

University of Southern Queensland
Faculty of Engineering and Surveying

**A REVIEW OF THE APPLICATION OF
ADVERSE POSSESSION WITHIN THE
TORRENS SYSTEM OF LAND
REGULATION IN AUSTRALIA**

A dissertation submitted by

Michael Stephen Mulliss

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ABSTRACT

The doctrine of adverse possession is but one method of resolving boundary discrepancies in Australia. An abundance of research is available on the common law concepts of the doctrine. However little research has been conducted on how adverse possession is applied in Australian jurisdictions.

The aim of this research is to conduct a review of the application of adverse possession within the Torrens system of land regulation in Australia by comparing and contrasting variations in legislation between states, and also forming recommendations of best practice.

Comparing and contrasting legislation of Australian jurisdictions required the underlying Torrens statutes, case law, and other relevant statutes. Key to understanding the efficiency of a jurisdiction's approach to the application of adverse possession is performing a brief analysis of the number of disputes related to adverse possession. This has been done over a limited time period of 15 years due to time constraints.

Results showed that there are many differences between the four schemes used by Australian jurisdictions. Various strengths, weaknesses, and limitations were discovered when analysing the approaches. One of the more important findings is the fact that when adverse possession of less than a whole parcel is permitted by itself with no alternative boundary repair mechanism, more boundary disputes occur. This was evident in the results of the disputes analysis for Victoria. Four elements of 'best practice' were identified from the research performed. One such element identified is that if adverse possession of less than a whole parcel is permitted in a jurisdiction, than statutory encroachment should be offered as an alternative.

When identifying 'best practice', it may not be possible to put together a set of criteria in which everybody is satisfied. However, components have been identified which work well and which may minimise disputes over land boundaries, being a fundamental objective of the Torrens system.

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**ENG4111 Research Project Part 1 &
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Michael Stephen Mulliss

Student Number: 0050041064



Signature

29-10-09

Date

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ABBREVIATIONS

The following abbreviations have been used throughout this document.

Abbreviation	Full Name
ACTSC	Supreme Court of the Australian Capital Territory
HCA	High Court of Australia
QSC	Supreme Court of Queensland
SASC	Supreme Court of South Australia
TASSC	Supreme Court of Tasmania
VSC	Supreme Court of Victoria
VSCA	Supreme Court of Victoria – Court of Appeal
WASC	Supreme Court of Western Australia

GLOSSARY OF TERMS

Term	Meaning
Conveyancing	The transfer of title of property from the vendor to the purchaser which usually involves a contractual relationship.
Indefeasibility	Under a system of title by registration, an indefeasible title is created on the recording of particulars of a lot in the Register. The Registrar must issue a certificate of title containing the indefeasibility of title for a lot at the request of the true owner, which is conclusive evidence of the indefeasibility of the lot. The indefeasible title is subject to certain exceptions to indefeasibility.
Registrar	The Registrar is responsible for the management of land titles in a jurisdiction.

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NEW ZEALAND STATUTES

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Chapter 1

INTRODUCTION

Possession is nine-tenths of the law.

Land is one of the fundamental natural resources available to man. It provides such things as fuel and shelter for its inhabitants. Land has both a legal and physical extent. The legal extent considers the owners tenure, and the physical sense considers the physical possession. The owner of a property is the person who has the legal rights to the property. Property can be classified according to real or personal property. Real property relates to estates and interests in the land and to all things attached to or forming part of the land.

In Australia land holders do not own their property absolutely. Australia's system of land tenure is based upon that of the English system which takes the stance that all land is owned by the Crown, and any lesser interests have been granted to individuals to enjoy the use of the land. The crown grants land subject to certain conditions and reservations. In a sense what you own is the rights to own land. Legal evidence is found in the land title or in the deed of grant possessed. A statutory definition is defined by s 36 of the *Acts Interpretation Act 1954* (Qld):

‘...land includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the interest in the land.’

