precise boundary? As previously referred to, Lord Plumer, when discussing the rationale for adverse possession, confined his description to the occupation of whole land holdings adversely to the interests of the rightful owner who had never been in possession (*Cholmondeley (Marquis) v Lord Clinton* 1820). This can be contrasted with part parcel adverse possession where the occupier and the rightful owner are likely to be (and remain) neighbours. Of course, one plausible analysis of the variation of the location of the common boundary separating the holdings of two adjoining neighbours is that one of the neighbours has never been in occupation of the small strip lying between the occupational and the legal boundaries. For the sake of completeness it is here offered as a conclusion that the distinction between whole and part parcel adverse possession is that whole parcel adverse possession is always intentional and not inadvertent while part parcel adverse possession is usually inadvertent although deliberate (and not inadvertent) adverse occupation of part of another's landholding is possible.

The proposition that part parcel adverse possession is dissimilar to whole parcel adverse possession is supported in those jurisdictions which refused to recognise the acquisition of title to registered land by long standing adverse occupation. With some exceptions, these jurisdictions have legislated to provide for variation in the location of the boundary in instances of inadvertent encroachment. Thus New Zealand introduced encroachment into its land law in 1950 pursuant to the *Property Law Amendment Act* 1950 at a time when its registered land title statute expressly disallowed title by adverse possession. Similarly for New South Wales which introduced encroachment into its land law in 1922. The distinction is retained in the Northern Territory which permits boundary adjustment by encroachment applications but refuses to recognise adverse possession of whole or part parcels. Similarly South Australia impliedly refuses to permit part parcel adverse possession but does allow applications with regard to encroachments.

The dissimilarity in purpose is that the encroachment legislation was introduced to provide for boundary location adjustment between current neighbouring land holders while the introduction of whole parcel adverse possession was to provide relief where the registered proprietor of a registered title parcel had disappeared and abandoned any proprietary claims to the parcel. Encroachment was the resolution of a problem involving parties separated in space while adverse possession was the resolution of a problem involving parties separated in time.

#### **4.10 Alternatives to part parcel adverse possession**

Those jurisdictions which have long prohibited the acquisition of title by adverse possession have provided statutory recognition of a proprietary right founded upon constructions akin to adverse possession. This is the acquisition of proprietary rights consequent upon improvements being made to land in the mistaken belief that the applicant was able to exercise such proprietary rights — that is, the applicant mistakenly erected or has constructed improvements upon land in the mistaken belief that the subject land was owned by the applicant. To make such an award of proprietary rights it follows that another proprietor must be deprived of those rights and the statute permits a wide discretion to the court determining the matter so as to do justice between the parties.

The rationale of the legislation is perhaps to ameliorate the harshness of the common law where the remedy may be considered as excessive compared to the trespass committed. The court is called upon to balance the interests of both parties by considering the relative harm or detriment suffered by the parties. The detriment suffered by the landholder upon whose land has been encroached if the status quo is left undisturbed is to be weighed against the detriment suffered by the mistaken trespasser if the full force of the common law of trespass is applied and the prior position of the two landholders is restored. This is “statutory encroachment” where the encroachment (and trespass) upon another’s land holding is permitted by the parliament in limited circumstances.

Another alternative, admittedly of limited value, is the statutory recognition of a small margin of error in the location of boundaries such as that in the Victorian

*Property Law Act 1958* (section 272). This is another acceptance of the *de facto* occupational boundary where the discrepancy between the two boundaries is “small”. These alternatives will be considered below following the analyses of various registered title land schemes and how the issue of adverse possession is dealt with within those schemes.

#### **4.11 Conclusion**

Part parcel adverse possession arises from differing considerations than does adverse possession of whole parcels and it is not necessary that the solution to the problems arising from part parcel adverse occupation ought to be the same solution as that for the whole parcel adverse occupation. It may be that the resolution of part parcel problems could be better arrived at without the use of adverse possession. It should be appreciated that the problems associated with part parcel possession are not merely similar to those problems associated with whole parcel possession; in fact, the part parcel problem is distinct from that of the whole parcel.

#### **4.12 Summary**

This chapter has completed the chronological history of English real property law up to the middle of the nineteenth century when the Australian colonies introduced land title registration (which is dealt with in the next chapter). The way has been prepared for the introduction of land registration followed by the “combining” of adverse possession with registered title land. This chapter has demonstrated the relatively recent introduction of part parcel adverse possession with the increasingly sophisticated laws introduced by the 1833 reforms and since. It is these reforms coupled with the different approach to boundaries adopted in the colonies that has made any discrepancies in the location of boundaries more apparent and amenable to solution by the newer variant of adverse possession, that is, part parcel adverse possession.

The advent of adverse possession into the English legal system and its history are described with the recent extension to part only of a land holding where the adverse occupation has not extended to occupation of the whole land holding. Part parcel adverse possession is a newer variant of the long established principles applicable to

(whole parcel) adverse possession. In its most commonly encountered form part parcel adverse possession involves the inadvertent trespass by one landholder over a portion of land belonging to an adjoining landholder where there is confusion with regard to the correct position of the boundary dividing the two landholdings. The rights arising from occupation provide a somewhat enforceable title even where the acquisition of title by adverse possession is frowned upon and the relative title founded on occupation is not absolute and is liable to be defeated. Comparing the adverse possession of whole and part parcels implies that the problem of variation in boundary location need not be approached solely by resort to adverse possession. That is, the two different problems of land ownership and the extent of the ownership are amenable to the same solution but the single solution is not necessary. There are alternatives to the part parcel variant of adverse possession with regard to the boundary location problem. These possible alternatives are “statutory encroachment” and, where the discrepancy is relatively minor, adoption of the *de facto* status quo. These will be discussed in a later chapter.

# Chapter 5

## Registration of land title

### 5.1 Introduction

This chapter continues the chronological review of the development of real property law within the English common law countries and marks a major innovation within English real property law. The opening up in the new English colonies of large tracts of land considered at the time to be vacant permitted variants of land law that were not suitable for the long settled and developed landholdings of the mother country. The most important and radical variant adopted was that of land title registration (Lyall 1994, 790). The chapter provides the theoretical legal basis for land title registration necessary to permit the following chapter seven's commentary upon and discussion of a range of registration scheme versions that were introduced and evolved from the initial concept.

The opening up and granting of a large number of land parcels within a short time frame also encouraged the adoption of a more efficient conveyancing system than the traditional English system of private conveyancing which after many years of settlement was called upon only to cater for sporadic conveyances. The number of parcels available, the number of settlers and would be landholders and their status made for a marked difference between the land markets of the colonies and that of the colonial power. A further distinction was to be found in the intentions regarding the length of time the new settlers wished to hold their land — whereas land transactions were rare in England with the landed classes not desirous of selling their holdings, the colonial settlers were seeking to better themselves through speculation and buying, improving, and then on-selling their improved properties. As recently as the advent of the second World War (1939–45) it was common for persons born in the English colonies and having never set foot in England to refer to England as home and to express a desire to return “home” permanently upon establishing themselves financially. Little wonder that the colonial land markets were more active than the home market and were ripe for the introduction of a better variant of land law and a radically new method of conveyancing. Additionally the administration of

the colonies was better placed to establish and conduct a centralised public land market in contrast to the highly private nature of the English land market.

This chapter introduces a separate stream of real property law that will merge with that of the preceding chapter four to apply adverse possession to registered title land. This merger will be considered in the following chapter six.

The chapter discusses aspects of real property law and the legal principles underlying a title registration system with a view to establishing the defining principles and characteristics of land title registration to enable commentary upon and analysis of various systems established to provide registered title within the various jurisdictions.

## **5.2 Registered title land**

Strictly speaking, it is a person's title to an estate which is registered rather than the person; however, it has become customary to speak of registering the proprietor (Ruoff *et al* 1986, 82). The origins of, and the credit for devising, title registration are not without dispute. The introduction into Australian real property law of land title registration was effected in the second half of the nineteenth century and thereafter into other jurisdictions including New Zealand. Although there does exist some controversy over the role of Robert Torrens in devising the scheme, even the detractors of Torrens concede his important role in fostering the introduction and acceptance of the scheme throughout Australia. The history of the introduction into law of the scheme has been dealt with extensively elsewhere (Whalan 1967; Whalan 1971a) and it is generally accepted that the zeal of Robert Torrens led to its introduction first in South Australia, and shortly thereafter, throughout the Australian and other British colonies.

Thereafter, title registration has been introduced into many parts of the world and Torrens's surname has now been adopted as a noun, a verb, and an adjective, both with and without the lower case "t" to refer to title registration systems generally (Simpson 1976, 68 *ff*; Kerr 1927, 2). The generic use of the term has led some commentators to describe the Australian registered title schemes as Australian

Torrens systems in order to distinguish them from other foreign Torrens (or registered title) systems from elsewhere (Kerr *ibid*). That title registration should be first introduced into South Australia is a possible consequence of that colony's origins as a commercial development venture — from the outset of the colony's establishment there were proposals for procedures to simplify the transfer of property with a view to promoting security of tenure and reducing the delay and costs associated with the English private conveyancing system (Fisher 1836, Preface iii).

The new Australian colonies were the first (or perhaps among the first) to introduce registered title land into the English law jurisdictions in the mid-nineteenth century (Simpson 1976, 68; Hogg 1905; Hogg 1920, 4; Kerr 1927). Beginning with South Australia and shortly thereafter taken up in the other Australian colonies and also New Zealand, the system was adopted by some of the Canadian provinces, some of the United States of America and many other British colonies. The Torrens or other systems of land title registration were particularly suited to the large-scale settlement of the new and (apparently) vacant colonial lands (Lyll 1994, 790).

The system, as espoused by Torrens, sought to remove the hidden traps from land conveyancing with particular reference to equitable interests that were not necessarily discernible upon a proper title search. Further, in order to advance the simplicity of his proposed solution, Torrens railed against the retrospectivity of title (Torrens 1859, 8; Simpson 1976, 41) and wished that his system should disclose all interests held in the land – registered estates were to be held subject to such charges, estates, and interests as were notified in the register, but free from all other charges, estates, or interests *whatsoever* taking priority among themselves according to the date of registration, and over *all* unregistered estates or interests *whatsoever* [emphasis added] (Torrens 1881, 22).

To this end his proposal was for a register of interests that reflected all the facts relevant to the title leaving no obligation to go behind the register (Sackville and Neave 1975, 347). A conveyance would be effected by a surrender and a new Crown grant – the vendor was to surrender his land back to the Crown and the Crown would then make a fresh Crown grant of that land to the purchaser. By this artifice, the

investigation of the vendor's title would be complete when traced back to the Crown grant to the vendor (Hogg 1905; Hogg 1920; Kerr 1927; Harrison 1962). Similarly an investigation by a later purchaser into the title of a later vendor would be complete when traced back to the Crown grant to that later vendor. In this respect, the register system proposed was similar to the English copyhold derived from the feudal tenure in villeinage wherein the tenant's name and interest were recorded in the manorial court rolls (Simpson 1976, 29; Megarry and Wade 1975, 26–27) and the transfer of the tenant's interest was effected by a “surrender” (from the transferor to the lord) and an “admittance” (by the lord of the new tenant/transferee). The copyhold was an early form of register wherein the interest of the copyholder was (perhaps) more secure than that of a freeman owning free land which was dependent upon private conveyancing.

The utter simplicity of the original proposal was founded upon the dispensing with the necessity of investigating title as far back as its origin — the grant from the ultimate owner — the Crown. This was accomplished in a most simple manner. The present landholder (and would-be vendor and transferor) was to surrender his land grant back to the Crown which would then re-issue a new Crown land grant to the would-be purchaser (and transferee) (Harrison 1962). Thus the prudent would-be purchaser need only investigate the would-be vendor's title without fearing the appearance of a claimant asserting title based on an earlier transaction because the earliest transaction was that of the Crown granting the land to the would-be vendor. In effect, there were no earlier transactions because the surrender of the grant back to the Crown (and its re-issue) obliterated any earlier transactions (Ruoff 1957, 8).

Thus, investigation of title could always be traced back to an “original” Crown grant — this is the basis of the theory of “wiping the slate clean” as in South Australia, New South Wales, and Tasmania and one of the Canadian jurisdictions (Alberta) — (Ruoff 1957, 23; *Lutz v Kawa* 1980; Petersson 1992, 1317; *Sinclair v McLellan* 1919). Ruoff (1957) has concluded that in “wiping the slate clean”, Tasmania may have had the sanest solution to a difficult problem. An alternative way of describing the theory was that expressed by Kent J of the Alberta Queen's Bench Court as “to accommodate the principle of adverse possession within the framework of the



Torrens System, each time a bona fide purchaser for value obtains title to the land at issue, the 10 year period begins again” (*Tschritter v Otto* 2001).

Torrens himself described the scheme as eliminating the necessity for a *retrospective* investigation of title (Torrens 1859, 8 ff; Torrens 1881, 15 ff) and a centralised objective investigation of title by the administrator (the registrar) eliminates the necessity of separate individual (and isolated) investigations of title by each and every person with an interest in the land (Torrens 1859, 9; Torrens 1881, 14). Part of the proposal also was to do away with the accumulation of documents evidencing each and every transaction in the “chain of title”. A mortgage and its subsequent discharge, for example, required two documents whereas under Torrens’s proposal the later discharge obliterated the earlier mortgage and the fresh certificate issued bore no trace of the earlier mortgage and its subsequent discharge. The accumulation of documents and the necessity for their retention as evidence of title has been referred to as a “mausoleum of parchment” as described by Maitland while the need to retain in the register only the most recently issued certificate of title provided for “continuous finality” (Simpson 1976, 19–20).

Torrens elimination of the need for retrospective investigation beyond the most recent issue of title is elsewhere described as “independent” title, that is, the validity of the title is not dependent on the validity of each and every transaction preceding and including the transaction wherein the current title holder acquired his title (Sykes 1973, 26). Further, the administration of the register by a public official provided “external validity” (recognised and respected by all) upon the title evidenced in the register whereas the existing private conveyancing procedures merely provided “internal validity” whereas each individual transaction was binding only upon the parties to that transaction (Sykes 1973, 24 ff).

#### 5.2.1 *Is there a non-Torrens flavour of registered title land ?*

As already referred to, a number of commentators appear to have accepted that the terms “title registration” and “Torrens” are interchangeable. This is particularly true of the North American jurisdictions (Lamont 1989, 74). With regard to the Australian jurisdictions the usage is accepted because it is universally recognised that

all of the Australian title registration systems are “Torrens” systems. Conversely, in the past a number of writers have sought to distinguish the existence of title registration schemes differing from those that originated out of Australia. A possible reason for doing so is the rationalisation of the success of title registration in Australia whereas attempts to introduce title registration into England failed (Simpson 1976, 76; Dowson and Sheppard 1952, 73). This is further reinforced by the unsuccessful introduction of title registration into New Zealand in 1860 (the *Land Registry Act*) which was later replaced by the *Land Transfer Act* 1870 — a “Torrens” statute modelled upon the South Australian *Real Property Act* of 1861 (Whalan 1971a, 14–15).

These distinctions are no longer valid. With one exception to be discussed below, all present day title registration systems share the same characteristics in all but unimportant respects. For example, the “three vital respects” relied upon in an early comprehensive treatise (Kerr 1927, 17–18) to distinguish the Australian system(s) from the English system are no longer relevant given that (i) the NSW “Torrens” legislation provides for “qualified” and “limited” folios of title; (ii) the English law introduced registration of land charges at about the time of Kerr’s writing; and (iii) since the passing of the English *Land Registration Act* 1988, the English register is no longer strictly private and is now open to public inspection.

Other possible distinguishing features of the Torrens systems are not essential to its administration and could be done away with without detracting from the essentials of the Torrens systems. For example, Kerr himself wrote (*ibid* 10) that the assurance fund supporting the state indemnity is merely ancillary and not essential to the working of the system. Whalan writes that the assurance fund was included after the initial Torrens proposal and may have been inspired by the 1857 English Report (1971a, 9). The best demonstration of the wide range of non-essential features that can be included within a Torrens scheme is the wide variety of differing Australasian schemes, all of which are accepted as Torrens schemes. Hogg’s classification (1920, 5) of twenty-eight separate title registration systems into five different groups appears to be based more upon geographical and political criteria than any imputation that some title registration schemes do not possess Torrens-type

characteristics and should be distinguished from Torrens schemes. That the perceived distinction is possibly misconceived is alluded to in one commentary (Dowson and Sheppard 1956, 73) and that the distinction is more geographical and political than based upon substantive differences (*ibid* 98).

Thus it may be concluded that the distinctions between land title registration schemes derived throughout the English law world do not justify the two groupings of Torrens and non-Torrens today. The view is also expressed here that the two groupings may never have been justified and these two groupings may have been founded upon an erroneous analysis of land title registration by English interpreters. It is only in the recent past that the previous analyses have been discarded. With regard to the interpretation of the Australian statutes the ultimate arbiter was, until quite recently, the English Privy Council. The development of the law of registered title land was hindered by a reluctance on the part of the English Law Lords to appreciate the radical nature of land title registration and the marked differences between it and the traditional English law of real property. There is now a recognition that the two systems are “fundamentally different” as described by the Parliamentary Secretary during the debates over the *Land Registration* Act 2002 in the British Parliament (House of Lords Parliamentary Debates, 3 July, 2001).

That there is no real present distinction between land title registration schemes is supported by the changed thinking with regard to the English system. Previously the foundation for any analysis of the English registered land system has been predicated upon the requirement that the registered land system must be compatible with traditional real property law dealing with land not subject to the registered land system (Law Commission 1971). In the intervening thirty years since the 1971 working paper, there has arisen a recognition that the basis of title in each of the systems (registered and unregistered land) are fundamentally different and it is no longer necessary that the registered land system be compatible with traditional real property law (Law Commission 1998). Additionally, Ruoff (1957, 15) expressed the view that the English and Torrens systems of title registration are basically the same.

On the other hand it is indisputable that New Zealand, having introduced title registration based upon the English model in 1860, later abandoned that legislation and adopted a Torrens-style of title registration in 1870. One commentator has offered that the success of the 1870 scheme and the failure of that of 1860 is related more to the improved prosperity of the 1870s enjoyed in New Zealand than to the relative merits of the two schemes (Whalan 1967).

Similarly with regard to the Ontario system of land title registration, in respect of which the then Chief Justice of Canada based his dissenting judgement upon the distinction between the Torrens and the English styles of title registration in *United Trust v Dominion Stores* (1977). In that case the Chief Justice held that title registration in Ontario, following the English style, meant that registration prevailed against notice of equities (in the absence of fraud on the part of the registered owner) with the consequence that the registered proprietor's title was not subject to the equitable interest; the majority of the court holding that, notwithstanding registration, notice of an equitable interest was sufficient to limit the title of the registered owner. The majority held that a registered proprietor with notice of an equitable interest took subject to that equitable interest even though the legislation did not expressly include such interests as overriding interests. The reasoning of the majority was that because notice is not expressly excluded as not being an overriding interest, it is deemed to be retained as an overriding interest.

With all due respect to the Supreme Court of Canada, the Australian Torrens statutes are in accord with the Chief Justice's interpretation of the English statute and consequently do not assist in supporting his dissenting judgement. Nor do the Australian statutes support the interpretation offered by the majority. It may be concluded that the differences between the then English title registration statute (and similar statutes) and that of the Australian Torrens statutes do not justify the proposition that they are distinct from each other.

#### 5.2.2 *Should there be two flavours of registered title land ?*

It has been concluded above that the distinction often drawn between "Torrens" registered title system and an "English" registered title system is not now justified

and may never have been so. However, between some of the different versions of what have previously been unquestioningly accepted as “Torrens” style registered land, there does exist a marked difference. This difference is directly related to the basic principle underpinning registered title land. It is of sufficient importance as to raise the issue as to whether some of these styles can properly be categorised as within the Torrens schemes.

As originally envisaged by Torrens, the registration scheme dispenses with the necessity of looking behind the register because of the conclusive nature of the register. Consequently it may be that those jurisdictions permitting the existence of a title not disclosed on the register cannot properly be included within a registration of land title scheme. If this is the case, it would follow that those jurisdictions allowing the acquisition of title by an adverse occupier without the necessity of applying to be placed upon the register (as the registered proprietor) should not properly be included within the description of a registered title land system.

Thus, Victoria and Western Australia (and possibly Queensland) which permit the occupier to acquire title without this being disclosed upon the register may be wrongly classified as registered title land systems. In this regard these jurisdictions permit the title to be an overriding interest — an interest in registered land which binds the registered proprietor without being entered on the register (Megarry and Wade 1975, *Glossary*, page cxv). Thus the Victorian and Western Australian systems are similar to that of the English land registration system as it was prior to 2002.

It is important to understand that in the context of overriding interests in a registered title system, “title” can mean unregistered title as well as registered title. The possible confusion arising from the use of the term is demonstrated in an Irish text which refers to the adverse occupier, after having acquired title, applying to the registry to be registered as the owner and extinguishing the title of the dispossessed registered owner (Wylie 1986, 916–7). It is presumed that the author is referring to the adverse occupier who has acquired an overriding unregistered title. Thereafter, the occupier applies to the registrar to be registered as the registered owner. He thus acquires the status of the (new) registered owner at the same instant that the

(registered) title of the dispossessed registered owner is extinguished. Here the author has used the word *title* to mean both “unregistered title” (in the sense of “a right to property”: Burke 1977, 1773) and “registered title” (in the sense of a right to property recognised by virtue of it being recorded in the title register). When the occupier acquires an overriding unregistered title; the registered title is still retained by the dispossessed registered proprietor. It is only later, when the registrar makes the register entries, that the registered title is transferred from the dispossessed registered proprietor to the occupier, the “new” registered proprietor.

A further comment with regard to the Victorian and Western Australian schemes is that in addition to conferring indefeasibility of title on the registered proprietor, these schemes (which provide for adverse possession as an exception to indefeasibility) in effect confer indefeasibility of title upon the unregistered adverse possessor who has acquired the title by adverse possession.

The foundation for these conclusions regarding the Victorian and Western Australian schemes is the express exceptions to indefeasibility of registered title contained within sections 42(2)(b) and 68 of the respective 1958 Victorian and 1893 Western Australian *Transfer of Land* Acts.<sup>2</sup> The exceptions in favour of any rights subsisting under any adverse possession of the land is in no way restricted or limited and thus the traditional adverse possession (as applicable to general law or unregistered land) is applied to registered land in these states (Bradbrook *et al* 1997, ¶ 16.83; Sackville and Neave 1975, 354; Voumard 1965, 479; Sykes 1973, 411). It has been submitted that “any rights subsisting under any adverse possession” may not include the inchoate possessory rights an adverse possessor has before the expiration of the full limitation period (Hogg 1920, 82; Bradbrook *et al, ibid*) such that the registered proprietor’s “title” is subject only to the interests of the adverse possessor where the

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<sup>2</sup> Section 42 *Transfer of Land Act* 1958 (Victoria) [note: section 68 of the *Transfer of Land Act* 1893 (WA) is in similar terms]:

S. 42(1) ....

S. 42(2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to--

(a) ...;

(b) any rights subsisting under any adverse possession of the land; ...

[URLs: [http://www.dms.dpc.vic.gov.au/12d/T/ACT01236/13\\_4.html](http://www.dms.dpc.vic.gov.au/12d/T/ACT01236/13_4.html) accessed April 10, 2002 and [http://www.austlii.edu.au/au/legis/wa/consol\\_act/tola1893160/s68.html](http://www.austlii.edu.au/au/legis/wa/consol_act/tola1893160/s68.html) accessed April 11, 2002].

full limitation period has run. However, in Western Australia the point has been expressly decided in favour of the inchoate possessory rights of the adverse possessor prior to the completion of the full limitation period (*McWhirter v Emerson-Elliott* 1960; Francis 1972, 161). The point has not been expressly considered in Victoria although a recent decision appears to have decided the issue *sub silentio* in accord with the Western Australian caselaw (*Malter v Procopets* 1998 and 2000).

In England the point was beyond dispute as the wording of the statute covered both “rights acquired *or being acquired* [emphasis added] under the *Limitation Act*” (section 70(1)(iv) of the *Land Registration Act* 1925). It is possible the recent recognition of the fundamental differences between the registered and unregistered land systems may force a withdrawal from the Victorian and Western Australian interpretations favouring the unripened title founded on adverse occupation. The current law in England (after the passing of the *Land Registration Act* 2002) is no longer as described here.

The system in use in Tasmania between 1980 and 2001 also permitted the occupier to acquire title without this being disclosed upon the register. In South Australia title requires registration (“title by registration”) and New South Wales permits non-fraudulent dealings with the registered proprietor prior to the occupier’s application for registration to prevail over any interests of the adverse occupier. The regime in place in Queensland prior to the 1994 *Land Title Act* was along the same lines as that of South Australia (as is that of New Zealand) while the pre-1980 Tasmania regime was similar to that of the current NSW scheme. Thus it may be argued that while the rights of the adverse possessor may override those rights disclosed on the register, title based upon those overriding rights requires registration. Without registration, there can be no acquisition of title founded upon adverse possession in South Australia, New Zealand, and New South Wales. Prior to registration, the adverse possessor only has the right to seek registration and upon registration the adverse possessor acquires title.

It is only in the Victorian and Western Australian systems (and the Tasmanian scheme operative from 1980 to 2001 and, as argued below, Queensland since 1994) where those rights are overriding and can confer title without registration. In South Australia and New Zealand the rights of the adverse possessor do not override those of the registered proprietor where the proprietor takes objection and effectively vetoes the granting of title. It may be instructive to describe the rights of the adverse possessor in those jurisdictions requiring registration as “conditionally” overriding. Similarly the rights of the adverse possessor are only overriding to those of the dispossessed registered proprietor in NSW. The proprietor who gains registration in NSW is not bound by any accrued rights founded upon adverse possession prior to the date of registration. Upon registration the adverse occupier acquires an indefeasible title guaranteed by the registry office.

It has been decided to include Queensland with Victoria and Western Australia as permitting adverse possession rights as overriding and conferring title without registration. This is because the registered proprietor’s indefeasible title (section 184(1) of the *Land Title Act* 1994) is subject to an exception (section 184(3)(a)) favouring the interests of a person *entitled to be registered* as the owner because of adverse possession [emphasis added](section 185(1)(d)). It is concluded that the adverse possessor is not required to apply for registration in order to enjoy the overriding protection of the exception.

If an essential characteristic of land title registration is “title by registration”, then those jurisdictions permitting title without registration are lacking the essential characteristic and should not be properly described as a system of land title registration. In these jurisdictions the adverse occupier acquires an indefeasible title even though the title is not registered and the title of the dispossessed registered proprietor is not guaranteed and is not indefeasible even though it has been certified by the registrar.

It is here proposed that an essential characteristic of a “Torrens” registered title scheme is that only a restricted form of overriding interests (“conditionally” overriding) are compatible with a land title registration (Torrens) scheme. Thus, any



scheme permitting an unlimited or unrestricted overriding interest to exist is not properly a “Torrens” scheme. Thus a title registration scheme that does not admit overriding interests complies with the original concept expounded by Torrens wherein the necessity for retrospective investigation of title was done away with or, according to Ruoff (1957, ch 4), the curtain principle was introduced. According to Sir Garfield Barwick, land title registration is a system of title by registration, not a system of registration of title (*Breskvar v Wall* 1971, ¶ 15). The recent report of the UK Law Commission makes it clear beyond doubt that its recommendations and its proposed *Land Registration* Bill is in accord with the fundamental principle of a conclusive register which is “registration and registration alone that confers title” (Law Commission 2001, ¶ 1.10).

A title registration scheme admitting an unrestricted (or absolute or unconditional) overriding interest does not comply with the essential characteristic and cannot be classified as other than a *quasi*-title registration system — an example being that of Victoria which has always hitherto been considered to be a “Torrens” scheme. To use the description “non-Torrens title registration scheme” may permit a mistaken inference that the scheme in question is a title registration scheme although it is not a Torrens title registration scheme, that is, that there are two distinct flavours of land title registration. A title registration scheme admitting a restricted (or conditional) overriding interest can be considered to be in compliance with the essential characteristic. The description of the overriding scheme currently operating in Victoria and Western Australia (and operating in Tasmania from 1980 to 2001) is also applicable to that of the English scheme under the *Land Registration* Act 1925 which was in operation until its repeal by the *Land Registration* Act 2002.

Thus it is concluded that notwithstanding the general acceptance of the Victorian (since 1866) and the Western Australian (since 1874) *Transfer of Land* Acts as being registered land title (or Torrens systems) statutes, they should not properly be included within this categorisation because of the permitted exception to the requirement of “title by registration.” It follows that in the strictest sense the Western Australian and Victorian schemes cannot be classified as a variant or “second” flavour of the registered land title systems. The Tasmanian *Land Titles* Act 1980 (as

it operated until 2001) and the Queensland *Land Title* Act 1994 also fall outside registered land title systems. Thus there should be no recognition of any systems permitting title without registration as a registered land title system.

### 5.2.3 *Allodialism*

English real property law is founded upon the basis that all land is owned by the Crown with all other persons occupying land as tenants. Thus there is no “allodial” land owned absolutely by the subject in this “unusually perfect feudal structure” (Megarry and Wade 1975, 13; Grant 1997, note 19). One consequence of this legal theory is that the land registries (established in the Australian colonies in the nineteenth century and in England in the twentieth) record only those lands held by the occupying tenants pursuant to *tenure*. The purpose of the register was to record and provide an evidentiary record of those lands held by the subject. There was no perceived need to record or provide an evidentiary record of those lands owned absolutely by the Crown. There being no necessity for land retained by the Crown to be entered in the register it is only those lands alienated by the Crown that are within the land title registration register (Victorian *Transfer of Land* Act 1958, section 8). Consequently, as stated in a recent commentary, Crown land cannot be brought within the land title registration statute (Megarry and Wade 2000). Another consequence is that plans of each holding entered into the register are not coordinated and are only to serve the purpose of assisting in identifying a particular holding. Thus the current registers are an incomplete basis upon which a comprehensive cadastre or spatial data infrastructure can be founded.

The practical effect of land tenure today is that the feudal tenure system is irrelevant except in the theoretical legal sense. To all extents and purposes, it is possible to consider private land holdings as being owned absolutely by the subjects of the jurisdiction (Megarry and Wade 1975, 66; Simpson 1976, 6 and 26–27). That the United States of America threw off the English Crown to gain its independence in the 1776 Revolutionary War did not require a fundamental change to the law of real property in that jurisdiction. A similar observation can be applied to the Irish Republic where, in theory, feudal tenure is still held to apply today. Whereas freehold land in England and Northern Ireland is held of the Crown, freehold land in

the Republic is held of the state (Wylie 1986, 73; Lyall 1994, 81). The practical effect is however that both jurisdictions recognise the private ownership of land. The UK Law Commission has acknowledged that relativity of titles and the non-recognition of allodial land are concepts more consistent with unregistered land than with registered title land (Law Commission 1998, 205).

Similarly, land title registration has been introduced into other jurisdictions where the feudal basis of English land law does not exist. Except for the limitations imposed on the registries it is here concluded that land tenure today in all of the Australian jurisdictions are in practice subject to absolute ownership. It is within this context that the 2001 report of the UK Law Commission recommends enabling the Crown to grant (to itself) a fee simple title in order to register that estate (Law Commission 2001, ¶¶ 3.6 and 11.11). That is to provide that unalienated *demesne* lands of the Crown may be the subject of registration. The stated purpose of the recommendation is the goal of universal registration of all land and the statute based upon that report has now been passed into law as the *Land Registration Act 2002* with section 79 enabling the registration of Crown land. The enabling power provided in the Act is voluntary and not compulsory. This is unfortunate because the establishing of a comprehensive coordinated register requires that *all* land should be entered into the register. Section 48 of the Queensland 1994 *Land Title Act* is a similar provision in that it provides for the permissive (but not compulsory) registration of state land.

This subject will be raised later but it is concluded that a complete and coordinated cadastre requires all land to be recorded in that cadastre (Williamson 1983).

#### 5.2.4 *Characteristics of registered title land*

The hallmarks of registered title systems (including the Australian registered title systems) are:

- Title by registration, not registration of title (*Breskvar v Wall* 1971; *Lutz v Kawa* 1980). This has already been discussed above and was the basis for the conclusion that some of the land registration systems operating in Australia (Victoria and Western Australia) and (previously in) England are not in strict

compliance with this requirement. The UK Law Commission's report describes this requirement as being "the fact of registration and registration alone that confers title" (Law Commission 2001, ¶ 1.10). This requirement is in accord with a fundamental principle of a conclusive register being that "the basis of title to registered land is the fact of registration" (*ibid*, ¶¶ 1.10 and 1.13).

- Reversal of the *nemo dat* principle. This principle (*nemo dat qui non habet*; *nemo dat quod non habet* or "no man can give another any better title than he himself has") is a basic tenet of property law including real property. It is this basic principle that necessitated the retrospective investigation of title which was denounced by Torrens in introducing and championing land title registration. That a vendor actually has good title to that which he purports to sell should be established by a prudent purchaser. Otherwise another (the person with the good title) can assert that title to the detriment of the duped purchaser. A consequence of title being founded upon registration (above) is that the antecedents of the person named in the register as the proprietor need not be investigated to confirm that such registered proprietor does indeed have a good title capable of being transferred to the purchaser. Other authors have described such a title recorded in the register as "independent" (Sykes 1973, 26) and "dynamic" (DiCatri 1962, 11) security of title.
- Indefeasibility of registered title. This is also a consequence of title being founded upon registration (above) and protects any who are recorded in the register as the proprietor except a registered proprietor who has procured registration through fraud. Indefeasibility of registered title of course requires that the indefeasible title be registered. Thus, the title of an innocent transferee from a fraudulent registered proprietor cannot be attacked once registered while the registered title of the fraudulent registered proprietor may be attacked and reversed. The innocent transferee has an "indefeasible" registered title while the fraudulent registered proprietor's title is "defeasible". Those jurisdictions permitting the acquisition of title without the necessity of registration provide for an exception to the indefeasibility of

registered title and, in effect, confer indefeasibility of unregistered title.

- Assurance fund. Again, this is also a consequence of title being founded upon registration (above) and is a necessary ancillary tool supporting the reversal of the *nemo dat* principle. The fund provides compensation or indemnification for a registered proprietor who has suffered loss or damage by reason of the operation of the registered land title statute. In the normal course of events such a registered proprietor would be required to enforce his legal rights against any person who has deprived the proprietor of his property or who has derived title through such a person.

However, because of the reversal of the *nemo dat* principle, the registered proprietor is unable to enforce any legal rights against a person who has been registered as a proprietor without fraud on that person's part. Because the new registered proprietor has acquired an indefeasible title upon registration, the deprived registered proprietor can only be compensated by way of a monetary award from the assurance fund.

As already described (see page 94 above) the assurance fund is merely ancillary (Kerr 1927, 10) and was included as an afterthought to Torrens's initial proposal for a land title registration scheme (Whalan 1971a, 9). It can be argued that the Torrens schemes were devised some seven decades prior to the emergence of the modern law of negligence in 1932 (*Donoghue v Stevenson* 1932). Thus the assurance fund was necessary to compensate a registered proprietor who had suffered loss or damage by reason of the operation of the registered land title system and was left without recourse against the newly registered proprietor enjoying indefeasible title and was unable to found a cause of action against a party whose negligence had caused the registered proprietor's loss or damage. This reasoning is supported by some current land title registration schemes which do not incorporate an assurance fund but are supported by compulsory insurance cover taken out by the public officers administering the schemes. However, the nineteenth century assurance fund will indemnify the deprived proprietor in cases where

negligence cannot be established. In lieu of the assurance fund, a “no fault” insurance policy would be necessary to protect the deprived proprietor where the cause of the loss is the fraudulent conduct of a disappeared rogue and without negligent conduct on the part of the public officers remaining at their posts. It is concluded that the assurance fund or a similar provision is necessary where the land title registration system guarantees the title of a registered proprietor, confers indefeasible title upon the current registered proprietor, and reverses the *nemo dat* principle.

- Guarantee and certification of title by a public authority of publicly registered public transactions available for public inspection. The issue of a certificate of title and the making of an entry in the register are mirrors of the state of the title at the time of issuing the certificate or making the entry in the register. These are corollaries of title by registration, indefeasibility of registered title and the assurance fund which supports the guarantee of title.

That some jurisdictions permit legal interests founded upon occupation to survive and override the certification by the public authority is an erosion of the principles underlying title registration. Thus the issue of a certificate and the certification of title by the public authority is negated if prior interests founded upon occupation can continue to exist contrary to the certified title. Statements to the effect that the “register is mirror of the state of the title at any given time” (in re *Shotbolt* 1888, 347) may be misleading where the register and the certificate of title are not continuously maintained. This is because it is possible for interests to come into existence after a period of time since the issue of the certificate. Thus, the certification issued with the certificate should only be construed as accurate at the time of certification which is the issue of the certificate. The public authority issuing the certificate and providing the certification is unable to provide a certification that faithfully records the legal title when the legal title can change with the passing of time from that time when the certificate was issued. However, where a conclusive register is maintained the “register should be a complete and accurate reflection of the state of the title at any given time” which will

enable title investigation “on line” (Law Commission 2001, ¶ 1.5). It is only in the recent past that the English register has been opened to public inspection (*Land Registration Act 1988*).

Title registration may be compared with private conveyancing wherein title is dependent upon a series of private transactions, each of which is binding only upon the parties to each individual transaction. There is no public authority certifying to the legal efficacy of the title and providing a guarantee of the certification with the guarantee being underwritten by an assurance fund. A flaw in any one of the series of private transactions may be sufficient to render the title valueless. Further, the misplacement or loss of any one document evidencing a transaction may leave the owner unable to establish his title.

An improvement upon private conveyancing was the establishment of a public register where documents evidencing private transactions can be registered and gain legal priority over similar unregistered documents. Such a public register merely records the existence of the document evidencing a private transaction. There is no requirement that the officers of the registry examine or investigate the legal effect of a document presented for registration. The register does not confer legal weight or efficacy upon a registered document. Consequently the public registry does not certify or guarantee the title based upon the registered documents. Thus, if a document possesses no legal efficacy, registration will not overcome this deficiency. Registration merely confers a greater legal weight and attaches a higher priority than that of a similar but unregistered document.

These characteristics or properties are considered as essential to any registered land title scheme. While there do exist other characteristics considered to be desirable, they are not essential. The basis of registered land title is similar to that of the feudal *copyhold* where a tenant held of the lord of the manor and as a consequence of a transaction between the tenant and a “transferee”, the tenant surrendered his interest to the lord who then re-issued (“admittance”) a similar interest to the transferee. Such

dealings were evidenced in writing in the rolls of the manor court and were, as a consequence, more secure than fee simple tenure where such interests were not recorded in writing but were evidenced by reputation within the immediate neighbouring community (Torrens 1859, 11; Simpson 1976, 29).

These characteristics make up those principles described by Ruoff as applicable to registered title land: the mirror, curtain, and insurance principles (Ruoff 1957, ch 3, 4, and 5). With regard to the mirror principle it is generally accepted that the register correctly reflects the state of the title as it was at the time the entry was made in the register and the certificate of title was issued (re *Ford's Application* 1953, 24 *per* Morris CJ). This may be referred to as the time of issue. To require the register to reflect the state of the title at the time of inspecting the register — the “time of reliance” — would impose upon the registrar a duty to certify as to facts regarding the state of the title which have occurred since the issue of the certificate by the registrar.

In the context of the proposed “electronic conveyancing” introduced into the English land registration system by the *Land Registration Act* 2002, the aim is to create a register viewable on-line that, at any given time, is as complete and accurate as possible (House of Lords Parliamentary Debates 30 October, 2001 *per* Lord Bassam of Brighton at column 1364). To this end, the Act seeks to restrict or eliminate off-register (or overriding) interests. Unless such overriding interests are eliminated, statements that the register reflects the state of the title as it exists at any given time or “from time to time” (DiCatri 1962, 16; in re *Shotbolt* 1888, 347 *per* Crease J) are incorrect and may render a title registration scheme unworkable. The “electronic” register created and maintained pursuant to the English *Land Registration Act* 2002 will give true effect to the curtain principle. Except for the registrar and those provided with historical access by authority of the registrar, the electronic register available for public inspection will only disclose the current entries in the register. A title investigator curious enough and wishing to peer behind and beyond the curtain will be unable to do so unless expressly permitted by the registrar.



