

A UNIFORM APPROACH TO BOUNDARY LOCATION DISCREPANCIES: PROMOTING AND PROSCRIBING THE REFORM OF THE LAND TITLE REGISTER

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ABSTRACT

Adverse possession of part parcels permits the variation, rectification, and re-adjustment of boundaries with boundary definition being essential to parcel-based spatial data sets. Adverse possession and part parcel adverse possession address (and provide a possible solution to) two distinct problems by providing a single solution. It is suggested that utilizing adverse possession as a solution to boundary location discrepancy is inappropriate.

Also, if a national cadastre is to become a reality, a basic requirement is a unified national law regarding land ownership. In turn this will require a unified approach to the issue of adverse possession of registered title land and particularly adverse possession of part of a land parcel. The authors view this issue as a major obstacle in achieving a unified national cadastral survey practice. This fundamental distinction requires resolution as a necessary step towards a unified approach ultimately leading to an integrated national cadastre.

In this paper the authors analyse recent changes and current proposals for reform and offer the conclusion that reluctance to change is but a small obstacle to reform. However this optimistic conclusion is offset by misgivings with regard to the manner with which reforms are accomplished.

KEY WORDS

registered title - boundaries - location – discrepancies – adjustment – law – reform

INTRODUCTION

This paper addresses the feasibility of reforming the various Australian Torrens systems

to make them more effective, comments on the reform process, and explores the consequences of pursuing a uniform national law of registered land ownership.

Given the widely differing systems operating in Australia, reform of some or all of the systems will be necessary if a single uniform Australia-wide system were introduced. Such a uniform law has been advocated on many occasions since the federation of the Australian colonies into the Commonwealth of Australia 100 years ago. While the rationale behind the push for unification and its perceived benefits will be referred to, the main thrust of the paper are the lessons to be learnt from recent reforms of the Torrens systems. These lessons may assist in any reform process by indicating the extent of feasible reforms and in avoiding errors that have occurred in the past.

Similarly, while a particular model suitable for adoption as the unified system is outside the scope of the paper, the current thinking of the authors is referred to with some reference to the reasons supporting a compromise model derived from the already existing systems.

A uniform system would require the adoption of a common approach to adverse possession and part parcel adverse possession in particular. Consequently this paper considers several examples of recent reforms of the Torrens scheme where major changes were introduced to the operation of the law of adverse possession in Tasmania (1980 and 2001), Queensland (1994), and Singapore (1994). Additionally, the 1998 proposal for the reform to the English *Law of Property Act 1925* is considered. These initiatives provide a wide range of reforms, in some cases broadening the law and in others, restricting or narrowing down the operation of the law. A possible compromise model suitable for Australia will likely require some of the jurisdictions to expand the operation of their adverse possession law while others may be required to rein in their existing law.

The initial conclusion offered is that major changes are both feasible and attainable, if this is desired, although a caveat is offered on achievable reform having regard to the necessity for synchronized reforms throughout Australia. The optimism relating to the ability to achieve meaningful reform is tempered with concern brought on by a number of errors permitted to occur during the Tasmanian and Queensland reforms and a possible oversight foreshadowed in the proposal for reform in England. Thus the conclusion regarding the feasibility of reform requires modification in that reform is insufficiently difficult as to prevent blunders to be made too readily.

WHY UNIFORMITY ?

Despite assertions to the contrary, Australia does not have a common title registration system throughout its six states and two territories. Similarly the provisions relating to adverse possession (and part parcel adverse possession) are diverse in their operation ranging from express prohibition to permitting the unrecorded interests of the squatter to override the recorded interests of the registered proprietor. Since federation of the Australian states there have been calls for unification of the registered land title (Torrens) statutes (Hogg, 1920; Hogg in the Foreword to Kerr, 1927; Wiseman, 1931; Barwick in *Breskvar*, 1971; Whalan, 1982; Butt, 1992; Croft, 1993; Kerr, 1993; MacCallum, 1993; Neave, 1993; Irving, 1994). These calls have not advanced reasons