The need to prove ownership of land has always been important. Land registration has been constantly evolving since the Romans introduced an early form of land registration to England. In English feudal times the regular conveyancing method for land was by feoffment with livery of seisin. So in other words using a form of spoken words spoken on or near the land, by which intention to convey the land was indicated to the land purchaser by the conveyor. Livery of seisin was the handing over of a vacant parcel of

land in conjunction with a public ceremony. From here conveyancing in England introduced documentary titles.

Early conveyancing faced many problems including the danger of fraud and the time taken to investigate the chain of title was long, causing inefficiency. A call for change was looming in Australia and England and Sir Robert Torrens proposed the Torrens System in the late 19th century. This system was adopted in both Australia and England. The Torrens system can be described as a system of registration by title. The fundamental objective was to establish and maintain a register which could accurately record facts relative to each parcel of land from time to time. Land registration has evolved to a system of registration by title, a system where the accurate identification of each parcel of land and recording of all interests related to each parcel of land is performed. Under the Torrens system there is only one document of title, the certificate of title. This eliminated the need to investigate the chain of title, which saved significant time.

The register must except in certain circumstances, issue a certificate of title containing the indefeasibility of title of the lot at the request of the owner. This is exclusive evidence that the person named as holding the interest in the land is rightfully entitled to the interest, subject to certain exceptions, one of which being the doctrine of adverse possession. Simply indefeasibility is the guarantee that once an interest is registered it cannot be set aside due to some defect existing in title prior to registration.

What does the expression 'Possession is nine-tenths of the law' mean and how does it affect the law of property? It does not mean if you gain physical possession of something you have a 90% chance of keeping it from someone else, including the true owner. What it does mean is that someone in possession of property can have an advantage over someone else that wants the property and deems it theirs. Possession of a land parcel throws onto any other claimant the burden of showing an even better claim to possess. This is an underlying concept of the doctrine of adverse possession. Until the true owner can show a better right to possession, the adverse possessor can remain on the property. It is an old doctrine which originates in common law concepts such as squatting, in which if the squatter satisfied requirements such as a specified time period for possession of the land, they could become the true owner. The doctrine can be defined as:

‘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’¹

All Australian jurisdictions have different approaches as to how they apply the doctrine of adverse possession to land registration systems. As a result of the differing approaches, land markets, cadastral surveying practices and the definition of boundaries is affected differently between states.

Recently Tasmania and England amended legislation to severely restrict adverse possession. Similarly in the last decade Malaysia and Singapore abandoned the doctrine all together. So there has been a move to reign in the laws of adverse possession, but it is a valuable tool suitable for providing adjustments in the location of land boundaries and solving disputes over land. It is this reason that research should be undertaken to investigate possibilities of a best practice which could be used Australia wide.

1.1 THE PROBLEM

Until recently there has not been any comprehensive study on the variances in how adverse possession is applied between Australian States. From 1999 to 2003 there have been several such articles published by Park and Williamson, several being conjointly published. Perhaps the most comprehensive is that of Park’s PhD thesis titled ‘The effect of adverse possession on part of a registered land parcel’ which was completed in 2003. In this paper his main objective was to devise a suitable model for adverse possession.

One area which has not been researched greatly is research into devising an optimal statutory period for adverse possession. There are many variables which need to be taken into consideration and the time requirement and scope of work required is beyond the objectives of this project. By analysing legislative material, dispute comparisons between Australian states, and a discussion on the effects of changing the limitation

¹ Park M and Williamson I, *The effect of adverse possession to part on a future Australian cadastre*, (1999), p 3.

period, a model of what may constitute ‘best practice’ could be devised for use in Australian jurisdictions.