### 5.2.5 *Completeness of the Register*

The term “completeness” when used to describe the register can take two meanings (Simpson 1976, 18):

- Completeness of the cadastre – in this instance, the cadastre is only complete if all land in the jurisdiction is included within the registered title system and there is no land that is not on the register. Because of the sensitivity surrounding the introduction of title registration wherein conversion of unregistered land to registered title land was only voluntary and not compulsory, mostly the register is not complete in this sense in that there are land parcels not within the land registration system. Similarly, where title registration has been introduced to facilitate the land market, land not available to that market is not on the register, for example, state forests or large bodies of water and other public or crown lands.
- Completeness of the register entry – in this instance a complete register entry should include all relevant information relating to a particular land parcel. In contrast to those land parcels that are not within the registered title land system, these parcels are within the system but their register entries are incomplete. If there are undisclosed off-register proprietary interests in the land then the register, in this sense, is incomplete. Thus, those registration systems permitting unrecorded interests acquired through long adverse occupation and which override the recorded proprietary interests of the registered proprietor cannot be complete because the register does not include all relevant information. Interests in land based upon long-term occupation (adverse possession) of whole or part only of a land parcel which prevail without the necessity of being entered upon the register contribute to an incomplete register. These interests are “overriding” as defined by Megarry and Wade because a registered proprietor is bound by such an interest although it is not entered on the register (Megarry and Wade 2000, pages 221 *ff* and Glossary cxlvii).

The original purpose of the register was to facilitate the land market and provide a reliable register of proprietary interests in land. Because of the English feudal theory

of land tenure wherein all land is owned by the Crown with a small part of the land in the Crown's own occupation (demesne lands) and the remainder occupied by tenants holding either directly or indirectly from the Crown; there was no need to enter Crown's own demesne lands upon the register. Until it was alienated there was no connection with the land market and the Crown, being the absolute owner, has no need of evidentiary support of its proprietary interests (Megarry and Wade 2000, 12).

Consequently the original land title registration statutes do not permit the registration of land which is held in absolute ownership by the Crown unless and until that land has been alienated: see for example section 8 of the *Transfer of Land Act* 1958, Victoria. Any move towards expanding the register to provide the basis for a comprehensive land information system (Megarry and Wade 2000, 203) will necessarily require amendment to permit the inclusion of all land including Crown land because the feudal theory of land tenure is not consistent with a modern multi-purpose cadastre.

Fortunately in practice today, this theoretical basis of land tenure can now be ignored and land is commonly described as owned by its proprietors (Megarry and Wade 2000, 13). A necessary basis for a comprehensive land information system is the compulsory inclusion of all land within the register. As has been conclusively demonstrated by the existing registered title schemes, reliance upon voluntary conversion and inclusion of land within the scheme has failed to provide the incentive to eliminate remaining unconverted unregistered land. The mere permitting of the voluntary conversion of unregistered land has seen such land remain unconverted. A comprehensive register forming the basis of a comprehensive land information system must require all land to be brought into the system. That the English *Land Registration Act* 2002 recently passed by the English Parliament provides for the voluntary (but not the compulsory) registration of crown land (as does the 1994 *Queensland Land Title Act*) does not fully address the problem. Similarly, Part IIIB (sections 81J–81T) was introduced (in 1997) into the Western Australian *Transfer of Land Act* 1893 permitting the registration of crown land parcels upon the request of the Minister for Lands. With regard to privately held unregistered land, the debates in the English House of Commons in late 2001

canvassed the compulsory registration of all unregistered land by the end of the year 2003 pursuant to the inclusion of new clauses 2 and 3 in the *Land Registration Bill* 2001 (House of Commons Parliamentary Debates 13 December, 2001). However, these proposed amendments did not address the issue of the compulsory inclusion of unalienated (crown) lands in the proposed register. These proposed amendments did not survive in the Act passed in 2002. The time for the voluntary conversion of unregistered land without the imposition of a time limit is drawing to a close (if it has not already passed) and it is necessary for *all* land (including *all* crown lands) to be included in a modern comprehensive multi-purpose cadastre incorporating land title registration.

The desirability of all land being brought within a registered title system has been a discussion topic for more than four decades (Ruoff 1957, 69; Benchers' Special Committee 1956). The only progress to date is those recent statutes that permit, but do not compel, the inclusion of all land on the register.

With regard to the inclusion of all land within the register, the difficulty presented by the boundary problem is of little consequence except insofar as a comprehensive and co-ordinated cadastre will promote accurately located boundaries. It is with reference to the other sense of the completeness of the register that the boundary problem and the methods adopted to deal with it are necessarily relevant. Failure to maintain the register necessarily means that it will become progressively out-of-date. Permitting off-register legal interests (such as unregistered title) allows and fosters such a failure of maintenance.

#### 5.2.6 *Relativity of title*

The inherent nature of a comprehensive register displaying all information regarding each land parcel means that there is only one recognised “absolute” title to any one parcel, the registered title of the registered proprietor. Just as title to land in a registration system depends upon registration rather than occupation, it also depends upon registration rather than the relative strength of an asserted title. Thus the concept of relativity of titles has little relevance to registered title land except where the interests asserted are unregistered and the relative legal positions of the

disputants fall to be resolved within traditional English real property law. In these instances, the interests of the disputants are lesser than that of the registered proprietor and cannot defeat the registered proprietor's interest. Relativity of titles arises where there exists more than one possible valid title and an analysis of title relativity determines which title is supreme. In a registered land title system there can only be one valid registered title at any given time; that of the registered proprietor. Before another valid title can come into existence, the first valid title must necessarily be extinguished.

In those jurisdictions which recognise overriding interests there is still no scope for relativity of titles because the only paramount title is that held by the holder of the overriding unregistered title which has extinguished the registered title held by the dispossessed registered proprietor. These jurisdictions are exceptional and as of 2002 are Victoria, Western Australia, and Ireland (both the Irish Republic and Northern Ireland). The *Land Registration Act 2002* being applicable only to England and Wales does not affect the legal recognition of overriding unregistered title acquired by adverse possession in Northern Ireland.

#### 5.2.7 *Overriding interests*

Possibly the most controversial aspect of a registration of land title system is the issue of whether overriding interests should be permitted within such a system. Overriding interests are defined as those interests which bind the registered proprietor of registered land even though he has no knowledge of them and no reference is made to them in the register (Megarry and Wade 1975, 1064).

The difficulty created by the recognition of unregistered interests is exacerbated by the failure to fully protect registered interests, that is, where unregistered interests are accorded a higher degree of protection than that provided to registered interests. The underlying principles supporting the creation of a register are the protection of those registered interests and dealings or transactions entered into in reliance upon the register. The purpose of a register is undermined when protection is extended to unregistered interests. The purpose of the register is subverted when protection is extended to unregistered interests at the expense of a lesser degree of protection for

registered interests. At its simplest, protection should only be provided by, one, registering those interests capable of registration; and two, providing for the entering of a caveat for those interests which cannot be registered.

The integrity and purpose of the register is undermined by permitting those interests capable of registration to remain unregistered and yet to retain the protection of the registration system. This results in interests capable of being registered being left unregistered. Similarly, interests incapable of being registered and intended to be protected by caveat are left unregistered and unprotected by caveat. This is because these interests retain the protection of the registration system without being registered or being the subject of a caveat. Thus the absurdity results that interests capable of protection by registration are left unregistered and interests capable of protection by caveat are left without caveat. By providing protection to unregistered interests the registration system encourages a failure to register.

The absurdity of providing protection for unregistered interests was compounded by the prior English practice which provided a higher degree of protection to an unregistered interest than that provided to the same interest when registered. Pursuant to the 1925 Act, the English registration system permitted unregistered overriding interests to be entered on the register as minor interests with a lesser degree of protection than that provided to the same overriding interests when remaining unregistered (Law Commission 1998, 36). That is, an unregistered overriding interest enjoyed a greater degree of protection than the same interest enjoyed as a registered minor interest. Thus the holder of a fully protected unregistered overriding interest lost the benefit of this full protection if the holder was foolish enough to register the interest. There can be no doubt that no detriment and only benefit can arise if such protection is withdrawn from those interests capable of being registered which are not so registered. Such a policy would be in accord with logic. Logic has prevailed with the passage of the *Land Registration Act 2002* which has put paid to the drollery herein described.

Other systems of registration recognise a duty to register and the *Land Registration Act 2002* proposes that interests capable of registration will lose their protection if

not registered within a certain limited period of time after their creation. The public benefit will also be enhanced with the consequence that the accurate maintenance of the cadastre will be improved by the incentive to register those interests capable of registration. With the passage of the *Land Registration Act 2002* those interests capable of being registered must be registered if they are to enjoy the protection afforded by the Act — failure to register an interest capable of registration will mean loss of the protection provided by the Act.

### **5.3 Conclusion**

The existence of public overriding interests should not detract from the security of title or confidence in the register if they can be readily ascertained by reference to a public authority. Conversely, private overriding interests which do detract from confidence in the register should not be permitted in a registered land title system. Preferably the entering of such interests into the register will do away with overriding interests. That protection not be provided to those interests capable of being registered but which remain unregistered would appear to be self-evident but must be referred to here because of past practice in advancing such protection. In regard to those jurisdictions which provide a high degree of protection towards unregistered interests which are capable of being registered, it is concluded that these jurisdictions are not providing all the benefits usually associated with a registered land title system.

To be included within a title registration scheme the paramount indicia is that there cannot be title without registration because title registration is title *by* registration — it is registration that confers title and without registration there can be no title. Consequently it is here concluded that those jurisdictions permitting title without registration (*quasi*-title registration) henceforth not be described or recognised as registered title systems because they lack the *sine qua non* of title registration. To maintain the integrity of title registration, it is essential to refuse recognition to those systems permitting title without registration as belonging to a registered title system.

## 5.4 Summary

This chapter has covered the introduction and workings of registered land title which was devised to provide an objective register maintained as a public service and accessible by the public wherein title to land can be readily ascertained with little expenditure of effort and money. The legal theory underlying registration of title eliminates blemishes on the title by the surrender of a crown grant back to the crown with the issuing of a fresh crown grant (the 'curtain' principle). As a consequence the history of a land holding is limited to the current registered proprietor and the grant to that proprietor of the land. Any interests in the land created after the most recent crown grant should be recorded in the register to be legally effective (the 'mirror' principle). Because the register is maintained by a public authority with investigative and supervisory capacity the title is able to be guaranteed and damages suffered as a consequence of reliance upon the register can be compensated for by a pay out from an assurance fund if necessary. That the register is available for public inspection, is maintained by a public authority exercising a supervisory capacity, and is supported by a guaranty of title together with an assurance fund provides a foundation for public confidence in the security of titles included in the register.

The private conveyancing system, even with a public register of its dealings, is unable to provide security of title without necessary investigation of title each and every time a search is conducted. Unlike title registration with its only entry being the current entry, private conveyancing requires a growing list of transactions each of which requires investigation because, just as a chain is only as strong as its weakest link, a title chain will wholly fail if only one transaction (of many) is unable to be legally upheld.

This chapter describes the advent of land title registration which took place after the modern law of adverse possession was introduced into real property law in the early nineteenth century. Although the chapter follows chronologically after the preceding chapter there is no necessity for so doing because the respective concepts in both chapters are independent. The two concepts existed in parallel until they merged after the introduction of registered title in the middle nineteenth century. To properly consider the merging of the two it is necessary beforehand to consider each

independently. The order of consideration is not important because of their independence from each other and the chronological order was as simple an approach as any others available.

The chapter introduces title registration as it bloomed from its initial beginnings in South Australia. The legal theory underlying title registration is discussed enabling the consideration of a variety of registration scheme versions that have resulted from the different jurisdictions adopting different features as the schemes have evolved separately from their common ancestor. Having established land title registration it then follows that the thread of this chapter can be merged with that of the previous chapter to consider adverse possession in registered land title systems.

It is noteworthy that while the Australian jurisdictions today encompass a wide variety of schemes within the rubric of “Torrens” or registered land title, the two oldest and most populous states (Victoria and New South Wales) saw fit to abandon their own initial proposed title registration systems in the 1860s in order to adopt a “uniform” model based upon the South Australian scheme. Despite this aim for uniformity the resulting systems in use in Victoria and New South Wales differ markedly.

The conclusions able to be formulated at the close of this chapter point towards the strict requirement that title must be registered – that is, entered into the register. There cannot be any legal recognition of “off register” or “overriding” titles. The concept of unregistered title in a registered title system is an oxymoron. The only permissible overriding interests are those vested in public authorities and readily ascertainable, otherwise private rights and interests not entered in the register are not binding upon the registered proprietor or members of the public acting in reliance upon the register.

Further, the two tenure systems of registered and unregistered land do not require similarity in or equality of treatment. In fact, the registered title system necessarily cannot share some of its attributes relating to the register with an unregistered title system. It may be observed that the development and operation of the English title



registration system has been hindered by the mistaken perceived need for treating unregistered and registered land alike. It is only in the very recent past that there has been recognition of the fact that the two systems are fundamentally different and need not be treated in a similar fashion. Indeed, the two systems *cannot* be treated alike if the benefits of title registration are to be enjoyed.

This chapter introduced land title registration — a radical change to land ownership in the English common law world and capable of being adopted in jurisdictions outside the common law world. This chapter, together with the proceeding chapters will come together in the next chapter wherein adverse possession of registered land will be considered. The next chapter is sufficiently wide that those jurisdictions that do not permit adverse possession of registered land will be included within the chapter subject: adverse possession of registered land. After all, the refusal to recognise adverse possession is but one variant, admittedly an extreme, of the wide range of approaches available to a consideration of adverse possession.

# Chapter 6

## Adverse possession and registered title land

### 6.1 Introduction

This chapter brings together the threads of the preceding chapters which have traced the workings of the statute of limitations with particular reference to land (adverse possession) and its application to part parcel adverse possession as a possible means of resolving boundary location discrepancies. Additionally the last chapter introduced registered title land and it is the purpose of this chapter to bring these two threads together with regard to the adverse possession of registered title land. This chapter should provide a theoretical analysis which will, coupled with the following chapter which provides illustrative examples by way of case studies, demonstrate the workings of adverse possession as a means of resolving boundary location discrepancies. Additionally these chapters provide critical commentary with regard to various schemes used to resolve this problem. This is preparatory to formulating a model capable and suitable for wide adoption.

The commentary provides analysis of the components and characteristics of registered title schemes with a view to distinguishing those schemes that have perhaps in the past been incorrectly classified as registered title land systems. Thus the chapter is preparatory to the following chapter where the workings of the different versions are illustrated by actual examples.

The two threads (the theoretical foundation of a title registration system from the last chapter and adverse possession from the preceding chapter four) are drawn together to apply adverse possession to registered land title in this chapter. To this end a number of different approaches to incorporating adverse possession within a registered title system are considered with the introduction of a classification and ranking scheme of the various approaches. The classification and ranking of the different approaches enables comparisons to be drawn between these approaches. The classification and rankings are then allocated to the different Australian jurisdictional approaches to enable the differences in the schemes to be readily illustrated and understood.

Thereafter a historical review of the different Australian schemes is presented to provide some insight into the evolution of the schemes as they currently exist.

The chapter proceeds to a discussion of the conflict between adverse possession and registered title land with the conclusion that the conflict is more apparent than real and that where there is conflict, this is the consequence of some schemes that are not properly registered land title schemes. These schemes are designated as *quasi*-registered land title schemes and the reasons why they cannot properly be described as registered land title are provided. This chapter provides a departure point for the following chapter seven that will apply the principles of registered land title and adverse possession to a number of recent lawsuits from the different jurisdiction. These case studies provide comparative and illustrative analyses of the workings of the various systems including the exposure of any shortcomings.

Because of a widespread interpretation that a logical contradiction exists where adverse possession is permitted within a registered land title system, the chapter includes a discussion of the apparent contradiction based upon a perceived conflict between registered land title and acquisition of title to land based upon long unopposed occupation including the resolution of this conflict. The chapter comments upon the possible origin of the perceived conflict of applying adverse possession to registered title land and investigates whether adverse possession and land title registration are necessarily in conflict.

## **6.2 The necessity for adverse possession of registered title land**

Prior to the introduction of the registered title schemes into Australia in the nineteenth century, title was based upon possession in accord with traditional English real property law. The promoters of registered title countenance title based upon long continued and undisputed possession with regard to bringing unregistered land into the new system. Thus adverse possession was recognised under traditional English real property law and, in converting to registered title, the new system. The promoters did not provide comment with regard to whether adverse possession should continue to form the basis of title to registered land under their new systems.

Consequently some of the schemes retained adverse possession as did Victoria from 1866 and some others dispensed with adverse possession as being inconsistent with a system of title registration – examples being of New South Wales and New Zealand where possession as evidence of ownership was considered contrary to registration principles (Davis 1971, 44).

Notwithstanding the perceived inconsistency of title based upon adverse possession in a registered title system, in those jurisdictions where such title was expressly disallowed, the prohibition against title being founded upon adverse possession was belatedly relaxed to permit informal ownership to be formalised. For various reasons there arose a substantial number of land occupiers with a “good holding title”, that is, occupiers not registered as proprietors nor having any formal documentary title.

Despite the lack of registration or formal documentary title these occupiers were secure insofar as no others sought to challenge their continued occupation. The causes of such irregular occupation were many, examples being abandonment of the land by the registered proprietor, informal transfers incapable of being registered which had been prepared by the parties to the transactions themselves or by incompetent or even dishonest conveyancers retained by the parties. Other irregular occupations may have been initiated with a desire to evade transfer (stamp) duties upon a conveyance by sale and transfer or even the evading of estate (death) duties upon a devolution by succession following the death of the registered proprietor. The examples of abandonment of land offered in one text (Davis 1971, 49) as being related to land acquired during a “gold rush” and thereafter abandoned by an unsuccessful prospector does not hold up in all jurisdictions. Instances of counter-examples include Western Australia which incorporated adverse possession into its registered title statute some two decades prior to that state’s gold rush while Victoria and New South Wales took opposing approaches although both states had hosted gold rushes shortly before the introduction of their registered title statutes. In NSW, for whatever cause, there began to accumulate a growing number of parcels occupied by persons without the benefit of indefeasible registered title but with unchallenged “good holding title.”

Although more than a hundred years had passed the NSW legislators debating the 1979 Bill introducing adverse possession specifically referred to the problem as arising from abandoned land acquired during the gold rushes in Goulburn (NSW Legislative Assembly Parliamentary Debates, 28 Feb, 1979, p 2613) and Bathurst (*ibid.* p 2607).

In order to formalise the interests of these occupiers, those jurisdictions which had held to the view that title based upon adverse possession was not consistent with a registered title system were later forced into introducing limited forms of adverse possession. They were South Australia (1945), Queensland (1952), New Zealand (1963), and New South Wales (1979). This recognition of the necessity of permitting adverse possession was begrudging because possession as evidence of ownership was considered as contrary to registration principles (Davis 1971, 44).

Prior commentators have been unanimous in their approval of the inclusion of adverse possession within a land title registration scheme: one arguing for the application of adverse possession unless expressly barred by statute (Hogg 1920, 85–88), and another expressing the view that the applicability of adverse possession should be the subject of an express statutory provision (Kerr 1927, 252–7). These commentators have not passed opinion upon the acquisition of title through the passage of time alone and without the necessity of applying for registration save that their failure to criticise the Victorian and Western Australian provisions imply approval *sub silentio*. That they have not done so is not surprising given that their commentaries predate the later limited statutory introduction of adverse possession into the South Australian, Queensland, New Zealand, and New South Wales schemes. For similar reasons, these commentators have not expressed opinions with regard to the later statutory enactments which expressly forbade adverse possession applications for part only of a parcel in Queensland, New Zealand, and New South Wales.

The only rationale for permitting title based upon adverse possession is the quieting of titles and the preservation of the status quo: that is, the present unchallenged

occupation. These reasons apply equally to registered land as to “old law” or unregistered land.

### **6.3 Differing degrees of protection for the registered proprietor**

The variety of ways in which the different jurisdictions permit adverse possession supports the desirability of a scheme for ranking the different jurisdictions to enable relative comparisons between the jurisdictions to be drawn. For example, at one extreme, there are jurisdictions that do not permit adverse possession of registered title land, representative examples being the Australian Capital Territory and all of the Canadian provinces using a registered land title system with the exception of Alberta. At the other extreme, adverse possession is permitted in its widest form with little restriction. Victoria and Western Australia are representative examples where adverse possession of registered title land is permitted in a way akin to adverse possession of land not within a registered title land scheme, that is, adverse possession of unregistered land as under traditional English real property law.

#### *6.3.1 Acquisition of title prohibited: ranking “A”*

To facilitate such comparison it is proposed that a ranking of “A” be assigned to represent a high degree of protection for the interests of the registered proprietor as against those of the trespasser or occupier; a ranking of “B” representing a lesser degree of protection, and so on. The assigned values denote a relative qualitative property rather than a scaled quantitative property. The proposed allocation of rankings is “A” being the highest protection of the registered proprietor’s title, that is, acquisition of title to registered title land as a consequence of long-term occupation is impossible because such acquisition is *prohibited*. Of course a ranking of “A” does not prevent adverse occupation by a trespasser, it merely precludes acquisition of title by the trespasser.

#### *6.3.2 Permitted acquisition of title subject to veto: ranking “B”*

Where acquisition of title to registered title land based upon adverse possession is permitted; a ranking of “B” signifies a scheme where a long-term adverse occupier may apply to be registered as the proprietor of that land. However, the displaced registered proprietor is enabled to *veto* the granting of such an application at any time

prior to its grant. Acquisition of title in these limited circumstances requires the registration of the squatter as the new registered proprietor only in the absence of objection by the registered proprietor. Adverse occupation for the limitation period alone is insufficient to extinguish the title of the dispossessed registered proprietor. However, adverse occupation for the limitation period *together with* a successful application for registration is sufficient to extinguish the title of the dispossessed registered proprietor. The squatter who has been in adverse occupation for the required limitation period is able to make application to be entered into the register as the new registered proprietor. Upon registration, the dispossessed proprietor's title is extinguished and the squatter has acquired the title to the holding. These schemes were devised to permit the acquisition of title by occupiers in the instances of disappeared proprietors who had abandoned their holdings and were unavailable or disinclined to object to the granting of the occupier's application for registration.

### 6.3.3 *Permitted acquisition of title subject to refreshing or reassertion of title: ranking "C"*

A more permissive regime permitting title acquisition is accorded a ranking of "C". This regime permits the acquisition of title following upon adverse occupation for the required statutory period where the adverse occupation is wholly subsequent to the most recent issue of a fresh certificate of title. Thus, the issue of a fresh certificate of title at any time prior to the running of the required period sets at naught that period of occupation prior to the issue of the certificate. The issue of the fresh certificate "wipes the slate clean". Thus, a successful applicant must be in adverse occupation for the required period *and* apply to be registered as the new proprietor before any *fresh issue* of a certificate. This general refreshing scenario is ranked as "C(ii)" as being the median of three variants.

Closely related to this ranking are two variations offering similar protection to the registered proprietor. The first is that which was permitted by the Singapore registered title land statute where the registered proprietor was enabled to lodge a "reassertion" of title which would have the same effect as the issuing of a fresh certificate. This enabled the registered proprietor to protect his title without the necessity of entering into a transaction or dealing which would have the effect of

causing the issue of a fresh certificate. Accordingly it may be ranked as “C(i)” indicating a higher degree of protection for the registered proprietor than that generally provided by refreshing systems of ranking “C(ii)”. The provision allowing the registered proprietor to lodge a reassertion is in addition to the issue of a fresh certificate upon each transaction. This mode of refreshing the title by reassertion was discontinued in 1994 when Singapore amended its registered land title system to prohibit acquisition of title by adverse possession.

Similarly, the provisions introduced into the NSW registered land title scheme in 1979 precludes an application by the adverse occupier unless the whole of the required limitation period of adverse possession has run against the person who is the current registered proprietor (*Real Property Act* 1900, section 45D(4)(b)). This provision does not accord as high a degree of protection for the displaced registered proprietor as C(ii) or C(i) but does confer some degree of protection on the person purchasing from such a proprietor. Accordingly, it has a rating score of “C(iii)” as providing less protection for the registered proprietor than generally provided by those systems of the other variants within the “C” ranking

#### 6.3.4 *Permitted traditional acquisition of title: ranking “D”*

The lowest ranking of “D” represents the application of the *permissive* traditional limitations provisions to registered title land with title acquisition being dependant only upon adverse occupation for the requisite period without more. This ranking would apply to adverse possession of land holdings not within the registered title schemes, that is, unregistered or “old law” or “general law” land. Thus an application to be registered is not necessary under such a scheme and there must exist doubts whether such a scheme can be properly considered as a “Torrens” or registered title scheme if a registered title scheme is “a system of title by registration” (*Breskvar v Wall* 1971). This *permissive* category “D” can be further sub-divided into two variants: D(i) where title is acquired by the squatter (with the dispossessed proprietor’s title being extinguished) upon the passing of the required limitation period; and D(ii) where unmaturing rights survive a transaction that is registered. Thus the English *Land Registration Act* of 1925 (section 70(1)(iv)) provided that “rights acquired *or being acquired* [emphasis added] under the *Limitation Act*” are



overriding interests binding on the proprietor without being entered on the register and irrespective of any registered transactions taking place after the commencement of the period of adverse occupation. Thus the 1925 English provision (and those of Victoria and Western Australia would be classified as D(ii) which is the registered land equivalent of the traditional English real property law applicable to adverse possession of unregistered land. Since the passage of the *Land Registration Act* 2002, this provision is no longer applicable in England and Wales.

An example illustrating the narrower D(i) rating would be that of the Queensland *Land Title Act* 1994 where section 185(1)(d) provides that a matured adverse occupation (sufficient to permit an application for registration) is an exception to the indefeasible title of the registered proprietor under section 184. Thus, in Queensland, an unmatured adverse occupation, a right in the course of *being acquired*, would not survive and override the registration of a transaction or dealing. The registration of the dealing would “wipe the slate clean” of the unmatured adverse occupation. However, the registration of such a dealing would not “wipe the slate clean” of a matured adverse occupation. This is so even where the squatter whose adverse occupation has matured through the passage of time has not yet applied to be registered as the owner of the lot — it is sufficient that the squatter is entitled to apply.

#### 6.3.5 *Allocating whole parcel adverse possession rankings*

With regard to the prohibitive “A” rating, the two Australian territories (the Northern Territory and the Australian Capital Territory) and all of the registered land title Canadian provinces (save Alberta) prohibit the acquisition of title to registered title land by adverse possession.

In the past, the registered title statutes of South Australia (prior to 1945 when it introduced a limited form of title acquisition founded on adverse possession), New Zealand (prior to 1963), and New South Wales (prior to 1979) expressly prohibited acquiring title to registered land by adverse possession (section 251 of the *Real Property Act* 1886 (SA), section 64 of the *Land Transfer Act* 1952 (NZ), and section 45 of the *Real Property Act* 1900 (NSW) respectively).

Although the Queensland *Real Property Acts* of 1861 and 1877 did not specifically address the issue, in 1936 the Queensland Supreme Court had held that adverse possession as a basis of title acquisition was not possible pursuant to these statutes (*Miscamble v Phillips* 1936). Thereafter in 1952 the *Real Property Acts Amendments Act* permitted a limited form of title acquisition based upon adverse occupation in Queensland.

Since 1994, Singapore has prohibited adverse possession as a basis for acquiring title to registered land. Previously Singapore had expressly permitted adverse possession subject to the registered proprietor reasserting title or the issuing of a new certificate by the Registrar pursuant to a transaction. These jurisdictions (and the respective dates) are tabulated under “A. Prohibition model” in Table 6.1 on page 129.

Pursuant to statutory amendment, several jurisdictions that had previously prohibited adverse possession introduced a narrow form of adverse possession to permit unchallenged occupiers with good holding titles to acquire the security of tenure usually provided by registered title. As indicated above, these amendments were introduced to cover the incidence of abandoned lands or informal conveyancing or both. These jurisdictions were South Australia (1945), Queensland (1952), New Zealand (1963), and New South Wales (1979). Essential to all these statutory modifications was the reliance upon “privative clauses” wherein the law providing for title acquisition was to be wholly found within the registered title statutes and without reference to the limitations statutes applicable in the jurisdictions. A typical example of such a privative clause is that within section 46 of the Queensland *Real Property Acts Amendment Act* 1952 which reads:

A person shall not obtain a title by possession to any land under the Acts or any interest therein save and except under, subject to, and in accordance with this Act.

Excepting the NSW provisions, all of the jurisdictions permitted an occupier to apply for registration as the proprietor based upon long occupation with the application being subject to a veto or objection lodged by the actual registered proprietor. Thus, where the registered proprietor declined to lodge an objection or did not lodge such

an objection because the registered proprietor could not be traced to be notified of the occupier's application, the application would succeed. Upon the granting of the application, the occupier will be registered as the proprietor in the register and the title previously held by the dispossessed proprietor (who had not lodged an objection) will be extinguished. Where, however, the registered proprietor lodges an objection to the occupier's application, the registrar is obliged to refuse the application. The registered proprietor is enabled to veto any application by an adverse possessor at any time prior to the application being granted. Once the occupier's application has been granted, the registered proprietor's interest is lost and with it, the exercise of veto.

This regime of permitting adverse possession except where vetoed by the registered proprietor has recently been modified by the introduction of two variants. Thus the *veto* regime may be subdivided into three grades. The original veto regime introduced by South Australia, Queensland, and New Zealand can be described as an *absolute veto* and ranked as "B(i)". Added to the original regime is the variant recently introduced in Tasmania in 2001 wherein an absolute veto may be exercised by the registered proprietor who has continued to pay rates and land taxes on the land holding. Further protection is provided to the registered proprietor under the current Tasmanian scheme because adverse occupation during a period while the registered proprietor continues to pay rates and taxes on the land holding does not constitute adverse occupation for the purposes of the limitations statute. It may be concluded that the limitations statute does not run while the registered proprietor continues to pay the land rates and taxes.

This variant permits the registered proprietor to exercise a veto only if that proprietor is not in arrears with regard to the rates and taxes levied upon the land holding. The Tasmanian variant (a *conditional veto*) is rated as "B(ii)" because the protection provided by the registered title statute is less than that of the original absolute veto.

The most recent variant was introduced with the new English scheme in February 2002. This variant is contained in the *Land Registration Act 2002* and is modelled upon the South Australian absolute veto scheme with an important addition. Under

this scheme, a trespasser may apply to be registered after the passage of ten years adverse occupation. Upon application by the trespasser, the registered proprietor may exercise an *interim* or *temporary* veto against an application by the adverse occupier. The temporary veto is effective only for two years in which time the proprietor must commence proceedings to eject the occupier. If the proprietor has not commenced proceedings within two years of exercising the *interim* veto and the occupier remains in occupation, a further application by the occupier will succeed despite objection by the registered proprietor. Because the protection is temporary and less than that of an absolute veto this English variant is ranked as “B(iii)”. These jurisdictions (and the respective dates) are tabulated under “B. Veto model” in Table 6.1 on page 129.

As has already been described above, the NSW scheme introduced in 1979 permitting a limited form of adverse possession was excepted from the veto schemes. The NSW approach to conferring security of tenure was to reduce the opportunity for objection by the proprietor and is dealt with below as a *refreshing* of the registered proprietor’s title. A further point is that the absolute veto introduced into Queensland in 1952 is no longer operating in that state after the *Real Property* Acts were repealed and replaced by the 1994 *Land Title* Act. This Act introduced a different approach to the issue of providing security of tenure to registered land in Queensland.

The variant closest to the theory underlying registered land title and yet permitting a limited form of title founded upon adverse occupation is similar to that currently utilised in New South Wales. As with other recent schemes seeking to regularize the position of occupiers with a good holding title this approach is founded upon statute and includes a privative clause which confines its operation wholly within the statute. NSW is the only Australian jurisdiction that currently uses this variant although prior to 1980 the state of Tasmania used this approach as did South Australia, the original home of registered title, in the nineteenth century (re *Ford’s Application* 1953; *Hunter v Player* 1875). These jurisdictions (and the respective dates) are tabulated under “C. Refresh model” in Table 6.1 on page 129.

[text continued on page 130]

			whole parcel	part parcel
<b>A. PROHIBITION model:</b> Prohibition against acquisition of registered title by adverse possession			Australian Capital Territory New South Wales New Zealand Northern Territory Singapore South Australia Queensland	current prior to 1979 prior to 1963 current since 1994 prior to 1945 prior to 1952 prior to 1994
<b>B. VETO model:</b> Veto against acquisition of registered title by adverse possession [the practical effect is to prohibit adverse possession of part parcels]	(i) Absolute veto by registered proprietor (ii) Absolute veto by ratepaying registered proprietor (iii) Limited veto to permit ejection proceedings to be brought within 2 years by the registered proprietor	New Zealand Queensland South Australia Tasmania England	since 1963 1952-1994 since 1945 since 2001 since February, 2002	current prior to 1994 since 2001*
<b>C. REFRESH model:</b> Registration "wipes the slate clean" of any interests founded upon adverse possession and restores the reliability of the register	(i) by registered proprietor	Singapore	prior to 1994	prior to 1994
	(ii) by registrar	Tasmania	prior to 1980	prior to 1980
	(iii) protects 3rd party	NSW	since 1979	
<b>D. OVERRIDING model:</b> Adverse possession overrides register entries	(i) after passage of time	Queensland	since 1994	since 1994
	(ii) acquired or in the course of being acquired	England Tasmania Victoria Western Australia	prior to 2002 1980-2001 current current	prior to 2002 1980-2001 current current

**Table 6.1 Whole and part parcel adverse possession marshalled in order of decreasing indefeasibility**

\* Tasmania has postponed the enactment of encroachment legislation and has effectively repealed the previous provisions allowing adverse possession of part only of a land parcel

\*\* England has legislated to permit part parcel adverse possession in limited circumstances only where the boundaries have not been fixed: *Land Registration Act 2002*



[text continued from page 128]

In South Australia this approach was discontinued when that State expressly prohibited adverse possession of registered land in 1878. Tasmania discontinued its use of this approach in 1980 when that state enacted its *Land Titles Act*. Another jurisdiction that uses this approach is Alberta (*Lutz v Kawa* 1980). Of those Canadian provinces which have adopted registered title, Alberta alone permits acquisition of title pursuant to adverse occupation.

The theoretical basis of this approach is that the ultimate (and only absolute) owner of all land is the Crown. All other lesser persons can only have an interest lesser than absolute allodial ownership. These lesser persons are said to hold a fee simple of the Crown. As a consequence any transactions between subjects of the Crown are, in theory, a surrender of tenure by the transferor back to the Crown with the Crown then making a fresh Crown grant to the transferee. In theory, there is no transfer from one subject and tenant of the Crown (the transferor) to another of the Crown's subjects (being the transferee). Thus, in a registered title system, every transaction that is registered is a fresh issue of title by the Crown. The fresh issue of the title by the Crown is sufficient to obliterate the past history of the land holding (including any blemishes on the title) and "wipes the slate clean" (*Lutz v Kawa* 1980, 24–26; *Hunter v Player* 1875; re *Ford's Application* 1953; Ruoff 1957, 8–9). A fresh issue is the same as an initial issue of title and there is no distinction between an endorsement upon the certificate of title and the issuing of a fresh certificate of title (re *Ford's Application* 1953, 24–25).

The issuing of a fresh certificate upon the registration of a transaction "wipes the slate clean" with the consequence that any rights pursuant to adverse possession (including even accrued or matured rights) are of no effect. As a consequence any rights acquired or being acquired are destroyed. Thus, where a squatter has been in adverse occupation for a period less than the limitation period, any registered dealing with the land sets the accrued period of adverse occupation at naught and the period of occupation must then recommence in favour of the occupier if he or she remains in adverse occupation. Where the squatter has been in adverse occupation for a time period sufficient to comply with the limitation statute, the matured rights

of adverse occupation sufficient to support an application for registration by the squatter will be set at naught unless the application by the squatter precedes the registration of the transaction.

Thus, where the squatter has been in occupation for the period prescribed by the limitation statute or longer, but has not yet applied to register his possessory title acquired by adverse possession, any dealing by the registered proprietor will, upon the registration of that dealing, destroy the right of the squatter to be registered as the proprietor. This *refreshing* regime can be ranked as “C”. With the advent of two variants it will be ranked at C(ii) with the variants being “C(i)” and “C(iii)” representing a more protective (of the registered proprietor’s title) variant and a less protective variant respectively.

A variant favouring the proprietor was introduced with the advent of registered land title into Singapore in the 1950s. The system adopted provided for adverse possession with the fresh issuing of a certificate obliterating any blemishes on the title including rights under adverse occupation. Additionally, the system provided further protection for the proprietor by permitting the proprietor to “reassert” title with the same effect as registering a transaction. Thus, under the Singaporean regime, rights acquired or being acquired under a limitation statute could be set at naught by the proprietor “reasserting” his title in addition and as an alternative to the issuing of a fresh certificate (or a freshly endorsed certificate) upon the registration of a dealing (Yee 1992, 484). This provision favoured the registered proprietor by allowing the renewal of protection of the registered title without the necessity of entering into a registrable transaction. This variant is no longer in use after Singapore amended its registered land title statute in 1993–4 to prohibit adverse possession. This variant is rated as “C(i)”.

As previously indicated, the ranking of “C(ii)” is allocated to the refreshing of title by the registration of a dealing or transaction as was exercised in Tasmania prior to its abolition in 1980. The same ranking is applicable to the similar provisions in the Alberta registered title scheme which remain in current use.

In NSW, a similar approach has been adopted although the wording of the statutory provision indicates that the dispossessed proprietor is afforded less protection and is accordingly rated at “C(iii)”. There has not been a definitive judicial interpretation of the relevant statutory provision: section 45D(4) of the *Real Property Act* 1900. The section’s wording appears to protect a third party who has dealt with the registered proprietor and, as a consequence, has become registered without fraud on the part of the newly registered third party. The registration of the third party “wipes the slate clean” as regards the interests of the adverse occupier and the newly registered third party. However, there is no similar protection provided to the dispossessed registered proprietor. Thus, it would seem that if a squatter were in adverse occupation for the required limitation period in NSW, that squatter may apply to be registered as the proprietor of the land with the consequent extinguishing of the dispossessed registered proprietor’s title. If the squatter has not been in occupation for the required period the registered transfer between the current (dispossessed) registered proprietor and the third party would set at naught the accrued period of occupation by the squatter as of the time when the third party was registered as proprietor.

However, it is where the squatter has been in occupation for the required period but has not yet applied to be registered as the proprietor that is of interest. Such a squatter is well positioned to displace the registered proprietor from the register upon application. The squatter has an interest in the land greater than that of the registered proprietor in that the proprietor cannot resist any application by the squatter to be registered as the proprietor. However, should a third party deal with the dispossessed proprietor the registration of that third party as the proprietor would extinguish any rights or interests held by the squatter as against the newly registered third party. This is provided for by section 45D(4). That section does not, however, provide any protection for the dispossessed proprietor as against the squatter. Thus, the squatter who is now unable to prevail against the newly registered third party may be able to seek redress from the dispossessed proprietor.

An example will illustrate the point. Suppose Richard Roe is the registered proprietor of *Blackacre*, and that the squatter Stephen Soe has been in adverse



occupation of *Blackacre* for a period sufficient to ground a possessory application under the *Real Property Act* to be registered as the proprietor. Before the squatter Soe makes such an application, Roe transfers his interest in *Blackacre* to John Doe. The transferee, Doe, provides valuable consideration, say \$100 000, and has not colluded with Roe to defeat the interests of the squatter Soe. Doe becomes registered as the proprietor of *Blackacre*. Pursuant to section 45D(4), squatter Soe is now unable to pursue a possessory application to be registered as proprietor of *Blackacre*. However, the section does not prevent squatter Soe pursuing an action against Roe seeking an account of the proceeds of the sale of *Blackacre* to Doe, that is \$100 000. As a consequence of the analysis offered here, the NSW regime has been allocated a rating of “C(iii)” indicating a lesser protection for the dispossessed registered proprietor than that provided by other schemes where the registration of a recent dealing “wipes the slate clean.” These jurisdictions (and the respective dates) are tabulated in Table 6.1 on page 129.

The approach most favourable to the squatter is that utilised in Victoria and Western Australia (and England until recently) and is most like the traditional adverse possession of lands not within a title registration system. All that is required of a trespasser to acquire title is that the trespasser be in adverse occupation for the requisite statutory period of limitation. Such a term of adverse occupation is sufficient to extinguish the title of the registered proprietor and to confer title on the squatter. There is no requirement for the squatter to ensure that his newly acquired title is entered into the register although there do exist provisions permitting the squatter to ensure that the title is registered.

Thus it can be appreciated that title to registered land may be acquired through long-term adverse occupation without more as is the case with unregistered land. In seeking to conform to the principles of registration of land title, the English *Land Registration Act* of 1925 expressly provided that adverse occupation did not extinguish the registered proprietor’s title but that the dispossessed proprietor thereafter continued to hold the title as a trustee for the squatter (section 75(1)). This provision was of little practical effect and was merely serving the form, but not the substance, of land title registration. In their 1998 report, the Law Commission and

Her Majesty's Land Registry commented unfavourably upon the artifice of retaining the dispossessed registered proprietor's title with the title being held on trust for the benefit of the squatter. The report also questioned the utility and efficacy of the approach (Law Commission 1998, ¶¶ 2.43 and 10.28).