for unification. It may be supposed that the recent calls assume the benefits of simplicity (with consequent cost reduction) for the participants in the land market (including the financial institutions) who are less bound by geography and state borders as distances shrink with modern travel and communications. Similarly the global economy is not restricted by national borders, much less internal borders within Australia. Additionally it is suggested that there are cost benefits to be derived by the federal government in a federal cadastre founded upon the seamless integration of the various state cadastres. A sharing of these financial benefits between the federal and state governments may provide an incentive for the states to cooperate in introducing a unified system. This is additional to those initiatives of the Australian and New Zealand Land Information Council (ANZLIC) and the Public Sector Mapping Agency (PSMA) in fostering a national cadastre. We also suggest that the surveying profession will benefit from the uniform practices associated with a uniform law.

It should be noted that, to date, the state Attorneys General have not expressed as fervent a desire for a uniform registered land title law as called for by the numerous advocates and there are no current moves toward this goal.

Of the numerous advocates for unification few have addressed the practical difficulties of achieving co-ordinated reform simultaneously where there are eight different sovereign parliaments involved. Neave (1993) cites lethargy, parochialism, and the self-interest of the legal profession as factors inhibiting a move towards uniformity. It is suggested that a well-devised system accompanied by full explanation of all the aspects of such a proposed system should be capable of overcoming lethargy and parochialism. If these inhibitors can be offset the remaining legal profession self-interest may not be sustainable by itself alone.

We would argue that implicit in these calls for a uniform registered title system is the included requirement of a uniform approach to adverse possession and part parcel adverse possession. Two of the commentators cited have suggested that the diversity in approach to the question of adverse possession is a major inhibiting factor to the adoption of a uniform Torrens statute (Hogg , 1920; Irving, 1994).

ADVERSE POSSESSION TO PART IS NOT JUST A VARIANT OF ADVERSE POSSESSION

Our interest is in boundary location discrepancies. One solution to the problem posed by such discrepancies is part parcel adverse possession – after the passage of sufficient time (the limitation period) the occupational boundary becomes the new legal boundary. Or we could say the *de facto* boundary becomes the new *de jure* boundary. Other than that we have little interest in adverse possession. As was expressed in an unpublished paper by David Lambden when he lectured in Australia, adverse possession of a land parcel is an issue of significance to a lawyer – it does not concern a surveyor. However, part parcel adverse possession is of interest to the surveyor. Possibly a new boundary is being created. In fact, most probably.

It is our position that adverse possession is of assistance in resolving the dispute over who owns a particular parcel of land. On the other hand, part parcel adverse possession resolves the dispute over the extent of ownership. Where does one parcel end and

another start? The first resolves who, while the second resolves what or how much. Consequently we suggest that part parcel is a convenient solution, being derived from adverse possession; but it is not the inevitable and only solution. Adverse possession as a solution to the first has been extended and called in to play to solve the second.

There are two distinct problems. This is well illustrated in the instance of South Australia. Arising from long abandoned land and disappeared registered proprietors, that state introduced a limited scheme permitting adverse possession in certain limited circumstances. There was no prohibition or barrier placed in the way of part parcel adverse possession. However, the practical result of the particular scheme introduced in that state is that an application for registration of part only of a parcel based on long adverse occupation is almost invariably bound to be unsuccessful. This is not because that state distinguishes between whole parcel and part parcel adverse possession. It is a consequence of the different problems that each is a solution for.