1.2 RESEARCH AIM

The aim of this research is to conduct a review of the application of Adverse Possession within the Torrens System of Land Regulation in Australia, by comparing and contrasting variations in legislation between states, and also forming recommendations of best practice. This will be done by firstly analysing the differing state schemes in terms of discrepancies in legislation. A selection of evaluation criteria will be put together for further analysis and discussion. A number of criteria will be used to help objectively form recommendations as to what may constitute ‘best practice’.

1.3 RESEARCH OBJECTIVES

The research will:

- Research previous studies on the application of Adverse Possession.
- Analyse the application of Adverse Possession between Australian States.
- Critically evaluate the strengths, weaknesses, and limitations of how each Australian State uses Adverse Possession.
- Perform research as to how the application of Adverse Possession by Australian States can be developed into a uniform system.

1.4 RESEARCH LIMITATIONS

There are two possible research limitations which are brought to mind. Firstly there is the ability to access enough data. The USQ library has limited coverage of legal articles. Therefore online databases may have to be relied upon as it would be unpractical to have to order case materials or books regularly from interstate libraries. Online sources have their limitations because the data contained within is generally only from the last few decades.

Another limitation may be the time limit imposed upon the project. There is a lot of legal material available for analysis so it will be important not to get fixated on any one area of research. By keeping the analysis to covering the important areas only will suit for reading by a general audience.

1.5 CONCLUSION

Chapter one has given a brief overview of the project's aim and objectives and what the project seeks to achieve. This project follows on fairly limited existing research into how adverse possession is applied in Australian jurisdictions. Also a significant portion of the journal articles and other legal media has been published from just a few authors who practice in the legal profession. This is not ideal but will be adequate to achieve the aim and objectives of this project.

Chapter 2

LITERATURE REVIEW

2.1 INTRODUCTION

A land market requires two fundamental cornerstones for participants to have confidence in participating in that land market, security of tenure, and to have confidence in their title to land. An important part of title is the boundary of the land parcel which defines the land parcel. For land owners, the accurate location and recording of all relevant interests for a parcel of land by the register provides the confidence for the participants. Adverse possession 'is but one method of resolving errors and discrepancies in the boundary position irrespective of the cause or origin of such error'.¹ Other methods include statutory encroachment, the doctrine of acquiescence, and the statutory recognition of a small margin of error, all of which will be covered in this review. The cause of origin of such an error can be put down to a number of factors but some of the more common reasons are the incorrect placement of fences, and degraded and deteriorated fences causing dispute over the original location.

Adverse possession has a mixed history, having origins relating to The Doctrine of Laches, squatting, and various eras of English History. It is a provision found in legislation of Countries such as Australia, Canada, England, New Zealand, Singapore, and the United States of America. Over the years many reforms and amendments have been made in various jurisdictions, so it is quite different in operation today, as opposed to its original conception. It is a subject which requires substantial explanation, as it is a fairly complicated doctrine.

To perform comparisons and evaluate how these discrepancies are resolved in current Australian jurisdictions, several related topics must be investigated and explained first. Topics included in the literature review are to make the following chapters easier to understand and also support the aim of the project.

¹ Adrian Bradbrook et al, *Australian Real Property Law* (3rd ed, 2002).

2.2 BACKGROUND TO THE TORRENS SYSTEM

Before we delve into the concept of adverse possession, it is important to understand the scheme and purpose of the Torrens System of Registration of Title. As already stated in the introduction, the effectiveness of a system which deals with land interests is very much dependent upon security of title.

Before the Torrens system of registration of title was introduced purchasers of land did not have any ability to verify with certainty and in a simple manner, any preceding dealings of the land parcel. The certainty and security of title were and could not be assured, under what Sir Robert Torrens described as 'The dependent nature of titles'.² In Australia it was a requirement of the purchaser to examine all documents in the chain of title, commencing with the original Crown grant. For purchasers in this early time of conveyancing, it was a lengthy and a time consuming process examining all of the documents in the chain of title. It was a fact that even if a thorough and exhaustive search was undertaken, the purchaser could not be absolutely certain of the title. Interests which were acquired by undocumented means were not reflected in the chain of title, resulting in a lack of uncertainty with regard to land title.