Further, a period of adverse occupation is not interrupted by the registration of a dealing prior to the maturation of the period. This is best illustrated by the section in the English *Land Registration Act* of 1925 which provided for any "[r]ights acquired or *being acquired* under" adverse possession [emphasis added] as overriding the title of the registered proprietor (section 70(1)(f)). Thus the trespasser who has been in adverse occupation against the registered proprietor for a period insufficient to comply with the limitations statute can, where the registered proprietor transfers title to a transferee, add the period of adverse occupation prior to the transfer to that period against the transferee (after the transfer) in order to acquire title to the land. For example, seven years adverse occupation against the transferor can be added to a period of subsequent adverse occupation against the transferee. In this instance five years adverse occupation against the transferee will provide the squatter with the necessary twelve years adverse occupation necessary under the English *Limitation Act* to acquire the title and defeat that of the registered proprietor (the transferee). Unlike the provisions in New South Wales and the Canadian province of Alberta discussed above, the registration of the transferee as the proprietor does not "wipe the slate clean" and consequently does not set at naught any rights accrued or accruing to the squatter prior to the transfer to the transferee.

The wording of the Victorian and Western Australian *Transfer of Land Acts* (of 1958 and 1893 respectively) are not as explicit. These provide that "any rights subsisting under any adverse possession" are exceptions to the paramountcy of the registered proprietor's title (sections 42(2)(b) and 68 of the respective Acts). Although it could be argued that this provision only excepts matured rights from the paramountcy of the registered title (Hogg 1920, 82; Bradbrook *et al* 1997 at ¶ 16.83), the law cases determined with regard to this section are clear in that it is applied to unripened or inchoate rights in the course of being acquired (*McWhirter v Emerson-Elliott* 1960; Francis 1972, 161; *Malter v Procopets* 1998 and 2000). The

Victorian and Western Australian statutes are not reliant upon the artifice of the registered title being held on trust for the squatter instead of being extinguished and there is no inference that this omission has hindered the operation of the statutes as a result.

With the introduction of the 1994 *Land Title Act* Queensland repealed its *absolute veto* scheme (ranked at “B(i)”) and adopted a scheme permitting adverse possession more favourable to the squatter. The current scheme is similar to the Victorian and Western Australian schemes in that adverse occupation alone appears to be sufficient to extinguish the registered proprietor’s title and confer title upon the squatter. A possible significant distinction between the Victorian and Queensland schemes is that the exception to the indefeasibility of the registered proprietor’s title in Queensland is confined to a squatter who “would be entitled to be registered as owner of the lot because the person is an adverse possessor” (section 185(1)(d) of the *Land Title Act* 1994). This provision confines the right to acquire title based upon adverse possession to those squatters who have been in adverse occupation against the current registered proprietor for the whole of the required limitation statute. Thus a proprietor who transferred his interest would appear to have destroyed any unripened rights being acquired. However, where the trespasser’s period of occupation has matured it would seem that any transfer after the ripening of the trespasser’s interest would be ineffectual to defeat that ripened interest. The 1994 Act removed the privative clause operative between 1952 and 1994 with the consequence that the adverse possession provisions applicable to registered title land in Queensland are now to be found in the *Limitation of Actions Act* 1974 and the *Land Title Act*.

Pursuant to the *Land Titles Act* 1980, Tasmania utilised a scheme similar to that of the 1925 English scheme only recently repealed in 2002. The similarity extended to including the provision that upon the limitation period being tolled, the title of the dispossessed proprietor was not extinguished but remained with that proprietor holding the land on trust for the benefit of the squatter. Following upon the 1995 report of the Tasmanian Law Reform Commissioner, the 1980 Act was amended in 2001 to provide for a veto to be exercised by the proprietor against any application

by the squatter. Curiously, the provision that the registered proprietor holds the land upon trust for the squatter was retained.

The Queensland provisions in place since 1994 are rated as “D(i)” because they afford a greater protection for the registered proprietor than do the other permissive scheme rated within the “D” class. The Victorian and Western Australian schemes (and the recently abandoned provisions for adverse possession in England) are rated as “D(ii)” as providing less protection for the dispossessed registered proprietor than the D(i) rated Queensland. The Tasmanian scheme operative from 1980 to 2001 is also rated at “D(ii)”. With the passing of the *Land Registration Act 2002*, the new English system would be rated as “B(iii)” as described above as an *interim* veto.

Those schemes with “D” ratings cannot properly be described as “Torrens” or as registered land title systems as they permit the acquisition of title without the necessity of registration. These systems are not in compliance with the requirement that title be by registration (*Breskvar v Wall* 1971; *Lutz v Kawa* 1980). The requirement is more strongly described as “registration *and registration alone* that confers title [emphasis added] (Law Commission 2001, ¶ 1.10). It is because registration is a *sine qua non* or essential element of a registered title scheme that those schemes permitting title *without* registration cannot properly be described as registered title. Instead, they may be referred to as *quasi*-land title registration schemes. In April 2001 Tasmania returned to utilising a land title registration scheme in its proper sense (with registration as an essential element) while England has also taken up such a scheme for the first time in 2002.

#### 6.3.6 *Allocating part parcel adverse possession rankings*

As the two territories (the Australian Capital Territory and the Northern Territory) expressly prohibit adverse possession, these jurisdictions are rated as “A” as for whole parcel adverse possession. Additionally the New Zealand statute, which has permitted whole parcel adverse possession since 1963, expressly prohibits part parcel applications. This was also the case for the Queensland scheme operative from 1952 to 1994 which utilised a particularly robust ban against applications for part only of land parcels. The two jurisdictions of New South Wales and Tasmania

do not expressly prohibit part parcel applications in their respective schemes introduced in 1979 and 2001. However, the requirements necessary to found such an application are so restrictive as to be prohibitive. This is in part because any application to acquire registered title over land treats the subject matter of the application as a separate and distinct single land parcel and there exist restrictions upon the recognition of such distinct single parcels. Were the applications to be considered as adding to or increasing the holding of the applicant and subtracting from or decreasing the holding of the dispossessed proprietor, then the altered parcels would more likely conform to the requirements imposed on individual parcels.

The ability of the registered proprietor to veto any application by the adverse occupier (rating “B”) is effectively a prohibition. The veto protects the interests of the registered proprietor except in those instances of abandoned land and disappeared proprietors. Because part parcel adverse possession usually involves the continued presence of the registered proprietor remaining in occupation of that portion not occupied by the squatter, the proprietor who has not abandoned the land and has not disappeared is able to exercise the veto. The practical reality of the South Australian provisions introduced in 1945 is that such an application is bound to be opposed by the registered proprietor and thus refused by the registrar. As a result the South Australian provisions can be rated as a prohibitive “A” although the statute does not expressly prohibit a part parcel application but merely permits a veto by the registered proprietor.

With regard to the refreshing or rejuvenation of the title upon the registration of a dealing (rating “C”), there are no remaining jurisdictions in Australia which permit this with regard to part parcel adverse possession. The Tasmanian provision (rated “C(ii)”) was abolished with the new *Land Titles Act* 1980 and although New South Wales provides a special protection for the newly registered proprietor, this does not apply to part only of land parcels. Internationally, Singapore abolished adverse possession (based on the proviso that a refreshed title extinguished any accruing rights of the trespasser) in 1994 leaving the Canadian province of Alberta as the sole jurisdiction permitting adverse possession of part parcels with the interests of the

trespasser liable to be negated by the registration of any dealings prior to the adverse occupier applying to be placed on the register.

The last approach which is permissive (rated as “D”) does not distinguish between whole and part parcels of land. Thus Victoria and Western Australia (and the recently abandoned English scheme) permit adverse possession of part parcels with the unripened interest of the trespasser surviving the registration of dealings.

Further, there is no requirement compelling the trespasser to ensure his interest is recorded in the register. Since the passing of the English *Land Registration Act* 2002, there is in place a restrictive scheme which will permit adverse possession of part parcels in limited circumstances and only where the subject part parcel is not bounded by a boundary that has been fixed, that is, part parcel applications may only be made where the boundary discrepancy is related to a *general* or descriptive boundary. Where such a general boundary has been replaced by a fixed boundary there are no provisions for part parcel applications. The statutory recognition of “off register” title over registered land renders such statutes as outside the description of registered title — at best they may be described as *quasi*-registered land systems because they allow recognition of unregistered title unrecorded in the register. That is, these systems lack the essential “title by registration” necessary to qualify as a proper registered title system.

#### **6.4 The different Australian approaches and how they got that way**

Notwithstanding assertions of uniformity throughout the different Australian jurisdictions (Brown 1980, p 56), there exist variations between the states including the provisions regarding adverse possession in general and, in particular, adverse possession as to part parcel. The following description provides the theoretical underpinning of the different schemes with regard to registered title land.

##### **6.4.1 Victoria**

Victoria was an early adopter of the Torrens scheme introducing title registration with the *Real Property Act* 1862. As with most of the new Torrens jurisdictions, the issue of adverse possession was covered only insofar as bringing unregistered land into the new system. Whether registered land was subject to adverse possession was

not considered. This was rectified within four years with the passage of replacement legislation which specifically provided that interests founded on adverse possession of registered title land were to take precedence over those interests entered in the register.

Having provided for the supremacy of title based upon possession the statute neglected to provide a procedure enabling the adverse occupier to obtain registration of the acquired title. This neglect to provide the necessary administrative procedure to enable the acquired title to be registered was canvassed in the 1885 Royal Commission. Thus, upon the application to the court by such an adverse occupier seeking to compel a reluctant registrar to register his interest, the Victorian court had held that the proper course was for the occupier to litigate against the dispossessed registered proprietor and seek a court order compelling the registered proprietor to execute a transfer which could then be submitted to the registrar (re *Allen* 1896). That this was unsatisfactory is evidenced by the addition of the present sections 60 and 61 of the *Transfer of Land* Act 1958 which were introduced in 1914.

While these provisions enabled the registration of the title acquired by adverse possession, the title so acquired does not require registration in order to perfect the title. Thus it may be concluded that the title registration scheme in Victoria adopts the already existing provisions for adverse possession pursuant to traditional English real property law with only those necessary amendments or modifications to suit the registered land title scheme by enabling an adverse occupier to acquire the status of a registered proprietor without requiring the adverse occupier to do so. This provision is an exception to the oft-quoted dictum that “[t]he Torrens system of registered title ... is not a system of registration of title but a system of title by registration” (*Breskvar v Wall* 1971, per Barwick CJ at ¶15). It is a title acquired through occupation alone and is not “a title which registration itself has vested in the proprietor” [*ibid*]. The exceptional nature of this title so acquired through occupation is that it is a title *without* registration capable of an independent existence without registration. The 1914 introduction of procedures enabling the squatter to have himself placed on the register as the proprietor were not matched with similar provisions enabling the dispossessed registered proprietor to have his extinguished

title interest expunged from the register. This oversight may have been considered as unnecessary because it was believed that the squatter's self-interest would be sufficient to induce a squatter to have his acquired interest formalised in the register. That the unregistered interests of the squatter override the registered interest of the registered proprietor has illuminated the consequences of the omission.

Thus the rights founded upon adverse occupation "override" the rights of the registered proprietor. These rights are overriding in the strictest sense of the term in that without being entered upon the register, the registered proprietor and those dealing with the registered proprietor on the strength of the register are bound by this overriding interest. A perhaps unintended consequence is that if the adverse occupier does not apply for registration, the dispossessed registered proprietor is left with the residue of his holding with a "clouded" title and is unable to clear the title. This impediment was the subject of a written submission to the Victorian Parliamentary Law Reform Committee Inquiry into the *Fences* Act in (VPLRC 1998, ¶ 6.64, p 148). The provisions enabling the adverse occupier to apply to be entered in the register as the registered proprietor do not extend to allowing the dispossessed registered proprietor to apply to have the occupier entered in the register as the registered proprietor.

An important feature of the rights associated with adverse occupation in Victoria are that Victoria (and Western Australia) is *minimalist* in that registered title land is subject to the Statute of Limitations and, as a consequence, only necessary minor provisions *mutatis mutandis* [with the necessary changes in points of detail] are included within the Torrens statutes to cover those aspects of registered title land outside the "traditional" English real property law and the limitations statutes.

Because of the overriding nature of the rights of the adverse occupier it may be preferable to distinguish between the jurisdictions which permit overriding rights and those where the entries in the register prevail over any rights not appearing on the register. If the hallmark of a registration scheme is that it is a system of title by registration (rather than registration of title), then those jurisdictions permitting title without registration cannot be properly classified as title registration systems.



Victoria has never permitted the acquisition of part only of a lot pursuant to statutory encroachment as have two of the other jurisdictions with a long history of permitting adverse possession of registered title land including part parcel adverse possession: Western Australia and the Canadian province of Alberta. The Victorian *Transfer of Land* Act does not distinguish between whole and part parcel adverse possession.

#### 6.4.2 Western Australia

This state was the last Australian jurisdiction to adopt a land title registration scheme in 1874. It did so, in the main, by adopting the 1866 Victorian statute (Whalan 1971a, 11; Whalan 1982, 11). Thus Western Australia from the outset countenanced the acquisition of title based upon adverse possession. Consequently to its borrowing from Victoria, WA also adopted any shortcomings in that Victorian statute. One such shortcoming was the failure of the statute to provide an administrative or procedural mode of enabling registration of the interest recognised by the substantive law. The Western Australian parliament rectified this omission with the *Transfer of Land Act 1874 Amendment Act 1880* where the forerunners of the current sections 222–225 were introduced (although the present section 223A was first introduced in 1950 permitting a person claiming an interest to lodge a caveat preventing the Registrar from granting the application of the adverse possessor). It was to be 24 years later than Western Australia that Victoria enacted similar provisions for the adverse possessor to gain registration (through action initiated in the Supreme Court) and a further 10 years before the Victorian parliament entrusted the registrar with such applications pursuant to the current sections 60 and 61 of the Victorian Act. Thus WA also countenances title *without* registration and also cannot properly be classified as having a title registration system.

Additionally, Western Australia has provided for encroachments pursuant to its *Property Law Act 1969* (sections 123(1) and 122) where the term “encroachment” is used to describe a building wholly built on another’s land through mistake and also a building which straddles the dividing boundary between two adjoining lots (its true meaning). These provisions were introduced into the 1969 *Property Law Act* and were possibly based upon the New Zealand *Property Law Act* of 1952. Section 122

refers to intruding encroachments — those involving the owners of adjoining lots whereas section 123 extends to “mistakes” related to the lot identity or boundaries of any lot and does not require an encroachment or intrusion into the adjoining lot. As a direct consequence of this state adopting the Victorian statute, the Western Australian statute also does not distinguish between whole and part parcel adverse possession. As previously discussed in relation to Victoria, the statute provides for adverse possession subject only to those changes necessary to accommodate the registration of title with no requirement compelling the registration of a title acquired by adverse possession. Unlike Victoria, WA has legislated to allow for statutory encroachment as well as permitting part parcel adverse possession. The availability of one remedy does not seem to have inhibited the availability of the other.

By way of comparison, a foreign jurisdiction (being the Canadian province of Alberta) which permits adverse possession of registered title land in a manner similar to adverse possession of unregistered land, requires the occupier to apply for registration in order to extinguish the title of the dispossessed registered proprietor and to “perfect” the title of the adverse occupier. Because Alberta requires the adverse occupier to register the acquired interest in order to perfect title, the acquired title complies with the requirement of “title by registration” and may properly be described as a registered system unlike the *quasi*-registered title systems operating in Victoria and Western Australia. Until its abolition in 1994, Singapore used a scheme similar to that of Alberta.

#### 6.4.3 *Queensland*

Queensland introduced its “Torrens” legislation in 1861 shortly after it came into being as a colony after being hived off from NSW. The 1861 statute was based upon the 1860 South Australian legislation and thus its registered land title scheme was markedly different from the other Australian Torrens schemes which were based upon the later 1861 South Australian statute (Whalan 1982; Hogg 1905, 41). In 1877 a further *Real Property Act* was passed and these two Acts together governed registered title land in Queensland until a consolidating Act, the *Land Title Act*, was passed in 1994 to replace the 1861 and 1877 *Real Property Acts*.

As with all of the jurisdictions which adopted the Torrens system in the 1860s, Queensland also did not expressly provide for the possible application of the limitations statute to registered title land. There was no provision in either of the Acts stating whether it was the intention of Parliament that registered title land be subject to a statute of limitations such that registered title land could be subject to claims of title based upon adverse possession for the requisite time. Thus the issue fell to be determined by the Queensland courts.

Two commentators (Hogg 1920, 88; Kerr 1927, 252) have asserted that initially the courts held such registered title land could not be the subject of claims founded upon adverse possession and cited several Queensland law cases in support. Unfortunately the cases cited by both commentators do not support this conclusion with the Justice in the most authoritatively reported case (*Maltby v Pang See* 1911 *per* Chubb J) expressly disavowing having decided the issue of whether the Queensland law permitted adverse possession of registered title land and thus the issue remained open.

A reference to two 1929 cases decided in favour of adverse possession of registered title land (Brown 1980, 37) is, unfortunately, lacking a citation or other reference.

When the issue arose in the 1930s, a single justice of the Queensland Supreme Court initially determined that registered title land was subject to the statute of limitations and thus could be acquired by adversely possession (*Miscambles v Rae* 1935; *Verri v Holmes* 1934). These decisions were based upon the Privy Council decision in the *Belize Estate* case (1897). This view has been approved by one commentary (Francis 1972, 621) but has met with the disapproval of another (Jackson 1967, 272).

Upon challenge by the Registrar of Titles, the Full Court held on appeal that adverse possession was irreconcilable with the provisions providing for paramountcy of title in the registered title land statute (*Miscamble v Phillips* 1936). This ruling was unsatisfactory because of a need for providing for the quieting of title of land that had been subject to long standing occupation. This need may have arisen from

informal transfers or conveyances of registered title land in a manner incapable of permitting entry in the register or the abandoning of land by long since disappeared registered proprietors (QLRC 1989, pp 63–64).

Legislation providing for the quieting of title to such land was passed in 1952 and was, in the main, similar to the 1945 legislation passed by South Australia. It is reasonable to assume that it was passed for the same motivation — the unsatisfactory state of affairs where the occupiers did not have the security provided by registration and yet there was no person challenging the rights or title of the occupiers. The Act sought to permit occupiers to gain registration in the absence of an objection by the registered proprietor. This amendment to the law would have permitted the previously unsuccessful applicant in *Miscamble v Phillips* (1936) to obtain registration of that land registered to a long absent owner where previously the Full Court had held that the statute did not countenance the acquisition of title by long adverse occupation.

The 1952 amending legislation included a strong privative clause (section 46 of the *Real Property Acts Amendment Act 1952*; Sykes 1973, 410) excluding the operation of the *Limitations of Actions Act* to registered title land. The purpose of the privative clause was to exclude the acquisition of title founded upon possession except in accord with the scheme introduced into the registered title statute by the 1952 amendment. The statute provided that upon objection being made to the application for registration by an occupier, the Registrar must refuse the application if satisfied that the objection was taken by the person registered as the proprietor. In effect, the Queensland Parliament had adopted a similar regime to that of South Australia which permitted occupiers of abandoned land to gain registration if the registered proprietor did not make objection. The scheme first introduced in South Australia has been described as the veto model and provides a high degree of protection for the proprietor short of an absolute prohibition against acquiring title by adverse possession.

In addition, the 1952 Queensland amendment prohibited the acquisition of title by long possession in instances of encroachment of buildings and enclosures of parts of

land parcels by fences or similar enclosures. Thus it is clear that the 1952 amendment only permitted applications for title of whole parcels of registered title land. The prohibition against part parcel applications was both express and robust. The 1952 Queensland legislation was later used as a basis for the 1963 introduction of adverse possession into the New Zealand registered title land statute and was also the basis from which the 1998 recommendations for the United Kingdom were developed and adopted in the English 2002 *Land Registration Act*.

The Queensland Law Reform Commission has commented upon the inevitability of a registered title scheme later being required to allow adverse possession of land within the scheme (QLRC 1989, pp 63–64). The Commission’s comment was confined to abandoned whole parcels with disappeared proprietors of such parcels. The comment is consistent with the 1952 amendments wherein applications for other than whole parcels of registered title land were expressly excluded. Described by Cook (1992, 14) as an “unusually explicit statement of public policy” regarding land boundaries, section 47 of the 1952 amendment states:

Whereas parts of parcels of lands under the Acts may have been before the passing of this Act or may be hereafter encroached upon by a building or any part thereof or by the enclosure of those parts within contiguous lands by means of a wall, fence, hedge, ditch, or other means whatsoever of demarcating boundaries between lands so encroached upon which is not the true boundary thereof as shown in the plan on the deed of grant or certificate of title therefor:

And whereas it is undesirable that a person should obtain a title by possession to parts of land encroached upon by any building or part thereof or by enclosure as aforesaid:

Now therefore be it enacted that a person shall not obtain under this Act a title by possession to part of parcels of lands under the Acts so encroached upon.

Indeed, the section has been the subject of amused comment (Duncan 1975, 19). The necessity for the “unusually explicit” prohibition against obtaining title by possession to part only of a parcel is doubted. As will be discussed below in relation to South Australia, adverse possession applications based upon the absence of objection by the disappeared registered proprietor of abandoned land implicitly preclude applications for part only of a parcel because the dispossessed proprietor of

the land in question is the proprietor of the contiguous neighbouring lot and is not likely to permit an application to succeed without objection. On the other hand, the unusually explicit prohibition has the advantage that it leaves no room for doubts regarding the intent of the Parliament in passing the legislation.

The provisions of the scheme adopted by Queensland followed those adopted in South Australia in 1945 and later taken up by New Zealand in 1963. These provisions catered for the occupier of land registered to a disappeared proprietor while protecting the proprietary interests of the proprietor who still wished to assert title. This was accomplished by permitting an application for registration by the trespasser to succeed in the absence of any objection by the registered proprietor. Thus the registered proprietor who elected not to object or the disappeared proprietor who could not be traced and as a consequence did not object would permit, by default, the application by the trespasser to succeed. However, any objection by the registered proprietor to the application is an absolute bar to the further processing of the application by the trespasser.

It may be observed that the consequence of the 1952 amendment was to now permit those previously rejected applications, such as that considered in *Miscamble v Phillips* (1936), to succeed without extending the operation of an application beyond that sought by an occupier of abandoned lands.

In fact, the 1986 text authored by A J S Byrne, then Queensland Registrar of Titles, supports the conclusion that the procedure was intended to be used by an occupier of land for which the registered proprietor was unable to be traced. The learned author indicates the necessity for the occupier-applicant to prove uninterrupted adverse occupation of the land for a period of at least 30 years (Byrne 1986, 141). In the ordinary course of events, the limitation period necessary to bar an action for the recovery of land is twelve years in Queensland (section 13 of the *Limitation of Actions* Act 1974). There is an absolute maximum period of thirty years in cases where the person with the cause of action to eject the adverse occupier is under a disability (section 29 *ibid*). Pursuant to a number of court cases it is settled law in Queensland that in those instances where the registered proprietor, or those who may

have an interest in the land under the registered proprietor and who cannot be identified, must have been out of possession for at least thirty years to exclude the possibility of a person suffering a disability being deprived of land without having been out of possession for the necessary thirty years (Re *Johnson* 1999; *Lambourn v Hosken* 1912; Dixon 2000; Duncan 2000).

As already indicated this scheme was the basis for the 1963 introduction into New Zealand of adverse possession and the 1998 recommendations by the UK Law Commission which resulted in the passage of the English *Land Registration Act* 2002. A brief discussion of those schemes will suffice to describe them without the necessity for providing an individual section for each. As with the 1952 Queensland provisions, the 1963 New Zealand scheme prohibits applications for part parcels of registered title land based on long-term adverse occupation and also includes a privative clause excluding the operation of the statute of limitations — the statutory limitation provisions applicable to registered land title are to be found wholly within the registered land title statute without reference to the New Zealand *Limitation Act* 1950. Curiously, the NZ legislation imposes a longer period of limitation than that provided in the limitation statute for land that is not the subject of the registered title land statute. For “old law” or “general law” or “old deeds system” land (or unregistered land) the limitation period is set at twelve years while the period of adverse occupation necessary under the registered title land statute is *twenty* years.

Similar to Queensland, the New Zealand statute expressly prohibits the acquisition of title to part only of a registered title land parcel where the part parcel occupation arises from the occupational boundary not coinciding with the title boundary (section 21(e) of the *Land Transfer Amendment Act* 1963).

Following enquiry by the UK Law Commission and Her Majesty’s Land Registry, those bodies prepared a report making recommendations for the future of registration of land title in England. With regard to the adverse possession of land the report recommended a scheme described as being based upon that operating in Queensland (Law Commission 1998). A new *Land Registration Act* 2002 based upon these recommendations has recently been passed by the English Parliament.

The scheme adopted in the recent English Act draws heavily upon that of South Australia and Queensland with a view to providing an easy and simple manner for an occupier to gain registration as the proprietor of registered title land where that land has been abandoned and the proprietor has disappeared. However, where that is not the case, the proprietor is provided an opportunity to terminate the adverse occupation of his land but that opportunity has a time limitation of two years, the opportunity is not an indefinite one (Megarry and Wade 2000, 277–278).

The operation of the newly-adopted scheme is that after ten years adverse occupation, the occupier may apply to be registered as the proprietor. The existing registered proprietor (or those claiming under the registered proprietor) would then be provided with the opportunity to object. If so, the occupier's application would fail and would be refused. Thereafter the registered proprietor or objector would have a period of two years in which to commence ejectment proceedings against the occupier. Failure by the registered proprietor to commence those ejectment proceedings within two years would enable the occupier (who has remained in adverse occupation) to be registered, as of right, as the proprietor instead of and notwithstanding further objection by the dispossessed proprietor.

Where there was no objection by the existing registered proprietor, either because the land had been abandoned and the proprietor has indeed disappeared, or the proprietor has elected not to enter an objection to the occupier's application, the occupier would obtain registered title (Law Commission 1998, 221).

The 2002 *Land Registration* Act addresses the issue of adverse possession of part only of a parcel in a restricted manner. Such an application for part only of a parcel may only be made where the boundary between the applicant's land and that applied for is a general boundary where the exact line of the boundary has not been fixed or determined. There is a further restriction that the occupation of the land applied for has been pursuant to a reasonable belief on the part of the applicant that the land applied for was in fact part of the applicant's holding. The requirement of "reasonable belief" is no doubt intended to cover the main concern of boundary



discrepancies where all relevant parties have been unaware of the adverse occupation of the part parcel in question. The requirement that part parcel applications can only be made with regard to a general (or descriptive) boundary is restrictive in that such boundaries usually do not give rise to location discrepancies. The provisions for part parcel applications will probably only allow very few applications to be made. The conclusion that follows is that the recent 2002 Act does not sufficiently provide for the resolution of boundary location discrepancies. This is somewhat surprising given the legislation is based upon the 1998 report which offered as a conclusion that most cases of adverse possession are in fact boundary disputes (Law Commission 1998, ¶ 10.15).

The new English statutory scheme is a radical departure from the previous registered land statutes operative in England. Under the new scheme the acquisition of title to registered land is not complete until the squatter had successfully applied to be entered into the register as the proprietor. The new scheme has done away with the prior overriding rights of the adverse occupier and the registered proprietor is provided with a greater degree of protection than was available under the old statute. With the 2002 Act, England has only recently adopted a registered land title system. Although the previous 1925 Act purported to underpin registered land titles, it is concluded that the previous system in operation may at best be described as a *quasi*-registered title system because it provided for the legal recognition of title that was not registered.

It is noteworthy that this radical change to the English approach to adverse possession of registered title land was brought about by the proposed creation of an on-line searchable electronic register rather than an appreciation of the contradictory aspects of according recognition to unregistered title in a registered title system (House of Lords Parliamentary Debates 30 October, 2001 *per* Lord Bassam of Brighton at column 1364).

In order to describe these schemes, it is clear that from 1952 the Queensland adverse possession provisions would be rated as B(i) for whole parcels and A for part parcels. A similar rating would be applied to New Zealand (from 1963). The

recently repealed English provisions would be rated at D(ii) for both whole and part parcels on the basis that those English provisions were of the same tenor as those operating in Victoria.

With regard to the recently adopted reforms to the English system, these would be rated at B(iii) for whole parcels and A for part parcels. The basis for the whole parcel rating of B(iii) is that the proposed scheme is sufficiently similar to the 1952 Queensland scheme with the exception that the registered proprietor's veto in Queensland is absolute.

The part parcel rating of A is based upon conjecture in that the English 2002 Act providing for part parcel applications is hedged with restrictions and, similarly to such applications in South Australia, the veto upon the encroachment by a neighbour should ensure the failure of most, if not all, applications. The proposed English scheme is to permit applications with regard to long abandoned lands but otherwise to restrict adverse possession where the proprietor still desires to assert title. The very nature of part parcel adverse possession is that the encroached upon neighbour has not disappeared and has not decided not to assert title. It is conjectured that where there are no provisions for part parcel adverse possession in a system that allows the registered proprietor to veto any application by the occupier, an application for part only of a title will result in such a veto. Part parcel adverse possession arises out of boundary and fencing errors or blunders; it does not arise out of abandoned land and disappeared proprietors. The operation of the South Australian and similar schemes require that the adverse occupier's application will only usually succeed where the proprietor has disappeared. Thus, in accord with South Australia, to be discussed below, the new English scheme is rated at "B(iii)" for whole parcel and "A" for part parcels. Because the new English scheme is too restrictive for part parcel adverse possession, the adoption of the encroachment provisions (as in South Australia) or similar may be necessary. The new Act does not provide for statutory encroachment to as a means of resolving boundary discrepancies in the English registered land system.

The 1952 Queensland provisions were repealed in 1994 along with an unruly array of statutes governing registered title land in that state. These statutes were replaced with the single *Land Title Act* 1994. Although the replacement legislation was touted in both the report of the Queensland Law Reform Commission (QLRC 1991) and the state legislature as merely re-enacting the existing law in a more conveniently consolidated and understandable form. In fact the Queensland legislature enacted a statute that radically altered the law.

The present scheme, in place since 1994, is similar to that of Victoria with regard to adverse possession of registered title land and consequently the assessed rating has been changed from “B(i)” to “D(i)” for whole parcels and from “A” to “D(i)” for part parcels. The radical alteration of the law effected by the 1994 statute changed the Queensland scheme from being dependent upon registration to confer title to that where interests founded upon adverse possession override those interests entered in the register (*Land Title Act* 1994, section 185). The previous veto against an application by the squatter allowed to the registered proprietor has been dispensed with. Further, the new statute has made permissible applications with regard to part parcels while previously such applications were prohibited. While the current Queensland provisions favour the trespasser whose adverse occupation has fully matured and is capable of supporting an application for registration, they do not extend so far as those of Victoria and Western Australia where the interests of the adverse occupier, whose interest has not fully matured, is an exception to the registered proprietor’s indefeasibility of title.

Thus, unlike Victoria and Western Australia, in Queensland an as yet unmatured adverse occupation will not survive the registration of a new dealing which will wipe the slate clean of the unmatured adverse occupation. However, as in Victoria and Western Australia, a matured but not registered adverse occupation will survive the registration of a new dealing which will *not* wipe the slate clean of the matured adverse occupation.

In addition to the whole parcel adverse possession provisions introduced in 1952, Queensland legislated to permit encroachments in 1955 (buildings encroaching from

one land holding across the boundary into the abutting or contiguous parcel) passing the *Encroachment of Buildings Act* 1955 and improvements under mistake of title in the later consolidation of the *Property Law Act* 1974. One feature of the 1955 encroachment legislation is that it did permit applications to be made in respect of part parcels for which adverse possession applications were prohibited. That the prohibited applications for part parcel adverse possession and the permitted applications for part parcel encroachment differed in their scope was to lay the ground for possible later confusion. New Zealand similarly introduced encroachment legislation to cover both improvements straddling the boundary between two contiguous parcels (that is, encroachments intruding from one lot into another) and mistake of title where an improvement is mistakenly erected wholly within the bounds of the “wrong” parcel instead of within the bounds of the intended parcel. South Australia, which has a similar adverse possession system to that of Queensland, has also introduced provisions to deal with encroachments (or intrusions) but not to deal with mistake of title cases.

The following analysis of the current Queensland law of adverse possession provided here differs from that offered by the Queensland Law Reform Commission and other commentators (McGill 1993; Bradbrook *et al* 1997). At the time of its 1991 report, the Law Reform Commission concluded that the registered land title statutes had served Queensland well for over a hundred years and purported to make recommendations that did not change the substantive law. The Commission saw its role as focussing upon consolidation and modernisation, rather than alteration, of the then current system. The Commission may not have fully appreciated the operation of the law as it existed at the time of its investigation. Further, the actual legislation enacted by the Queensland parliament in 1994 was not that recommended by the Commission. Consequently, the end result is that the Commission proposed permitting an adverse possession scheme more favourable to the squatter (and less favourable to the dispossessed registered proprietor) and the resulting 1994 statute was even more favourable to the squatter than that recommended by the Commission.

The analysis offered by the Commission in its 1991 report concluded that the law, as it then existed, permitted a squatter who had been in adverse occupation for the necessary limitation period of twelve years to successfully resist ejection proceedings launched by the dispossessed registered proprietor. That the dispossessed registered proprietor could prevent the squatter from obtaining registration without being able to eject the squatter resulted in a stalemate and the Commission's recommendations were to permit such a squatter to obtain registered title notwithstanding the objections of the dispossessed registered proprietor. It is submitted that the Commission was incorrect in its analysis and that the law then in force allowed the dispossessed registered proprietor to both veto any application for registration by the squatter and to also eject the squatter from the registered proprietor's land notwithstanding the long adverse occupation by the squatter. The interpretation offered here is that the subsequent 1994 legislation based upon the Commission's recommendations now permits a squatter to apply for registered title of part only of a land parcel. Consequently the Commission and the parliament may have inadvertently effected major changes to the law of adverse possession of registered title land in Queensland.

It is important to note that the Commission's 1991 report included a proposed replacement *Real Property Act* with accompanying annotations relating to the provisions of the replacement Act and the replaced Acts. It is instructive to note here that the Commission did not comment upon or otherwise offer any explanation for the failure to include provisions in the replacement *Real Property Act* equivalent to sections 46 and 47 of the 1952 *Real Property Acts Amendment Act*. These provisions were the privative clause and the prohibition against adverse possession applications for part only of a registered title land parcel respectively. The privative clause prohibited acquisition of title based upon adverse possession except as permitted by the 1952 Act.

Similarly the Commission's recommendation and section 185 of the subsequent 1994 Act were the subject of annotations although doubt is here expressed with regard to the accuracy of the Commission's annotation to the effect that "[a]lthough the RPA 1952 has been incorporated into Part VI division 5 of the Bill, no policy

changes have been made to the legislation” (QLRC 1991, 51). Thus it would seem that the Commission recommended, and the Parliament enacted, a provision in the 1994 statute that confers title upon the occupier when the limitation period has passed without the need for the occupier to apply to the Registrar of Titles to be entered in the register as the registered proprietor. This is a dramatic alteration to the registered title scheme in Queensland which had previously required the adverse occupier to apply for and to obtain registration to “perfect” the title based upon adverse possession. It would also appear that the Commission was fully conscious of the effect of its recommendation because its report included the annotation “[i]n contrast to section 44 RPA 1861–1990, the right of an adverse possessor to registration as proprietor is included in the Bill ... as an exception to indefeasibility.” This comment relates to the change effected by the 1994 Act which provides that the interest of a trespasser who is entitled to apply for registration is an exception to the paramountcy or indefeasibility provision of the Act. The previous exception to indefeasibility required the adverse occupier to gain registration before the dispossessed “paper” owner’s indefeasible title was rendered defeasible (section 44 as amended by the *Real Property Acts Amendment Act* 1952).

It is concluded that that the provisions relating to adverse possession (including part parcel adverse possession) of registered title land in Queensland are now less restrictive. Any assertion that the 1994 alterations to the registered title land system were not substantive and merely procedural is misleading. The result being that under the present regime it is not necessary for the adverse occupier to “perfect” the title acquired by adverse possession by applying to be entered into the register as the proprietor and that part parcel applications are no longer wholly prohibited. The interpretation offered here is in accord with that of a number of commentators (Tan *et al* 1997, 194; Sackville and Neave 1999, 487; Bradbrook *et al* 1996; Chambers 2001, 467). This interpretation of the Queensland *Land Title Act* 1994 carries with it the conclusion that Queensland has abandoned an essential characteristic of a registered title scheme (no title without registration) and the present scheme may only be considered as a *quasi*-registered title scheme.

It must be conceded that there do exist some disputed aspects with regard to the interpretation of the 1994 Queensland *Land Title* Act offered here. The Executive Director, Land Services, Department of Natural Resources and Mines, Queensland is responsible for the administration of the Act. The immediate past Executive Director has advised that applications for registration by occupiers pursuant to the adverse possession provisions of the Act will only be granted where the applicant is able to demonstrate payment of municipal rates and taxes and a bona fide belief by the applicant justifying the initial entry into and continued occupation of the land in question (Leader 2001). A further requirement for a successful application is that the application should only be for a whole parcel of land (*ibid*).

These expressed requirements are inconsistent with the description of the requirements of an “Application for Title by Adverse Possession” as set out in the Queensland practitioner’s manual which is, in fact, prepared by the Registrar’s office (Registrar of Titles 1996). Both the practitioner’s manual and the 1994 Act make reference to “adverse possession” without indication that that term, as understood in Queensland, takes on a wholly different meaning to that understood throughout the rest of the common law world. Further, the manual refers the practitioner to several texts relating to adverse possession (*ibid* ¶ 14-2290). In their discussions of adverse possession, none of these reference texts (Megarry and Wade 1984; Butt 1988; and Bradbrook *et al* 1990) diverge from the meaning accepted throughout the common law world. None of the given references support the interpretation offered by the past Executive Director or the inference that “adverse possession” takes on a wholly different meaning in Queensland and unlike that understood throughout the rest of the common law world. Thus it must be doubted that the Queensland statute requires the payment of municipal rates and taxes and a bona fide belief in entitlement to entry and possession by the occupier.

It is to be emphasised that, until successfully challenged, administrative policy is *de facto* law requiring compliance by a prudent practitioner seeking to pilot his or her client through the treacherous shoals of an uncertain stretch of water (or law). Outside the Queensland jurisdiction it is beyond dispute that registry practice does not make law (*Strand Securities v Caswell* 1965; Megarry and Wade 1975, 1056). It

may well be that this principle also extends to the Queensland jurisdiction given that the past Executive Director's interpretation of the administrative law governing the exercise of his power has been successfully challenged in the past (*Leader v Beames* 2000). It is not yet clear whether the present Executive Director will continue with past policy in regard to the interpretation of the 1994 Act.

#### 6.4.4 *New South Wales*

The 1862 NSW *Real Property* Act was based upon the 1862 Victorian statute (which was in turn based upon the 1861 South Australian Act). Consequently the adoption of a wholly new 1866 Act by Victoria saw wide divergence between NSW and Victoria (Whalan 1982; see also Hogg 1905, 41). As with the other jurisdictions, the statute did not address the issue of adverse possession of registered title land although there was provision for "old law" land held on possessory title to be brought within the system.

The issue of adverse possession of land within the NSW registered title system was first broached in the re-enacted 1878 statute which included a new section 11 which expressly disallowed the acquisition of title based upon adverse possession of registered title land. As regards the law prior to 1878, one commentator has expressed an opinion that the purpose of introducing the prohibition against adverse possession in 1878 was to alter the then existing law which impliedly permitted adverse possession of registered title land (Francis 1972, 621).

With the subsequent re-enactment in 1900 this express prohibition was continued in section 45. Of course, no statute can prohibit a course of action: all that it can do is proscribe the disfavoured conduct by dictating the consequences of the course of action which the statute is designed to discourage. In this case the statute expressly prohibited the acquisition of title founded upon long-term adverse possession. Thus registered title land in NSW could be adversely occupied by a trespasser but such adverse occupation could not be used to found a claim to title.

Thereafter a restricted form of adverse possession was introduced into registered title land in 1979. As in the other registered title land jurisdictions, the ill sought to



be cured was the large number of registered title land parcels where the proprietor had disappeared and effectively abandoned the land or had transferred the holding in an irregular manner incapable of supporting a duly registered transfer with the registration of the transferee as the proprietor. In many cases the occupier was in possession through having purchased or otherwise acquired land from the registered proprietor pursuant to an informal, incomplete, unregistrable, or even non-existent transfer instrument. Consequently the transferor remained on the register as the proprietor while the transferee entered into possession and remained in occupation.

As a consequence there were many occupiers with a good “holding title” where, “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..., there is equally little likelihood of his occupation being disturbed by that registered proprietor, or by anyone claiming through or under him” (Grimes 1976b, 5–6). These occupiers with a holding title had entered into possession under colour of right and were a more deserving group of persons than a trespasser (*ibid*).