There are a number of jurisdictions that solve the boundary location problem without adverse possession, for example, the Australian Capital Territory. Adverse occupation of any duration is insufficient to override the legal boundary. Any discrepancy between the *de facto* boundary and the *de jure* boundary is easily resolved in favour of the *de jure* or legal boundary. However, this is not necessarily the best solution. It is impossible to legislate a problem away – parliament can pass laws against speeding and dropping litter in the streets. Such laws will only punish offenders, but cannot prevent the offence from being committed. Notwithstanding a prohibition against part parcel adverse possession, the boundary location problem will still arise. McLelland (2001) provides an example in inner suburban Brisbane where the occupational boundaries diverge from the legal boundaries in a neighbourhood of about 160 parcels. The origin of the discrepancies involving most or all of these lots has been lost in the mists of time. The discrepancies are of the order of 15 links (or 3 metres). We venture to suggest that the solution provided by the ACT, that is to restore the legal boundaries while disregarding the occupations is not at all feasible. Part parcel adverse possession is a feasible solution.

We express the view that part parcel adverse possession is not the only available means to provide a solution to the boundary location discrepancy. Whether statutory encroachment be considered as a distinct alternative to part parcel adverse possession or as merely a special variant of it is of no consequence. It is able to provide a solution to the boundary problem.

Possible alternative to part parcel adverse possession?

Statutory encroachment has been introduced in a number of jurisdictions in Australia. In the main it can be said that those jurisdictions that prohibit (or at one stage prohibited) part parcel adverse possession introduced this as a means of providing resolution to the boundary discrepancies that inevitably arise. Thus it follows that it is provided for in Queensland, NSW, South Australia, and the Northern Territory. Oddly enough, it is not allowed for in the ACT which is a jurisdiction where adverse possession is not permitted. Again, oddly enough, Western Australia, which permits part parcel adverse possession, also permits statutory encroachment.

Although statutory encroachment does not apply as widely as part parcel adverse

possession, we suggest it is a viable alternative in that there are included provisions to avoid the stark results of adverse possession. Where adverse possession is frowned upon is that it involves awarding a victory to one party at the expense of the other party involved in a possible boundary dispute arising from the discrepancy. Statutory encroachment can soften the blow suffered by the loser by requiring the victor to provide some monetary compensation. There are other provisions. We merely note that the solution provided by encroachment may involve rancour, but a less severe rancour than that produced by part parcel adverse possession.

PAST REFORM AS A GUIDE TO THE FUTURE

In considering and assessing some recent examples of legislative reform we suggest that the different approaches to adverse possession in Australia may be characterised as “permissive”, “prohibited”, and “median” (indicating an approach between the two extremes of permissive and prohibited). By considering some recent reforms effected in Tasmania (1980 and April of this year) and Queensland (1994) it may be possible to gain insight with regard to the substance of future reform as well as its feasibility. Later in the paper we shall discuss a proposed reform in the English law of adverse possession of registered title land.

(i) Tasmania: the *Land Titles Act 1980*

Prior to the passing of this legislation, Tasmania permitted the acquisition of registered title land through long unchallenged occupation (adverse possession) and did not distinguish between whole land parcels or lesser portions. The scheme permitting such adverse possession was described favourably by one commentator as possibly “the sanest solution to a difficult problem” (Ruoff, 1957).

For reasons that are unclear the Tasmanian parliament enacted the *Land Titles Act* in 1980. In a paper delivered by the then Acting Registrar-General of Tasmania at this Institution’s twenty-second congress in Hobart it was suggested that the motivation behind the legislation was the failure of voluntary conversion of general law (or unregistered) land to registered title land. After more than a century of the Torrens system, the author commented on the high ratio of unregistered to registered land in Tasmania (Mulcahy, 1980). The purpose behind the statute was to compulsorily force the conversion where voluntary conversion had failed.

A later commentator 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 Commissioner further noted 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.

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 the indefeasible registered title (prohibition)

and, on the other hand, the overriding character of rights based upon adverse occupation (permissive). The new provisions adopted the overriding or permissive scheme as in force in the United Kingdom.