There was a strong impetus in the 1860's for land conveyancing. What was eventually introduced during the 1860's across Australia was totally different to private conveyancing of the era in conception, form, & operation. This is best described as a system of title by registration, commonly known as the Torrens System. It is a register that records any dealings relating to individual parcels of land. The parcel of land must be ascertained and identified. Francis best outlines the scheme of the Torrens system as:

'The crown grants and certificates of title thus registered comprise the register or the register book, and from the time of first registration of title to a parcel of land, all transactions with it which are within the scope of the Act are effected, and can only be effected, in so far as they create or assign legal or registered estates by the registration in the register or the register book of dealings or instruments.'³

² Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859), p 8.

³ E A Francis, *The law and practice relating to Torrens Title in Australasia Volume 1* (1972).

O'Connor also details the aims of the Torrens system as being 'to provide security of title, and to facilitate transactions by making them quick cheap and safe.'⁴

Torrens statutes in use in Australia today retain basic doctrines of the original system first introduced in the 1860's by Sir Robert Torrens. The doctrine of estates and types of interest in land which can exist at the common law level have not been discarded under the Torrens system. In general the types of interests which can exist within the Torrens system can exist under a general law system.⁵ The fundamental principle was that title and interests to land should be dependent upon registration, and not that of instruments.⁶

Under the Torrens system, the register is created to document the registration of titles. Once land has been brought under the system, its identity and nature is established along with the type of tenure (whether freehold or leasehold tenure), and the identity of any associated persons who have an interest. The certificate takes into account any exceptions, reservations, and encumbrances in which the registered estate is subjected. All subsequent dealings, charges, and encumbrances must be recorded by the register. The system governs all transactions in relation to all land which is governed by the Torrens statutes.

Over the years many amendments have been made to the original Australian statutes. Several jurisdictions which did allow a limited form of adverse possession moved to restrict the doctrine. For example South Australia prior to 1945 did allow for a limited form of title acquisition founded on adverse possession. Both England and Tasmania in 2002 and 2001 respectively introduced major amendments to their legislation to restrict the doctrine. New South Wales up until 1979 prohibited acquiring title to land by adverse possession. Since 1979 a limited form of adverse possession has been introduced. Queensland experienced significant amendments in 1952 to allow the doctrine to a degree as before 1952 it was prohibited all together. In 1994 amendments were introduced to allow a more permissive model. Table 1 below details Torrens statutes currently enforced in Australia.

⁴ O'Connor P, 'Double Indemnity – Title insurance and the Torrens System' (2003) 3(1) *QUT Law & Justice Journal* 2.

⁵ See above n 1, 115.

⁶ See above n 3, 6.

Table 2.1 Torrens Acts currently enforced within Australia.

<i>State, Territory</i>	<i>Act</i>	<i>Abbreviated Reference</i>
Australian Capital Territory	<i>Land Titles Act 1925</i>	(ACT)
New South Wales	<i>Real Property Act 1900</i>	(NSW)
Northern Territory	<i>Land Title Act 2000</i>	(NT)
Queensland	<i>Land Title Act 1994</i>	(Qld)
South Australia	<i>Real Property Act 1886</i>	(SA)
Tasmania	<i>Land Titles Act 1980</i>	(Tas)
Victoria	<i>Transfer of Land Act 1958</i>	(Vic)
Western Australia	<i>Transfer of Land Act 1893</i>	(WA)

There are several land title statutes common throughout Australian jurisdictions. The Torrens statutes as shown in Table 2.1 have several uses but a major aspect is to create the register. A register is provided for registered proprietors and prospective purchasers by these acts to detail all facts relating to land title.