Following on a 1976 report for the NSW Registrar General’s Office, the NSW parliament passed the *Real Property (Possessory Titles) Amendment Act 1979*. The recommendation of the report was to introduce a “possessory title system ...into [the] existing Torrens system without disrupting the security of existing Torrens titles” (*ibid* 4–5, 6). There were four further bases for another recommendation that applications for title to part only of land holdings be disallowed. These were that such applications for part only of a parcel would impose serious disruption to the normal activities of the Titles Office. Secondly: a rebuttable presumption that the occupation of a substantial part of an established parcel (the balance of which is unoccupied) is occupation of the whole; thirdly, applications for part only of a parcel would breach town planning guidelines; and last, permitting applications for part of a parcel would confer a benefit on the occupier-applicant that was not available to those registered proprietors in occupation pursuant to an existing Torrens title (*ibid* 25–7).

A comparison of the report and the subsequent legislation permits a number of observations to be made. First; permitting applications for part of a parcel would not confer a benefit that was not available to existing registered proprietors in occupation pursuant to an existing Torrens title although it would confer a benefit previously unavailable to such existing registered proprietors. Secondly, there is little evidentiary basis for the assertion that part parcel applications would seriously disrupt the normal activities of the Titles Office. Thirdly, the adoption of the presumption that occupation of a substantial part is occupation of the whole was incorporated without including the requirement that the balance be unoccupied; and, lastly, part parcel applications may have the effect of introducing sub-divisions of land parcels that would not have been approved if subjected to the requirement of compliance with town planning principles. There is no corresponding restriction on part parcel adverse possession of unregistered land where one would also expect compliance with planning principles to be desirable.

A further observation is that in seeking to provide title to the deserving honest occupiers without disrupting the security of existing Torrens titles, the legislation does not accomplish this object. The parliament adopted a regime wherein a trespasser could dispossess a registered proprietor of an existing Torrens title. If the parliament wished to avoid disrupting existing Torrens titles, it could have followed the examples provided by the introduction of a limited form of adverse possession into South Australia (1945), Queensland (1952), and New Zealand (1963). In these jurisdictions a registered proprietor or someone claiming through or under a registered proprietor was permitted to exercise an absolute veto over an application by the occupier.

By adopting a scheme that permits the adverse occupier to prevail over the registered proprietor's objection, NSW has included protection for those acting in reliance upon the register by incorporating a limited form of indefeasibility of the proprietor's title. An adverse occupier cannot defeat the proprietor's title unless the trespasser has been in adverse occupation for the required limitation period since the proprietor's interest was entered in the register. That is, any period of adverse occupation against the interest of a previous registered proprietor cannot be counted

towards satisfying the required limitation period against the interest of the current registered proprietor. This limited form of protecting the indefeasibility of the proprietor's title is a form of "wiping the slate clean" with the fresh issue of a title.

In other jurisdictions these provisions have been described as "wiping the slate clean". In order to defeat the registered proprietor's title the trespasser must have been in occupation adverse to that proprietor. For example, consider a trespasser in adverse occupation against RP 1 for ten years when RP 1 transfers the property to RP 2. The trespasser remains in adverse occupation of the property. After two years of occupation adverse to RP 2 the trespasser cannot defeat the title of RP 2 even though the trespasser has been in adverse occupation of the property for twelve years. The ten years occupation adverse to RP 1 cannot be included as adverse occupation against RP 2 and in order to defeat the registered title of RP 2, the period of adverse occupation against RP 2 commences with the entry of RP 2's interest in the register. The entry of RP 2's interest in the register "wipes the slate clean" of the accrued ten years adverse occupation by the trespasser prior to the entry in the register and the trespasser cannot rely upon the aggregation of the periods of adverse occupation against successive registered proprietor's in order to satisfy the statutory limitation period.

The "wiping the slate" provision was introduced within the 1979 legislation which introduced possessory titles into the NSW registered title system. The provision, section 45D(4), differs from similar provisions in other jurisdictions in that the protection provided extends only to include the interests of the current registered proprietor. Although the intent of the sub-section has not been tested in a lawsuit it appears to provide less protection than the "wiping the slate" provisions in other jurisdictions. The provisions in the other jurisdictions would appear to wholly destroy any interest acquired or in the course of being acquired prior to the making of an entry in the register leaving the adverse occupier with no interest whatsoever. The NSW provision limits the protection of "wiping the slate" only insofar as the new entry records the interest of a party who has just acquired the interest recorded by the new entry. Thus, it may be possible for the adverse occupier to retain an interest against the dispossessed registered proprietor in the following

circumstances. Consider the trespasser who has been in occupation adverse to the registered proprietor (RP 1) for the twelve year period necessary to satisfy the limitations statute. The trespasser has not applied, pursuant to section 45(1), to be recorded in the register as the proprietor of that land. Prior to any application by the trespasser, the proprietor RP 1 transfers the land to another party RP 2 who becomes the new registered proprietor for valuable consideration and without fraud. The registration of RP 2 as the newly registered proprietor will destroy any interest held by the trespasser *vis-à-vis* the newly registered proprietor. Whether the trespasser retains a right against the previous registered proprietor is an interesting question that may permit the trespasser to hold the previous proprietor as liable to account for the proceeds arising from the transfer to the newly registered proprietor. That is, the trespasser may be able to force the dispossessed proprietor (RP 1) to disgorge the purchase price paid by the current proprietor (RP 2).

The NSW parliament was most conscious of the desired aims of the 1979 legislation as evidenced by the parliamentary debates. The legislation was introduced to provide security of tenure in instances of informal transfers or the occupation of abandoned land where the occupiers had expended capital and labour in making improvements to the land. The legislators were most concerned that the provisions they were introducing in 1979 not be allowed to permit the “numerous trifling cases of adverse possession of small strips of land occasioned by a fence” being located off the actual boundary (NSW Legislative Assembly Second Reading speech, February 28, 1979, p 2603). Allied with the disinclination to permit the adverse possession of boundary strips was the recognition that such strips would constitute a substandard land parcel incapable of complying with town planning standards (*ibid*). In the Second Reading speech, the Minister for Lands equated a possessory application for registration with a memorandum of transfer and because the subject matter of a memorandum could only be a whole land parcel, it followed that a possessory application could only be made in respect of a whole land parcel (*ibid*).

The particular approach to this issue of adverse possession of part parcels was accomplished by reference to and distinguishing between “occupational” and “whole parcel” boundaries. The result is that the Act does not expressly prohibit part parcel

applications, but provides for certain consequences to flow from applications where the occupational and whole parcel boundaries differ. With reference to the particular facts of the Tasmanian *Woodward* case (to be discussed in the next chapter), it will be seen that the NSW provisions would not prevent the particular example of part parcel adverse possession that was upheld in that case. It may be that a section robustly denying part parcel adverse possession such as the “unusually explicit” section 47 of the 1952 Queensland *Real Property Acts Amendment Act* would have better achieved the legislative intent of the NSW parliament.

In order to maintain consistency with the philosophy of the Torrens system, the 1979 amendments to the *Real Property Act* did not detract from the “mirror” and “curtain” principles until the possessory application by the adverse occupier had been approved (NSW Hansard Legislative Assembly Second Reading speech, February 28, 1979, p 2603). The integrity of the philosophy was further upheld by the inclusion of a privative clause (section 45C) disallowing any acquisition based upon long adverse occupation except in compliance with the 1979 scheme. Additionally, section 45D(4) provided protection for a person acting on the faith of the Torrens register at a time when no possessory application had been made (*ibid* pp 2603-4). Thus any rights founded upon possession were not “overriding” in that such rights were ineffective until entered on the register in compliance with the scheme. The Minister may have been in error when he stated that the register was to be conclusive in favour of the registered proprietor until the possessory application by the occupier had been approved and granted. This is because a possessory application made, but not yet granted, would defeat any later application for registration supported by a memorandum of transfer. Reference has already been made previously to the interpretation that section 45D(4) will only “wipe the slate clean” of the adverse occupier’s interest as against a person dealing with the dispossessed registered proprietor. The particular wording of the section is such that the dispossessed proprietor may be unprotected by the provision and liable to disgorge the purchase price to the adverse occupier where the purchaser has become registered and within the protection of the section.

The NSW Torrens statute can be rated at “A” prior to the introduction of the 1979 Part 6A of the *Real Property Act* for both whole and part parcel adverse possession. With the passage of the 1979 Act, the rating is changed to “C(iii)” for whole parcels where a dealing will “wipe the slate clean” of the occupier’s interest but only insofar as the person dealing with the dispossessed registered proprietor is concerned. As regards part parcel adverse possession, the rating remains as “A” wherein the integrity of the register provides indefeasibility of title for the registered proprietor and does not countenance the acquisition of title by an adverse occupier of less than a whole parcel.

It is of historical interest that at the time of the Australian Capital Territory being “carved out” of NSW, the prohibition against adverse possess in the 1900 *Real Property Act* (NSW) was “inherited” by that territory and later expressly adopted by its incorporation in the *Land Titles Act* 1925 (ACT).

#### 6.4.5 *South Australia*

The “Torrens” system of registration of land title was initially introduced in South Australia in 1858. The Real Property Acts (being the *Real Property Act* and the *Real Property Law Amendment Act*) of 1858 were subsequently replaced by the *Real Property Act* 1860. The 1860 Act was then repealed and replaced by the *Real Property Act* of 1861. This 1861 statute formed the basis upon which most of the remaining Australian jurisdictions founded their registered title statutes (Victoria 1862 and Tasmania 1862 with New Zealand 1870 and New South Wales 1862 being based upon the 1862 Victorian statute). The last of the adopting jurisdictions, Western Australia, based its 1874 statute upon the later Victorian 1866 scheme. That NSW (1862) was based upon Victoria (1862) meant that NSW omitted to include the overriding interests of the adverse possessor which were first introduced in the later Victorian 1866 statute. The Queensland Torrens statute of 1861 was based upon the earlier 1860 South Australian scheme.

The 1861 South Australian statute was adopted in Victoria and New South Wales although those states had contemplated different legislation. Their proposed

legislation was abandoned in favour of adopting the South Australian scheme because “uniformity” was desired (Hogg 1905, 45-6).

None of the 1860s South Australian statutes expressly provided for adverse possession of registered title land. It was only with regard to bringing unregistered land into the registered land system that the legislation permitted an adverse occupier to apply to be registered as the proprietor of unregistered land that was the subject of an application to bring that land within the registered land system.

However the 1878 (amending) statute expressly precluded the acquisition by adverse possession of registered title land by introducing a prohibition. The 1861, 1878, and 1881 statutes were re-enacted and consolidated in 1886 with section 251 prohibiting title based upon adverse possession. These matters remained until 1945 when South Australia introduced a limited form of possessory title permitting occupiers (in possession of registered land) to apply to be registered as the proprietors of that land.

Prior to the introduction of an express statutory provision prohibiting the acquisition of title by adverse possession, the issue was resolved by the courts construing the will of the parliament by interpreting the statute. When the issue came before the courts, it was held that the registered title system did not preclude the operation of the limitations statute but the certification by the registrar of the entries in the register were decisive. Thus, upon each occasion when the registrar issues a certificate or re-issues a certificate there is a warranty (by the registrar) that the information contained in the certificate is correct at the time of the certificate being issued. The then statute was interpreted to permit such acquisition only so long as the period of adverse occupation against the present registered proprietor was sufficient to satisfy the limitation statute (*Hunter v Player* 1875; re *Ford's Application* 1953).

The rationale of this interpretation was that a person dealing with the registered proprietor was entitled to rely upon the facts disclosed by the register which must be taken to be true at the time the entry is made. Alternatively, the State warrants the title to which the registrar certifies when issuing a new certificate. At the time of

issuing the new certificate the title is free from blemish and consequently any period of occupation adverse to the registered proprietor can only commence after the date of issue of the new certificate. As a corollary any period of occupation adverse to the registered proprietor which has accrued prior to the issue of the new certificate is disregarded. The general principle was described by the Chief Justice of Tasmania thus:

...the general principle of the Torrens system that is that the state warrants the title to which its Recorder of Titles certifies. ... when a certificate of title says that the registered proprietor is entitled to an estate in fee simple, or whatever other estate it might be in the land concerned, that statement must be taken to be true at the time it is made, and for that reason the registered proprietor's right to recover possession cannot be barred within twelve years of it.

Re *Ford* [1953] Tas SR 23 at 24 *per* Morris CJ

An alternate interpretation would be an “ambulatory” or “time of reliance” on the register approach which requires that the statement be taken to be true at the time when the register is inspected, even if that time is far removed from the time at which the entry was made and the certificate issued. Thus, in the case of *Verrall v Nott* (1939) the boundary description “as bounded by high water mark” was held to refer to the mark as it existed in fact from time to time rather than the mark as it was at the time the certificate was issued. The disadvantage of the reliance approach is obvious in that the registrar would be taken as warranting the quality of title long after the issue of the certificate.

This interpretation of the then South Australian Torrens statute that the title is freed from any accrued blemishes by the Registrar's issuing of a fresh title has been overtaken by the subsequent introduction of an express prohibition and the later introduction of a limited scheme permitting adverse possession in 1945. This description of the 1875 interpretation is included here as it will be referred to elsewhere in the descriptions of those schemes operating in New South Wales and Tasmania.

The 1945 amendment introduced Part 7A (sections 80a to 80i) into the 1886 *Real Property Act* which provided for a strict procedure wherein registered title land could be subject to an application for registration by a person not registered as



proprietor who was in possession of the land. An amendment to section 251 ensured that the Part 7A procedure was privative in that the operation of the South Australian *Limitation of Actions* Act 1937 was excluded leaving the Part 7A procedure as the sole means of acquiring title based upon adverse possession. The procedure was a compromise between upholding the rights of the registered proprietor as recorded in the register and those of the occupier where the application by the adverse occupier could only be granted in the absence of objection by the registered proprietor. Upon objection by the registered proprietor the application was refused. The overriding interest was that of the dispossessed registered proprietor who took exception to the dispossessor being registered as proprietor. Similar schemes were later introduced into New Zealand (1963) and Queensland (1952) and the recently passed English *Land Registration* Act 2002 was based upon the procedure introduced into South Australia in 1945.

The 1945 introduction of this limited form of adverse possession did not distinguish between applications for whole parcels and those for part only of a holding as the later New Zealand and Queensland schemes did. That is, the South Australian scheme does not expressly prohibit applications for part only of a holding.

Technically, part parcel adverse possession claims are countenanced by the South Australian statute but the practicalities arising from providing the registered proprietor with an absolute veto over the application means that a part parcel application could only rarely succeed or never. This is because the scheme is designed to allow successful applications only in the absence of an objection by the registered proprietor and this will only arise in those instances of abandoned land and disappeared proprietors. Where the application is for part of a neighbour's parcel and that neighbour remains in occupation of his parcel and has not abandoned his parcel or any part of it, an objection against the adverse occupier's application is most probable and upon objection, the application must then be refused by the registrar.

This procedure was the model upon which the later introductions of limited forms of adverse possession into Queensland and New Zealand were based. These limited forms were privative in that the operation of the limitations statute was expressly

disallowed and the law for acquiring title to registered land was to be found wholly within the registered land title statute.

The South Australian procedure was also the basis for a recommendation for reform of the English *Land Registration Act 1925* (Law Commission 1998) which became the *Land Registration Act 2002*. The Queensland scheme is described elsewhere while two comments need to be made with regard to the procedure introduced in New Zealand. First, the period of adverse occupation necessary to support an application for registration of the occupier is twenty years compared to twelve for unregistered land, and applications for other than whole parcels were not permitted. The 1963 amending Act to the New Zealand Torrens statute expressly disallows applications for part only of a parcel.

An important feature of this restricted form of adverse possession is that it is ineffective until registration is granted and as a consequence, the interests of the adverse occupier do not override those of the registered proprietor. That is, in addition to occupation adverse to the dispossessed registered proprietor, the occupier must “perfect” his title by applying for, and being granted, registration. Thus it may be concluded that the South Australian Torrens system be rated at “B(i)” for whole parcels and “A” for part parcels although the legislation would appear to permit part parcel applications to be rated similarly to the whole parcel applications.

It is of historical interest that the present Northern Territory statute (dating from 1886) is a legacy from that time when the Territory was part of South Australia and subject to its legislative jurisdiction.

Amendments to the South Australian legislation following the incorporation of the Northern Territory as a territory of the Commonwealth of Australia in 1902 did not alter this “legacy” legislation of the territory. Thus, the 1945 amendments to the 1886 South Australian statute permitting a limited form of adverse possession did not effect any change to the same statute remaining in force in the NT

#### 6.4.6 *Tasmania*

Tasmania introduced its registered title statute in 1862 based on the South Australian legislation of the previous year. In fact, upon being invited to do so by the Tasmanian parliament, Torrens himself drafted the 1862 legislation (Whalan 1982; Hogg 1905, 41).

In common with many of the early Australian Torrens statutes, the Tasmanian legislation also failed to deal with the issue of adverse possession of registered title land. Consequently the issue fell to be determined by the Supreme Court. In Tasmania the Supreme Court held that title registration merely added to the body of real property law and, absent an express abolition of that body of law, adverse possession remained applicable to all land including registered title land (*Featherstone v Hanlon* 1886; re *Bartlett* 1907; *Burke v Lock* 1910; re *Ford's Application* 1953).

The Supreme Court utilized similar reasoning to that of the later Privy Council decision in *Belize Estate* (1897) and held that in the absence of express provisions excluding the application of the limitations statute to registered title land, the presumption to be followed was that the parliament intended the least departure from the previous law. Consequently the Supreme Court concluded that the limitations statute applied and there could be adverse possession of registered title land. In other words, in the absence of express provisions repealing the principles of real property law, the presumption is that parliament did not intend to repeal such laws.

The Tasmanian Supreme Court also followed the lead of the Supreme Court of South Australia where that Court held that the “supremacy” of the register to be such that a transaction or dealing with the land by the registered proprietor “acts like a wet sponge, and wipes the slate clean” (*Hunter v Player* 1875 per Gwynne J at 102) such that there must be an adverse occupation for the required period so far as each successive registered proprietor is concerned. The date of the commencement of the period depends on the issue of the last certificate of title (Jackson, 1967, 272). The supremacy of the register is such that an entry in the register is unimpeachable and the date of the entry’s unimpeachability is the date at which the entry is made.

Consequently any period of adverse possession that has accrued prior to the making of an entry and issuing of the certificate is wholly ineffective. The making of an entry in the register stops time running in favour of an adverse occupier and forces the recommencement of any period of adverse occupation — it “wipes the slate clean”.

Criticism of the Tasmanian Supreme Court’s interpretation of that state’s Torrens statute is valid if confined to the statute which was silent with regard to the applicability of adverse possession to registered title land. Such criticism directed towards a statute which expressly provided for title based upon long-term adverse occupation is misdirected and would appear to be founded upon a failure to appreciate that the Tasmanian parliament legislated in 1933 to allow for title to be acquired by adverse possession. Thus, the criticism offered by Jackson (1967 at page 272) was misplaced.

Later, in 1933, the Tasmanian parliament legislated to enshrine the application of adverse possession to registered title land in the statute thus removing any doubt or the possibility that a later court would overturn the existing court precedents. In this instance the Tasmanian parliament adopted the same prudent approach as the Canadian province of Alberta. In that province, the same issue arose and the court interpreted the silent statute as allowing title based upon adverse possession. To preclude any change in attitude or interpretation, the parliament legislated to put the matter beyond doubt. Similarly that province also holds that registration acts as a sponge and wipes the slate clean because it is registration that gives or extinguishes title (*Lutz v Kawa* 1980, pp 24–26).

When the Tasmanian parliament legislated to enact the adverse possession provisions into Tasmania’s Torrens statute, the provision regarding “wiping the slate clean” was also given Parliamentary approval (Tasmanian *Real Property* Act 1932 adding sections 146–156 to the *Real Property* Act 1862). Complementary to the provisions expressly permitting adverse possession there was enacted a procedure for the adverse occupier to apply to the Registrar to be entered into the register as the registered proprietor. Until the applicant adverse occupier was entered in the register

as the registered proprietor the displaced registered proprietor's title was paramount. It could be said that to perfect a title based upon adverse possession it was necessary to obtain registration after complying with and satisfying the limitations statute. At any time prior to the adverse occupier applying to the Registrar to be entered into the register as the registered proprietor there remained the possibility that any transaction necessitating an entry in the register would "wipe the slate clean" and totally destroy any rights based upon the accrued period of adverse occupation by the occupier.

Thus until 1980, Tasmania's registered title statute permitted adverse possession of registered title land with the safeguard that any dealings entered in the register set accrued periods of adverse occupation at naught. These provisions applied equally to part as well as whole parcels of land. Thus on the proposed scale, Tasmania could be rated at "C(ii)" for both part parcel and whole parcel adverse possession of registered title land. These provisions dealing with the question of adverse possession of registered title land prompted one commentator to opine that Tasmania had found the sanest solution to a difficult problem (Ruoff 1957, 23).

These provisions were retained in Tasmania until, for reasons that are not clear, the 1980 *Land Titles* Act removed the provisions providing for "wiping the slate clean" and requiring the adverse occupier to apply for registration to perfect his title. Instead the new scheme retained adverse possession but made the requirements more favourable to the adverse occupier (and conversely prejudicial to the interests of the displaced registered proprietor). In place of the previous provisions the Tasmanian parliament borrowed from the English registered title statute of 1925. The result was that upon the passage of the required limitation period the registered proprietor then held the land on trust for the adverse occupier. While it may have been prudent for the adverse occupier to apply to have the acquired title registered it was not necessary. As a consequence the provisions wherein a fresh transaction entered in the register would wipe the slate clean were no longer part of the registered title statute in Tasmania.

Thus the statute would be rated at “D(ii)” for both part and whole parcel adverse possession. This is a rating shared with Victoria, Western Australia, and, until 2002, England. With regard to the overriding nature of adverse possession it could now be said that the unregistered interests of the adverse occupier overrode those of the registered interests of the registered owner. Indeed, section 40(3)(h) of the 1980 statute expressly provided that the “rights acquired, or in the course of being acquired, under a statute of limitations” were an exception to the indefeasible interests of the registered proprietor.

The expressed purpose of introducing the new Act in 1980 was to encourage the voluntary conversion of “general law” (or unregistered) land into registered title land. After more than a century of the Torrens system, there still remained a high ratio of unregistered to registered land in Tasmania (Mulcahy 1980). The purpose behind the statute was to further encourage the conversion where voluntary conversion had failed (*ibid*). Otherwise, the purpose in introducing wholly new and vastly different adverse possession provisions is not clear and the parliamentary debates do not provide a rationale. This is surprising given the recommendation of the Tasmanian Law Reform Commissioner in his 1994 Report wherein the desirability of a provision similar to that contained in section 45D(4) of the NSW *Real Property Act* is commented upon favourably. Section 45D(4) is a provision for “wiping the slate clean” in limited circumstances. In recommending the adoption of such a provision the Law Reform Commissioner neglected to observe that Tasmania had previously had such a provision when it was disposed of in the 1980 statute for unknown reasons. As a consequence the 1980 statute removed the applicability of the dictum that the Torrens registration scheme was a system of title by registration and not a system of registration of title.

Thus, it could be argued that the system in place after 1980 was no longer one of title registration but a hybrid of title registration and overriding interests wherein the unregistered interest founded upon adverse possession overrides the registered interest of the registered proprietor. The overriding nature of the unregistered interest founded upon adverse possession extended to inchoate (or not yet matured) interests founded upon adverse possession.

With regard to the changes effected by the wholly new 1980 *Land Titles* Act, the Law Reform Commissioner referred to the Parliamentary Debates contemporaneous with the passage of the Act and concluded that the 1980 Act consolidated and modernised a number of old statutes (LRCT, 1995). The Law Reform Commissioner further stated that the adverse possession provisions of the 1980 Act substantially re-enacted the prior adverse possession provisions but with certain changes which were intended to clarify uncertainties. The Commissioner based this further note upon the Clause Notes on the *Land Titles* Bill 1980 which had been prepared by the then Acting Registrar-General of Tasmania for the assistance of the legislators.

Given the foregoing it is surprising that the Tasmanian parliament, by enacting the 1980 statute, effected major changes to the adverse possession provisions applying to registered title land in Tasmania. The prior provisions were *median* between the two extremes of, on one hand, the supremacy of indefeasible registered title (prohibition favouring the registered proprietor) and, on the other hand, the overriding character of rights based upon adverse occupation (permissive favouring the trespasser). The new provisions adopted the overriding or permissive scheme as was in force in England.

The borrowing whole from the English *Land Registration Act* of 1925 extended to including a provision wherein the registered proprietor's title is not extinguished by the squatter's completion of the necessary period of occupation, but rather the proprietor holds the land on trust for the squatter as a beneficiary. The 1980 Act was a major change from the median approach to a permissive regime favouring the squatter. That is, the Tasmanian parliament effected dramatic changes to the law of adverse possession in 1980 while expressing itself as not substantially altering the law.

Further, the Tasmanian parliament adopted an approach that had been discredited in its home habitat (Megarry and Wade 1975, 1056–7; Law Commission 1998, 24; Sara 1991, 64 and 76). With particular regard to the provision that the dispossessed registered proprietor retained the title to his land which was held on trust for the

benefit of the squatter, the report of the Law Commission and Her Majesty's Land Registry commented unfavourably upon this artifice. The report also questioned the utility and effectiveness of the approach (Law Commission 1998, ¶¶ 2.43 and 10.28). Consequently the 1980 statute introduced a *quasi*-registered title system into Tasmania at the expense of functioning system that had earned praise from a disinterested observer. It is also apparent that the Tasmanian parliament was unaware of the radical nature of the changes it was introducing into the registered title system in that state.

Following upon a 1994 lawsuit that gained much notoriety throughout Australia (*Woodward v Wesley Hazell* 1994), the Tasmanian Attorney General referred the question of adverse possession to the Law Reform Commissioner who reported with recommendations in 1995 (LRCT 1995). The *Woodward* case had caused much dismay in Tasmania when it became appreciated that a registered proprietor could be deprived of his registered title land after twelve years adverse occupation by a neighbouring landowner who was unknowingly occupying and using the land.

Subsequent to the 1995 report and recommendations the Tasmanian parliament legislated in 2001 to amend the 1980 *Land Titles Act*. The notoriety of the *Woodward* case had exerted sufficient pressure upon the Tasmanian legislators that the 2001 Act passed by the parliament went beyond the Commissioner's 1995 recommendations and introduced provisions wherein an adverse occupier can acquire title to registered title land only in very limited circumstances. Except in the case of land abandoned by a disappeared proprietor, the current 2001 provisions favour the paramountcy of the registered proprietor's title in all cases.

Additionally the parliament legislated to prohibit the adverse possession of part parcels ("sub-minimum lots") associated with the adjustment and rectification of boundary discrepancies. Thus the Torrens legislation for the Tasmanian jurisdiction may now be rated at "B(ii)" for whole parcel adverse possession and "A" for part parcel adverse possession. The changes effected include an unbundling of part and whole parcel adverse possession whereas previously there was no distinction drawn



between whole and part of land parcels. This is a major change introduced in 2001 and was not included within the Commissioner's 1995 recommendations.

Also, acquisition of title now requires an application to the Recorder to alter the register and the requirements necessary to acquire title now prohibit the acquisition of title based upon long continued adverse occupation in all but those instances involving abandoned land. For the first time the Tasmanian statute distinguishes between part and whole parcel adverse possession and titles based upon adverse possession can only succeed in the absence of objection by the dispossessed proprietor. Another major change effected by the 2001 amendments is a return to the pre-1980 requirement of perfecting the title based upon adverse possession by applying to be entered in the register. The Law Reform Commissioner's recommendations recognised the role played by adverse possession with regard to occupational boundaries differing from the legal boundaries and recommended against change. The changes wrought by the 2001 statute eliminate this role. The parliamentary debates show the legislators were aware of the benefits provided by part parcel adverse possession and the necessity for some means of resolving boundary problems. The legislators have not indicated how this is to be achieved. Because applications for "sub-minimum" lots are prohibited, it may be that Tasmania will introduce some form of encroachment legislation.

With regard to the 2001 amendments, the legislators have created difficulties in their efforts to improve the registered title or Torrens legislation for their state. That the legislators did not follow the recommendations of the Law Reform Commissioner is not of itself a concern. It would appear that the legislators were attuned to the concerns of their constituents with regard to the practice and principles of adverse possession, particularly with regard to registered title land. The evidence taken by the Commissioner and his consequent recommendations were related to experienced practitioners in the fields of law, conveyancing and surveying. In the main, the Commissioner accepted that the system, as it was in 1994–95, was in little need of alteration and the adverse possession provisions of the scheme ought to be more widely publicised to ensure wider understanding and knowledge of the practice. In contrast, the general public expressed disquiet that an owner could lose title through

no fault except that of passive lack of action. In particular, that an owner continuing to pay government rates and taxes associated with his land holding could lose ownership over that land holding. Consequently, the legislature acted beyond the recommendations of the Commissioner and in keeping with the concerns of the citizenry expressed individually to the elected legislators and collectively in the form of petitioning Parliament.

The result was a major revision of the law only some twenty-one years after the last major revision. Further, although the Commissioner recommended the retention of adverse possession with regard to the repair of boundary discrepancies, the legislature elected to effectively refuse to pass legislation pursuant to encroachment. The result is that in the interim, part parcel adverse possession or encroachment is effectively prohibited without any certain time schedule for the passage of replacement legislation, that is, the previous provisions permitting adverse possession of part parcels has been repealed in possible anticipation of future legislation that will permit applications with respect to boundary encroachments.

Further, the replacement legislation has introduced a number of inconsistencies and contradictions into the registered title statute. This is most unfortunate as, at best, confusion is created and, at worst, neither the citizens nor the courts nor the Recorder is provided with a coherent scheme capable of administration.

These inconsistencies are –

- (i) For the first time a privative clause has been introduced into the registered title statute which displaces the operation of other laws and statutes (except for *the Land Titles Act 1980-2001*) with regard to adverse possession of land. Another provision extends the operation of the adverse possession provisions of the *Land Titles Act* to all land – both registered and unregistered. This has been done without the repeal of those parts of the *Limitation Act 1974* dealing with land. Thus, the end result is that the *Limitation Act* purports to deal with adverse possession of all land and at the same instant the *Land Titles Act* purports to do the same while providing that

all other laws (of which the *Limitation Act* is one) do not have any role to play in regard to adverse possession.

(ii) The 2001 amendments to the *Land Titles Act* purport to require the applicant occupier to apply for and gain registration to “perfect” his title based on long-term possession. The 2001 amendments did not repeal that provision introduced in 1980 wherein the adverse occupier acquired beneficial ownership while the dispossessed registered proprietor retained the legal title and held the land on trust for the adverse occupier. This is a remnant of the provisions that allowed title to pass upon the passage of the required limitation period without further acts on the part of the occupier. Thus the retained 1980 trust provision permits the adverse occupier to acquire the beneficial title to the occupied land without further act on his part while the new 2001 provisions require the adverse occupier to apply to the Registrar of Titles and only where the Registrar is satisfied that the land has been abandoned can the occupier gain registration of the land. This particular inconsistency is an absurdity.

(iii) Sections 138H and 138W are contradictory. The first removes any distinction between registered and unregistered land. The second requires that adverse occupation does not extinguish the title of the dispossessed registered proprietor, but instead vests the beneficial ownership of the land in the adverse occupier who would have extinguished the title of the true owner if the land had not been registered title land. This contradiction is another absurdity hidden within its circularity.

(iv) Section 138W(1) states that the *Limitations Act* 1974 applies to registered title land to the same extent that it applies to unregistered land. However, section 138T is a privative provision excluding the operation of all but the *Land Titles Act* 1980-2001 regarding the acquisition of title to registered title land.

In regard to the retention of the contradictory trust provision in the 2001 scheme it is noteworthy that two English commentators have doubted the efficacy and value of the provision in its original English jurisdiction (Law Commission 1998, 24; Sara 1991, 64 and 76). These comments, together with the examples of Victoria and Western Australia, cast doubt on the necessity for including the provision in the 1980 *Land Titles Act*. With the 2001 scheme eliminating the previous title without registration it is difficult to appreciate why the trust provision was retained.

It is concluded that the Tasmanian parliament has ill-advisedly legislated to reform the law of adverse possession in that state in the last two decades. In 1980 that State adopted an overriding scheme wherein the adverse occupier was not required to perfect his title by seeking registration. In doing so the State repealed a scheme described favourably by an English commentator in his comparative analysis of the systems then operating in Australia and New Zealand. This major regressive step was accomplished under the guise of merely consolidating and modernizing the law without effecting substantive change to that law. Later, in seeking to correct the perceived wrongs of the 1980 scheme, the parliament has introduced a contradictory scheme that does not permit boundary adjustments although the legislators expressed themselves to be fully aware of the beneficial and curative effects of part parcel adverse possession. The shortcomings of the 2001 corrections to the 1980 scheme cannot be attributed to haste as a long period has passed since the 1995 recommendations of the Law Reform Commissioner.

#### *6.4.7 The Federal territories – the Australian Capital Territory and the Northern Territory*

These are the only remaining jurisdictions in Australia that do not permit the acquisition of title to registered title land by long-term possession adverse to the registered proprietor (or true or documentary owner). Their legislative history is that these two territories were carved out of two of the Australian colonies that agreed to participate in a federal system involving all of the Australian colonies which were designated as states within the newly formed federation. The Australian Capital Territory was taken out of the state of New South Wales and retained that state's laws in the interim pending the passage of superseding laws by the federal parliament or (later) the territory's own legislature. Thus the consequence of the

federal takeover was that the registered title statute governing the territory after its absorption into the federal system remained that of its parent state: the NSW *Real Property Act 1900*.

That Act prohibited adverse possession pursuant to section 45 and after 1911 when the territory was removed from NSW, the territory retained the 1900 NSW Torrens statute including the prohibition against adverse possession until its own Torrens statute was enacted. This was in 1925 with the passage of the *Real Property Ordinance* (later renamed as the *Land Titles Act 1925*). That Act contained a prohibition against adverse possession (section 69) with the identical wording to that of section 45 of the NSW statute which had prohibited adverse possession in the ACT prior to 1925 and the passing of the Ordinance. Thus it was that when the NSW parliament introduced a limited form of adverse possession into its Torrens statute in 1979, that parliament no longer exercised legislative power over the territory and thus the repeal of section 45 from the NSW statute had no effect upon the ACT statute and its section 69 which had been wholly adopted from the NSW statute. Thus the ACT approach to adverse possession today is that of NSW prior to 1979 and consequently is ranked at “A” for both whole and part parcel adverse possession. Thus while it remains possible to occupy adversely to the interests of the registered proprietor, such adverse occupation cannot found a claim to title of registered title land in the ACT.

The history of the Northern Territory is similar to that of the ACT. Prior to the federal government assuming jurisdiction over the Northern Territory in 1911, the territory had been part of South Australia. Consequently the Torrens statute governing what was to become the Northern Territory was the 1886 *Real Property Act* including its section 251 prohibition against adverse possession. As with the ACT, upon its change of status to a federal territory in 1911, the new territory retained South Australian law pending the passing of its own laws. Consequently the NT retained the 1886 *Real Property Act* including section 251 after it ceased to be subject to SA legislative power. It still retains the 1886 *Real Property Act* – note XX to the current NT *Real Property Act* recites that that Act is the 1886 SA *Real Property Act* as amended by other SA Acts and as further amended by the

Ordinances of the NT. Consequently the current NT *Real Property Act* retains the original section 251 providing that “[n]o person shall acquire any right or title ...”.

Similarly to the ACT, when in 1945 the erstwhile parent of the NT introduced a limited form of adverse possession into the SA Torrens statute, that parent state no longer exercised legislative jurisdiction over the NT. Thus the introduction of Part 7A into the SA Torrens statute and the alteration of its section 251 to now read “Except as provided in Part 7A of this Act no person shall acquire any right or title ...” effected no change in the law of the NT. Thus the NT approach to adverse possession today is that of SA prior to 1945 and consequently is ranked at “A” for both whole and part parcel adverse possession. Thus while it remains possible to occupy adversely to the interests of the registered proprietor, such adverse occupation cannot found a claim to title of registered title land in the NT.

The Northern Territory legislature has enacted the *Encroachment of Buildings Act* 1982. Thus there exists provisions for dealing with boundary location discrepancies in that territory. The Australian Capital Territory has no similar legislation and has no means of dealing with these associated problems should they arise.

## **6.5 The conflict between adverse possession and registered title land**

There exists a general recognition that the principles pertaining to adverse possession cannot be incorporated within a registered title system without abandoning logic. As a consequence there are a large number of jurisdictions that do not permit adverse possession to operate within their registered title systems. For example, with the exception of Alberta, all the Canadian registered land title provinces do not allow adverse possession. The United States jurisdictions which have adopted registered title also do not permit adverse possession of registered title land and in the last decade Singapore and Malaysia have abolished adverse possession from their registered land title systems. The Australian experience, with the exception of Victoria, Western Australia, and Tasmania, has been the prohibition of adverse possession with its recent acceptance in a restricted form to provide security of tenure in instances of abandoned land and disappeared registered proprietors.

Adverse possession involves the recognition of undocumented property rights founded upon long-term occupation or possession. Opposed to this is the underlying principle of title registration wherein *all* property rights are recorded (or documented) in the register. Another way of describing the conflict is that possession is strong evidence which supports an inference of ownership while registration is considered to be the ultimate evidence of ownership. This conflict arises because there are two principles of real property law that are seemingly in opposition. These are, that the title holder is deemed to be in possession of the property in the absence of any evidence to the contrary (*Powell v McFarlane* 1977, 470 *per* Slade J; *Murnane v Findlay* 1926, 86 *per* Cussen J; *Riley v Pentilla* 1974, 561 *per* Gillard J), and possession is good evidence of title in the absence of evidence to the contrary (Jackson 1967, 11 *ff*; Megarry and Wade 1975, 1004 *ff*; Sackville and Neave 1975, 84 *ff*). The conflict arises when the title holder and the possessor are not the same person. However, the resolution is not difficult; it only being necessary to determine which of the two principles should prevail. Where there is a limitation period, the titleholder prevails over the possessor where that period has not passed and, when it has passed, the position is reversed such that the possessor prevails over the titleholder.

The conflict may be further exacerbated in the case of registered title land where the public register is the central depository of title information. That the central register comprehensively and correctly reflects the current status of the title and that a trespasser can acquire title through long continued adverse occupation are in opposition when the acquired title based upon possession is an overriding interest which binds the proprietor without being entered on the register (Megarry and Wade 1975, *Glossary* page cxv).

The mode of incorporating the law of adverse possession within a registered land title statute then takes on added significance. Thus, there are those jurisdictions that do not permit the acquisition of title based upon long adverse possession such as the two Australian territories, those of the American states that have adopted registration of land title and the majority of the Canadian provinces that have also adopted land

title registration. There is no conflict in these jurisdictions because of a refusal to recognise one of the two principles which give rise to the conflict. The basis of the prohibition against adverse possession in these jurisdictions was the conflict with the principles of registration of land title, that is that title based upon adverse occupation is inconsistent with a system of title registration.

Where title acquisition founded upon adverse possession is permitted within a land title registration system, some jurisdictions recognise the overriding nature of the interest (although not recorded in the register) and there are others that only accord recognition of the title acquired by adverse possession after the title has been entered into the register. Victoria and Western Australia are jurisdictions which permit the unrecorded title based upon adverse possession to override the title of the registered proprietor while New South Wales, South Australia, and Alberta (among others) are jurisdictions that require title based upon adverse possession to be entered into the register before such title is recognised.

The previous analyses of the conflict involved with adverse possession in a registered title system have been based upon the existence of only two types of registered title systems: one that prohibits adverse possession and the other that permits it. In the first type there is no conflict while the second admits a conflict arising from the contradictory nature of the two concepts. However, a preferable analysis should recognise that between these two types, there exists a third which recognises title based upon adverse possession *only* after such title has been registered by entering the adverse occupier into the register as the registered proprietor. Thus of the three types of registered title system, only one is in conflict when adverse possession is included and it is concluded that this type should be nominated as a *quasi*-registered title land system because registration is not an essential requirement.

A clear example of the conflict resulting from the recognition of title based upon adverse possession in a registered title system is that contained within the recommendations of the Victorian Royal Commission on Land Titles and Surveys in 1885. In their report, the Commissioners made recommendations with regard to



amending the registered title statute in force in Victoria. Recommendation #14 on page iv was for title certificates “to show *all* encumbrances *excepting* adverse possession, ... [four further excepted encumbrances were also here listed]” (emphasis added). On the next page, the Commissioners made their thirtieth recommendation. This recommendation provided for the issuing to members of the public, upon request and payment of a fee, “[s]earch certificates showing that a registered property is clear of *all* encumbrances, or showing the encumbrances, ... “ (emphasis added). Although the Commissioners did not canvas the issue, it is clear that a search certificate would not show the registered property to be clear of those encumbrances excepted by recommendation #14; or, where the property was not clear of those excepted encumbrances, neither would the search certificate show those encumbrances (Royal Commission on Land Titles and Surveys 1885).