Because some of the 1980 Tasmanian provisions can only be found elsewhere in the English registered title system, it is possible to speculate that the provisions introduced in 1980 were borrowed whole from the English *Land Registration Act* of 1925. Thus, prior to 1980, Tasmania utilised a scheme wherein the possessory title of an adverse possessor could only prevail against the registered proprietor if the adverse possessor had obtained registration or had lodged an application for registration. After 1980, Tasmania had adopted a scheme wherein the title of the registered proprietor was overridden by the rights acquired or being acquired under the limitations statute without the necessity of the squatter's rights being entered upon the register. The borrowing whole from the English *Land Registration Act* of 1925 extended to including the 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 a median system 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. Upon the Tasmanian example, it is possible to formulate a conclusion that amending the law to encompass a permissive regime is feasible and may be accomplished without raising disquiet. This is of relevance to the possible Australian future uniform national cadastre if the uniform model were more permissive than that currently employed, as for example it is in New South Wales and South Australia.

(ii) Tasmania: the *Land Titles Act* 1980-2001

Less than fifteen years after the passage of the *Land Titles Act* 1980, a notorious lawsuit was determined in the Tasmanian Supreme Court which was to cause Tasmania to revisit the reform of the laws of adverse possession as they apply in that state. In 1994 there was widespread dismay in Tasmania 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 (*Woodward*, 1994). This occurred notwithstanding that the displaced registered proprietor had continued to pay rates and taxes upon the land for the whole period of adverse occupation by the neighbour who was not paying rates and taxes.

Following this case, the Tasmanian Attorney-General issued a reference to the Tasmanian Law Reform Commissioner calling upon the Commissioner to review and report upon the law relating to adverse possession in Tasmania. The Commissioner did so in 1995 and made nine recommendations with respect to amending the law (LRCT, 1995). The Commissioner's 1995 report resulted in the passage of the *Land Titles Amendment (Law Reform) Act* 2001 which came into effect on April 12, 2001.

The Commissioner's 1995 report was not without irony in the sense that he included recommendations that had the effect of restoring the law as it had been prior to its repeal in 1980 when the *Land Titles Act* 1980 was passed. The irony was heightened by the

recommendations being cast in terms of adopting provisions from the registered title legislation of other states, in particular that of New South Wales. The Commissioner's report did not acknowledge or in any way indicate any awareness on the part of the Commissioner that he was recommending a return to the position as it had been prior to 1980. In another sense of the meaning of irony the 1995 report was a perverse arrival of an event or circumstance that is in itself desirable.

The notoriety of the *Woodward* case 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. We would characterise the 2001 amendments as falling short of the description "prohibited" but occupying a position on the prohibited side of the "median" description.

The parliament was of the view that the urgency of reform was such as to outweigh the necessity of passing legislation covering the whole field and the issue of part parcel adverse possession or encroachment has been left to a later legislative session. Thus the parliament has indicated that it intends to enact laws with regard to adjustments and resolution of boundary location discrepancies. There exists the possibility that the perceived urgency for reform will diminish with the consequence that the foreshadowed legislation to deal with part parcel adverse possession or encroachment will fail through neglect. In the interim, the previous provisions allowing for such adjustments have been effectively repealed. Thus there is no provision for such adjustments although the parliament recognises the desirability of providing for these boundary adjustments.

We further make the observation that in seeking to undo the harm exposed by the *Woodward* case, the Tasmanian parliament has left in place several remnants of the 1980 provisions which may render the 2001 amendments meaningless. As examples, the 2001 amendments prevent the acquisition of title by the adverse occupier excepting in the narrow circumstances provided for within the 2001 legislation. In direct contradiction, the 1974 *Limitations Act* has been left intact and this statute provides for the extinguishing of the registered proprietor's title at the expiry of that state's 12-year limitation period. Another provision of the 2001 legislation provides that upon the expiry of the limitation period, the registered proprietor's title is not extinguished, but that proprietor holds the land on trust for the benefit of the adverse occupier. This is a provision that was an essential part of the now repealed 1980 "permissive" scheme and is wholly unnecessary and possibly a source of contradictory confusion in the restricted 2001 law.

It is possible to formulate a conclusion that amending the law to encompass a restrictive regime is feasible and may be accomplished without raising disquiet. This is of relevance to the possible Australian future uniform national cadastre if the uniform model were more restrictive than that currently employed, as for example it is in Victoria and Western Australia.

