THE EFFECT OF ADVERSE POSSESSION TO PART ON A FUTURE AUSTRALIAN CADASTRE

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ABSTRACT

In accord with modern cadastral principles, a comprehensive land information management system should ideally disclose the complete legal status of all land with the disclosure of all public and private rights and restrictions, including rights acquired under adverse possession. Recognizing trends to develop national spatial data sets, if a national cadastre founded upon these data sets is ever to be considered, a basic requirement will be a unified national law regarding land ownership. In turn this will require a unified approach to the issue of adverse possession of registered title land and particularly adverse possession of part of a land parcel. 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. 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. Wishing to promote consideration and debate on the issue the authors propose that the current Australian state schemes be categorized according to whether they permit part parcel adverse possession and suggest some possible options. The authors conclude that all Australian jurisdictions except New South Wales, South Australia, and the two territories (the Australian Capital Territory and the Northern Territory) permit part parcel adverse possession of registered title land.

INTRODUCTION

All Australian jurisdictions take differing approaches to the issue of adverse possession of registered title (“Torrens”) land. In particular, the authors suggest that the prohibition against part parcel adverse possession is the single greatest distinguishing feature of the various state schemes. Prohibition against part parcel adverse possession is usually associated with New South Wales where it is expressly prohibited. However, the authors believe that for practical purposes South Australia may be considered to utilize a similar regime although there is no express prohibition against part parcel adverse possession in the SA Torrens legislation.

It is the authors’ view that this distinguishing feature must and does affect the respective land markets in the states with the consequence that cadastral surveying practice and the definition of boundaries is also affected and differs between the states.

The importance of adverse possession is underscored by the attention recently paid to it by a number of legislative bodies. In 1998 the Victorian Parliamentary Committee on Law Reform inquired into that state’s Fences Act 1968 and during the inquiry investigated adverse possession. The Law Reform Commissioner of Tasmania has also recently reviewed the operation of the current law relating to adverse possession in that state after only fourteen years of its operation. Consequently he has recommended amendments to the Tasmanian regime which would in part incorporate some features of the NSW regime and restore some features of the previous Tasmanian scheme that were abolished in 1980. Both the Tasmanian Law Reform Commissioner (LRCT, 1995: 24 - 27) and the sub-committee of the Victorian Parliamentary Committee on Law Reform (VPLRC, 1998a; 1998b: 127-8) have
noted the strong views that the issue incites in the citizens who made representations to their respective hearings. It is only as recently as 1980 that NSW reversed a long-standing prohibition against adverse possession to introduce a limited form of adverse possession into that state. In 1994 the Queensland parliament legislated to alter the way in which the issue is resolved in that state.

The authors interest in the topic, particularly part parcel adverse possession, arises because it is one of the few methods of altering, re-adjusting, or varying the boundary separating adjoining land parcels without the common or mutual consent of the parties involved and does not require the consent of local authorities. It is also the most commonly used method of altering, re-adjusting, or varying the boundary.

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

The utility of adverse possession has long been recognized judicially (Megarry and Wade, 1975: 1003 ff; Hallmann, 1994: para 9.45 ff). Further, adverse possession has been utilized to regularize the position where a person has been in occupation for many years and there is no active registered proprietor who wishes to revive the claim (QLRC WP 32, 1989: 63; NSW RGO WP, 1976: 5-6).

In order to appreciate the difficulty presented by the different state-based approaches it is necessary to fully understand the scope of and the differences between these current approaches. In general terms this paper explores the role of adverse possession as to part parcels in maintaining Australian cadastral systems.

What exactly is Adverse Possession?