Alongside the Torrens statutes there is a property law Act. For Queensland the *Land Title Act 1994* operates in conjunction with the *Property Law Act 1974*. The *Property Law Act 1974* applies to unregistered land and land governed by the *Land Title Act 1994*. A statute of limitations and Crown land Act is also used. These acts state the limitations on actions with regards to land under the Torrens Acts and Crown land.

2.2.1 THE CONCEPT OF INDEFEASIBILITY OF TITLE

Indefeasibility of Title is quite often used in Torrens system language. Section 42(1) of The *Real Property Act 1900* (NSW) provides an appropriate description of indefeasibility.

‘(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such

other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:⁷

Section 42(1) of the Act bestows protection on the registered proprietor of any estate or interest in the land. Proprietor is defined under s 3 as ‘Any person seised or possessed of any freehold or other estate or interest in land at law or in equity in possession in futurity or expectancy’.⁸ Therefore it could be thought that indefeasibility of title is bestowed upon both the registered holder in fee simple and any registered holder of any lesser interest. For example the registered holder could be a mortgagee, lessee etc. All of which are within the meaning of registered proprietor.

Leros Pty Ltd v Terara Pty Ltd concluded that unregistered interests are extinguished by registered interests, unless protected by caveat or preserved as an exception to indefeasibility.⁹ This is found in provisions of the Torrens statutes relating to exceptions to indefeasibility. Essentially indefeasibility of title puts priority of the registered interest above that of the unregistered one. If an unregistered interest is extinguished it will not be enforceable against a later proprietor unless under exceptional circumstances. There are five main classes of exceptions to indefeasibility which include:

- Exceptions contained within Torrens statutes
- Power given to the Registrar of Titles to correct the register
- Exceptions made by other statutes
- Overriding statutes
- Exceptions allowed by courts

Certain other statutes other than the Torrens statutes make provisions for specific exceptions to indefeasibility of title. For example provisions to deal with improvements under mistake of title are contained within the *Property Law Act 1974(Qld)*. The paramountcy of an indefeasible title is the basis upon which the Torrens system is founded.

⁷ *Real Property Act 1900* (NSW) s 42.

⁸ *Ibid* s 2.

⁹ *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407.

2.2.2 STATE GUARANTEE OF TITLE

When the Torrens system of land registration was first introduced, a provision for a person suffering loss to seek compensation was considered important. The fear of loss of title without compensation resulted in such a provision being implemented. There are two kinds of loss possible under the Torrens system which most certainly would not have occurred in common law. These include loss from mistakes by the registry, and loss from operation of indefeasibility provisions of Torrens statutes.

Due to the rate of payments out in comparison to contributions to the assurance fund, these assurance funds became substantial. Because of this some Australian states disallowed further contributions, and abolished assurance funds in some states. There are strong arguments for the retention of the compensation scheme. Bradbrook et al states that:

‘it is still the case that innocent persons may suffer loss under the Torrens system which they would not have suffered under the general law systems of conveyancing.’¹⁰

When there is adverse possession there generally is no compensation provided to the adverse possessor or registered proprietor. On the other hand where statutory encroachment, an alternative to adverse possession, is provided for, there is compensation. The nature of statutory encroachment will be covered later in this review.

2.3 THE DOCTRINE OF ADVERSE POSSESSION

The modern doctrine of adverse possession as we know it today is closely related to the English law of limitations from about 1833. This English law of limitations is significant because prior to the 1833 reform adverse possession did not give title to the adverse possessor, only a defence sufficient to defeat the true owner. The reforms had the effect of extinguishing title after a passage of required time although extinguishing the true owner’s title did not give title to the adverse possessor. The reforms had to fit

¹⁰ See above n 1, 186.

the changing social and economic opinions of the era.¹¹ The true origins of limitation occurred as a result of the Norman invasion in 1066. A limited form of limitation was brought into use in 1154 via the Treaty of Winchester 1153.¹²

The first modern statutes emerged in 1540 when time limits for legal proceedings began.¹³ Prior limitation statutes did not allow for disputes of rights that could be enjoyed. Any claims were barred. In 1275 the limitation period was 86 years, 1375 was 186 years, 1475 being 286 years, and 1539 the limitation period was assumed to be 350 years.¹⁴ Statutes of limitations of these lengths were of little use. A new statute introduced in 1540 had a fixed period of 60 years. Although adverse possession has many historical ties to concepts such as the Doctrine of Laches, and squatting, for the purpose of this project England's reforms played the most important part in its history.