Our purpose in outlining the recent legislative history of adverse possession in Tasmania was to illustrate the relative ease with which reforms can be introduced despite the fact that the likely effects of those reforms may not be fully appreciated. It is our suggestion

that in little more than two decades the Tasmanian parliament has meddled with a system that had previously drawn praise from an interested observer and has not yet repaired the damage inflicted by that meddling upon the system.

(iii) Queensland: the *Land Titles Act 1994*

The short-lived move from a median system to a permissive one by Tasmania has been discussed above. It is our view that this move was ill-advised and, if we are correct, the move was facilitated by a failure of the Tasmanian parliament to appreciate the radical nature of the reform passed by it in 1980. This was assisted by the responsible Minister representing the proposed statute as merely consolidating and modernising a number of old statutes. This error was compounded by the Minister's representation that the proposed Act substantially re-enacted the prior adverse possession provisions without substantive changes.

We suggest that a similar occurrence took place in Queensland in the 1990s resulting in the *Land Title Act 1994*. Following upon an investigation and several reports the Queensland Law Reform Commission made recommendations in regard to a proposed *Real Property Act 1991* to effect a consolidation of the 1861 and 1877 and other *Real Property Acts* (QLRC, 1989; QLRC, 1991). The passage of the 1994 *Land Title Act* was the end result.

Since 1952 Queensland had permitted the acquisition of title to registered land by a long-term adverse occupier in limited circumstances. These restrictions were confined to the abandonment of land and disappeared registered proprietors. The scheme was similar to

that adopted in 1945 by South Australia. The 1952 Queensland scheme included an express prohibition against applications for acquisition of title to a part parcel.

Although there are differing views on the resultant changes brought about by the 1994 Act it is suggested that the question of adverse possession in Queensland may now be classified as permissive and allows for the previously prohibited part parcel adverse possession. This is the consequence of the repeal of the 1952 Act and the failure to include in the 1994 Act provisions equivalent to sections 46 and 47 in the repealed 1952 Act. Section 47 was the robustly worded prohibition against part parcel adverse possession that has no counterpart in the 1994 Act. We are not alone in our conclusion that Queensland moved from a restrictive to a permissive operation of the adverse possession laws in 1994. Tan, Webb, and Wright (1997), Sackville and Neave (1999), Chambers (2001), and Bradbrook, MacCallum, and Moore (1996) all note that the law since 1994 favours the adverse occupier at the expense of the registered proprietor. With regard to the last text its authors may be thought to have equivocated. In the 1997 second edition of *Australian Real Property Law*, the authors retained their discussion of the Queensland approach to adverse possession as it had appeared in the 1991 first edition

As was the case in Tasmania, the Queensland Law Reform Commission accepted that the operation of the registered title land statutes was satisfactory and concluded that any proposed amendments should focus upon modernisation rather than alteration of the

system (QLRC, 1991). Consequently the Commission characterized its proposed replacement Act as not effecting any substantive changes to the law of registered title land in Queensland including the adverse possession provisions. Later, when parliament was debating the 1994 *Land Title Act* this characterization was accepted and adopted by the legislators.

Thus, similarly to Tasmania, the conclusion is that the Queensland parliament effected dramatic changes to the law of adverse possession in 1994 while expressing itself as not substantially altering the law. Upon the Queensland example, it is possible to formulate a conclusion that amending the law to encompass a permissive regime is feasible and may be accomplished without raising disquiet. This is of relevance to the possible Australian future uniform national cadastre if the uniform model were more permissive than that currently employed, as for example it is in New South Wales and South Australia.