The authors have previously proposed the adoption of the following legal definition of adverse possession (adapted from Jowitt, 1977: 60):

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

ADVERSE POSSESSION TO PART ACROSS AUSTRALIA

It may be stated that all of the Australian states have a system of adverse possession contained within their registered title land legislation (LRCT, 1995: 22). However it is asserted that the state differences regarding part parcel adverse possession produces the conclusion that boundary variation by adverse possession is permitted in
Victoria, Western Australia, Tasmania, South Australia, and Queensland. The other jurisdictions expressly prohibit such boundary variation although the practical effect of the South Australian legislation is that part parcel adverse possession claims are unlikely to be successful in that state. New South Wales expressly prohibits possessory applications for less than whole land parcels. In the two territories (the Australian Capital Territory and the Northern Territory), part parcel adverse possession is encompassed within the express prohibition against adverse possession generally.

**Why include SA as a jurisdiction that prohibits part parcel adverse possession?**

It is here suggested that while the SA scheme does not expressly prohibit part parcel adverse possession, the practical effect of only permitting such claims to succeed in the absence of objection by the registered proprietor is that the adjoining proprietor will not consent to and will object to an alteration in the dividing boundary. It is only where the registered proprietor has no interest in objecting to an application that such application will succeed and such application is likely to be for the whole of the land parcel.

Consequently the authors propose that the various state schemes be categorized according to whether adverse possession of part of a parcel is permitted. In that case NSW, SA, and the two territories do not permit (part parcel) adverse possession.

**EFFECT OF ADVERSE POSSESSION TO PART ON A MODERN AUSTRALIAN CADASTRE**

The bundle of proprietary rights related to land holdings is an important subset of the data held within a comprehensive cadastre. Such a bundle includes those rights arising from adverse possession. Proprietary rights arising from adverse possession of part only of whole land parcels are recognized within most jurisdictions. Thus, adverse possession of such lesser portions can affect the boundaries between adjacent parcels by creating a newer boundary displaced from the older boundary. While it is important that cadastral surveyors should be aware of old or past boundaries it is equally important that they be aware of the possibility that another, newer and different boundary may have replaced the old.

Up-to-date digital cadastral data bases (DCDBs) are desirable and this requires the acquisition and incorporation of new data and information as soon as it becomes available. Conversely, to retain misleading or out-of-date information in a DCDB may
be worse than having no data at all. There is little justification for establishing a cadastral system if it is not to be maintained (UN-FIG, 1996: para 6.10).

Of the six principles for a future cadastre enunciated by Kaufmann and Steudler in “Cadastre 2014” (1998), the authors suggest the first is the most important. This requires that the complete legal situation of land, including public rights and restrictions be documented. Similarly, one of the seven necessary features of a title registration system enumerated by Simpson (1976: 17 - 18) was “[c]ompleteness of record” meaning a title registration system “complete and up-to-date.” As has been previously argued, these necessary features extend beyond legal aspects of ownership to a title survey system (Williamson and Holstein, 1978; 37); and consequently completeness of record requires a complete and up-to-date title survey system. The Bogor Declaration (UN-FIG, 1996) expressly recognized the need to clearly and comprehensively identify the rights associated with land ownership and use. It is noted that over 100 years ago, Richard Gibbs, a witness before the Victorian 1885 Royal Commission on Land Titles and Surveys, advocated that the interest of the adverse possessor (and other encumbrances on title) be shown on the register and on the foot of every certificate of title (Royal Commission, 1885: 20).

With regard to those jurisdictions permitting part parcel adverse possession, as already noted, adverse possession of less than a whole land parcel allows the creation of a newer boundary displaced from the older boundary. The plain fact is that occupation seldom accords with title dimension (Toms and Lewis, 1974: 262) and these jurisdictions allow boundary adjustments by way of adverse possession. It is adverse possession of part parcels that permit the variation, rectification, and re-adjustment of boundaries. Conversely the absence of provisions permitting the variation, rectification, and re-adjustment of boundaries requires a prudent approach to land transactions where the title dimensions cannot be made to accord with occupation. This prudent approach is reflected in the conduct of the land market where confirmation or check or identifying surveys are commissioned by the would-be purchaser.