2.3.1 REQUIREMENTS OF THE ADVERSE POSSESSOR

Depending on the jurisdiction, title can be claimed by adverse possession, or what is often referred to as possessory title. Possessory title can offer land title for the holder which is enforceable against the entire world, provided the registered proprietor cannot show a better title. In many cases possessory title was held for a required period of years so that the true owner is precluded from having the ability to regain possession of the land. This results in the possessor gaining a title to the land by adverse possession.

Generally there are a number of criteria which need to be satisfied for a potential adverse possessor to successfully extinguish the registered proprietors' title. The possession must be 'open, not secret; peaceful, not by force; and adverse, not by consent of the true owner'.¹⁵ The possession has to satisfy these criteria, otherwise the true owners title will not be extinguished, irrespective of the length of occupation.

In a more generalised sense, adverse possession must satisfy six criteria.¹⁶ These criteria are listed and briefly described below. It should be noted that applicable statutes of

¹¹ A Brown, *Law relating to Land Boundaries and Surveying*, (1st ed, 1980) 36.

¹² Malcolm Park, *'The effect of adverse possession on part of a registered title land parcel'* (Phd Thesis, University of Melbourne 2003) 65.

¹³ Park, above n 12, 65.

¹⁴ Ibid.

¹⁵ *Mulcahy v Curramore Pty Ltd* (1974) 2 NSWLR 464.

¹⁶ Aaron Larson, *Adverse Possession* (2004),

<http://www.expertlaw.com/library/real_estate/adverse_possession.html> at 18 April 2009.

limitations can vary significantly between jurisdictions, but in a common law sense these generalisations will apply.

- Actual – You have actually acted in a manner that a property owner would if he was in your position.
- Open and Notorious – Acts of possession with the subject property were capable of being seen. In other words the possession doesn't necessarily need to have been observed, but if the general public were in a position to observe you, the actions must be visible.
- Exclusive – The adverse possessor does not occupy the same parcel of land with the true owner at the same time. During the statutory period the person who wants to claim title through adverse possession must not have shared possession in common with the public and have acted as the true owner.
- Hostile – A hostile situation exists where a possessor possess the land of another and who intends to hold to a specified, recognizable boundary location. Adverse possession cannot be claimed if you are permissibly using somebody else's land.
- Continuous – The elements of adverse possession must be satisfied for the whole statutory period which is governed by the limitation Act of the jurisdiction.
- Time – The statutory period specifies the time a claimant must hold in order to successfully apply for title through adverse possession.

Possession must have the required intention. Essentially there has to be 'animus possidendi' – an intention to possess.¹⁷ There has to be an intention to exclude the whole world, including the registered proprietor of the land, from the land.¹⁸ This is a different concept than an intention to own the land. The use of land for personal use without the intent to exclude all others is not sufficient.

¹⁷ Peter Butt, *Land Law*, (4th ed, 2001) 740.

¹⁸ Butt, above n 17, 740.

For example in *George Wimpey & Co Ltd v Sohn* (1967), adverse possession was not granted where the possessor merely fenced off an area for a garden. He had the intention of excluding the general public, but there was no intention of excluding the documentary owner.¹⁹ Proof of the actual intention is very important. Enclosure is one of the strongest forms of evidence for adverse possession.²⁰

By the term open, it is meant that the act of possession of the land would be easily noticed by a registered proprietor, who is conscientious of his/her interests.²¹ So in other words if the intention is not open, then it is not adverse in nature. Also the possession must be peaceful, meaning without violence.