There is no conflict between the two principles in those registered land title systems which recognise adverse possession but only after the interest based upon adverse possession has been registered. There is no conflict between the entry in the register and the occupier of the holding even if that occupation was initially adverse to the interests of a past registered proprietor. It is only where adverse possession is recognised without the requirement that it be registered that there exists a conflict. The conflict is that of recognising an unregistered title in a registered title system. A corollary of the conflict is the retention in the register of the extinguished title of the dispossessed registered proprietor. The recognition of title based upon adverse possession without the necessity for registering that title is not consistent with a registered land title system while the recognition of title based upon adverse possession with that title necessarily being registered is within such a system and consistent with it. Where such title must be registered before it is accorded legal recognition the conflict is more apparent than real.

That the register is paramount is “one of the fundamental principles of Torrens’ system” which would necessarily be violated by permitting off-register overriding proprietary interests to be upheld (Dowson and Sheppard 1956, 131; Davis 1971, 44). A similar conclusion is implicit in the discussion by Kerr (1927, 9 and 252). There is an inherent conflict between a title registration scheme that purports to

disclose *all* property interests in the register and the recognition of undisclosed off-register overriding interests that prevail over the interests of the registered proprietor notwithstanding the indefeasibility provisions of the registered title systems. However, this is not the case in those jurisdictions that accord recognition of title based upon adverse possession only if such title is registered. Such a title is not an undisclosed off-register title. Such a title is disclosed upon inspection of the register.

The conflict is exacerbated in a registered land title system wherein the whole purpose of registration is to provide a curtain beyond which title investigation is not desirable, is unnecessary, and in most cases will not be possible (Ruoff 1957, 11). The curtain principle providing that the register is the sole source of information for proposing purchasers who need not and, indeed, must not concern themselves with trusts and equities which lie behind the curtain and are not disclosed by the register (*Gibbs v Messer* 1891, 254; *Wolfson v Registrar-General* 1934, 308). The importance of the curtain principle is that it is the act of registration that confers title. Thus the title registration systems are title by registration rather than registration of title (*Breskvar v Wall* 1971, p 385 *per* Barwick CJ; *Lutz v Kawa*, pp 24–6 *per* Laycraft JA).

The requirement that the register is paramount, Ruoff's curtain principle, and that the system of registration by title rather than registration of title are only alternative expressions to that of Palmer's fourth criteria (1996) cited by Dale and McLaughlin (1999, at 42); that because the statute guarantees that the title is not affected by anything not shown on the register, it is not only unnecessary but also impossible to establish a right in the land by any other means (*ibid* citing Simpson 1976).

An important feature of title by registration is the reversal of a fundamental principle of property law, that of "*nemo dat* ..." discussed above under "Characteristics of registered title land" in the previous chapter. To permit the superiority of an unregistered off-register overriding title of the adverse possessor to defeat the registered title of a transferee from the dispossessed registered proprietor whose title has been extinguished is to restore the "*nemo dat*" principle to registered title land

law. In other words; if registered title effects a reversal of the general “*nemo dat*” principle, then overriding adverse possession title is a further reversal of the reversal.

The existence of the conflict can be directly attributed to the creation of the system of registration. It is here asserted that the creation of public registers are of two types. The first is where registration is compelled by law with examples being, among others, the Register of Births, Deaths and Marriages; a Motor Vehicle Registry (which includes the issuing of a unique identifying number for each vehicle registered to be attached as a plate to the vehicle); professional vocation registers such as medical practitioners, nurses, surveyors, financial advisers and brokers, and others; corporate registers including those for business names and companies. The compulsion of law is such that failure to register is a criminal offence and there may be further civil penalties imposed, for example, an unregistered practitioner may be precluded from suing for fees owing. Generally, it may be concluded that these registries have been created for the protection of the public who may have dealings with the objects of the registry.

The second kind of register is purely voluntary. Whereas it is not necessary to register, there are incentives by which registration is fostered. Examples of such a registry are the Vehicles Security Register and the deeds registry administered by the Registrar-General in relation to unregistered (“general law” or “old law”) land. Although registration is not compulsory, with the consequence that failure to register is not a criminal offence, failure to register an interest can result in the holder of that interest losing priority. Thus a finance company facilitating the “hire purchase” of a motor vehicle is well advised to ensure that its interest in the vehicle is entered in the appropriate register as should a lending institution financing the purchase of land by way of a general law mortgage (over unregistered land) or a registered mortgage (over registered title land). In the event that an earlier financial interest is not entered in the register, the holder of that earlier interest may lose priority to the holder of a more recent interest who has acquired that interest without notice of the earlier interest. The purpose of such registers are to provide public notice of claimed financial interests and are created for the protection of interest holders who may enter into dealings in reliance upon and on the strength of the register. Thus where

there is provision to register an interest and the opportunity to do so is not taken, the holder of the earlier interest cannot be heard to complain that a later transaction or dealing took place in disregard of the earlier interest.

It is here asserted that some jurisdictions (including Victoria and Western Australia) have incorporated a *hybrid* land title registry — one where registration is not compulsory but failure to register does not result in a loss or diminution of the interest. This has the consequence that there is no incentive to register and no fostering of registration where it is not compulsory. Thus it is that the matured but unregistered title founded upon adverse occupation is recognised and overrides the documentary registered title of the person shown in the register as the registered proprietor although that person may have long been dispossessed by the squatter.

It is no more than speculation but it is here conjectured that the existence of this hybrid registry (where registration is not compulsory and failure to register is not penalised in any form) is founded upon the perceived benefits of a registration system.

Thus, it was thought inconceivable that interest holders would fail to avail themselves of the benefit flowing from a registration system. Thus, the administrators of such schemes will provide procedures whereby a person to be divested of an interest can be forced against their will to participate in the necessary procedure but it was not considered that a person benefiting from the system should require compulsion to participate. Coupled with the belief in the benefits of the registration system is the reliance upon voluntary (as opposed to compulsory) participation in the system. The undisputed fact is that after nearly one hundred and fifty years of title registration in Australia, not all landholders have been able to appreciate the benefits flowing from participating in the system. This has the consequence that there exist two different systems with the possibility of added expense in the maintenance of the second system. The time for waiting for voluntary conversion has now passed and those remaining non-participants must be compelled to join the rest of the community. Additional speculation supports the conclusion that these hybrid registries owe their existence to the requirement mistakenly

imposed upon the registered land system that the law applying to the system should apply equally to unregistered land. This was certainly the case with regard to the English registered land system with only the recent recognition that the systems are different and do not require equality of treatment.

In summary, it is concluded that it is necessary to require registration of title irrespective of the manner of acquisition of title, and, where title is accorded recognition without registration, that is the possessory title overrides the registered title, such a system can only be described as a *quasi*-title registration system. The system currently in force in Victoria and Western Australia are thus *quasi*-title registration systems. Thus it follows that the conflict between adverse possession and registered title is apparent only and consequently is merely a paradox. There is no conflict between the two where the title founded upon adverse possession is required to be registered before it is accorded legal recognition. There does exist a conflict between title and adverse possession in a *quasi*-registered title system that provides legal recognition to unregistered titles which are not required to be registered.

## **6.6 Summary**

This chapter merges the concept of adverse possession (from Chapter 4) with that of land title registration (Chapter 5). Although this chapter follows chronologically after the preceding chapters there is no necessity for so doing because the respective concepts in both chapters are independent. The two concepts existed in parallel until they merged after the introduction of registered title in the middle nineteenth century. To properly consider the merging of the two it was necessary beforehand to consider each independently. The order of consideration is not important because of their independence of each other and the chronological order was as simple an approach as any others available.

Having established land title registration in the previous chapter 5 it then follows that the thread of this chapter can be merged with that of the prior chapter 4 to consider adverse possession within registered land title systems.

This chapter has provided the theoretical background to the operation of land title registration and part parcel adverse possession of such registered land. The theoretical background will provide the theory behind the analysis of three recent lawsuits to be considered in the next chapter. This does not mean that the progress is all from this chapter to the next. While it is important to have access to the theoretical background when considering these law cases, the cases in the following chapter will in turn illustrate and illuminate the theoretical background of this chapter.

In considering the combined effect of adverse possession within the title registration system the conflict between the two was considered with the conclusion advanced that it is more apparent than real with the conclusion offered that the retention of the fundamental principle of a complete and comprehensive register removes any conflict. The various methods by which ownership and boundary location problems are resolved by adverse possession within a registered title system are considered and subjected to analysis. The analysis in turn permits a classification and ranking scheme which provides a form of assessing the qualities of any system and enables comparisons to be made. This chapter thus provides the theoretical background necessary to apply the available systems to several factual scenarios taken from some recent lawsuits involving adverse possession of registered title land. These case studies in the next chapter will demonstrate the practical application of those systems currently in use. Together, the two chapters should enable the strengths and weaknesses of any system to be assessed and illustrate the working of and the consequences of using that particular system. These two chapters will provide the necessary background to assess and evaluate any proposals for improving the current systems.

The conclusions able to be formulated at the close of this chapter point towards the strict requirement that title must be registered — that is, entered into the register. There cannot be any legal recognition of “off-register” or “overriding” titles. The concept of unregistered title in a registered title system is an oxymoron.

Further, the two tenure systems do not require similarity in or equality of treatment. In fact, the registered title system necessarily cannot share some of its attributes relating to the register with an unregistered title system. It is observed that the development and operation of the English title registration system has been hindered by the mistaken perceived need of treating unregistered and registered land alike. It is only in the very recent past that there has been recognition of the fact that the two systems are fundamentally different and need not be treated in a similar fashion. Indeed, the two systems *cannot* be treated alike if the benefits of title registration are to be enjoyed.

This chapter has clearly demonstrated the wide range of different systems of land title registration in Australia all of which have been accepted as “Torrens” systems without question. It is not necessary that only one system can be designated as “Torrens”, but it would seem clear that those systems that permit the recognition of title without the necessity of registration should not be permitted to be portrayed as either Torrens or registered title systems. This in turn supports the earlier conclusion that there are no real distinctions between the Torrens and non-Torrens systems of registered land title. The existence of the differing Australian systems permits the ironic observation that Victoria and New South Wales abandoned their proposed title registration schemes in the early 1860s in favour of the South Australian scheme with a view to uniformity among the colonies. That uniformity, if it ever existed, was short-lived.

The remaining conclusion is that the solutions to two distinct problems need not be bundled together. These problems relate to the ownership of land parcels and the location of the common boundary separating two adjoining parcels. While it is true that the two problems may share the similar solution of adverse possession, it is not necessary that they must. Consequently a solution to boundary location discrepancy problem need not be reliant upon adverse possession of part only of a land parcel.

Perhaps the strongest conclusion draw by this chapter is that the permissive retention of an outdated private conveyancing system alongside the registered title system has now passed its usefulness. Not only has it passed its usefulness, it has positively

hindered the administration and operation of the newer registered land title system and prevented its benefits from being fully enjoyed by the community. The full range of the advantages provided by title registration may possibly never be realised while the community persists in catering to the whims of those members who will not voluntarily suffer their unregistered land to be converted to the simpler registered title land. Further, the costs of maintaining two systems cannot be justified after 150 years of retention in order to refrain from forcing compulsory conversion.



# Chapter 7

## Some case studies: a comparison of approaches

### 7.1 Introduction

The differing approaches to boundary variation or adjustments or both are best demonstrated by a comparison between the varying modes permitted within the Australian jurisdictions (and particularly the states of New South Wales and Victoria). This chapter, in dealing with some recent court cases should aid in the understanding of the working of the different features associated with different schemes involving the part parcel adverse possession of registered title land. The purpose of the two chapters (six and seven) is to provide a thorough grounding in the problem and some different approaches to the solution. With this grounding it is expected that a number of characteristics (both desirable and undesirable) will emerge so that in formulating a proposed model the aim will be to retain the desirable characteristics while discarding (or at least minimising the effect of) the undesirable characteristics.

For many years until quite recently NSW did not allow for the acquisition of title to registered title land by adverse possession. In order to rectify the register to allow for the registration (as owners) of those in possession of land pursuant to informal conveyances or abandoned land, the NSW Parliament legislated in 1979 to permit the registration of titles based upon long-term occupation in limited circumstances.

Conversely, Victoria has permitted adverse possession of registered title land to be a part of its registered land system for all but the first four years since it was first introduced in 1862. Further, there is no limitation or restrictions upon the Victorian system such that adverse possession of registered land is akin to adverse possession of land that is not within the registered land system (that is, “general law” land or unregistered land referred to as “old law” land in NSW).

The limited form of adverse possession in NSW restricts the right to apply for registration based upon long-term occupation and possession to whole parcels only with the consequence that the boundary dividing (or separating) adjoining parcels

cannot be varied or relocated through adverse possession. The whole purpose of the 1979 legislation was to confer the benefits of land registration upon long-term occupiers without disrupting in any way the rights long enjoyed by registered proprietors of land. To permit part parcel adverse possession applications would have infringed upon those rights long enjoyed wherein the registered proprietor could not be displaced as the owner.

On the other hand, Victoria permits unrestricted acquisition of registered title land by way of adverse possession. In general, the different approaches taken by these states can be succinctly summarised by the two statements that in Victoria, what you see is what you get (WYSIWYG) and; also, that there is more employment opportunity for title surveyors in NSW because of the necessity for the prudent purchaser to verify that the transaction actually does convey the property inspected and believed by the purchaser to be the subject property. Toms and Lewis (1974, 262) wrote that the law favours the proposition that purchasers buy what they see and this proposition is in accord with the purchasers' expectations.

There are however further variants of schemes permitted by statute that allow for boundary variation in NSW without recourse to adverse possession. With regard to those jurisdictions which permit part parcel adverse possession, adverse possession of less than a whole land parcel can create an effective "new" 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 acquiring title over slivers of land representing that land lying between the "true" legal boundary and the occupational boundary.

It is proposed to illustrate these varying modes by the analysis of a number of recent lawsuits wherein the location of a parcel boundary was in dispute. The lawsuit will be described with reference to the jurisdiction within which it arose and, for purposes of comparison, an analysis of the probable outcome of the lawsuit were it to have been litigated in the other jurisdictions. It is believed that this approach will permit a ready analysis and comparative description of the modes permitted within the different jurisdictions and will provide a yardstick with which to "measure" the

comparative benefits arising from any model proposed to be an improvement suitable for adoption within any registered land title scheme.

## **7.2 Some recent lawsuits involving boundary location of registered title land parcels**

With a view to illustrating the schemes permitted in the various jurisdictions some recent representative cases involving divergence of the occupational boundary from the theoretical legal boundary have been selected. These cases will provide an illustrative view of the scheme permitted in the jurisdiction where the case arose and will permit a comparative analysis of the other jurisdictions. The cases selected involve parcels of land less than the whole landholding. In the selected Tasmanian case it cannot be argued that the boundary location was altered as a consequence of adverse possession because the whole land holding was comprised of two distinct parcels separated from each other by a creek and another intervening land holding. One of the selected cases is from New Zealand where the applicant, unable to rely on part parcel adverse possession of registered title land, sought to demonstrate matured adverse occupation of the part parcel prior to the unregistered land being brought within the registered land title system.

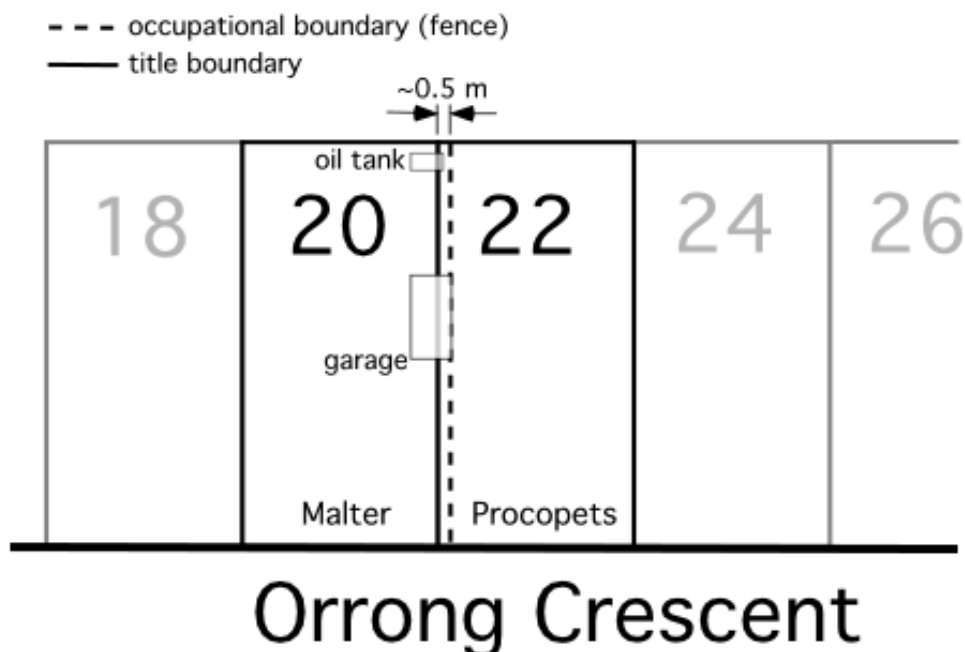
### *7.2.1 Malter v Procopets (Victoria)*

This case describes a dispute that arose between two adjoining land owners, Malter and Procopets, who were the respective registered proprietors of the land holdings known as 20 and 22 Orrong Crescent in Caulfield North, a suburb in metropolitan Melbourne in the State of Victoria. Malter had purchased number 20 in 1960 and had been in occupation as the registered proprietor since that date. The dividing fence separating (and delimiting the common boundary between) the two properties was in existence at the time Malter entered into occupation until its demolition some thirty-five years later in March, 1995.

It would appear that in mid-1994 the defendant proprietor Procopets became aware that the dividing fence was erected in an incorrect position wherein Malter enjoyed the occupation of a strip of land of approximate width of one-half metre that had originally been part of the registered title land parcel known as number 22. The

dispute between the parties came to a head upon the demolition of the dividing fence in 1995 when it became apparent that Procopets was intending to erect a new dividing fence upon the correct position which would have had the effect of Procopets regaining the occupation of the half metre strip and the cessation of Malter's enjoying the occupation of the strip as part of his holding of number 20 (see Diagram 7.1 below).

The issue between the parties was whether the occupation of the strip by Malter prior to 1994–5 was of sufficient duration to extinguish the title to the strip, where the title was held by the registered proprietor of number 22. Although Malter's predecessor as the registered proprietor of number 20 was in occupation of the strip prior to Malter's purchase of number 20, Malter was unable or elected not to adduce evidence of the occupation by his predecessor. As has been described, the legal issue would appear to be trivial with Malter's occupation of the strip from 1960 to 1994–5 being of sufficient duration to extinguish the title (to the strip) of the registered proprietor of number 22. There are however, some additional features that make this lawsuit a valuable illustrative example.



**Diagram 7.1: Numbers 20 and 22 Orrong Crescent, Caulfield North**

Further complicating the dispute between the registered proprietors of numbers 20 and 22 is the fact that Malter was enabled to purchase the adjoining property, number

22, in 1971. As the registered proprietor, Malter owned number 22 from May 1971 until December 1972 when he sold the holding to a predecessor of Procopets. Because the evidence of adverse occupation of the strip related only to the period commencing with the occupation by Malter in 1960, the period from 1960 to May 1971 was of insufficient duration to extinguish the title held by the proprietor of number 22 because the Victorian *Limitation of Actions* Act 1958 requires fifteen years of adverse occupation to extinguish the title (section 8). The occupation of the strip by Malter after May 1971 was not adverse to the registered proprietor of number 22 because that registered proprietor was Malter himself. Thus it can be appreciated that Malter's purchase and his registration as proprietor of number 22 terminated his adverse occupation of the strip prior to the title to the strip being extinguished and vesting in Malter as an adverse occupier. Of course, the title to the strip vested in Malter in his capacity as the registered proprietor of number 22 rather than in his capacity as an adverse occupier.

In December 1972 Malter re-sold number 22 to Mr and Mrs Richardson. Thus, on one view, it could be stated that a new period of occupation adverse to Mr and Mrs Richardson commenced in December 1972. In August 1987, following the death of Mr Richardson, Mrs Richardson became the sole registered proprietor of number 22 and in November 1987 Mr Procopets became the registered proprietor following the sale of the land by Mrs Richardson to Mr Procopets. The action of issuing a fresh title pursuant to a transfer does not, in Victoria, extinguish any rights subsisting under adverse possession: section 42(2)(b) of the *Transfer of Land* Act 1958. Thus it would appear that in December 1987, following fifteen years occupation adverse to the registered proprietors of number 22, Malter had been in adverse occupation of the strip for a period of sufficient duration to extinguish the title to the strip held by the registered proprietor of number 22. By December 1987 the registered proprietor of number 22 was Mr Procopets. Of course, it goes without saying that at no time between 1960 and 1994-5 were any of the parties, Malter, the Richardsons, and Procopets, aware of the incorrect location of the dividing fence between numbers 20 and 22.

Further, at some time in the 1970s Malter constructed a path, a domestic heating oil tank and a garage sufficiently close to the dividing fence that these constructions

were partly upon the strip that would later be in dispute. This fact is provided here for completeness of the factual description and because of its possible relevance to a later discussion of encroachment with regard to the disputed strip.

At trial the analysis of Smith J was as follows. Upon the transfer to the Richardsons in December 1972 Malter had conferred title and exclusive possession upon them. Further, the intent to confer title and exclusive possession must have been of duration a reasonable time although Smith J did not find it necessary to determine the actual duration that would constitute a reasonable time. In order to demonstrate an intent to possess the land (and to dispossess the registered proprietors) the onus of proof lies upon the adverse occupier to establish this intent with some objective evidence leading to the inference that he intended to exercise possession to the exclusion of all others. Malter was unable to adduce any such evidence.

The only objective evidence regarding Malter's intent was equivocal in that there was no support for the inference that Malter's intent had changed in the intervening period since the conferral of title and exclusive possession upon the Richardsons. Thus, the trial judge concluded that the earliest objective evidence of intent to possess could not arise prior to the change of registered proprietor in 1987. Thus the earliest that the objective evidence of intent to occupy adversely to the registered proprietor came into existence was when Mr Procopets was registered as proprietor in November 1987. Thus the period of adverse occupation by Malter from November 1987 to 1994-5 was insufficient to extinguish the title of Procopets.

Smith J fixed the time of Procopets asserting title as June 1994 and he assessed the time of adverse occupation by Malter commencing in November 1987 when Mrs Richardson transferred to Mr Procopets. His Honour does not satisfactorily explain why the adverse occupation did not commence in August 1987 when Mrs Richardson was first registered as the sole proprietor following upon the decease of her husband. Nor does His Honour satisfactorily explain his fixing of the time of Procopets asserting title as early as June 1994. However, even if it be taken that the period of adverse occupation by Malter commenced in August 1987 and continued until 1995 when Procopets's assertion of title meant that the adverse occupier could no longer

continue to accrue time in his favour, the extended period of approximately eight and a half years would still fall far short of the required fifteen years necessary to establish title.

It is possible that Smith J permitted himself to fall into error in his holding that the vendor Malter's intent to confer title and exclusive possession upon the purchasers must have endured for some finite "reasonable" duration. At about the same time that Smith J was determining this case, the Privy Council issued judgement upon a case originating from Hong Kong. In that case the Privy Council held that a grantor's occupation adverse to the grantee could commence at the same instant as the time of the grant from the grantor with the consequence that Malter's intent to confer title and exclusive possession may have only been of instantaneous duration: *Sze To Chan Keung v Kung Kwok Wai David* [1997] 1 WLR 1232, 1235 (see also Megarry and Wade 2000, 870 and 1314).

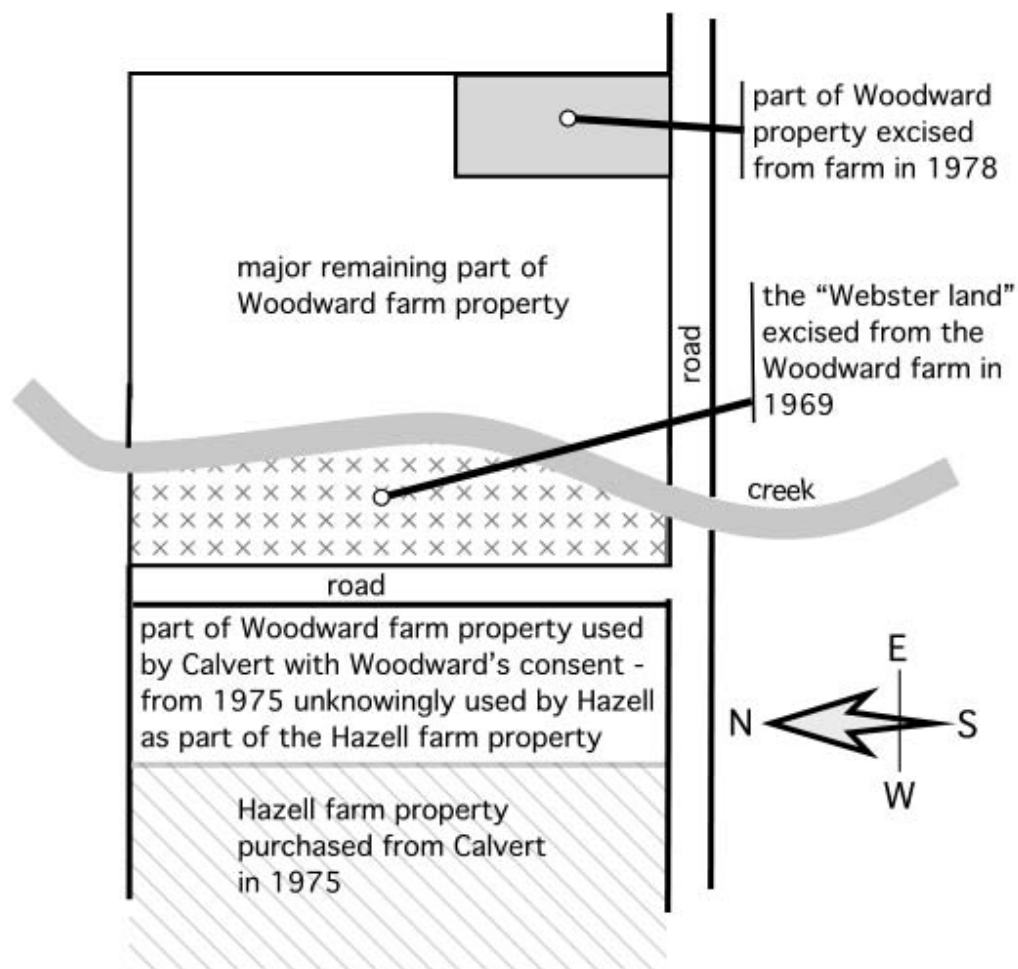
Upon appeal to the Victorian Court of Appeal that court reversed the judgement of Smith J. The judgement was delivered by Brooking JA and is not entirely satisfactory in that the conclusion that Malter was in adverse occupation from January 1973 and thus had acquired a possessory title to the disputed strip by January 1988 is not fully explained nor is there an explanation of the error into which the Court of Appeal held that Smith J had permitted himself to suffer. Their conclusion was based upon the fact that an intent to possess (to the exclusion of all others) is a consequence of Malter's actual possession. The consequence of this ruling is that Mr Procopets could only enforce his remedy of ejectment against Malter in the narrow window between November 1987 when he became the registered proprietor and December 1987 (or January 1988 according to the analysis of the timeline by the Court of Appeal) when Malter's adverse occupation had crystallized into an unassailable title.

#### 7.2.2 *Woodward v Wesley Hazell* (Tasmania)

This case determined in the Tasmanian Supreme Court before Underwood J was concerned with the adverse occupation of part of a farm owned by the plaintiff (Woodward) and his predecessors since 1958. The layout of the farm introduces a complicating factor in that the original 658 acre farm was made up of two parts —

the eastern section of 622 acres separated from the western 36 acres by a creek running through the property. Further, in 1969 the western section was subdivided with the eastern part of that section (the “Webster land”) being alienated so that the remaining farm comprised the eastern section of 622 acres separated from the remaining western 13 acres by the creek and the interposed Webster land. It was the remaining western portion of 13 acres that was the subject of the dispute giving rise to the Supreme Court proceedings (see Diagram 7.2 below).

Pursuant to an informal arrangement between the plaintiff and an adjoining proprietor, that proprietor (Calvert) was permitted to use the western 13 acres in a manner such that the plaintiff’s land was indistinguishable from Calvert’s adjoining farm. In 1975 Calvert sold his farm to the defendant (Hazell) and, whereas Calvert’s use of the plaintiff’s land was pursuant to the 1958 agreement between Calvert and



**Diagram 7.2: the various sub-divisions of the Woodward farm**



the plaintiff, the defendant's use of the land after 1975 was that of a proprietor in possession because he believed it to be part of the Calvert farm he had purchased.

At no stage was the defendant apprised of the 1958 agreement. On the other hand, the plaintiff was content to permit the defendant to use the western part of his farm under a similar arrangement to that previously enjoyed by the plaintiff and Calvert. Woodward's belief was that Hazell's occupation was a continuation of the Calvert agreement. Thus the seeds of the dispute were sown — the plaintiff believing the defendant to be in occupation of part of the plaintiff's farm under the same terms as Calvert had previously occupied that part and the defendant believing himself to be in occupation as of right as the fee simple owner of the Calvert property. The defendant was not aware that the western part of the plaintiff's farm was not part of the Calvert property which the defendant had purchased in 1975.

It was not until the end of 1990 that a discussion between the plaintiff and defendant occurred wherein each became aware of the other's beliefs — the plaintiff learned that the defendant was unaware that the western part of the farm was part of the plaintiff's registered title holding and that the defendant believed it to be part of the Calvert property. Similarly the defendant first learned of the 1958 arrangement between Calvert and the plaintiff and the fact that the western part of the plaintiff's farm was not part of the Calvert property transferred to the defendant in 1975 and was in fact part of the plaintiff's registered title holding.

In the ensuing lawsuit the defendant's claim of title based upon adverse possession was upheld with the plaintiff's registered title over the disputed portion being held to have been extinguished by the defendant's long-term adverse occupation despite the plaintiff's continued payment of rates and charges on the disputed land throughout the defendant's occupation. The case that came before the court in 1994 was further complicated by two factors — during the period of occupation by the defendant, the Tasmanian registered land title statute was changed in a substantial manner in 1980, and, also during the period of occupation by the defendant, the plaintiff's land was the subject of a transaction wherein part was hived off and sold in 1978. The 1980 statute came into effect on a date no earlier than May 21, 1980 so the period of

Hazell's adverse occupation under that Act was less than the required 12 years before the plaintiff sought to enforce his registered title on March 5, 1992. Thus, the transitional provisions regulating the status of the previous statute are of great import. The 1994 decision of Underwood J favouring the adverse occupier Hazell caused much dismay among the general populace of Tasmania and was directly responsible for the Attorney General's Reference requesting the Law Reform Commissioner to investigate the law of adverse possession in Tasmania (LRCT 1995).

Since the 2001 amendments to the *Land Titles Act* 1980, the adverse occupation by the defendant Hazell of the disputed land would be ineffective to found an application for title in this case. This is because any period of adverse occupation while the dispossessed registered proprietor continued to pay the land charges and rates cannot count towards the limitation period required to found an application and to acquire the title to the land. Under the present law (effective since 12 April, 2001) Woodward's continued payment of rates would mean that Hazell's occupation has never been adverse with the consequence that time would never commence to run against the registered proprietor Woodward.

### 7.2.3 *Cotton v Keogh* (New Zealand)

This case was concerned with the dividing boundary between numbers 18 and 20 of Kingsley street in Westmere, an Auckland suburb. In 1939 both parcels were brought within the registered land title scheme. Following a survey in 1993, a dispute between the adjoining proprietors arose wherein the physical dividing fence was found to be incorrectly positioned such that the proprietor of number 20 (Cotton) was occupying approximately 35 m<sup>2</sup> of land within the title to number 18.

Although New Zealand has permitted the acquisition of title to registered title land based upon long-term occupation since 1963, such acquisition is expressly limited to whole parcels only. Thus, in order for Cotton to retain the occupation of the strip of land it was necessary for him to show that the strip had been adversely occupied prior to the time when number 18 was brought within the registered land title scheme. The provisions of the New Zealand *Land Transfer Act* were that land that

was adversely occupied at the time of being brought within the scheme could form the basis for title based upon possession but where the adverse occupation commenced after the land was subject to the scheme, no title based upon possession was permitted although 1963 saw the relaxation of the prohibition in the case of whole parcels. Thus Cotton could not base his retention of the disputed strip upon the 1963 amendments permitting adverse possession of whole registered title land parcels. That left him with the onus of showing adverse occupation of the disputed strip prior to 1939.

In this case, because of the paucity of evidence regarding the occupation prior to 1981 when he became the registered proprietor of number 20 (including evidence of occupation prior to 1939), Cotton was unable to discharge the onus and his application to have the title to the disputed strip transferred to him failed. Another point of interest is that the 1963 introduction of registered title founded on adverse possession required a longer period of occupation (20 years) than the 12 years necessary to extinguish title to land not included within the registered title land system. Thus, if Cotton's application was in respect of a whole parcel of registered title land it would be necessary for him to show adverse occupation by his predecessor of at least eight years to which Cotton could "tack" his own twelve years of adverse occupation making a total period of twenty years. If Cotton were unable to show adverse occupation by his predecessor any application prior to 2001 would have been premature.

### **7.3 Applying the various schemes to the case studies**

#### *7.3.1 New South Wales*

- *Malter v Procopets* (Victoria)

Were this case to arise within the jurisdiction of New South Wales there can be little doubt about the outcome and, indeed, it is doubtful that the matter would have been litigated between the two parties. Because of the restriction imposed upon the land parcel the subject of a possessory application, any application by the proprietor of number 20 (Malter) to be registered as the proprietor of the half-metre strip originally within the registered title parcel of number 22 could not be successful.

As in Victoria, the adverse occupation of the trespasser (Malter) only commenced upon Malter's sale of number 22 to the Richardsons but the trespasser is unable to evade ejectment by relying upon the *Limitations Act* 1969 when the subject land is registered title land and the occupational boundary and the actual title boundary are different. Otherwise the limitation period in NSW is only 12 years in order to found a possessory application.

However, with regard to the improvements effected by Malter in number 20 which encroached into number 22, an application under the *Encroachment of Buildings Act* 1922 would most likely be successful in the case of the garage, but not the heating oil tank. With regard to the path the issue would be dependent upon the degree of permanence of the path's construction. A successful application under the Encroachment legislation is only restricted to a transfer of that amount of land necessary to rectify the encroaching nature of the garage. The NSW statute does not authorise the transfer of curtilage associated with the encroaching building (*Healam v Hunter* 1991). Thus it would be that an irregular boundary would be the result of a successful application. Whether the community's interest are well served by such an irregular boundary is not canvassed here but it may well be that a negotiated sale of the regularly shaped half metre strip so that the whole of the disputed land passed from the registered proprietor of number 22 to the proprietor of number 20 would be more desirable.

Further, the provisions of section 45D(4) of the *Real Property Act* 1900 (NSW) are such that in 1994 Malter would need to show adverse occupation for the full period against Procopets which could only commence in 1987. That is, the registration of Procopets as proprietor without fraud on his part and as a consequence of his purchase for valuable consideration would "wipe the slate clean" with the consequence that Malter could not include the period of adverse possession prior to Procopets's registration in his computation of the 12 year limitation period. Thus, even were NSW to permit part parcel adverse possession this requirement would preclude Malter from being able to apply (and thus perfect his title) for registration prior to 1999.

- *Woodward v Wesley Hazell* (Tasmania)

If the facts of this case were to arise in NSW there are several features which may well determine a different result. As a general proposition it may be stated that NSW does not permit the acquisition of title of a part parcel of registered title land. In this case however, the disputed land was part of the whole Woodward farm but it was physically separated from the main part (to the east) by the creek that divided the Woodward farm and also by the Webster land — being that eastern part of the western part of the farm that had been previously subdivided from the farm and sold. Thus between the disputed land and the main part of the Woodward farm there was the intervening Webster land and the creek between the Webster land and the main eastern section of the farm. Although the disputed land was part only of the Woodward farm, the disputed land would qualify as a “whole parcel of land.” This is because the occupational boundary marking the extent of the occupation by the defendant adverse occupier (Wesley Hazell) coincided with the true boundary dividing the disputed land from the Webster land. If this analysis be incorrect then it serves to display a shortcoming of the NSW legislation permitting a limited form of acquisition of registered title land based upon adverse possession. It may be observed that if the NSW parliament intended to prohibit possessory applications for part only of a parcel, it would have been preferable to unequivocally provide for this in the legislation rather than relying on the implication of the occupational boundary not being located at the same position as the true boundary.

An interesting aspect of the NSW legislation is the provision wherein any transaction involving the registered title parcel negates any possessory rights that have yet to mature. Thus, any transaction involving the land after the commencement of a period of adverse occupation will have the effect of negating that period of occupation prior to the transaction with the consequence that the period of adverse occupation is deemed to re-commence at the time of the transaction. In the instant case the defendant occupier was in adverse occupation of the disputed land from 1975. However, it will be recalled that the registered proprietor of the disputed land (which was part of the Woodward farm) sold off another part of the farm in 1978. The effect of selling part of the Woodward farm would be that the Titles Office would issue

new titles for the part (to the purchaser) and for the balance (to the vendor Woodward).

In NSW, the effect of this transaction would be to eliminate the period of adverse occupation by the defendant occupier and set it running again, commencing at the time of the sale transaction and the issue of the balance title certificate. Thus, the 12 years adverse occupation necessary to found an application for possessory title would date from 1978 (although the defendant had adversely occupied the land from 1975). It will be further recalled that it was near the end of 1990 that the plaintiff and the defendant participated in a discussion wherein each learned of the other's misapprehension regarding the status of the disputed land. Unfortunately the recitation of the facts in the judgement of Underwood J does not provide the exact dates of the transaction involving the sale of part of the property in 1978 and the discussion between the parties in 1990. Thus it is not possible to determine whether prompt action by the plaintiff upon first being made aware of the defendant's belief in 1990 would have been sufficient to defeat the defendant's incipient title based upon adverse occupation.

There is further possibility for speculation when it is recalled that one of the Law Reform Commissioner's recommendations involved the adoption of the NSW practice wherein a dealing or transaction would stop the running of the period of adverse occupation and force the period to begin afresh. The irony of the Law Reform Commissioner's 1995 recommendation was the failure to appreciate that until 1980 the Tasmanian registered land title legislation included such a provision (similar to that of NSW) which was, for reasons not made clear during the parliamentary debates over the introduction of the replacement statute in 1980, removed from Tasmanian law. The possible ramifications flowing from the changes to Tasmanian law taking place at a time during the running of the limitation period will be discussed below.

There are no relevant facts provided in the judgement supporting the possibility that the NSW encroachment legislation may have been applicable if this case had arisen in NSW.

- *Cotton v Keogh* (New Zealand)

If this case and the facts giving rise to it were transposed to NSW it seems clear that the restriction against other than whole parcel possessory applications would not avail the registered proprietor of number 20 with regard to his adverse occupation of part of number 18 Kingsley Street. If Cotton was able to demonstrate that in fact the strip was adversely possessed at the time the land was brought within the registered land title system it would appear that any rights associated with or derived from adverse possession should have been contested at the time of the application to bring the land within the registered title scheme. If however the period of adverse possession was inchoate (or insufficiently matured), the issue of the initial certificate could not be impugned or challenged and the issue of that certificate would destroy any possessory rights. Thus, if Cotton had established that the strip had been adversely occupied and the occupation had ripened prior to 1939, his remedy would lie in compensation from the assurance fund rather than a belated correction of the registered title boundary.

### 7.3.2 *Queensland*

- *Malter v Procopets* (Victoria)

With regard to adverse possession of registered title land in Queensland it is necessary to consider two different regimes – that existing from 1952 until 1994 which was thereafter replaced by the 1994 *Land Titles Act*. Prior to 1952 it had been held by the Supreme Court of Queensland that registered title land and title based upon adverse possession were logically inconsistent.

The proprietor of number 22 Orrong Crescent became aware of the adverse occupation of a small strip of his holding by his neighbour in June, 1994. If the effective law at that time were the 1861 and 1877 *Real Property Acts* then it follows that Procopets could successfully evict his trespassing neighbour (Malter) for two reasons. First, the Queensland Real Property legislation (which included the 1952 amending Act) *expressly prohibited* applications for title based upon adverse occupation of partial land parcels. Secondly, for an application to acquire title based upon adverse occupation to succeed there must be a lack of objection from the registered proprietor. Such failure to object may be the consequence of a failure to notify the registered proprietor of his right to object because of the difficulty or

impossibility of tracing a registered owner who has long abandoned his land or it may be that such an owner, upon being traced, acquiesces in the application by the adverse occupier. Given this bitterly contested lawsuit it is clear that at no time would Mr Procopets have consented to any application by Mr Malter to be registered as the proprietor of the disputed strip. Even so, the fact that the strip was not a whole lot or parcel would have been fatal to any application by Malter whether Procopets acquiesced or not.