Part parcel adverse possession is an important concept to the legal and land surveying professions because both are concerned with land (or real property) law and both require their data be accurate and reflect reality. Accurate and up-to-date information is essential to any proposal for a single multi-purpose cadastre suitable for a variety of users. That the proposed basis for a future multi-purpose cadastre is the individual land parcel requires the individual parcel to be sufficiently defined. The defining element of a land parcel is its boundary. Comprehensive and up-to-date information, particularly boundary information, is a basic underpinning of the Bogor and “Cadastre 2014” principles.

The authors express their view that these differences arising from different state approaches must be resolved in a uniform manner before a uniform Australian cadastral practice can be a reality. Such uniform Australian cadastral practises should accord with the principles enunciated in the Bogor Declaration (UN-FIG, 1996) and “Cadastre 2014” (Kaufmann and Steudler, 1998). It is recognized that there are other features affecting the adoption of a uniform Australian cadastre but the greatest impediment to its adoption is the resolution of adverse possession as to part of a
The different approaches to adverse possession by the different Australian jurisdictions can only inhibit the development of a uniform Australian cadastre (if ever contemplated) by preventing the adoption of a single unified law relating to land ownership. A resolution of the different approaches requires an appreciation of what it is that constitutes the different approaches.

It is suggested that the adoption or incorporation of adverse possession into real property law does not offend against the recent Bogor Declaration on Cadastral Reform (UN-FIG, 1996) advancing support for the development of an efficient land market. Real estate law incorporating adverse possession would support land management and economic development without significantly detracting from the desired protection of land rights and would lead to the simplification of cadastral processes. The declaration recognised that the success of a cadastre is not dependent on its legal or technical sophistication, but whether it protects land rights adequately and permits those rights to be traded (where appropriate) efficiently, simply, quickly, securely and at affordable cost. This requires a focus on the user and landowner as well as the needs of government (UN-FIG, 1996: para 7.1).

It is the authors’ view that the needs of society as exemplified by the current practices regarding adverse possession show that society is content to define the extent of ownership by occupational boundaries. Not only does the law favour the proposition that purchasers buy what they see; this proposition is in accord with the purchasers’ expectations (Toms and Lewis, 1974: 262). It is because of the way that boundaries are defined that this proposition holds true in all the Australian jurisdictions except NSW and SA (and the two territories). There the proposition that purchasers buy what they see is not necessarily true and a prudent purchaser will require an identification survey prior to completing a land purchase. In the other jurisdictions there exists a strong probability that the boundaries as seen by the purchaser and coinciding with long established occupation are favoured by the law. That the definition of parcel boundaries differs in the different jurisdictions means that this factor has an effect on the cadastral surveying practices in the different jurisdictions. Also affected are the local land markets. Consequently the establishment and the maintenance of the cadastre is partly dependent upon the validity of the proposition that purchasers buy what they see.

Further, it is the authors’ view that the acceptance of the need for adverse possession in land law has been amply demonstrated by the historic trend. Adverse possession, albeit in a limited form, has been adopted in those jurisdictions (such as New Zealand, SA and NSW) where previously it had been prohibited. The authors’ view is strengthened by the case of Queensland which adopted adverse possession in a limited form in 1952 and forty years later legislated to remove the previously imposed limits. It is noted, however that Tasmania may well diverge from this trend if the Law Reform Commissioner’s 1995 recommendations are introduced into law. If Australia is to adopt a uniform law defining boundaries it is suggested that a median path between the various states’ schemes would be adopted. The authors propose that NSW “relax” the prohibition against part parcel possessory applications and Victoria and Western Australia disallow the undocumented overriding interests
of the adverse possessor. This could be accomplished by those states adopting a provision similar to that of section 45D(4) of the NSW Real Property Act 1900 and the Tasmanian provision discarded in 1980. These provisions permitted the registered proprietor to “wipe the slate clean” by dealing with the affected holding with a fide transferee for value. This last provision is in line with the recommendations of the Tasmanian Law Reform Commissioner and may be a sufficient protection for the registered proprietor to overcome reluctance to change in NSW.

CONCLUSION

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

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

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