(iv) Proposed UK Reforms

In 1998 the Law Commission and Her Majesty's Land Registry jointly published a report on proposed reforms to the English registered title statute (Law Commission, 1998). The proposals are far reaching in that the report recognises that registered title land has a radically different legal basis than does unregistered land and as a consequence there is no necessity that the laws applying to unregistered land should be applicable to registered title land. As a consequence the reforms recommended included a "median" approach to adverse possession of registered title land along similar lines as that introduced by South Australia in 1945 to deal with abandoned land and disappeared registered proprietors. Thus the 1998 proposals encompass a shift from a "permissive" scheme as has always been included within the English registered title statutes to a "median" approach.

It would appear that the Law Commission was not fully cognizant of the full effect of adopting a median scheme similar to that of South Australia. As noted above in the discussion of the distinction between adverse possession and part parcel adverse possession, although South Australia has not expressly prohibited part parcel adverse possession, the practical effect of its legislation is to refuse such applications. This is because the neighbour, who has not disappeared and does not wish to abandon that portion of his land that has been adversely occupied, is enabled to exercise a veto over any application by the adverse occupier. In its discussion of adverse possession, the Law Commission commented favourably upon the corrective effect of part parcel adverse possession with regard to boundary discrepancies. Their proposed model, although not expressly disavowing the beneficial aspect of part parcel adverse possession, implicitly will not permit this beneficial aspect to operate.

This proposed reform was before the English parliament at this time of writing in July 2001. It shows that a major change from a permissive system favouring the squatter as in Victoria and the United Kingdom to a median system where the registered owner enjoys better protection is considered both possible and desirable by the UK Law Commission. This is of relevance to the possible Australian future uniform national cadastre if the uniform model were more restrictive than that currently employed, as for example it is in Victoria and Western Australia. However, it is noted that the proposed

reforms will not assist with regard to the problem created by boundary location discrepancies.

(v) 1994 Singapore Reforms

In 1994 pursuant to the *Land Titles Act* 1993 and consequent amendments to the Limitations statute, Singapore prohibited adverse possession of registered title land in that state. Previously it had permitted adverse possession (including part parcel) and the 1994 changes represent a move from a median system to one prohibiting adverse possession. It is noted that Singapore has not introduced an encroachment statute or similar to resolve boundary discrepancies. Accepting the limitation suffered by viewers from afar we suggest with some diffidence that such a statute is required because of inevitable boundary discrepancies. We offer the observation that Singapore, being a small, densely populated, and wealthy island state, may have introduced its prohibitive system in full confidence that its particular land market and its business and commerce sectors are well able to manage boundary discrepancies without the assistance provided by the encroachment statutes or similar. The Singapore reforms show that a move away from a median to a prohibitive system is feasible.

COMMENTS REGARDING FUTURE REFORM LEADING TO THE ADOPTION OF A UNIFORM AUSTRALIAN TORRENS SYSTEM

With the recent extensive legislative experience undertaken by Tasmania, there may exist a belief that the law of adverse possession has suffered much reform and that the law should be left to allow stabilisation and acceptance by its citizens. To a lesser extent the same observation could be made of the 1994 Queensland reforms. It is here suggested that notwithstanding a possible reluctance to further modify their recent reforms, the difference between the actual achievements of the recent reforms and the professed intended reforms require further reform even if it were unpalatable. Reluctance on the part of those jurisdictions which have recently undertaken reform can be partly overcome by the provision of financial incentive from that body that will benefit from the introduction of a uniform cadastre – the Commonwealth of Australia. Similar incentive may overcome the reluctance to reform of those jurisdictions that may be labouring under the misapprehension that the particular system already in place and in operation is so well suited to the jurisdiction that it cannot be improved upon.

CONCLUSION

A national uniform registered title scheme is feasible. If this is considered desirable, such a scheme will include provisions to resolve boundary discrepancies. It is concluded that this may be best achieved by providing for statutory encroachment as a means of resolving disputes arising from boundary discrepancies. It is suggested that this review of recent reforms and the proposed English reform show that major reforms can be introduced with little or no disruption. A further conclusion is founded upon an appreciation that some aspects of these reforms show that there is insufficient reluctance to implement change and this insufficiency may have permitted undesirable reforms to be introduced.

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