As discussed above with regard to NSW, there is a likelihood of a successful application pursuant to the encroachment legislation with respect to the garage and possibly the path constructed by Malter. It is not clear whether the heating oil tank could be the subject of a successful encroachment application. The Queensland legislation does not permit the court to order the conveyance of land beyond that which is the subject of the encroachment. It follows that, similar to NSW (*Healam v Hunter* 1991), the court lacks the power to authorise the transfer of curtilage associated with the encroaching building or improvement (*Tallon v Proprietors of Metropolitan towers Building Units Plan # 5157* 1996). A consequence of a successful encroachment application would be an irregular boundary to take in the encroaching portion of the garage and no more. Whether the community's interest are well served by such an irregular boundary is not canvassed here but it may well be that a negotiated sale of the regularly shaped half metre strip so that the whole of the disputed land passed from the registered proprietor of number 22 to the proprietor of number 20 would be a more desirable result.

However, under Queensland law, the trespasser Malter is not necessarily confined to a remedy under the encroachment provisions. The effective commencement date of the 1994 *Land Titles* Act was April 24, 1994. Thus it would appear that the 1994 Act and the transitional provisions of that Act may well govern the determination of this case (were it to be decided under Queensland law). The Queensland *Limitation of Actions* Act provides for a twelve year limitation on actions to recover land (as opposed to the fifteen years allowed in Victoria). If this case were to be determined by the 1994 statute it is necessary to consider whether the prohibition against adverse possession claims in the instances of encroachments would apply. If the only



constructions in issue were the portion of the garage, the heating oil tank, and the path then the adverse occupier (Malter) would be prevented from applying pursuant to the adverse possession provisions of the 1994 *Land Titles Act* and permitted only to apply under the encroachment provisions of the 1974 *Property Law Act*. However, these encroachments were within the disputed strip that was within the land on Malter's side of the dividing fence. Thus the dividing fence itself does not constitute an encroachment with the consequence that the disputed strip could be the subject of an adverse possession claim notwithstanding that the strip contains several encroachments.

At the relevant time the adverse occupier (Malter) had been in occupation for a period sufficient to found a successful adverse possession application. It is here again observed that the present analysis is not in accord with recent commentary to the effect that the 1994 statute did not effect major change to the registered title land provisions in Queensland (McGill 1993; Bradbrook *et al* 1997) and, consequently, prior to 1994 the prohibition against part parcel applications would suffice to prevent a successful application with the same result flowing from the post-1994 regime. That Procopets would not consent or acquiesce in the application is irrelevant because the recent commentary asserts that the failure to consent or acquiesce is no bar to a successful applicant who has been in adverse occupation for the requisite period sufficient to satisfy the limitations statute. As has been argued above (pp 152 *ff*), these recent commentaries have been questioned here and appear to be ill-founded. It is only in the post-1994 regime that an adverse possession application may succeed notwithstanding objection by the dispossessed registered proprietor. Prior to 1994 any objection by the registered proprietor was an absolute bar to an adverse possession application.

- *Woodward v Wesley Hazell* (Tasmania)

The application of the Queensland law to this Tasmanian case does not involve encroachments in either jurisdiction because Tasmanian law does not allow applications in respect of encroachments and the nature of the occupation by the defendant would not qualify as an encroachment in Queensland where such applications are permitted. It is here argued that the plaintiff's action to eject the defendant would be successful under the pre-1994 scheme because objection by the

registered proprietor to any application by the adverse occupier is fatal to the adverse occupier's acquisition of registered title. The action was litigated in the Tasmanian Supreme Court prior to the 1994 statute coming into effect. However, should the case have been litigated under the post-1994 Queensland regime, the plaintiff registered proprietor would be unable to prevent an application for registration by the adverse occupier.

- *Cotton v Keogh* (New Zealand)

If this case and the facts giving rise to it were transposed to pre-1994 Queensland it seems clear that the restriction against other than whole parcel possessory applications would not avail the registered proprietor of number 20 with regard to his adverse occupation of part of number 18 Kingsley Street. Further, the refusal to consent or acquiesce to Cotton's application would also prove fatal to that application.

If Cotton was able to demonstrate that in fact the strip was adversely possessed at the time the land was brought within the registered land title system it would appear that any rights associated with or derived from adverse possession should have been contested at the time of the application to bring the land within the registered title scheme. If however the period of adverse possession was inchoate (or insufficiently matured), the issue of the initial certificate could not be impugned or challenged and the issue of that certificate would destroy any possessory rights. Thus the provisions in Queensland are similar to those of NSW. With regard to an application by Cotton pursuant to the post-1994 scheme, the prohibition against part parcel applications and the provision for upholding the veto by the registered proprietor are no longer part of the current Queensland registered title statute and, consequently, an application by Cotton would prevail over the objections of the registered proprietor Keogh.

### 7.3.3 *Victoria*

- *Malter v Procopets* (Victoria)

While it may appear superfluous to consider the hypothetical question of the determination of this case were it to be determined in Victoria given that the case has already been determined, it is believed to be instructive to analyse the Victorian rulings.

This case demonstrates the “what you see is what you get” (WYSIWYG) nature of certified land titles under the Victorian scheme where part parcel adverse possession is permitted. However, it also demonstrates that the Victorian practice does not necessarily lead to increased certainty for the participants in the land market. Another possible observation is that the issuing of a fresh certificate of title (as originally envisaged by the Torrens schemes) would have hidden the identity of a prior registered proprietor and possibly have prevented this litigation from being initiated. It was only upon the recommendation of the 1885 Royal Commission that the practice of issuing a fresh certificate upon the registration of each transaction was discontinued thus introducing the possibility of seeing beyond the present registered title. It is arguable that a properly advised Procopets was only induced to initiate the litigation because of the particular circumstances involving the adverse occupier also being the proprietor (at one time) of the adversely occupied holding because he was the registered proprietor of both numbers 20 and 22 in the early 1970s.

The initial ruling by Smith J was based upon the particular facts of this case and related to the sale by Malter (the occupier) of number 22 to the Richardsons in 1972. His reasoning was that the time of the sale Malter conferred title and exclusive possession upon the Richardsons and could not be heard to assert otherwise. Malter’s intent to confer possession must have been of a duration of a reasonable time. The onus was on Malter to show some objective fact or facts inferring that he was exercising possession adversely to the Richardsons and there was no change in the behaviour of Malter or other objective facts leading to the inference that contrary to his conferring of exclusive possession, he was now occupying adversely to the Richardsons. Smith J went so far as to hold that this failure to change his behaviour continued until the time of Mrs Richardson transferring the property to Procopets (in November of 1987) which was the first instant at which the intent of Malter to adversely occupy number 22 could arise. Because Procopets asserted title in June 1994 the time running in favour of Malter as an adverse possessor stopped running short of the necessary fifteen years required under the Victorian *Limitation of Actions* Act to extinguish the title of Procopets, the registered proprietor.

It could perhaps be argued that time began to run in favour of Malter earlier in 1987 when Mrs Richardson became the sole proprietor following the death of Mr Richardson and also that Procopets did not assert title until 1995. Even if this be so it will be seen that Malter's period of adverse occupation is still insufficient to extinguish the title of the registered proprietor. The Victorian law does not allow for the extinguishing of any possessory rights upon the registration of a dealing or transaction as in NSW where, upon the registration of Procopets as a proprietor, any possessory rights of Malter would be negated and time would again commence to run in favour of the adverse occupier. If that were the case the registration of the transmission to Mrs Richardson and the subsequent registration of the transfer to Procopets would set the unripened period of occupation at naught. This is a feature of the Victorian adoption of the limitations statute at its widest wherein adverse occupation for the requisite period alone is sufficient to extinguish title and transfer title to the occupier, there being no requirement that the period of adverse occupation must be perfected by an application for registration and the subsequent registration of the occupier as the registered proprietor.

Of further interest was the comment by the Court of Appeal regarding the failure of the occupier (Malter) to adduce evidence of occupation prior to 1960 by Malter's predecessor. Even if such evidence was available it could only mean that Malter had succeeded in extinguishing the title over the disputed strip held by the registered proprietor of number 22. Such evidence could not detract from the sale and transfer to the Richardsons in 1972 of all that land described in the Certificate of Title for number 22 (including the disputed strip). Such evidence of prior occupation could only be of relevance if Malter had not become registered as the proprietor in 1971. If that were the case Malter would have extinguished the title to the strip at some time in 1975 by continuing his adverse occupation of the strip.

A further comment by the Court of Appeal deplores the wastefulness of the litigation over the disputed strip. There is no support for the proposition that the litigation by Procopets was so untenable as to make it frivolous. Its lack of frivolity is supported by the fact that the trial judge upheld Procopets's right to evict his trespassing neighbour.

Another less than satisfactory aspect of the reversal by the Court of Appeal was the summary manner in which the analysis by Smith J was dismissed as incorrect and the lack of explanation as to the exact nature of the error contained in that analysis.

- *Woodward v Wesley Hazell* (Tasmania)

Because the basic principles of limitations applied in these two jurisdictions are similar the analysis and consequent result is unchanged by considering this case under the Victorian law excepting that the longer requisite period of adverse occupation in Victoria (15 years) means that the last possible instant for the registered proprietor to successfully assert title was in 1990 when in fact the registered proprietor became aware that the occupier was in occupation adverse to the registered proprietor's title. The facts of the case do not disclose the exact dates but it would appear that the occupier's adverse occupation ripened into the period sufficient to extinguish the proprietor's registered title in 1990 being 15 years after Hazell entered into occupation of the Calvert property and the disputed western remnant of the Woodward farm. In the Tasmanian context the shorter requisite period of 12 years had been satisfied by 1987, an instant in time long before the registered proprietor was made aware of the nature of the occupier's beliefs.

- *Cotton v Keogh* (New Zealand)

As there is no prohibition against part parcel adverse possession of registered title land the occupation of the disputed strip by Cotton from 1981 to 1993 would have been insufficient to establish 15 years adverse occupation and the extinguishing of the title over the strip held by Keogh. Of course Cotton would find it necessary to adduce evidence to show adverse occupation by his predecessor of at least three years to which Cotton could "tack" his own twelve years of adverse occupation making a total period of fifteen years. If Cotton was unable to show adverse occupation by his predecessor any application prior to 1996 would have been premature. Thus this case would have been determined differently had it been heard in Victoria according to Victorian law.

#### 7.3.4 *Tasmania*

- *Malter v Procopets* (Victoria)

Because the basic principles of limitations applied in these two jurisdictions are similar the analysis and result is unchanged by considering this case under the Tasmanian law excepting that the shorter requisite period of adverse occupation in Tasmania (12 years) means that Malter's occupation of the disputed strip would have extinguished the title held by the Richardsons in 1984, some three years prior to Procopets's purchase of the property. It then falls to consider the transitional provisions of the 1980 Tasmanian statute because eight of those years were accrued prior to the 1980 Act coming into force. There can be no doubt that had this case been determined only under the law in force prior to 1980 then the assertion of title by the registered proprietor prior to any application by the adverse occupier may have been sufficient to destroy the interest of the occupier even if ripened for the requisite period. This is because title based upon occupation was required to be perfected by an application for registration and subsequent registration. Prior to the 1980 statute any registered transaction by the registered proprietor (such as the conveyance from Richardson to Procopets) was sufficient to destroy any interests founded upon adverse occupation that had not been perfected by an application for registration by the occupier.

- *Woodward v Wesley Hazell* (Tasmania)

While it may appear superfluous to consider the hypothetical question of the determination of this case were it to be determined in Tasmania given that the case has already been determined in that State, it is believed to be instructive to analyse the Tasmanian ruling given the subsequent investigation and recommendations of the Tasmanian Law Reform Commissioner and the major amendments to the 1980 *Land Titles* Act that were passed in 2001. After all, it was the 1994 determination of this case that brought about the 1995 investigation by the Commissioner and the 2001 amendments to the 1980 Act.

It will be recalled that after Hazell entered into adverse occupation in 1975, the registered proprietor sold a house lot carved out of the farm in 1978. At that time, that sale transaction, if registered was sufficient under the law then in force to set at naught any period of adverse occupation prior to the transaction. Thus Hazell's

effective adverse occupation dates from 1978. Thus the effective date for the adverse occupier to extinguish the registered proprietor's title was some time in 1990 which is when the existence of the dispute became apparent. Thereafter the first of the two competing parties to transact business with the Titles Office would prevail over the other. Should the occupier apply for registration based on the ripened period of adverse occupation this would be sufficient to extinguish the interest of the registered proprietor. On the other hand, had the registered proprietor executed a transfer to the would-be purchaser, the lodging of that transfer for registration would be sufficient to negate any interest of the occupier, including any ripened interest founded upon adverse occupation.

The facts become more convoluted when it is recalled that the analysis proffered above does not take into account the major amendment to this area of law effected in 1980. Thus after the then effective commencement of Hazell's adverse occupation in 1978 but before the existence of the dispute became apparent in 1990 the law in Tasmania underwent major change. What is not clear is whether the change of law had the effect of restoring the earlier commencement date of adverse occupation (1975). If that is the case then the registered proprietor's title was extinguished in 1987 and there was no necessity for the adverse occupier to perform any further act to perfect his title.

An alternative analysis is that the major changes effected by the 1980 statute had the effect of destroying any rights based upon adverse occupation except those that had ripened and been perfected prior to the change of law in 1980. Any consequences arising from the new 1980 provisions could only be founded upon acts of the parties that took place subsequent to the effective date of the 1980 statute which was May 22, 1980. If that were the case then the registered proprietor's title could not be extinguished prior to May 21, 1992 and the proceedings commenced by the plaintiff registered proprietor (Woodward) on March 5, 1992 were commenced in time to eject the occupier and prevent the occupier defending on the basis of the limitations statute.

It is also of interest to consider this case in light of the recommendations of the Law Reform Commissioner. The Commissioner's Recommendation 5 included the adoption of a provision similar to section 45D (4) of the NSW *Real Property Act* (to protect bona fide transferees) and extending the limitation period from 12 to 15 years. The amendments introduced by the 2001 legislation did not include either of these recommendations of the Commissioner. The NSW *Real Property Act* provision is not an exact substitute for the previous Tasmanian provision wherein a registered transaction resets the commencement of the period of adverse occupation but does have some similarity. This recommendation, with an extended limitation period would have ensured that the registered proprietor had until 1990 to commence ejectment proceedings (if the period of adverse occupation were taken as having commenced in 1975) or 1993 if the period of adverse occupation were taken as commencing upon the fresh issue of the Certificate of Title after the 1978 transaction involving the sale of the house lot. Thus the law as recommended by the commissioner would have effected a different result than that of the 1994 Supreme Court action which had upheld the title acquired by the trespasser through his adverse possession.

The Commissioner's recommendations were not adopted in the 2001 amendments. Had this lawsuit been governed by the 2001 amendments it is clear that the partial occupation of the registered proprietor's property would not have prevented the acquisition of title by the trespasser because that partial occupation would not have fallen foul of the prohibition against sub-minimum lots introduced in 2001. However, because the registered proprietor had paid the due land charges, rates, and taxes throughout the period of adverse occupancy by the trespasser, pursuant to the 2001 amendments, the trespassers period of adverse occupancy for the purposes of acquiring title over the land would never have commenced. Consequently, the payment of rates by the registered proprietor would have defeated the trespasser's claim to the title if this case were to be determined by the law introduced in 2001.

- *Cotton v Keogh* (New Zealand)

As there is no prohibition against part parcel adverse possession of registered title land the occupation of the disputed strip by Cotton from 1981 to 1993 would have been sufficient to establish adverse occupation and the extinguishing of the title over



the strip held by Keogh. Thus this case would have been determined differently had it been heard in Tasmania according to Tasmanian law. As the limitation period is not extended as in NZ (where it is 20 years) or Victoria (where it is 15 years) the 12 years adverse occupation by Cotton would be sufficient to extinguish Keogh's title without the need to rely upon tacking with a period of adverse occupation by Cotton's predecessor. Thus, according to the law in effect in Tasmania in 1995 the trespasser would have succeeded against the registered proprietor. If this case were to be heard in Tasmania today under the laws introduced in 2001, the current prohibition against sub-minimum lots would be sufficient to defeat the trespasser. The payment of land rates and charges may not have been sufficient to protect the registered proprietor under the 2001 law. This is because the assessment of the rates may have been levied upon a physical inspection by the valuer with the rates being struck according to the actual occupation enjoyed by the respective ratepayers and not with regard to the actual legal boundaries of the respective holdings. If that were the case, it is arguable that the rates for the disputed strip were levied against the trespasser Cotton as the valuer's inspection and striking of the rate to be levied would be levied against the occupier even though he was a trespasser.

#### 7.3.5 *South Australia*

- *Malter v Procopets* (Victoria)

There are two significant differences between the laws of SA and Victoria, each of which would independently ensure that the determination of this case in SA would result in a different outcome. The first is that an application for registration founded upon adverse occupation can only succeed with the consent of the registered proprietor, or in the absence of an objection lodged by the registered proprietor. The second is that although the SA statute does not expressly prohibit applications for part only of parcels, the effect of the consent or absence of objection provision is that an application for part only of a registered title land parcel would rarely be expected to be successful. Thus it is concluded that Procopets, the registered proprietor, would be able to eject the adverse occupier of the disputed strip (Malter). However, Malter could make application pursuant to the encroachment provisions of the statute to retain those improvements erected on his land which encroach into his neighbour's land. Any application by Malter pursuant to the encroachment provisions would not

be contingent upon the accrual of a period of adverse occupation of the disputed strip.

- *Woodward v Wesley Hazell* (Tasmania)

As indicated above, the refusal of the registered proprietor to consent to the acquisition of title by the adverse occupier is sufficient to defeat any claim by that occupier. Thus this case would be determined differently in SA than it was in Tasmania. The facts provided in the judgement do not support the existence of any improvements of a substantial nature which would permit an application by the occupier pursuant to the encroachment provisions.

- *Cotton v Keogh* (New Zealand)

As indicated above, the refusal of the registered proprietor to consent to the acquisition of title by the adverse occupier is sufficient to defeat any claim by that occupier. Thus this case would be determined with a similar result in SA to that of the NZ lawsuit. The facts provided in the judgement do not support the existence of any improvements of a substantial nature which would entail an application by the occupier pursuant to the encroachment provisions

#### 7.3.6 *Western Australia*

- *Malter v Procopets* (Victoria)

Because the basic principles of limitations applied in these two jurisdictions are similar the analysis and result is unchanged by considering this case under the Western Australian law excepting that the shorter requisite period of adverse occupation in Western Australia (12 years) means that Malter's occupation of the disputed strip would have extinguished the title held by the Richardsons in 1984, some three years prior to Procopets's purchase of the property. Because of the encroachment provisions of the WA law any successful ejectment of Malter prior to 1984 could permit him to apply for a limited form of protection for the encroaching structures (the garage, the path, and – perhaps – the domestic heating oil tank).

- *Woodward v Wesley Hazell* (Tasmania)

Because the basic principles of limitations applied in these two jurisdictions are similar the analysis and result is unchanged by considering this case under the Western Australian law.

As in Victoria, the transaction involving the sale of the house lot in 1978 will not affect the commencement of the period of adverse occupation and as a consequence, 1987 would see the ripening of the 12 year period of adverse occupation sufficient to acquire title with no necessity to perfect the title by applying for registration.

Although WA does provide for applications to regularise encroachments, the facts described in this judgement are not supportive of any improvements erected upon or encroaching upon the disputed land.

- *Cotton v Keogh* (New Zealand)

As there is no prohibition against part parcel adverse possession of registered title land the occupation of the disputed strip by Cotton from 1981 to 1993 would have been sufficient to establish adverse occupation and the extinguishing of the title over the strip held by Keogh. Thus this case would have been determined differently had it been heard in Western Australia according to WA law. As the limitation period is not extended as in NZ (where it is 20 years) or Victoria (where it is 15 years) the 12 years adverse occupation by Cotton would be sufficient to extinguish Keogh's title without the need to rely upon tacking with a period of adverse occupation by Cotton's predecessor.

### 7.3.7 *New Zealand*

- *Malter v Procopets* (Victoria)

There are two significant differences between the laws of New Zealand and Victoria, each of which would independently ensure that the determination of this case in NZ would result in a different outcome. The first is that an application for registration founded upon adverse occupation can only succeed with the consent of the registered proprietor, or in the absence of an objection lodged by the registered proprietor. The second is that the NZ statute expressly prohibits applications for part only of parcels. Thus it is concluded that Procopets, the registered proprietor, would be able to eject

the adverse occupier of the disputed strip (Malter). However, Malter could make application pursuant to the encroachment provisions of the statute to retain those improvements erected on his land which encroach into his neighbour's land.

- *Woodward v Wesley Hazell* (Tasmania)

As indicated above, the refusal of the registered proprietor to consent to the acquisition of title by the adverse occupier is sufficient to defeat any claim by that occupier. Thus this case would be determined differently in NZ than it was in Tasmania. The NZ prohibition against part only parcel applications would probably be ineffective in this case because of the discrete nature of the two parts making up the registered proprietor's holding. The facts provided in the judgement do not support the existence of any improvements of a substantial nature which would permit an application by the occupier pursuant to the encroachment provisions.

- *Cotton v Keogh* (New Zealand)

This case originated in NZ and because of the prohibition against part only of parcel applications, the occupier was forced to base his case upon adverse occupation prior to the lots being brought within the registered land title system. This he was unable to do. Further, as indicated above, the refusal of the registered proprietor to consent to the acquisition of title by the adverse occupier is sufficient to defeat any claim by that occupier. The facts provided in the judgement do not support the existence of any improvements of a substantial nature which would entail an application by the occupier pursuant to the encroachment provisions

#### **7.4 Summary**

In this chapter the varying schemes and systems permitting variation in the location of boundaries have been illustrated by actual law cases recently determined by the courts. By considering the cases as if they were to be determined in all the jurisdictions the schemes and systems described in the previous chapter are exemplified in a demonstrative manner that exposes the practical ramifications of the different schemes including the exposure of aspects of these schemes that may be considered as shortcomings. In two of the jurisdictions covered, Tasmania and Queensland, the analysis of those schemes includes a comparison with the previous schemes recently replaced in those jurisdictions. Thus this chapter serves as an

illustration for the schemes previously described and also provides a base upon which other schemes may be assessed. Thus any proposed uniform Australian national scheme or any alternative model can be tested against the factual circumstances of these recent law cases with a view to determining and comparing the performance of any proposed scheme against the existing state systems. It is expected that any proposed replacement scheme should, at the minimum, perform as well as the existing schemes and in most instances perform in a manner producing better results however the assessment of “better results” is derived. This chapter provides a view as to the practical application of the law with regard to adverse possession in a number of registered land title jurisdictions. The views serve as a skeleton upon which commentary and analysis can be made. This and the preceding chapter provide a comprehensive analysis of a number of different approaches to the boundary problem; chapter six providing the theory and this chapter illustrating and illuminating the theory. These two chapters have prepared the ground for formulating a proposed model in that they have enabled an appreciation of both the desirable characteristics that should be incorporated in the model (as well as the undesirable characteristics that should be avoided). The current chapter also provides a mode of assessing and evaluating the model in that its performance when applied to the three law cases should not fall below that of the existing models and will preferably outshine them all.

## Chapter 8

### Boundary adjustment in Australia

#### 8.1 Introduction

This chapter summarises the different approaches to boundary discrepancies with a view to formulating an ideal model acceptable to all jurisdictions administering a registered land title system. The ideal model should also be acceptable as a single uniform Australia-wide system. Ideally such a model should possess all the advantages enjoyed by the different existing methods and none of the undesirable characteristics. This chapter will set out all that has been learned from chapters two through seven with a view to formulating a proposed model in chapter nine. The chapter discusses several means of resolving boundary discrepancies including part parcel adverse possession as well as an alternative adopted in some jurisdictions — *statutory encroachment*. Included within this discussion are those provisions enabling the amendment or correction of register entries and title certificates. Also discussed in this chapter is a provision giving effect to an allowable margin of surveying error which serves as the basis for an inhibition on litigation over small boundary location discrepancies

#### 8.2 Traditional boundary adjustment

As outlined previously in chapter 3 the issues of boundary adjustment and part parcel adjustment only arose comparatively recently in the nineteenth century. This was the consequence of the increasing sophistication of English law including the 1833 reforms to English land law and the settlement and development of the New World. The changes to land law included the devising of new ways in which land could be sub-divided including vertical division. The 1833 reforms ended the presumption that occupation of part was deemed to be occupation of the whole where the remainder was not occupied. Because of its comparative recent origin there is little “traditional” law regarding boundary adjustment and boundary location discrepancies. What law there is originates from around the beginning of the nineteenth century. The most common approach to the problem presented by such discrepancies has been the adapting and extending of the statute of limitations to the portions of the lots enclosed between the legal and occupational boundaries, that is, adverse possession.

### 8.2.1 *Part parcel adverse possession*

Except for encroachment on the manor commons by a tenant, part parcel adverse possession was not recognised by English law prior to the 1833 law reforms. The approach adopted by traditional English land law in the 1833 reforms was to extend adverse possession to part only of parcels. In effect, the only change was to extend the limitations defence to the extent only of those lands actually adversely occupied by the squatter. Previously where the squatter had occupied part while the documentary or “legal” titleholder remained in possession of the remainder the squatter was unable to rely on the statute of limitations to defend any action to eject him. That is, adverse occupation of part only of a holding did not provide any legal benefit to the squatter unless the true or documentary proprietor was wholly out of possession of any part. Where the squatter occupied part only and the titleholder was wholly out of possession of any part, the trespasser was deemed to occupy the whole and could rely on the limitations defence. After the 1833 reforms the squatter was confined to acquiring title only over the land actually adversely occupied.

After the 1833 reforms which provided recognition of the divisibility of the holding it was necessary for the squatter to be in occupation *and* for the title holder to be out of occupation (that is, dispossessed) for the squatter to establish the limitations defence. Where the titleholder remained in occupation of part of his holding he was not out of occupation and that part could not be subject to a limitations defence. It was only that portion that was occupied by the squatter and not by the titleholder that permitted a squatter to extinguish the titleholder’s title to the portion. This practice was extended to the English colonies at the time and even to the United States although that country was no longer an English colony.

With the introduction shortly thereafter of title registration the practice was extended to include those lands within the registered title systems. That is until it was determined by the courts or the legislature that there was no scope for adverse possession within the registered title systems. The consequence of this interpretation is that only the Australian states of Victoria and Western Australia (and possibly Queensland) and the Canadian province of Alberta permit part parcel adverse

possession of registered title land. Both England and Tasmania recognised part parcel adverse possession of registered land until the recent passing of the *Land Registration Act 2002* and the *Land Titles Amendment (Law Reform) Act 2001* by the English and Tasmanian parliaments respectively. The present position in England and Tasmania is that the new legislation, while not prohibiting part parcel adverse possession, imposes such restrictions as to severely curtail applications founded on adverse occupation of part parcels.

#### 8.2.2 *Statutory encroachment*

Predating the introduction of registration of land title there was accorded some legal recognition of real property rights founded upon informal and irregular occupation. De Soto (2000, 105-140 and 150-1) describes those rights gained by the North American pioneer settlers who took up land holdings outside and ahead of the advancing jurisdiction of the then governments. That is, these pioneer settlers occupied land that was not subject to any law at the time of settling. Later, when government and the reach of law extended into those areas settled by the pioneers it was politically expedient to recognise the long enjoyed informal occupation. In part this recognition was based upon the expenditure of time and effort and money in developing the holding. For the newly established government to deprive the occupier of long standing would in effect be a confiscation of property. The legal recognition of these *de facto* land holdings applied to whole holdings and provided recognition to established occupiers without the necessity of displacing another landholder or competing claimant. The legal recognition of one landholder was not at the expense of another — this was *not* the resolution of a dispute between two opposing parties. This recognition of rights acquired by *de facto* settlement and occupation was likened to the acquisition of property in a wild animal by its taming. Whereas there is no property in a wild animal, property in such an animal vests upon its capture or taming in the person performing the capture or taming.

This recognition of property acquired by the expenditure of effort by the settler and subject to no other claim was later extended to instances where “justice” demanded the recognition of such rights even where there did exist opposing claimants. For



example, a mistaken occupation of another's land and the subsequent improvement of that land at the expense of and by the mistaken occupier.

Although there have been instances where a court has provided a remedy between opposing claimants where there has been mistaken occupation, in the main the courts have declined to make such determinations without legislative authority. It is not within the common law making powers of a court to take property, in this case land, from one disputant and award it to another. Pursuant to statutory authority conferred by the legislature this power may be characterised as “statutory encroachment”.

- *Statutory encroachment as an alternative to part parcel adverse possession*

A general observation is that in registered land title systems some form of resolution of the boundary location discrepancy problem is utilised — either statutory encroachment or part parcel adverse possession. Although general, the observation is not universal as the Australian Capital Territory permits neither and it could be argued that the recent legislation in England and Tasmania has imposed a practical restriction on part parcel adverse possession without providing for statutory encroachment as an alternative. With the abolition of adverse possession in Singapore, that state did not introduce statutory encroachment as an alternative. Similarly the Australian state of Western Australia permits both part parcel adverse possession *and* statutory encroachment as does the Canadian province of Alberta. It is possible to interpret the Queensland legislation as permitting both part parcel adverse possession and statutory encroachment although there does exist a proviso prohibiting an adverse possession application where an encroachment application is possible. Similarly, South Australia does not prohibit part parcel adverse possession applications but the practical effect of the limitations on adverse possession applications is that statutory encroachment is the only practical solution provided for in that state.

- *Common law encroachments and improvements under mistake of title – the doctrine of “fixtures”*

Closely related to the problem associated with an incorrectly determined boundary is the building of an encroaching structure under the mistaken belief that the structure is properly located within a particular land parcel. The problem arises because the

location of the boundary is not precisely known or is mistakenly believed to be in a location different from its true location. Thus the encroaching building is a consequence of the difficulties associated with boundary location and could be described as merely another manifestation of the boundary location problem. There is, however, a further distinguishing feature related to the comparatively large costs involved in rectifying the problem. These costs can be classified as “thrown away” in that no benefit accrues from the expenditure. These are the costs expended in initially building the structure and those costs to be incurred in dismantling the structure. This “wasted” expenditure is a measure of the relative benefits to be gained (as opposed to the detriment suffered) in allowing the encroaching structure to remain despite its trespassing nature (VPLRC 1998, ¶ 5.46 at 126). These considerations have led some jurisdictions to enact laws that may, depending upon the circumstances, allow the encroaching structure to remain. It is to be emphasised that such laws are the result of deliberations by a legislative body authorising what would otherwise be an intolerable interference with private property rights. Where there is no statutory authority no court would or should take upon itself the compulsory transfer of property in order to satisfy the convenience of a mistaken landholder at the expense of another.

The legal position where such a structure is erected in a manner which trespasses on another land parcel is that the holder of the property rights in that other parcel can eject the trespasser and seek monetary damages as compensation for the trespass and enforce the removal of the offending trespassing structure. Alternatively, the landholder may retain the benefit of the improvement wrongly erected upon his land (*Brand v Chris Building Society* 1957). This is the legal position in those jurisdictions which have not sought to modify the common law regarding real property. The State of Victoria is such a jurisdiction. There has been a recent recommendation that Victoria should consider introducing statutory amendments to allow for a more economical and equitable solution where an encroachment has been erected based upon a mistake (VPLRC 1998).

As the law in Victoria currently stands, the only way in which the strictness of the law is overcome is through two processes of law, these being adverse possession and

the doctrine of *estoppel*. An estoppel is created where a party stands by while his rights are being infringed by the trespasser and the party fails to assert those rights. It requires that the trespasser be mistaken as to his own legal rights. Further requirements are that the trespasser does some act or expends money or incurs some detriment on the faith of his mistaken belief and that the victim of the trespass is aware of his own rights and is also aware of the trespasser's mistaken belief and, notwithstanding this awareness, abstains from asserting his own rights. If these conditions are met, the party standing by and refraining from asserting his legal rights is estopped from later asserting those legal rights (*Ramsden v Dyson* 1865). Described elsewhere as *equitable estoppel* the illustration contained in the description is apt: "Thus, if a stranger commences to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, the court will not afterwards allow the real owner to assert his title to the land" (Burke 1977, 726).

Alternatively, pursuant to the limitations statute, the trespasser may continue to trespass for such a period until the victim of the trespass is prohibited by law from ejecting the long-term trespasser or adverse occupier, that is, the trespasser gains the protection of adverse possession. Of course, while awaiting the accrual of the limitation period, the trespasser risks an action for ejectment and damages brought by the landholder. A prudent trespasser may decline to expend effort or money or both on improvements that may enure only to the benefit of the true or documentary owner with no benefit being retained by the trespasser. Conversely such a prudent trespasser who has been in occupation for a period sufficient to invoke the defence of adverse possession may find that the disinclination to improve the disputed land is interpreted as evidence of the lack of intent to possess (*animus possidendi*, see pages 76–7 above), the intent being a necessary element to the success of the defence.

In the absence of these exceptions, the real owner, instead of enforcing the removal of the offending trespassing structure may elect to leave it standing and retain for himself the benefit and value of the structure erected by the trespasser. Thus such an owner can eject the trespasser and seek monetary damages as compensation for the trespass and also deny to the trespasser access to the property to remove the structure

(*Brand v Chris Building Society* 1957). Further, the property (or “ownership”) in the structure has passed from the trespasser to the owner of the land. The common law doctrine of fixtures is that personal property (that is, chattels), which have been so annexed to real property, are regarded as part of the land. The chattels lose their characteristics of personal property and become part of the real property – the personal chattels are fixtures or “anything that has become so attached to the land as to form in law part of the land” (Megarry and Wade 1975, 711; Black 1979, 574; Burke 1977, 802–3).

Thus, in the normal course of events, if a landholder were to mistakenly build or erect a structure on another’s parcel, in addition to the builder’s trespass, the building being attached to the ground of the other’s parcel becomes part of the other’s real estate. Should the landholder mistakenly erect part of the structure on a land parcel adjoining his own, then the doctrine includes the implication that the building is attached to the two separate parcels (Hinde *et al* 1978, ¶ 2.095 p 190; Hinde *et al* 1997, ¶ 2.088). In the absence of parliamentary intervention the legal position is that the encroached upon landholder has a right of action against the encroacher in trespass and may retain the benefit of the added value to the land parcel by way of the improvements erected thereon. This is the position in Victoria (and Tasmania and the Australian Capital Territory): *Brand v Chris Building Society P/L* (1957). Except where other legal doctrines can be invoked, the mistaken improver has no other remedy; the only available remedies being based upon estoppel where the behaviour of the encroached upon landholder has induced the encroacher to act to his detriment. The other doctrine that may assist the trespasser is that of adverse possession provided that the trespass has not been challenged within the statutory limitation period (*Malter v Procopets* 2000).

The doctrine of *unjust enrichment* has been held inapplicable to English law (*Brand v Chris Building Society* 1957; Burke 1977, vol ii 1834). This is the case in most of the common law jurisdictions such as England, Australia, and Canada although it is acknowledged that some of the American states do recognise unjust enrichment.

Unjust enrichment is a neutral term permitting recovery of the “unearned” enrichment from the beneficiary of the enrichment — there being no necessary moral censure of the beneficiary enjoying the “unjust enrichment”. Thus, in the *Chris Building Society* case, the landholder was able to retain the unearned improvement to his land when a builder mistakenly erected a house on his property. The builder’s action against the landholder for the cost of the improvements, or alternatively, an order of the court permitting the builder to remove and retain those improvements and restore the landholder’s property to its previous state failed. The annotations to the discussion of this case in a leading text (Sackville 1975) note that the Roman-Dutch law in force in South Africa does recognise unjust enrichment where a bona fide occupier of land who effects improvements to the land in the mistaken belief that it is his will be permitted to remain in occupation of the land until the owner pays an amount equivalent to the increase in value of which his land has been enriched (*Fletcher v Bulawayo Waterworks* 1915).

The line of cases leading to this recognition in South Africa of unjust enrichment does not necessarily support that conclusion. A precedent set in an earlier case (*Rubin v Botha* 1911) formed the foundation for the later case. In the earlier case the defendant owner entered into an lease agreement with a tenant that the tenant could occupy the property rent-free for ten years with the tenant obliged to erect a building which building would become the property of the land owner at the end of the lease. The agreement was defective in the formality of its execution and was thus not legally enforceable. Consequently, the owner ejected the tenant after three years and wished to retain the building erected by the tenant. The tenant’s action against the owner was successful on the basis that the owner was unjustly enriched at the expense of the tenant. On the basis of that precedent, in the later *Fletcher* case, the occupier of land mistakenly effected improvements to an adjoining lot by constructing a well. As a consequence the mistaken occupier was permitted to remain in occupation of the adjoining land until the adjoining owner made just payment for the improvements to his land. It would appear that the reprehensible conduct of the landowner in the earlier case was extended to the landowner in the later case where that later landowner did not contribute to the error resulting in the mistaken improvement to his land.

Under English law the landowner who had benefited from the ten year lease agreement would be estopped from asserting the unenforceability of the agreement and an implied promise to pay for the value of the improvement would be enforced upon the land owner or, alternatively, the tenant would be permitted to continue in occupation for the full ten year period under the doctrine of part performance. This would not alter the position in English law of the landowner who did not contribute to or cause the confusion leading to the improvements being mistakenly effected by the occupier. It is submitted that the English practice is preferable being more consistent with logic. Further, another disquieting result from the South African line of cases is the order allowing the mistaken occupier to remain in possession until just compensation was made by the landowner. It could be the case that an impoverished landowner is unable to pay out the necessary compensation to the mistaken occupier where the improvements are of great value with the consequence that the mistaken occupier may retain possession indefinitely (*Carrick v Smith* 1874). A preferable outcome would be to allow the mistaken occupier to retain a charge on the land for the value of the payout thus ensuring that, should the landowner sell the land (at a sale price reflecting the increased value), the mistaken occupier would have security over the proceeds of the sale to the extent of that increased value. Additionally, the increased value of the land may only be of value to a limited number of persons such as the mistaken occupier but not including the landowner who may prefer to enjoy the rights associated with his land without the improvement. Thus his land is subjected to a proprietary right of the mistaken occupier with no benefit enjoyed by the landowner. It is submitted that the English law is preferable in its outcome in these circumstances in that it protects against morally repugnant behaviour by the beneficiary of the improvement while not penalising the beneficiary who has not contributed in any way to the error resulting in the mistaken improvement.

Consequently it is concluded that English real property law does not provide a remedy for the person who mistakenly effects improvements to another's land except where the beneficiary of the mistake has contributed in some way to the mistake. Any remedy assisting the mistaken improver must be by way of statute passed by the legislature. In the English common law jurisdictions Queensland, New South Wales,

South Australia, Western Australia, and the Northern Territory have enacted legislation to provide some protection or remedy to those who mistakenly effect improvements to another's land.

- *Early mistake of title legislation – mistake of quality of title*

North American legislation predating the introduction of land title registration was enacted for the protection of an occupier of land who was later ejected from the land by a claimant with a better title. Where the occupier had effected improvements to the land the successful claimant was under an obligation to compensate the ejected occupier for the improvements. Thus in 1888 Chief Justice Hagarty was able to trace the existence of such legislation in Upper Canada to 1818 and observed the existence of similar legislation in the North American states of Arkansas, Vermont, Ohio, and Illinois (*Beaty v Shaw* 1888). These statutes were designed to compensate the mistaken occupier who, believing himself rightfully in occupation, effected improvements to the land from which the occupier was later ejected by a claimant able to demonstrate a better title. The mistaken occupier was not mistaken as to the location of his holding or of the boundaries to the holding, he was mistaken as to the ownership of his holding. Thus, Richard Roe contracts to purchase *Blackacre* from the vendor and, after investigation of title, the conveyance is effected. Thereupon Roe enters into occupation of *Blackacre* and causes improvements to be erected on the landholding. Sometime later, John Doe challenges Roe's title to *Blackacre* and the court's determination is that Doe has a "better" title to *Blackacre* than does Roe. Roe has been mistaken in regard to the quality of the title he was acquiring from the vendor. Consequently Roe is ejected but, pursuant to the statute, Doe must compensate Roe for the improvements effected on *Blackacre* by Roe.

The wording of the statutes was broad enough to cover instances where a landholder mistakenly occupied and effected improvements on a holding other than his own. Thus, Roe, unmistaken as to the quality of his title to *Blackacre* mistakenly enters onto *Whiteacre* and causes improvements to be erected on the landholding. Roe has been mistaken as to the location of the holding onto which he has entered into occupation.

Additionally, the wording was broad enough to cover the instance where a landholder, mistaken as to the location of the boundary to his holding, erects an improvement upon his holding that also encroaches across the boundary into his neighbour's holding. Thus, Roe is occupying *Blackacre* and desires to effect improvements upon his holding. He is, however, mistaken as to the location of the boundary between his holding and that of his immediate neighbour Doe. Consequently Roe causes the improvement to be partially erected upon *Blackacre* and partially upon *Whiteacre* occupied by Doe. He has mistakenly encroached upon his neighbour's holding. Examples of such legislation are that of the Alberta *Law of Property Act* 1980, section 60 and the Ontario *Conveyancing and Law of Property Act* 1980, section 37.

These mistaken improvement statutes have also been utilised where the statute of limitations (that is, adverse possession) does not protect the mistaken occupier. It may be that the particular jurisdiction does not recognise the limitations statute as applying to land, or it may be that, although the jurisdiction permits adverse possession generally, the statute does not apply in the particular instance under consideration. For example, an adverse occupier whose period of occupation falls short of that necessary to invoke the limitations statute or an adverse occupier whose period of occupation is of sufficient duration to invoke adverse possession but the adverse occupier has neglected to "perfect" his acquired title by applying to be entered in the register as the proprietor. It is in this context that Alberta's mistaken title improvements statute was introduced in 1905 to compensate an adverse occupier who was defeated by a bona fide purchaser for value (Petersson 1992, 1303 and 1313). The transaction involving such a purchaser and the subsequent issue of a fresh certificate of title had "wiped the slate clean" and obliterated any accrued legal rights of the adverse occupier.

- *Common law approach to "encroachments" - encroachment on the manor commons*

The particular legal meaning of "encroachment" in the context of common law was the adverse possession of part of the waste or commons land by the occupier of a holding adjacent to the common. This has already been referred to as the only part



parcel adverse possession recognised prior to the passage of the 1833 land law reforms. This form of encroachment is discussed here only to eliminate an unnecessary complication that was recently introduced into statutory encroachment.

Encroachment on the commons is where a tenant of land takes in or adds to that tenancy other land adjoining or near to his tenancy so as to make the added land appear to be part of his original holding. The general rule is that if the wrongful act is acquiesced in for the limitation period, the encroachment (that is, the land added) is considered annexed to the original holding, and as having the same incidents as if it had originally formed part of it. Therefore, if a lessee of land makes an encroachment on an adjoining waste, as a general rule (a presumption of fact rebuttable by evidence to the contrary), that encroachment will belong to the landlord and not to the tenant (Burke 1977, 697; *Kingsmill v Millard* 1855, 318). At the expiry of the tenancy the original holding *and* the encroachment will revert to the landlord. Whether the encroachment has been made by the tenant in his capacity as a tenant or not is a question of fact to be determined. An encroachment contiguous to the tenant's leasehold would be indicative of the encroachment being made in the capacity of tenant while an encroachment physically separated from the tenant's leasehold is indicative of an encroachment independent of the tenant's status and relationship to the landlord. Contrary to these generalisations, there exists the possibility that a contiguous encroachment may be independent of the tenant's relationship to the landlord. Similarly, an encroachment physically separated from the tenant's leasehold may be a direct consequence of the encroacher's status as the landlord's tenant. The issue here is whether the tenant's encroachment on the commons or wastelands will enure for the tenant's benefit or for that of the landlord. The issue is *not* whether an encroachment, in its normal meaning, can include lands that are not contiguous. In the restricted sphere of law pertaining to commons or waste lands there is a series of cases holding that encroachments physically separated from the tenant's holding were inextricably attached to the tenant's holding. Thus, in this restricted sphere of law, there is a special extended meaning attached to the term "encroachment" which can include non-contiguous lands. This special meaning is contrary to that commonly understood in everyday usage.

It is noteworthy that prior to the 1833 amendments to the property laws of England the concept of encroachment was the only instance of part parcel adverse possession and required the subject land to be the commons. Although described as “of considerable antiquity” in 1866 (*Lisburne v Davies* 1866, 266), the practice and acceptance of such part parcel occupations would appear to date from around the end of the eighteenth century where the practice and acceptance was in a state of flux at that time (*Doe d Colclough v Mullinar* 1795; *Doe d Challnor v Davies* 1795). It should be appreciated that the common law questions being resolved were not whether the two parcels, not contiguous and separated at a distance, could be related to each other as an encroachment; but whether the added parcel was to be considered as part of the original holding and not as an independent landholding. By construing the cases as determining that encroachments need not be contiguous the rulings and determinations were subject to a misunderstanding that imparted a meaning to the term that did not require contiguity. It is here emphasised that the common English language (or dictionary) meaning of the word “encroachment” and the meaning as defined by the 1922 *Encroachment of Buildings Act* (NSW) differed from the special meaning attributed to the word in the narrow context of adverse occupation of part of the commons in eighteenth century England.

The normal and extended meanings of the word were considered in the interpretation of the 1922 NSW Act by the High Court of Australia in the 1990s with the determination being that the statutory encroachment law did not extend to include an unattached building wholly constructed within an adjoining landholding. Thus in the context of statutory encroachment, the encroachment must commence within one landholding and extend across the boundary into the adjoining landholding (*Ametek v Googoorewon* 1993; see also *Bolton v Clutterbuck* 1955 in relation to the 1944 South Australian *Encroachment Act*). An encroachment requires an intrusion from the land of the encroaching owner on to the land of the adjoining owner (*Bolton v Clutterbuck* 1955).

It is here emphasised that this discussion of the extended meaning of the term was necessitated only as a consequence of an erroneous determination by the NSW Court of Appeal that the 1922 NSW *Encroachment of Buildings Act* included the extended

meaning of the term “encroachment” (*Googoorewon v Ametek* 1991). The erroneous 1991 determination by the NSW Court of Appeal was corrected on appeal by the High Court in 1993. The legislative provisions in the Canadian province of Manitoba also clearly distinguishes between an encroachment which is partly on one land parcel and partly on another contiguous parcel and an improvement which lies entirely within a single land parcel (re *Robertson and Saunders* 1977).

- *Australasian approaches to encroachments and improvements*

In Australia, similar “mistake of title” legislation was not introduced until comparatively recently. The Australian approach to this problem was a result of the expedient survey methods used in opening up the new colonies with the consequence that the boundary locations were not precise. Such imprecision led to landholders mistakenly encroaching beyond their holdings onto those of their immediate neighbours. The perceived harshness of the common law of real property regarding encroachments then led some jurisdictions to enact legislation conferring a discretionary power on the courts to determine boundary disputes by considering all the circumstances and seeking to do justice. In referring to the 1944 South Australian legislation, Wells J considered the law existing at the time of its enactment to better explain the intent of parliament. The legislation has as its principal aim the placing “in the hands of the Court adequate and flexible powers to enable it to do more nearly complete justice between adjoining owners than was formerly possible” (*Clarke v Wilkie* 1977, 136). Thus the parliament had altered the prior law which had “led to some unseemly wrangling and to the making of some orders that for one reason or another were less than ideal” (*ibid*). Similarly Carter J of the Queensland Supreme Court considered that state’s legislation and inferred the intent of parliament to be that of best adjusting the legal rights of those affected by encroaching structures (ex parte *Van Achterburg* 1984, 162).

As a basis for considering the various encroachment statutes the *Encroachment of Buildings Act* 1922 (NSW) will be used. This legislation permits either of the adjoining owners to apply to the court for relief where one owner has erected a building which encroaches onto the adjoining parcel. The range of powers available to the court is wide. The Court can order the demolition of the encroaching structure,

payment of compensation by the encroaching owner to the adjoining owner, the conveyance, transfer, or lease of that part of the adjoining owner's land to the encroaching owner, or the grant to the encroaching owner of an easement over the adjoining land. The court is given wide powers and a variety of remedies are available thus allowing the court to do "justice" in all the circumstances of the case before it. Further the court is empowered to award compensation reflecting the "culpability" of the encroaching land owner – compensation is minimal in cases of unintentional encroachments without negligence on the part of the encroaching owner while increased compensation is payable where the encroaching owner is unable to demonstrate lack of intent to encroach or negligence.

With regard to the payment of compensation, there does not appear to be any provision for an order wherein the encroaching owner is deprived of any proprietary rights in the encroaching structure and the adjoining owner ordered to compensate the encroaching owner. The provisions of the NSW legislation are similar to that in the jurisdictions of Queensland, South Australia, Western Australia, and the Northern Territory. Thus it will be seen that there exists provision for altering the boundary between two adjoining owners pursuant to the encroachment legislation. This possible alteration to the boundary location is in addition to any provisions pursuant to adverse possession. Thus Western Australia provides for the boundary location to be altered by either encroachment or adverse possession while the Northern Territory and New South Wales only permit alteration of the boundary location pursuant to the encroachment legislation. Queensland specifically prohibits an adverse possession application in circumstances where the encroachment legislation is applicable. The legal position in South Australia appears to be similar to that of Western Australia where boundary alteration by either encroachment or adverse possession is permitted. However, as it has already here been argued, the practical consequences of the adverse possession provisions in the South Australia legislation have the practical consequences that part parcel adverse possession applications will rarely be countenanced leaving the encroachment statute as the only feasible solution for boundary location discrepancies.

The position in Queensland is subject to uncertainty. Prior to 1952, the legislation did not recognise adverse possession of registered title land and the courts had disavowed any interpretation permitting adverse possession. In that year the Queensland parliament introduced provisions into the Torrens legislation permitting applications for registration based upon long-term possession. The legislation was similar to that previously introduced into the South Australian Torrens legislation in 1945. However, the Queensland parliament made it clear that it was permitting applications based on possession only with regard to whole parcels. This was accomplished by section 47 of 1952 legislation. Thus there was no provision for altering the boundary location of registered title parcels pursuant to adverse possession. In 1955 the Queensland parliament enacted encroachment legislation similar to that of NSW. Thus, after 1955 it became possible to alter the boundary location of a Torrens parcel only if the provisions of the encroachment statute were applicable. It may be concluded that the then Queensland law was similar to that of the present NSW and Northern Territory laws. In 1994 the Queensland parliament replaced the Real Property Acts with the *Land Title Act*. The professed purpose of the 1994 legislation was to consolidate and simplify the then existing laws without effecting substantive change. It is here argued that the Queensland parliament, perhaps unintentionally, amended its Torrens statute substantially and failed in its professed purpose of not effecting substantive change with the consequence that since 1994 it is possible to acquire title to part parcels of Torrens land by adverse possession. Prior to 1994, only applications pursuant to the encroachment provisions of the 1974 *Property Law Act* which incorporated the 1955 *Encroachment of Buildings Act* permitted part parcel variation of boundary location. If the analysis proffered of the legal position with regard to Queensland since 1994 is correct, then it follows that part parcel adverse possession is permitted pursuant to the 1994 *Land Title Act*.

Where an application may possibly be based upon both the encroachment provisions of the 1974 *Property Law Act* and the adverse possession provisions of the 1994 *Land Title Act*, then only an application pursuant to the *Property Law Act* will be entertained because the *Land Title Act* specifically prohibits adverse possession applications where an encroachment application can be made.

Thus the position in regard to the Australian jurisdictions may be summarised as Victoria permitting part parcel adverse possession with no provisions for statutory encroachment, while NSW and the Northern Territory prohibit part parcel adverse possession but allow statutory encroachment. Queensland, South Australia and Western Australia permit both although Queensland and South Australia favour an encroachment application over a part parcel adverse possession application. Tasmania and the Australian Capital Territory permit neither although Tasmania allowed part parcel adverse possession until April 2001 when major amendments to that state's registered land title legislation were passed by the parliament. England does not allow for statutory encroachment and permits part parcel adverse possession only in the most limited circumstances since the passage of the *Land Registration* Act 2002. Prior to the 2002 Act, part parcel adverse possession was permitted to the same extent as it was for unregistered land. Of the Canadian provinces, only Alberta permits both statutory encroachment and part parcel adverse possession while the remaining registered land title provinces, British Columbia, Manitoba, Ontario, and Saskatchewan permit statutory encroachment only. The 1981 New Brunswick registered title statute is in desuetude with the consequence that part parcel adverse possession of unregistered land is permitted. Elsewhere, New Zealand prohibits part parcel adverse possession but does allow statutory encroachment and Singapore permits neither since 1994 when it repealed those provisions permitting adverse possession (including part parcel adverse possession) from its registered land statute.

An important distinction between part parcel adverse possession and statutory encroachment is that the latter, statutory encroachment, does not involve the creation of an additional parcel with its own certificate of title. Thus, a successful encroachment application will result in amendments to the existing title certificates to reflect the changed location of the boundaries whereas the acquisition of a part parcel pursuant to adverse possession requires the creation of a new title certificate for that lot which was the subject of the part parcel acquisition of title. This new certificate is in addition to that for the adverse occupier's own parcel.

As has been discussed, a limitation upon the use of statutory encroachment is that the encroaching structure must be erected on two adjoining parcels and intrude from one parcel into the other. This will be the usual case where there has been some mistake or error in ascertaining the correct boundary location. However, where the boundary location error is large, the mistaken proprietor of a parcel may erect a building wholly within an adjoining parcel. This is what occurred in the *Ametek* case where the intention of the landholder was to erect several buildings within his own parcel. However, being mistaken as to the location of the boundary, these buildings were actually erected wholly within the adjoining parcel. The resulting legal determination was that there was no encroachment from the correct parcel on to the adjoining parcel and the remedies under the *Encroachment of Buildings Act* were not available to the mistaken owner. It can be concluded that statutory encroachment may not always provide a remedy for boundary location discrepancies where the discrepancy, error, or mistake is large.

Unless there is provision within the statute to cover instances of the structure being wholly erected within the wrong parcel, the encroachment statutes are insufficient to provide a possible solution to the boundary location discrepancy in all possible cases.

### **8.3 Other statutory provisions for adjusting boundaries**

Based upon the recommendations of the Royal Commission of 1885 which enquired into land titles and surveys, Part VII was introduced into the Victorian *Property Law Act* 1958. This part applies to all Victorian land both registered and unregistered (*Property Law Act* 1958, section 273). The recommendations followed upon evidence with regard to the inaccuracy of early surveys in the colony. The provisions deem Crown Survey boundaries (as marked out on the ground) to be the correct boundaries and these boundaries are to prevail where there is a discrepancy between them and those depicted or described in any title documents or Crown grants (sections 268 and 269). There is also a provision regulating the re-establishment of Crown survey boundaries where the original survey markers have been lost or can no longer be found (section 271) These provisions are only applicable to Crown survey boundaries and do not extend to boundaries as set out by private surveying practitioners. This is the case even where the Crown survey boundary had been

established by a private surveying practitioner engaged by the Crown with later related survey boundaries being established by the same private practitioner but engaged by a private citizen. These provisions should be extended to *all* survey boundaries established by professional licensed practising surveyors. There are similar provisions in the Western Australian *Transfer of Land* Act 1893 (sections 151–155) with the distinction that the Victorian deeming provision is *prima facie* evidence rebuttable by evidence to the contrary while the deeming provision in the Western Australian Act is absolute.

Additionally there are the provisions of Part V, Division 5 of the *Transfer of Land* Act 1958 (Victoria) permitting amendments of the register in cases of erroneous entries with the Western Australian counterpart being section 170 of *Transfer of Land* Act 1893.

With the exception of the margin of error provision (section 272 of the *Property Law* Act in Victoria and section 155 of the *Transfer of Land* Act in Western Australia) discussed below, these provisions do not effect a change in boundary location because their purpose is merely to rectify the register entry (and the duplicate certificate of title) where it is found to be in error. These provisions come into operation where there is no discrepancy in the location of the legal and occupational boundaries but the boundary description (including graphical plan) in the register and the certificate of title is in error and does not coincide with the actual legal and occupational boundary. Consequently these provisions do not provide remedies for discrepancies in the boundary location which make up the subject matter of this thesis. The remaining provision of Part VII extends to *all* boundaries and incorporates a margin of error permissible in boundary descriptions and provides a resolution for discrepancies where those boundary discrepancies are small.

#### 8.3.1 Victoria's "more or less" provisions

Section 272 of the Victorian *Property Law* Act provides a small margin of error in boundary locations of all land wherein the bringing of an action seeking relief where the complaint is related to a discrepancy in the measured length of a boundary is prohibited unless the discrepancy complained of is in excess of 50 millimetres (in a



boundary of length 40.3 metres or less). This provision is only applicable in the absence of an express agreement to the contrary. It would appear that the provision binds both parties to a dealing (that is a purchaser could not bring an action against the vendor unless the parties had expressly stipulated the accuracy of the parcel dimensions) and it would appear to discourage litigation between adjoining landholders where the discrepancy complained of is small. This provision was introduced in 1890 following upon the 1885 Royal Commission and is applicable to *all* boundaries. Section 155 of the Western Australian *Transfer of Land* Act is a similar provision permitting an error of 50 millimetres in a boundary of 40 metres or less. For boundaries of length in excess of 40.3 metres (40 metres in Western Australia) the allowable margin is a ratio of 1 in 500.

### 8.3.2 *South Australia's "more or less" provision*

Section 220(4) of the South Australian *Real Property* Act 1886–1990 had a curiously similarly worded provision permitting the Registrar-General to amend title documents (title certificates and the Register Book) when the discrepancy is less than the similar margin of error permitted in Victoria. This provision was introduced into the Act in 1960 and retained until 1990. Despite the similarity with the Victorian and Western Australian “more or less” provisions, it would appear that this section merely confers a power of correction on the Registrar-General without imposing a prohibition on litigation between adjoining landholders.

### 8.3.3 *Threshold limits of adjustment*

A margin of error similar to that of Western Australia and Victoria could be adopted in all jurisdictions so as to discourage litigation over small discrepancies in boundary location. Where the discrepancy complained of is in excess of the allowable margin of error, the remedy sought would be limited to only that amount in excess over the permitted error margin.

## 8.4 **Summary of boundary adjustments modes**

Where there exist discrepancies between the location of the legal and occupational boundaries there are a variety of approaches taken to resolve the problem. These are tabulated in Table 8.1 on the following page. In the Australian Capital Territory, the

occupational boundary carries no weight whatsoever and the legal boundary remains as the only correct boundary. Other jurisdictions do not permit adjustments in the boundary location except in accord with statutory encroachment where the location of the boundary may be altered pursuant to court order to accommodate an encroaching building or improvement that intrudes from one land parcel into another. New South Wales, the Northern Territory, and New Zealand are such jurisdictions permitting boundary alterations pursuant to encroachment legislation only.

<b>A. Prohibition against acquisition of registered title by adverse possession or encroachment</b>		Australian Capital Territory Singapore Tasmania <sup>*</sup> England <sup>*</sup>	current since 1994 since 2001 since 2002
<b>B. Encroachment only</b>		New Zealand New South Wales Northern Territory South Australia <sup>•</sup>	since 1952 since 1922 since 1945 since 1944
<b>C. Adverse possession only</b>		Tasmania <sup>*</sup> England <sup>*</sup> Victoria	prior to 2001 prior to 2002 current
<b>D. Both adverse possession and encroachment</b>	adverse possession only where encroachment inapplicable	Queensland	since 1994
		South Australia <sup>•</sup>	since 1944
	either adverse possession or encroachment or both	Western Australia Alberta	current current

<sup>\*</sup> Although not prohibited, the statutory provisions permitting part parcel adverse possession impose a practical prohibition upon applications founded upon adverse occupation of part only of a land parcel. Tasmania has postponed the enactment of encroachment legislation and has effectively repealed the previous provisions allowing adverse possession of part only of a land parcel while imposing stringent restrictions upon part parcel applications. England has legislated to permit part parcel adverse possession only in limited circumstances where the boundaries have not been fixed: *Land Registration Act* 2002.

<sup>•</sup> South Australia permits an absolute veto by the registered proprietor over an adverse possessor's application. This precludes a successful application by a squatter with respect to a portion of his neighbour's parcel even though there is no statutory bar against part parcel adverse possession.

**Table 8.1: Statutory encroachment and adverse possession of part only of land parcels**

The recent changes to the title registration systems in Tasmania and England have left Victoria, Western Australia, Queensland, and Alberta as the only remaining jurisdictions permitting alteration of boundary location pursuant to part parcel adverse possession. Of these jurisdictions, Victoria is the sole jurisdiction allowing adverse possession as the only means of boundary location alteration. It has already been argued that while the recent legislative changes in Tasmania and England still

permit part parcel adverse possession, the practical effect of these changes is to prohibit part parcel applications and there is no provision for the alternative statutory encroachment.

Western Australia and the Canadian province of Alberta permit both part parcel adverse possession and statutory encroachment. The legislative provisions of South Australia impliedly also permit both. However, as has already been argued, the practical effect of the restricted adverse possession scheme used in South Australia is to prohibit part parcel adverse possession applications. Queensland is another jurisdiction permitting both part parcel adverse possession *and* statutory encroachment. However, there is a restriction preventing adverse possession applications where an application pursuant to statutory encroachment can be made (*Land Title Act* 1994, section 98). Thus it would appear that in Queensland one may only apply under the adverse possession provisions if the application cannot be made pursuant to an encroachment. This is to be contrasted with Western Australia and Alberta where it would appear the applicant may select which application to proceed under and, in fact, may even be permitted to proceed with both applications in the alternative, that is, to seek relief under either head of both the part parcel adverse possession and statutory encroachment applications (*Executive Seminars v Peck* 2001).

## **8.5 Summary**

Preparatory to formulating proposals for dealing with boundary location discrepancies in a registered land title system this chapter has reviewed current modes already in use within those jurisdictions with registered title systems. Without statutory intervention these rely upon either ignoring occupational (or *de facto*) boundaries or permitting occupational boundaries to prevail over original legal boundaries after the passage of sufficient time — that is, part parcel adverse possession or acceptance of the status quo which has endured for a period of time sufficient to satisfy the limitations statutes.

Additionally some jurisdictions have provided an alternative to part parcel adverse possession because of a reluctance to provide relief to the illegal acts of a squatter or

trespasser coupled with a recognition that failure to provide recognition to occupational boundaries may impose an injustice. Consequently, these jurisdictions have adopted a regime which provides a wider range of possible remedies to the problem rather than those previously existing where either the possible rights acquired by long-term occupation were ignored or the proprietary rights of actual owners were sacrificed in favour of long-term occupiers. The wider range of remedies include the exercise of discretionary powers in resolving these competing interests and the resolution provided is more “palatable” than the outright win or loss offered by the traditional modes of resolution. In the description of the courts these remedies “do more nearly complete justice between adjoining owners than was previously possible” or provide an alternative resolution to those that were “less than ideal.” This alternative is statutory encroachment which has previously been incorporated within systems that refused to recognise adverse possession — that is, the utility of a means to resolve the discrepancy between legal and occupational boundaries was recognised in jurisdictions which refused to recognise adverse possession as a viable means of resolving the competing interests between interests based upon legal holders and occupiers.

The chapter also considers several ancillary “tools” which may be invoked to assist in boundary problems with particular reference to an allowable margin of error which precludes litigious disputes where the magnitude of the problem is less than a threshold quantity. Other “tools” were also briefly discussed sufficiently to demonstrate that they do not have a role to play with regard to resolving boundary location discrepancies.

The purpose of this chapter was to complete the range of available means of resolving boundary location discrepancies leaving the way clear in the next chapter to formulate a proposed universal means of resolution complete with discussion of those attributes that ideally make for it to be universally adopted in Australia or in any registered land title system including a “new” system to be introduced into a jurisdiction that seeks to adopt land title registration.

## Chapter 9

### A proposed model including its evaluation

#### 9.1 Introduction

In this chapter the threads of the foregoing chapters are drawn together to formulate a proposed replacement for the current systems, the aim being to devise a single multi-purpose system suitable for the whole of the Australian jurisdiction with a view to the release of envisaged cost savings (Davies 2001) and to effect nationwide uniformity of law (*Breskvar v Wall* 1971, *per* Barwick CJ at 286; Whalan 1971b, 265–6; Whalan 1982, 12; Hogg 1920, 109; Hogg writing in the preface to Kerr 1927, vii; Neave 1993; Butt 1992, 34; MacCallum 1993; Kerr 1993). A further benefit is the wider utility of the multi-purpose cadastre with the increase in revenue receipts exceeding the increase in administration and maintenance expenses. To that end a discussion of desirable features or characteristics is included with a view to formulating a satisfactory model. The general consensus is that some form of adverse possession (or limitation) is desirable in any land tenure system but beyond that there appears little scope for unanimity. That some form of boundary adjustment is necessary also appears clear. Whether the limitation role is extended to the role of boundary adjustment is the next consideration with the possibility that both functions may be performed by adverse possession although the two problems do not necessarily require the same solution.

Boundary adjustment may also be accomplished by a statutory recognition of encroachment, either as a substitute for and alternative to, or in addition to part parcel adverse possession for boundary adjustment.

The proposed replacement model is then subjected to assessment by reference to those lawsuits that formed the case studies. The assessment also includes a consideration of anticipated criticism of the proposed model with a view to forestalling opposition to change. This will leave the final chapter (ten) to consider the possible adoption of the proposed model throughout Australia (and in any jurisdiction seeking to establish a registered land title system) and also include the conclusions that may be drawn from this research.

## **9.2 Desirable features of any system to resolve boundary variation**

Any proposed model advanced as suitable for the resolution of boundary variation problems should be capable of being assessed comparatively with existing models. Such a proposed model should be an improvement upon the existing models and should not possess any characteristic rendering the model less serviceable than the existing models while retaining those characteristics that are beneficial. It is recognised that some of the following individual characteristics are but a consequence of the requirement of compatibility with the principles of title registration and may be considered as redundant restatements. Nonetheless it is believed that these characteristics deserve individual discussion if only to add emphasis to the desirability of adherence to title registration principles. Consequently it may also be that some of these characteristics are essential rather than merely desirable.

A further note is that these characteristics are not confined to those desirable or necessary to implement a model for resolving the boundary location problem. Although this problem is the *raison d'être* for this thesis, it is not possible to properly consider the problem in isolation of other movements in the wider field of current cadastral reform. Thus any proposed model should fulfil its purpose in resolving the boundary problem in a manner compatible with the modern cadastre. It follows that some of the characteristics herein described are required more for compatibility with the modern cadastre than for resolving the boundary problem.

### *9.2.1 Logical coherence with registration principles*

Rather than being a desirable feature it is considered essential that any procedures for resolving boundary location discrepancies should be logically consistent with the principles of title registration, the most important being the supremacy of the register. The failing of some of the current models are directly attributable to the adaptation of aspects from traditional unregistered land with the consequence that there is conflict and inconsistency between the title registration system and outside procedure that has been grafted on to the system. That these outside procedures may be grafted upon a registered title system does not present difficulties so long as they

are altered or adjusted to comply with the fundamental principle of the system, that is, there is no title without registration. It has already been observed that the failure to ensure compliance with this fundamental principle means that the subject system (as utilised in Victoria and Western Australia) is at best a *quasi*-title registration system.

#### 9.2.2 *Law to be expressly stated with clarity and without reliance upon implication*

The history of determining the question of whether registered title land is to be subject to the principles of limitation or adverse possession is illustrative of difficulties produced by failing to expressly enunciate the law with clarity. Failure to so enunciate requires the drawing of an inference which leaves the law as uncertain for the community to plan their actions and with the possibility that a later different interpretation can be imposed. As an illustration it seems clear that almost without exception, commentators have advanced the necessity for applying the law of limitations to land tenure and ownership and this necessity applies equally to registered title land even though it be conceded that there may exist some logical inconsistency. If it be accepted that there be of necessity a system of adverse possession applicable to registered title land it now falls to determine whether the system be express or implied. It is because of the possible logical inconsistency of adverse possession in a registered title land system that the inclusion of adverse possession must be express to exclude any possible inference that the logical inconsistency requires adverse possession to be excluded from the system.

The whole problem of implied law is that it is unsatisfactory that two opposite conclusions may be derived without difficulty. One basis of legal interpretation is that a departure from previous established law is not to be inferred in the absence of express provisions for change — the presumption is that if parliament wished to alter the prior existing law then it would do so in clear and unequivocal terms. On the other hand, a strong inference may be drawn from the logical inconsistency of adverse possession of registered title land supporting a radical departure from pre-existing law with the consequence that the premise (of no departure from previous established law) is no longer valid.

Thus both the adversaries in the 1936 Queensland *Miscamble* case were able to argue credibly that the absence of an express reference to adverse possession of registered title land supported their opposing contentions. Adverse possession was permissible under Queensland law on the basis that the statute did not expressly disavow the incorporation of the statute of limitations into *all* real property law. Further support for this side of the argument was to be found within the NSW statute where that parliament had expressly prohibited adverse possession in that state. In this instance the NSW parliament was demonstrating an intent to move away from established law and if the Queensland parliament wished to also prohibit adverse possession, it also would have been expected to pass legislation to that effect. On the other hand, because of the inherent conflict between adverse possession and title registration there was no necessity for the parliament to expressly legislate to prohibit adverse possession when logic demands that it can have no place within a registered title system. The fact that NSW has expressly legislated to this effect merely showed that, through a timid abundance of caution, the NSW parliament had put it beyond dispute that its registered land statute did not countenance adverse possession of registered title land.

Another illustrative example of an abundance of caution on the part of the legislature is that of the Canadian province of Alberta. The registered land statute was silent regarding the application of adverse possession to registered title land. When the issue arose, that province's courts held that registered land was subject to adverse possession. Thereafter the Alberta legislature added to the registered land statute a provision confirming that adverse possession was applicable to registered land. To do so was not strictly necessary given the legal ruling. The parliament had placed the issue beyond doubt and beyond a later different interpretation of the law by another court. Tasmania similarly had included express provision for adverse possession in its statute which merely codified an earlier ruling by its Supreme Court.

Another aspect of this desirable requirement is the direct and clear statement of law without the necessity of inference based upon a process of elimination. There are a number of jurisdictions that, while permitting adverse possession generally, do not allow for the acquisition of title over part only of a land parcel. The approaches taken



by these jurisdictions to prohibit part parcel adverse possession vary widely. At one extreme is the robust express prohibition imposed in the Queensland statute operative from 1952 to 1994:

.... And whereas it is not desirable that a person should obtain a title by possession to parts of land encroached upon by any buildings or part thereof or by enclosure as aforesaid:

Now therefore be it hereby enacted that a person shall not obtain under this Act a title by possession to parts of parcels under the Acts so encroached upon. (*Real Property Acts Amendment Act 1952*, section 47)

This prohibition leaves no room for doubt and may be contrasted with the current Queensland provisions wherein the *Land Title Act 1994* is at best equivocal as to whether part parcel adverse possession is permissible. Although the robust 1952 prohibition has been subject to amused criticism (Duncan 1975, 19), it is here respectfully submitted that this “unusually explicit” prohibition (Cook 1992) is preferable to an indirect and unnecessarily vague implication.

Another jurisdiction has used express language to remove doubt regarding incorporation of law by implication. Malaysia has a registered title land scheme as enacted in the *National Land Code*. Pursuant to section 6 of the *Civil Law Act* nothing

shall be taken to introduce into Malaysia or any of the States comprising therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

In 1984 the Privy Council held that there was no room for importing into the *National Land Code* any rules of English law except where the Code itself expressly provides for this (*United Malaysian Banking BHD v Pemungai Hasil Tanah*, 1984).

Other jurisdictions have opted for a more nebulous approach. For example, the NSW provisions introduced in 1979 do not prohibit part parcel adverse possession except insofar as:

any boundary that limits or defines the land in the person’s possession is, to the extent that it is not a boundary of the whole parcel of land, an occupational boundary that represents or replaces a boundary of the whole parcel, .... (*Real Property Act 1900*, section 45D (2)(b))

and the subject land lies between the occupational boundary and the boundary of the

whole parcel that it represents or replaces. New Zealand has adopted a similar indistinct and indirect approach where an adverse possession application is permitted for a part parcel where the occupational boundary lies within the title boundary but not where the occupational boundary lies outside (section 14 of the *Land Title Amendment Act 1963*).

In a similar vein the provisions recently introduced into Tasmania (*Land Titles Act 1980*, section 138Y) discourage (without prohibiting) applications in respect of sub-minimum lots. The statutory scheme permitting adverse possession includes a privative clause (section 138T) to the effect that its provisions are wholly within the statute. In order to determine what constitutes a “sub-minimum lot” one is directed to the definition provided in the *Local Government (Building and Miscellaneous Provisions) Act 1993* (section 109). There exists a further section providing that the Recorder may process an application based upon the adverse possession of a sub-minimum lot but is not required to do so; the Act conferring upon the Recorder a discretion to proceed. Additional to the Recorder’s discretion, a part parcel (or sub-minimum lot) adverse possession application is permissible if the local government authority or municipal council consents. The definition of a permissible minimum lot is convoluted with requirements relating to the minimum road frontage, minimum area, aspects of its “shape”, and a minimum width of the lot. The definition may however be dispensed with where the Recorder or the local government authority elects to do so and permit an application for a sub-minimum lot. This discretionary power does not make for certainty of law.

This approach to the drafting of a statute introduces the possibility of different and inconsistent interpretations. It is concluded that the highly unsatisfactory necessity of inferring the meaning of a statute and the intent of parliament can be dispensed with by the adoption of direct and express provisions within a statute. The registered land title statutes in each jurisdiction should expressly state whether adverse possession of land is recognised in the jurisdiction and the existence of any restriction as to part parcel adverse possession.

### 9.2.3 *No exceptions to “title by registration”*

While the desirability of permitting adverse possession within a registered land title scheme overbears the possible logical inconsistency, the degree of inconsistency can be minimised by requiring registration to “perfect” the title. Just as a sale and purchaser contract gives rise to an instrument capable of supporting an application to change the registered proprietor in the register, a matured adverse occupation can give rise to and support an application to change the registered proprietor in the register. This entails the refusal to recognise acquisition of title upon occupation alone as in the Victorian and Western Australia registered land schemes. Thus the register entry prevails over the proprietary rights of the occupier until the occupier has caused the register entry to be changed to reflect the occupier as the registered proprietor. To illustrate; occupation for a period in excess of the limitation period alone would not extinguish the title of the dispossessed registered proprietor. The occupier must be in occupation for the required period *and* apply to be entered in the register as the proprietor to extinguish the dispossessed registered proprietor’s title. This was the requirement in the registered title system of Tasmania prior to 1980, and is the requirement in the current NSW system (in place since 1979) and the Canadian province of Alberta.

This was also the position in South Australia (*Hunter v Player* 1875) prior to the express prohibition against adverse possession of registered title land first introduced in 1878. Prior to that enactment the Court had interpreted the statute (which did not address the issue) as permitting adverse possession of registered title land with the supremacy of the register being upheld. Until the adverse occupier applied to be entered into the register, the title of the dispossessed registered proprietor prevailed over that of the occupier such that a transaction entered into by the registered proprietor after the period of adverse possession had matured but prior to the interest of the adverse possessor being registered had the effect of “wiping the slate clean” and resetting the time of adverse occupation at naught. With the recent (2001) amendments to the Tasmanian registered land title statute and the replacement English registered land title statute (2002), Victoria and Western Australia (and the Republic of Eire and the province of Northern Ireland) are the only remaining jurisdictions which recognise the proprietary rights of the adverse occupier whose

interest has not been entered into the register. It is on this basis that Victoria and Western Australia are described as *quasi*-registered land title systems.

It is proposed that any inconsistency between a registered title system and the permitting of title based on adverse possession be eliminated by requiring registration to be a necessary step toward acquiring title. This is in accord with the oft-quoted dictum that it is title by registration, not registration of title. The requirement of registration would be expected to confer two additional benefits. First, there is an incentive to apply for registration which entails maintenance of the cadastre. Additionally, the revenue receipts of the body charged with administering the cadastre may be enhanced if a duty or fee was levied on the nominal value of the parcel in which title is transferred to the adverse occupier/applicant from the dispossessed registered proprietor.

There exists a further rationale for requiring registration to “perfect” the acquisition of title irrespective of the mode of acquisition. Acquisition may be by long established adverse occupancy, statutory encroachment, sale and purchase, survivorship, testamentary disposition, or any of the numerous other means by which ownership of land is transferred. The actual registration provides an evidentiary record of a change or transfer of “ownership”. An illustrative example is provided by the New Zealand case study, the lawsuit of *Cotton v Keogh* (1995). From chapter 7 it will be recalled that Cotton, the registered proprietor of Number 20 Kingsley Street, was also the long-term adverse occupier of a portion of land included in the registered title of Number 18. The adverse occupier was required to show that the ownership in the disputed boundary strip had passed to his predecessor prior to 1939 when both Numbers 18 and 20 were converted and brought within the registered land title system. In this case, the adverse occupier was unable to do so. Consequently his suit against the proprietor of Number 18 failed.

The difficulty faced by the adverse occupier is that the legal position with regard to the status of the parcel prior to it being brought within the registered land title system is unknown — it has been lost through the passage of time and the paucity of evidence. Whether Cotton’s predecessor in title had acquired ownership of the

disputed strip prior to 1939 is unknown. In the absence of this information, Cotton's lawsuit is lost by default, as it was he who bore the burden of proving that ownership had passed pursuant to adverse possession. This is so even if it were the case that the predecessor had been in adverse occupation for the required limitation period. Thus, if the ownership had passed by operation of law alone pursuant to limitations, the inability to establish this fact some sixty years later means that ownership reverts, by default, to that party in whom ownership had previously been extinguished. This is highly unsatisfactory wherein the status of the land is subject to the evanescent nature of evidence dating back some sixty or more years. The uncertainty and doubt necessarily attached to possessory titles should not be permitted to continue in a system of registration which includes and facilitates the recording of information in the register.

Although included under the rubric of a desirable characteristic it is concluded that the requirement that registration is necessary to complete or perfect a title based upon adverse possession is an essential and necessary characteristic. It is also recognised that this characteristic is but a further aspect of the already described "logical coherence with registration principles".

#### 9.2.4 *No exception to the abolition of "Nemo dat..."*

The "*nemo dat ...*" rule has been described as "he who has not cannot give" (Black 1979, 935) or "no one can give who possesses not" (Burke 1977, 1229), that is, no one can pass a better title than he himself has (Megarry and Wade 1975, 1056). This is a basic principle of property law which, in the case of Torrens registered land title was done away with to be replaced with indefeasibility of title and assurance.

The abolition of this fundamental principle of property law was one of the striking changes effected by land title registration (*ibid*; DiCatri 1962, 11). Thus it can be concluded that together, the registered title principles of *indefeasibility* and *assurance* were a reversal of the "*nemo dat ...*" rule and an exception to a basic principle of property law. To permit the unregistered title of an adverse occupier to override that of a purchaser relying upon the certified title of the person named in the register as the registered proprietor is to allow an exception to the exception. To

allow title based upon adverse occupation to override the registered title entered in the register could, in theory, lead to a chain of unregistered deeds of conveyance dating back to the adverse possessor overriding a similar chain of registered transfers on the basis that none of the registered transferors was able to pass “good” title to the transferees because of the exceptional retention of the “*nemo dat ...*” rule only in instances of adverse possession.

With the recent (2001) amendments to the Tasmanian registered land title statute and the replacement English registered land title statute (2002), Victoria and Western Australia (and the two Irish jurisdictions) are left as the only registered land title systems which recognise the proprietary rights of the adverse occupier whose interest has not been entered into the register and impliedly retain “*nemo dat ...*” as an exception to its general abandonment by the title registration statute. It is on this basis that Victoria and Western Australia are described as *quasi-registered* land title systems. It is concluded that this characteristic which requires nothing less than the full and absolute abolition of “*nemo dat ...*” is also essential rather than desirable and is but another aspect of “logical coherence” with title registration principles.

#### 9.2.5 *Reliability and effectivity of certification*

If it be accepted that the register correctly reflects the status of the land holding it is necessary to consider the effective date at which the register “speaks”. There are two possible instances of time. The first, to be described as the time of “reliance”, assumes that the register correctly reflects the state of the register at the time of inspection. This is so even if the time of inspection is long after the making of the register entry. This requires an assumption that the status of the interests recorded in the register does not change in the interval between the making of the entry and the later inspection (with reliance upon) the register entry. This is the interpretation that was initially adopted in Canada (DiCastrì 1962, 16; in re *Shotbolt* 1888, 347). In the context of electronic on-line title investigation this is the desirable interpretation adopted in the formulation of the English *Land Registration Act* 2002 (House of Lords Parliamentary Debates 30 October 2001).

The other possible approach is that because the state warrants the title to which the registrar certifies, the facts as disclosed by the register entry must be taken to be true at the time it is made (re *Ford's Application* 1953). An early distinction was made between the duplicate certificate of title and the register entry where it was held that the duplicate could only be conclusive evidence of the state of the register at the time of issuance only while the register entry was considered as probative at the time of inspection or reliance. The more recent interpretation is based upon the inability of the registrar to continuously update the register to reflect those legal interests that may have come into existence since the most recent issuing of the certificate. Thus the register entry is taken to be true at the time it was made and the certificate issued (*Lutz v Kawa* 1980, 24). It is this recent interpretation that gives rise to the concept of the most recent entry in the register “wiping the slate clean” with the consequence that any blemishes on the title prior to the most recent entry in the register are obliterated. For that reason the registered proprietor's right to recover possession cannot be barred within the limitation period commencing with the most recent register entry certified by registrar at the time of issuing the certificate.

Closely related to the reliability of the register entry is the reliability of the registrar's certification. It is because the registrar certifies the correctness of the register entry that loss or damage arising from reliance upon the register gives rise to indemnity from the assurance fund. The basis of the registrar's certification is the initial investigation of title and the subsequent maintenance of the register. However, in Victoria and Western Australia, an exception to the paramountcy of the registered proprietor's estate is any rights subsisting under adverse possession which extends to inchoate rights in the course of being acquired (Francis 1972, 161; *McWhirter v Emerson-Elliott* 1960). Thus upon a dealing being registered and the registrar issuing a certificate, the registrar's certification is subject to the undocumented, unrecorded, unregistered overriding rights of an adverse occupier. It follows that in Victoria and Western Australia the reliability of the certification by the registrar is less than absolute and it for this reason that the Victorian and Western Australian systems have been described as *quasi*-registered title systems.

An essential characteristic of a title registration system is that the certification of the registrar should outweigh those rights acquired or in the course of being acquired under adverse possession. It follows that unless the registrar's certification is absolute it is meaningless. Although included under the description of a desirable characteristic it is concluded that the requirement that the registrar's certification be absolute is an essential and necessary characteristic. It is also recognised that this characteristic is but an aspect of the already described "logical coherence with registration principles".

#### 9.2.6 Avoidance of a "*mausoleum of parchment*"

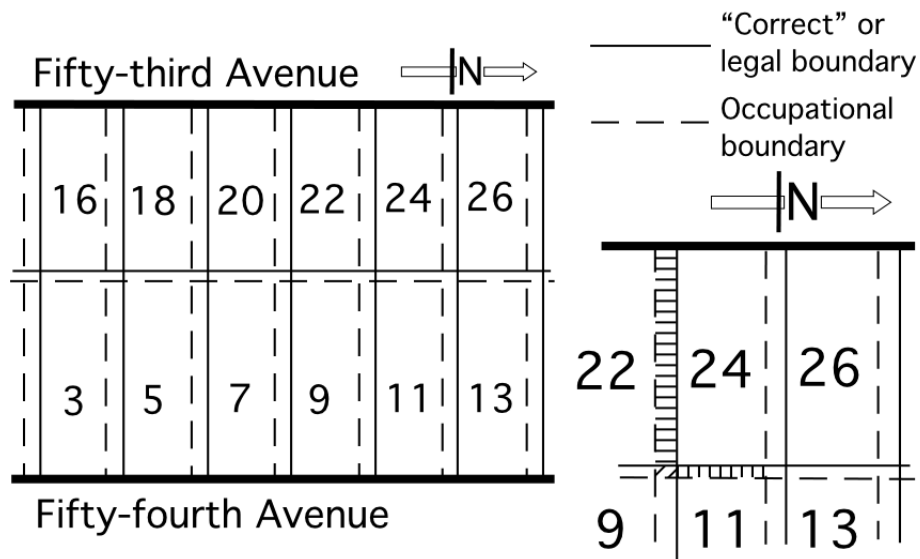
Maitland used the phrase *mausoleum of parchment* (Simpson 1976, 19–20) to describe the accumulation of documents necessary to prove title under the private conveyancing system. This was the "chain of title" wherein every transaction by which the property was or had been transferred was to be evidenced by a deed with the chain beginning with the first alienation of the property from the Crown down to its present title status. This chain of title was eliminated with the introduction of title registration. The issuing of the current certificate destroyed all that had passed before, because, in theory at least, the current certificate evidenced the alienation from the Crown to the current registered proprietor. Should the current proprietor transfer his interest to another, then the next certificate evidenced the alienation from the Crown to that transferee and also destroyed all that had passed before.

The permitting of title founded upon adverse possession can also add to the mass of documents accumulated although there would appear to be a finite limit to the number so accumulated. Traditionally, adverse possession has always led to the dispossession and acquisition of land with the consequence that even part parcel adverse possession is treated as the acquisition of a wholly separate parcel — small usually, but a whole parcel in its own right. For example, where one landholder has acquired through adverse possession a small strip of land that originally was owned by his neighbour, that small strip is not incorporated within the "parent" land holding of the occupier. Thus, in a registered land system that permits transfer of title founded upon part parcel adverse possession, there exists more than a single certificate of title with regard to the land holding of the trespasser.



Thus, in the example of *Malter v Procopets* already considered in chapter 7, when the court ruled that Mr Malter had acquired title to the half metre strip along the boundary separating numbers 20 and 22 Orrong Crescent, the acquired strip was the subject of a newly created title certificate and register entry. Thus, Mr Malter's land holding is made up of *two* contiguous parcels. Should he so desire, there is provision for consolidating these two parcels into one. Should Mr Malter desire to sell or otherwise transfer his land holding, care must be taken to ensure that the whole of his holding is the subject of the transfer. Unless it is clear from the transfer memorandum that the vendor was transferring the whole of his holding (including the part parcel acquired through adverse possession), the registry office will make register entries strictly in accordance with the memorandum. As a consequence, the result may not be that intended by the vendor (Mr Malter) and the purchaser with the purchaser being the registered proprietor (and thus title holder) of Number 20, Mr Procopets remaining as the registered proprietor (and title holder) of the remainder of Number 22 and Mr Malter being left as the registered proprietor of the disputed half metre strip between the land holdings of Mr Procopets and the purchaser of number 20. This is because the rights over the part parcel acquired by the adverse possessor do not pass under a transfer of the "parent" parcel (*Kirk v Sutherland* 1949; *Koadlow v Bollard* 1997; Francis 1972, 622). The term "Mother Hubbard" clause has been adopted from American oil and gas law to describe the transfer of all land over which the transferor has rights including slivers of adjoining land acquired by adverse possession (Brown 1986, 393–4; Brown 1981, 107–8; Black 1999, 1031; Garner 1995, 575; Redden 1993, 547). In the absence of a properly worded Mother Hubbard clause Malter may be left as the registered proprietor of a half metre strip of land between numbers 20 and 22 Orrong Crescent as described above.

Consider another example of the problem as illustrated in Diagram 9.1 (on the following page) depicting a sub-division between the two streets running North-South. Each lot is subject to multiple (or serial) encroachment in that the occupations for each lot diverge from the legal boundary by the same amount, for example lot 24 (shown in the detail on the right) has the "correct" frontage to Fifty-third Avenue but its occupational boundaries are to the south and to the east of the correct legal



**Diagram 9.1: A series of multiple (or serial) encroachments in a sub-division**

boundaries. The occupational land holding represented by lot 24 includes parts of lots 22, 9, and 11 and the major portion of lot 24 (with the strip along its northern boundary being occupied by the proprietor of lot 26). Under the present practices of the land registries which permit acquisition of parts of parcels pursuant to adverse possession, the register will record the proprietor of lot 24 as having title over *four* separate parcels with a corresponding *four* register entries: one for title over lot 24 (subject to the interests of the proprietor of lot 26), another for the title over the strip between lots 22 and 24, a third denoting title for the strip between lots 11 and 24 and a further entry for the title to the small rectangular shaped portion at the north-west corner of lot 9. Corresponding to the *four* entries in the register, the proprietor of lot 24 will have been issued with *four* separate duplicate certificates of title. This is the case although the proprietor considers his land holding as only one distinct parcel. Although there are provisions enabling a proprietor to consolidate several adjoining parcels into one whole, there is no necessity or compulsion to do so.

The *Land Title* Act 1994 (Queensland) did away with the physical duplicate certificate of title issued to the registered proprietor. Thus Queensland dealings are wholly confined to entries in the register. In the example just discussed, the proprietor of lot 24 will not have been issued with any duplicate certificates of title. However, the recording in the register of the legal interests of the proprietor will require four separate entries for the four separate parcels held by that proprietor.

Although not essential to the maintenance of a proposed model it is considered desirable that individual land holdings not be the subject of numerous entries in the register and a multitude of issued certificates. The present practice of the registries and the courts in those jurisdictions where statutory encroachment is permitted is that the “parent” land parcels are adjusted to incorporate the additions and subtractions of land portions with the register entry being amended to reflect that the parent parcel has been added to or subtracted from. The additional land portion transferred pursuant to statutory encroachment does not create an additional parcel necessitating an additional new register entry to be made and an additional new certificate to be issued as is the case in those jurisdictions permitting part parcel adverse possession. This aspect of adverse possession leading to the creation of an excessive number of parcels with corresponding entries in the register and the issuing of individual certificates is not what Maitland referred to as the "mausoleum of parchment" but his term could be extended to describe the excessive and unnecessary proliferation of parcels and titles and their corresponding physical paper certificates.

#### *9.2.7 Mandatory registration of registrable interests*

Another aspect of the registration system that is so desirable that it should be mandatory is the compulsory registration of registrable interests. It is only in some of the Australian registered land systems that protection is provided for interests that have not been registered although such interests are capable of being registered. For this reason alone these systems are exceptional. In the other Australian systems there is no compulsion to register an interest; however, failure to do so will result in the loss of the protection provided by the registration system.

Thus in a workable registration system seeking to protect the interests of those who have registered their interests *and* those who will act in reliance upon the register it is essential that there can be no protection without registration. This is a minimum requirement for any registration system. A possible further requirement is the compulsory or mandatory registration of interests. There exists a difficulty with regard to requiring the registration of an interest that may be unknown to the holder

of that interest in the particular circumstances associated with the boundary location discrepancy.

The current Australian practices which have permitted registrable interests to remain unregistered may have been born of the confidence that the benefits of registration are so easily appreciated and advantageous to the interest holder that there need be no compulsion on the interest holder to seek registration. If that is the case then the confidence was misplaced. After 140 years of title registration there still exists a large number of parcels remaining outside the registration system despite the perceived benefits attached to registration. There are now moves afoot to force registration of the remaining parcels in a move to reduce the expense of maintaining two systems. The modern view is that registration should not be reliant upon voluntary conversion. In a study of the Germanic land registration system reputed to have formed the basis of the system introduced into South Australia, Raff (1999, 427) states that the Germanic system includes the social obligation to register proprietary interests. Palmer's 1996 study cited by Dale and McLaughlin (1999, 39–40) listed several criteria for effective land registration, the first of which — jurisdiction-wide coverage — entails compulsory registration. Larsson (1991, 23) discusses the incorporation of compulsory registration in all but the most rudimentary deeds registration systems while Barnes *et al* (2000, 39) conclude that a consequence of permitting voluntary registration is the undermining of the reliability and integrity of a registration system.

More recently the English Parliament has considered the compulsory obligation to register land holdings with the consequences of failing to do so being loss of protection provided by law (Law Commission 2001, ¶ 3.38, p 49; *Land Registration Act* 2002, section 6). In the debate stage of the Act's passage through the English Parliament there was a proposal to impose criminal penalties on those failing to register their legal interests within the period expiring on December 30, 2003 (House of Commons Parliamentary Debates, 13 December 2001). The proposal to include these provisions in the Act was not taken up. Other measures are designed to reduce the number of recognised overriding interests in the first ten years operation of the Act. Failure to register those overriding interests slated for abolition will cause any

protection to be lost (House of Lords Parliamentary Debates 3 July 2001). A further provision will restrict the use of caveats as a means to protect unregistrable interests. The use of caveats to protect registrable interests will be confined to interim protection only, pending the registration of the interest. Otherwise the caveat will lapse with registration as the only means to protect registrable interests.

### **9.3 A proposed model to resolve boundary variation**

Having enumerated the essential and desirable characteristics, the construction of a model with these criteria is now proposed. It is proposed that the model be comprised of three modules which may be implemented independently of each other. Thus a “full” solution would involve all three modules while a lesser solution would involve utilising a lesser number of modules. The first module relates to whole parcel adverse possession while the remaining two modules are to resolve boundary discrepancies. The inclusion here of the first module is for completeness as it is otherwise outside the scope of this thesis.

The experience of those jurisdictions that have belatedly introduced adverse possession after prohibiting it supports the necessary pragmatism of acceptance of title based upon occupation by other than the registered proprietor. Consequently, with regard to title over whole lots it is proposed that title founded long-term adverse occupation be recognised but only upon application for registration by the occupier and the subsequent registration of the occupier as the registered proprietor. At any stage prior to the registration of the occupier (and the extinguishing of the dispossessed registered proprietor's title), the dispossessed registered proprietor has a paramount title and can transfer or convey that title to a transferee. Upon registration of the transferee as the registered proprietor any accrued interest held by the occupier is destroyed. The destruction of any accrued interest held by the adverse occupier is destroyed at any time prior to that interest being registered by the entry into the register of any new registered interest.

With regard to the occupation of less than a whole parcel it is proposed to *absolutely* and *expressly prohibit* the acquisition of title based upon adverse occupation. In conjunction with an express and absolute prohibition against part parcel adverse

possession it is proposed that lot boundaries may be subject to adjustment pursuant to an application based upon an encroachment by a building or other permanent improvement with a wide range of discretionary remedies available to a land division of the court. The court will be empowered to consider all aspects of the encroachment including the origin of the encroachment and to consider the balance of convenience with regard to all affected persons in arriving at its decision. The range of discretionary remedies will include the granting or refusal of an application coupled with the power to award compensation and costs associated with the application and subsequent remedies.

It is further proposed, in regard to boundary discrepancies, that a minimum "error" be established as a threshold before an application founded upon the boundary location can be made. This aspect would be an extension of the provision already in force in Victoria under section 272 of the *Property Law Act* 1958. This provision would be extended to include *all* surveys conducted by licensed professional surveyors. This proposal is not intended to and should not provide a "licence" for professional surveyors to perform their professional duties in a manner falling short of the performance expected of a professional surveyor.

The model herein proposed does not include all the detail necessary to establish a workable system. The period of adverse possession necessary to permit a successful application for the whole parcel trespasser or squatter has not been addressed. The current systems in operation in Australia impose a limitation period of either twelve years (NSW and Tasmania for example) or fifteen years (Victoria). This is because the legal principles involved are independent of the limitation period. A uniform scheme would preferably involve a uniform limitation period but that is not strictly necessary in that a uniform scheme could adopt a uniform set of legal principles while imposing differing limitation periods. As a matter of pragmatism it may be that an extended limitation period will assist in fostering the adoption of such a uniform scheme. An example being that of New Zealand, which introduced whole parcel adverse possession of registered title land in 1963, with the required limitation period set at twenty years being eight years longer than that required to set up adverse possession of unregistered land which only requires twelve years. Similarly, the

enquiry conducted by the Tasmanian Law Reform Commissioner elicited the proposal from some opponents of adverse possession that the limitation period be lengthened from twelve to fifteen years. This fifteen year period formed the basis of the Commissioner's Recommendation 5 (LRCT 1995, 5). Thus, those jurisdictions reluctant to permit adverse possession applications may be less resistant to its introduction if the necessary limitation period is extended.

With regard to the implementation of the proposed scheme it is proposed that the simplest utilisation will more readily find favour in any jurisdiction adopting the scheme. Thus it is proposed that the scheme be considered as comprised of the individual modules and the adoption of any combination of modules be voluntary with the proviso that the "error margin" component is a necessary component. Thus full implementation would involve permitting adverse possession of whole parcels, encroachment applications where buildings or similar improvements intrude into an adjoining parcel, and a discouraging of boundary location litigation where the remedy sought relates to less than a "minimum actionable" discrepancy. Coupled with the operation of the proposed model would be a restriction upon any procedure other than those included in the model — thus, a jurisdiction would be required to consider the adoption of *only* the three modules in the proposed model. This would permit adoption (or rejection) of any or all of the modules in the proposed model without adaptation or modification. As a consequence, for example, the Australian Capital Territory, which does not now permit adverse possession or encroachment, must at a minimum introduce the "error margin" to comply with the proposed model. Additionally, if the Territory wishes to adopt a provision for "quieting title" over a whole parcel it may do so *only* by adopting the whole parcel adverse possession provisions of the proposed model. Additionally, if the Territory wished to adopt a provision for adjusting boundaries where there exist discrepancies it may do so *only* by adopting the statutory encroachment provision of the proposed model.

#### **9.4 Evaluating the proposed model against the case studies**

Justification for the proposed model will be how it performs. Ideally, the model should perform better in all areas than the existing models. At a minimum, the model should not perform at a level below any one of the existing models. However, this

minimum performance level is undesirable in that if the performance is no worse than that of an existing model there is no pressing incentive to adopt the proposed model. The minimum performance level perhaps may be rephrased as not performing below the level of an existing model that is recognised as having a high level of performance. The evaluation of the proposed model is based upon its performance in regard to those recent lawsuits that made up the three case studies. While it is believed that these cases are representative of the more difficult problems arising from adverse occupation and boundary discrepancies, it should be kept in mind that they do not necessarily exhaust all the possible permutations of problems that may arise in the torrent of human affairs and the ingenuity of the legal mind in the devising of a problem requiring a solution.

#### 9.4.1 *Malter v Procopets* (Victoria)

If this dispute were adjudicated according to the proposed model there would be no application of the principles of adverse possession because the trespass by the occupier of number 20 was over less than the whole parcel of number 22. The only application open to the parties would be pursuant to the encroachment into number 22 by permanent improvements. These were confined to the garage, the path, and the oil-tank all partially erected on number 22.

Such an application in respect of the garage and the path (being improvements of a permanent nature) would be successful while that of the oil-tank (not of a permanent nature) would fail. The party benefiting from the compulsory transfer of land from number 22 to number 20 would be required to pay the necessary costs incurred in formalising the transfer as well as a “fair and reasonable price” to the owner of number 22. The “fair and reasonable price” will ensure that the proprietor of number 22 is not permitted to take advantage of the boundary discrepancy and seek compensation that is excessive and out of proportion to the loss suffered by the compulsory transfer of the affected land to the encroaching party. Otherwise there should be no order as to the costs of the application with the result that both parties would, in the usual course of events, bear their own costs. However, if the application by the owner of number 20 was the subject of vigorous opposition by the owner of number 22 then the costs of the proceedings may be awarded against the



opposing party where it was clear that the opposition was ill-founded. In fact, there may be no costs incurred by the party ordered to convey the affected land to the encroaching party if that party, recognising the likelihood of the application succeeding, offers no opposition to the application.

It follows that the register entry for number 20 would be amended to show the increased holding and the irregular boundary between numbers 20 and 22 necessary to provide for the inclusion of the land upon which the garage is erected to be wholly within the title of number 20. There would be no “new” certificate issued for the small land parcel created as actually occurred subsequent to the court decision awarding the disputed strip to the long-term adverse occupier (*Malter v Procopets* 2000).

Overall it may be concluded that the proposed model results in an irregular boundary between numbers 20 and 22; the integrity of the register is upheld; and Malter, the proprietor of number 20 is enabled to apply for the encroachment without the necessity of establishing adverse occupation of a sufficient duration. That is, at any time after selling number 22 to the Richardsons (in 1972) Malter could have applied for that small portion of land upon which his garage encroached into number 22. Under the present scheme of adverse possession in Victoria, at any time prior to late 1987, the Richardsons and thereafter Procopets could have compelled the removal of the encroachment. Whereas Malter would be required to compensate Procopets for the small portion conveyed to him he would not have faced the risk of being forced to dismantle the encroaching structure had ejectment proceedings been taken against him prior to the passing of the limitation period. The proposed model provides continuous security to Malter at the expense of the compensation ordered to be paid to the proprietor of number 22. With regard to Procopets he is awarded some compensation for the ordered transfer of a small portion of his land to Malter. This compensation is in respect of land that, to Procopets’s mind, was not his until his belated appreciation of the “correct” boundary location. The reverse side of the coin is that had Procopets become aware of the encroachment earlier, he would not have been able to resist an encroachment application by Malter pursuant to the proposed model. Thus the proposed model has deprived Procopets of his right to eject Malter if

and only if he had become aware of Malter's encroachment prior to the tolling of the limitation period in late 1987 under the current adverse possession provisions of the Victorian *Transfer of Land Act*.

#### 9.4.2 *Woodward v Wesley Hazell* (Tasmania)

This dispute would be resolved under the proposed model as being a whole parcel and subject to adverse possession. This is despite the parcel being physically removed from the rest of the Woodward farm through previous sub-division and sale of other parts with the result that the disputed parcel makes up only part of the land encompassed by the register entry and the issued certificate of title. The resolving of the ultimate registered proprietor is dependent upon the first of the competing interest holders to make application to the registry. Thus if Hazell were to apply for registration upon the necessary period of adverse occupation accruing prior to any dealings between Woodward (the proprietor proposing to sell) and the would-be purchaser, then Hazell's application would defeat and extinguish Woodward's registered title. On the other hand, any application by the proposed purchaser would defeat any interest of the trespasser Hazell. Under the current regime operating in Tasmania, the payment of local land rates and taxes by the dispossessed registered proprietor Woodward, would be sufficient to prevent Hazell's occupation counting towards the necessary period of adverse occupation.

If it were the case that the disputed land was held to be part parcel only, then it follows that such land cannot be the subject of an application based upon adverse possession and can only be the subject of an application pursuant to encroachment by improvements. The description of Hazell's adverse occupation was of agricultural cultivation of the land and this alone does not constitute permanent improvement sufficient to found an encroachment application. Under the current regime operating in Tasmania, the payment of local land rates and taxes by the dispossessed registered proprietor Woodward would be sufficient to prevent Hazell's occupation counting towards the necessary period of adverse occupation. As previously discussed, the reliance upon payment of land taxes and rates to defeat an adverse possession application is not necessarily always effective.

#### 9.4.3 *Cotton v Keogh* (New Zealand)

This dispute is wholly founded upon occupation of a boundary strip and being less than whole parcel, cannot give rise to an adverse possession application under the proposed model. The judgement discloses no evidence that the adverse occupation by the applicant included encroachment by a building or other improvement. The result is thus that the boundary will be restored to the “proper” legal location without reference to the occupational boundary. In the context of this case the law under the proposed model does not differ from that already in force in New Zealand.

#### 9.4.4 *Discussion*

In the cases under consideration, the proposed model performs in a manner which, it is submitted, is preferable to the existing models currently in use. Taking the Victorian case the proposed result would differ substantially from that that followed from the current system in force. It is argued that because the part parcel boundary discrepancy and dispute is between two parties who were neighbours prior to the dispute arising and who will remain neighbours after the resolution of the dispute, adverse possession is not an ideal solution as compared to those cases where the disputants occupy the disputed land in a mutually exclusive manner — that is, the person ejected as a consequence of a whole parcel adverse possession lawsuit does not remain a neighbour of the person whose proprietary right to occupy the land has been upheld by the courts. It was for this reason that it was concluded that part parcel adverse possession was not suitable for resolving boundary location discrepancies. Further, the resolution offered here does not involve the sudden transfer by operation of law that is outside the knowledge of the parties. The actual transfer of title is effected at the time the register is altered to reflect the change in title pursuant to an application to the registrar or the court. The proposed model represents a marked change in Victorian practice where, in the case here analysed, at some time in late 1987 the ownership of the disputed strip changed from Procopets to Malter, with the change of ownership being unknown and unheralded to both the parties and the administrator of the cadastre, the Registrar.

In the Tasmanian case of *Woodward v Wesley Hazell*, the envisaged result could extinguish the displaced proprietor’s title whereas the current regime would not

allow that because of Woodward's continued payment of rates and taxes throughout the period of Hazell's trespass. Of course to extinguish the displaced proprietor's title under the proposed model would require an application by the trespasser prior to any dealings between the proprietor and a third party. On one view it could be concluded that the present Tasmanian scheme is more in line with the expectations of the Tasmanian community than the model proposed here. However, it should be recalled that the payment of rates is but an indirect shield of protection for the displaced or dispossessed registered proprietor and its protection may be less substantial than apparent. This is because a physical inspection of the properties by the valuer prior to the striking of a rate based on land value may well result in the adverse occupier being levied with those taxes and rates associated with the land adversely occupied. A consequence of striking a rate based upon inspection may well result in the protection of the registered proprietor's interest being much less than that desired by the Tasmanian community and supposed by that community to be in place.

A further factor in favour of the proposed model over the current Tasmanian scheme is the suspected inherent defects of the presently existing scheme. It must be recognised that an argument in favour of the proposed model carries little weight when its main thrust is that the proposed model is no worse than the current model in use. Such an argument has little force. However, in the case of the current Tasmanian system its future is restricted by its own internal shortcomings. If, as has been argued here, the Tasmanian parliament has replaced a successful and robust scheme with a poorer substitute that will require further "tinkering", then the adoption of the proposed model may be advantageous to the Tasmanian community. That the performance of the proposed model is no worse than the current scheme in one example of its performance should not detract from its superiority in the wider view of its overall operation.

Insofar as the New Zealand case is concerned the proposed model does not change the outcome wherein the trespasser was unable to acquire title to the disputed strip along the boundary. The proposed model does not recognise occupation only in regard to part parcel applications and requires some permanent building or improvement encroaching on to or intruding in to the adjoining contiguous lot — occupation and use alone are insufficient. The present system does not recognise part

parcel adverse possession applications. It may be thus concluded that the proposed model does not effect any change except insofar as the proposed model would prohibit any actions involving less than that permitted within an allowable margin of error.

While not arguing that the proposed model is completely satisfactory with regard to the reliability of the register, the register will record legal changes to title as they are pronounced by the court (boundary encroachments of part parcels) or upon successful application to the registrar or the court (whole parcel adverse possession). This flows from the requirement that title is dependent upon registration. However the register will not disclose the *de facto* state of affairs until a successful application is approved at which time the *de facto* and *de jure* state of affairs will coincide. For example, in the Victorian case of *Malter* the title to the disputed strip vested in Malter in late 1987 but the register did not disclose this until the final resolution by the Court of Appeal in February 2000. Under the proposed model, the updating of the register will coincide with the change in title which occurs at the time the application is granted. Thus, under the proposed model the register will always disclose the legal title but will not necessarily disclose the *de facto* occupation.

## **9.5     Forestalling opposition to the proposed model**

Of the current Australian systems, the proposed model represents major change to the Victorian and Western Australian *quasi*-registration systems. A perceived advantage of these systems is their WYSIWYG (what you see is what you get) aspect which permits land market participants to rely upon inspection without the necessity of commissioning a professional identification survey to confirm the correspondence between occupational and legal boundaries. The WYSIWYG aspect is in accord with the law favouring the proposition that purchasers buy what they see and that this proposition is in accord with the purchasers' expectations (Toms and Lewis 1974, 262). It must be appreciated however that the inspection of Victorian occupations and the correspondence between the inspection and the subject of the sale is dependent upon the occupations being of sufficient antiquity to incorporate "ownership" pursuant to part parcel adverse possession. If the occupations are of less duration of existence than the limitation period there can be no WYSIWYG.

For example, in the Victorian litigation analysed as one of the case studies, it could be concluded that Procopets failed attempt to eject the trespasser Malter is a prime example of WYSIWYG. However, unknown to the vendor Malter and his purchasers (the Richardsons), the subject of the conveyance in 1972 was *not* the property as inspected by the purchasers. Unknown to the purchasers and the vendor, the purchasers obtained “more” than their expectations with their expectations being based upon their inspection. If at any time the purchasers had sought to eject the trespasser Malter from the (later disputed) half-metre strip, their right to do so is not in doubt. The successor in title to the Richardsons also obtained “more” than his expectations based upon his inspection. His right to eject Malter in that short interval between his purchase and the tolling of the fifteen year limitation period is also not in doubt. It was only after the limitation period had passed that Malter acquired title to the strip and extinguished Procopets’s title.

With regard to the necessity of commissioning an identification survey instead of reliance upon inspection, the following observations are offered. One, Procopets, the purchaser of number 22 Orrong Crescent, did not avoid commissioning the survey of his property. The survey was conducted outside the short period when he was still enabled to eject the trespasser. Two, had Procopets commissioned the survey at the time of purchase the ensuing litigation would have most likely ended in a different result. Three, had Procopets commissioned the survey at the time of purchase, any argument founded upon WYSIWYG and advanced on behalf of the trespasser Malter would have been ineffectual. It is concluded that WYSIWYG does not necessarily provide the protection for market participants as advanced by proponents of the Victorian scheme.

Further, the protection for market participants advanced by proponents of Victorian part parcel adverse possession are not necessarily lost if statutory encroachment is introduced as an alternative. Statutory encroachment will provide some measure of the protection provided by WYSIWYG adverse possession. The protection provided by statutory encroachment will not be as extensive as that provided by adverse possession because occupation without improvement will not invoke statutory

encroachment. As a balance to the lesser protection, the protection provided is not dependent on the tolling of the limitation period. Statutory encroachment is not dependent upon a fifteen year gestation period.

Additionally, any advantages resulting from WYSIWYG adverse possession do not outweigh the injuries inflicted upon a title registration system which recognises title *without* registration, which admits an exception to the abolition of the “*nemo dat ...*” rule, which permits the Registrar to issue a certificate but refuse to certify the contents of the certificate, and which permits unrecorded and unregistered interests to override interests recorded in the register and supposedly certified by the Registrar.

## **9.6 Summary**

Proceeding on the foundations established by the preceding chapters a proposed model suitable for adoption as a single uniform Australia-wide was introduced. The model provides resolution to property disputes involving whole parcels which may be considered as proceeding beyond the ambit of this thesis. A viable solution to the boundary discrepancy problem should be consistent with the occupancy of whole parcels. The overall solution here offered should also be applicable to other jurisdictions outside Australia. The utility of any such proposal must necessarily be established and this was done by applying the model to the lawsuits that made up the case studies.

# **Chapter 10**

## **Introducing the proposed model into the different jurisdictions**

### **10.1 Introduction**

In the previous chapter the proposed model was introduced and discussed. This chapter is concerned with its implementation or introduction into actual use. The proposed model necessarily includes whole parcel adverse possession for “quieting of title”. Although strictly outside the scope of this thesis it is recognised that the introduction of major changes to the existing systems cannot be effected in isolation. To do so may risk disrupting other aspects of the system seemingly unrelated to the introduced changes.

Another practical aspect of the planned introduction into the disparate Australian systems is the proposal that the introduction be of discrete modules in recognition of the difficulty of implementing the changes simultaneously. Desirably, the proposed model should be introduced in its entirety. However, it is recognised that not all jurisdictions may be willing to proceed in unison with other jurisdictions. The proposal for introducing the model will allow different jurisdictions to proceed at their own pace with the ultimate goal being the full implementation of the model uniformly across all the Australian jurisdictions. A disadvantage associated with the permissive encouragement of adopting the single model is the possibility that some jurisdictions will, through inertia, fail to fully implement the model in the absence of strong incentive or motivation. In Australia there existed a permissive voluntary scheme to cater for owners of unregistered land to convert their holdings by bringing their land into the registered land title system. Notwithstanding the perceived benefits of conversion the experience was that reliance upon voluntary conversion was not sufficient. The present perceived wisdom is that such owners should be encouraged to convert voluntarily within a generous period of grace but thereafter compulsory conversion must be imposed.



## **10.2 Introducing the proposed model into the existing systems**

The incorporation of the proposed model into the different Australian states registered title systems would, if done fully in its entirety and simultaneously, result in a single uniform Australia-wide system. However it is feared that not all jurisdictions will agree to adopt the proposed model in unison. Although full adoption of the model is favoured, the proposed model may stand an improved likelihood of uniform adoption if it is capable of being implemented in modular form in accord with the particular preferences of each jurisdiction. The discrete modules that make up the proposed model will permit a take-up of the model at a pace best suited to each of the jurisdiction with the ultimate goal being a single uniform model across Australia. Of course this will require some compulsion to avoid the failure to adopt the model; the allowing of the jurisdictions to set their own pace with regard to take-up cannot be permitted to continue indefinitely. There are three aspects of the proposed model of which only two are directly related to this thesis.

### *10.2.1 Whole parcel adverse possession*

This is an essential part of any land system to permit actual occupiers to remain in occupation with security of tenure. The only purpose served is to recognise the “abandonment” of land by the registered proprietor who are unable to be found when an application by the adverse occupier seeking registration is made. This aspect of acquisition of property rights (the title to a whole parcel) is outside the scope of the current research but is included here to present a comprehensive wide ranging model that covers the whole field. The experience of the Australian jurisdictions and the recently enacted English *Land Registration Act 2002* supports the need for a procedure to permit occupiers to acquire property rights when those rights have been abandoned by the registered proprietor and the occupier’s application is unlikely to be challenged.

The adoption of the proposed model would require little change in most of the Australian jurisdictions and in fact probably represents the least disruptive model necessary to introduce a single Australia-wide system. To do so would require the two territories to adopt acquisition of title founded on whole parcel adverse possession where the registered proprietor elects not to oppose an application by the

occupier for registration or cannot be “found” using reasonable means of seeking to notify the registered proprietor of a pending application. Of course, any period of adverse occupation necessary to support such an application by the occupier can only commence after the most recent register entry made by the registrar. Any accrued period of occupation prior to an entry made by the registrar would be wiped clean from the slate (register) by the registrar making that new entry.

At the other extreme are Victoria and Western Australia, the two jurisdictions most favourable to the adverse occupier. For these states to adopt the proposed model would require a recognition that occupation alone is insufficient to confer title and a title acquired by adverse occupation must be perfected by registration which can only be sought after occupation for the required limitation period. Furthermore, inchoate proprietary rights not yet matured for the required statutory period would not survive a new entry in the register effected by the registrar. This last requirement would remove the protection for those rights of adverse possession in the *course of being acquired*. Victoria and Western Australia are the only remaining jurisdictions permitting this approach favourable to the trespasser or squatter as Tasmania (2001) and England (2002) have abandoned their previously similar favourable stance.

The remaining jurisdictions are able to conform to this aspect of the proposed model with the least disruption as their current approaches are already very similar to that of the proposed model.

#### 10.2.2 *Permissible error margin prohibiting legal action*

This aspect of boundary location discrepancies should be the least contentious module of the proposed model save for one possible disadvantage. The effect of the proposal is expected to reduce litigation over boundary locations. Further, it may be expected that the provision can discourage litigation over boundary locations even where the discrepancy is in excess of the permitted error margin because the thrust of the provision is to indicate the trifling nature of small discrepancies. Certainly, the current margin of error of 50 millimetres is much less than the finite width of a typical suburban dividing fence. As a consequence it may be an opportune time to adopt a greater margin of error, for example, 150 millimetres.

There does exist a possible danger in that a party may deliberately seek to extend their holding by the amount permitted by the allowable margin. It must be emphasised that the purpose of section 272 of the *Property Law Act 1958* (Victoria) and its Western Australian counterpart is to restrict litigation over “trifling” matters; it is not to confer a licence upon a land holder to extend his holding or a professional surveyor to indulge in a less than professional exercise of his profession. It has been intimated that some professional surveyors have deliberately erred for the benefit of their clients by extending the client’s holding by an amount within the statutory margin of error (Bell 2001).

#### 10.2.3 *Statutory encroachment*

This is the major of the two modules related to boundary discrepancy resolution of the proposed model. Its adoption and recommendation over part parcel adverse possession is founded on its perceived advantages. These being that the wider range of remedies available in response to an encroachment application results in a more “palatable” disposition of the boundary dispute, the encroachment application does not have a threshold period before it may be invoked, and boundary location discrepancies and their resolution leave the disputants as neighbours whereas whole parcel adverse possession to “quieten title” usually removes one of the contesting parties from the physical location of the disputed property. The more palatable disposition of course relates to the viewpoint of the “loser” with the extent of the loss suffered by the loser being ameliorated by the terms of the resolution imposed by the court in response to an encroachment application. This may be contrasted with adverse possession where one disputant is rewarded with land title at the expense of another disputant whose loss is total.

With regard to its introduction it has the advantage that the jurisdictions of Queensland, New South Wales, South Australia and Western Australia and the Northern Territory already utilise statutory encroachment. To introduce encroachment into Tasmania would provide a resolution to the boundary location problem which that state does not now have yet the need for some means of resolution of the problem was well recognised by that state’s legislature. With regard

to Queensland and Western Australia, all that will be required to implement this module is the surrender of these states' part parcel adverse possession regimes while retaining their statutory encroachment provision. In the case of Queensland this should not prove difficult in that it is commonly supposed in that state that there is no current provision for part parcel adverse possession. This coupled with the administrators of the register in that state refusing to countenance part parcel adverse possession applications indicates that for Queensland to surrender its part parcel adverse possession regime should not attract opposition from proponents of its retention because the state does not have proponents who believe there is a part parcel adverse possession able to be retained. It will be necessary to persuade Victoria that its present means of resolving boundary location discrepancy may be replaced by statutory encroachment while the Australian Capital Territory will need convincing of the need for such provision where it has hitherto not required such a means of resolution.

In regard to foreign jurisdictions it follows that England is in a similar position to Tasmania, Alberta in a similar position to Western Australia, and Singapore and Malaysia are both in a similar position to that of the Australian Capital Territory.

#### 10.2.4 *Overcoming reluctance to change*

Because Victoria has retained its present system of resolving boundary location discrepancies for nearly 140 years it may be thought that inducing change will be difficult. The example of the recent 2002 Act passed in England may provide some encouragement with regard to overcoming opposition to change. That jurisdiction effected major change to its registered land title system not because there existed a perceived lack of logic in its prior system but to enable the introduction of an on-line register. A further argument in favour of change in Victoria is that it remains isolated (excepting Northern Ireland and the Republic of Ireland) as the only remaining jurisdiction that solely utilises part parcel adverse possession without registration as a means of resolving boundary location discrepancies.

A further factor aiding in the adoption of the proposed model is the possibility of funding provided by the central body best able to derive advantage from a uniform

nationwide system, that is the Australian federal government. If the central government recognises the advantage to be gained, it may provide funding to assist the state jurisdictions in adopting the proposed model *conditional* upon them adopting the proposed model.

### **10.3 Conclusion**

This study was undertaken with a view to ascertaining whether part parcel adverse possession of registered land aided the operation of the land market. It is clear that some means of “quieting title” and resolving boundary location discrepancies is needed. It is concluded that the initial hypothesis can be assessed thus — part parcel adverse possession of registered title land does indeed enhance the operation of the land market as perceived by the participants. However, a preferable alternative is “statutory encroachment”. Statutory encroachment does more to enhance the orderly conduct of the land market. Those jurisdictions permitting adjustment of boundary locations allow a more effective and efficient land market to arise. The best and most efficient method of dealing with the problems arising from an occupational boundary diverging from the legal boundary is statutory encroachment.

The conclusion offered is applicable to any jurisdiction utilising registration of land title. In the case of Australia, a federal system comprising several distinct jurisdictions each with the constitutional responsibility for the administration of its cadastre, it is further proposed that the nationwide adoption of a single uniform system is advantageous to the individual component jurisdictions — the Australian states, and the central overall jurisdiction — the Australian nation.

### **10.4 Thesis chapter summary**

The first chapter described the problem that is the subject of this research including its relevance to a modern society and why it is a problem – that is the means of resolving boundary location discrepancies. The chapter sets out the hypothesis central to the research and discusses the manner in which the investigation will proceed.

The following chapter two describes the central basis upon which the research is conducted and will be judged: the land market. Although the chapter necessarily entails a review of some economic aspects of the land market it does not purport to be a comprehensive economic treatise. Thus, only those aspects of direct relevance to the boundary location problem are considered with other aspects disregarded. Thereafter the development of boundaries are considered in chapter three with particular reference to those aspect of boundaries in the recently developed English colonies of which South Australia was one. Chapter four deals with limitations of actions with particular reference to actions to recover real property (land) in the English common law system. This chapter derives the conclusion that part parcel adverse possession does provide a solution to the problem posed by boundary location discrepancies but that it is not necessarily the only solution.

Chapter five introduces the application of property registration to land, that is, the ‘Torrens’ system of land title registration — as developed in South Australia and since exported worldwide. Included in its description is its basic simplicity of the underlying theory of the reissuing of a crown grant to obliterate its past history.

Chapter six “marries” the two preceding chapters to provide coverage of adverse possession of registered title land and investigates the apparent conflict between the two — this conflict is resolved by noting that it is only upon registration that title comes into being. Where the title founded upon adverse possession is registered there is no conflict.

Chapter seven illustrates the preceding chapter by considering several recent law cases from registered title jurisdictions to illustrate the administration of registered title and the application of the legal principles involved. This chapter also provides the background upon which any proposed replacement scheme will be assessed.

Thereafter in chapter eight other alternatives to part parcel adverse possession are considered as a means of resolving the boundary location discrepancy problem. Chapters nine and ten introduce a proposed model suitable for universal adoption and consider the practicalities of introducing this proposed model. This includes the

introduction of the proposed model as a single unified Australian system with a view to doing so with the least disruption in the different state jurisdictions with their present individual registered land title systems. Chapter ten concludes with a review of the research and this thesis.

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