Possession is not adverse if it is by permission of the documentary owner. There are three situations which should be realised. Firstly time cannot run in favour of a person who takes possession with the true owner's permission. Also the existence of a family relationship makes it hard to determine if the possession is actually adverse. And lastly if possession is taken without permission, and permission is granted during the limitation period, then accrued time is cancelled. Another issue is the fact of relevant circumstances. A court has to determine things such as what use is appropriate for a particular parcel of land, or determining if the possession in one situation is still adequate in another situation. Also it has to be determined how the type of conduct which indicated possession varies with different types of land. Trespassing does not constitute possession and is not considered relevant.²² Usually for conclusive evidence relevant circumstances need to be coupled together.

A summary of the applicable principles were summarised by Slade J in *Powell v McFarlane* (1979) and is included in Appendix B.

So what constitutes abandonment of possession? In general, time ceases to run against the documentary owner if the adverse possessor abandons possession. For example, non-use of land is not conclusive evidence that possession has been abandoned.²³ Possession isn't abandoned necessarily if the possessor has ceased to physically occupy

¹⁹ Butt, above n 17, 741.

²⁰ Butt, above n 17, 743.

²¹ Butt, above n 17, 741.

²² Butt, above n 17, 744.

²³ Butt, above n 17, 746.

the land due to temporary reasons such as drought.²⁴ Upon abandonment by the adverse possessor the title of the registered proprietor is fully restored.

A particularly important adverse possession case occurred in Tasmania. In 1994 Keith George Woodward, the plaintiff, took Wesley Hazell Pty Ltd, the defendant to court over a disputed portion of land. Figure 2.1 shows a diagram of the disputed land.

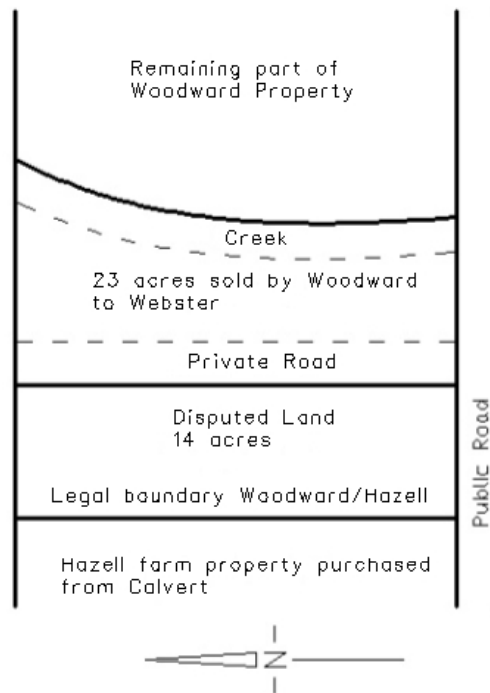


Figure 2.1 The Woodward Case

In 1958 the plaintiff's father bought a farm with 658 acres of land. At this time title was taken in the name of the plaintiff and his father in tenants in common. There was a 37 acre block of land attached to the western side of the main property. Calvert, the adjoining land owner to this western portion of land cleared the land as Woodward had no immediate use of the land.

The plaintiff and his father sold 23 acres to Mr Cordwall in 1969, which at the time of the trial was owned by Mr and Mrs Webster. There were 14 acres separated from the rest of Woodward's land. Calvert fenced off this land from Woodward, being the land subject of the dispute.

²⁴ Ibid.

The year 1975 saw the plaintiff's father transfer all of his interest of the 658 acres to the plaintiff. Calvert's land which by now had a dwelling on it was purchased by Hazell using the family trust. During 1978-1988 Woodward only visited his farm on occasional weekends until he built a house and set up a machinery business with his son. In 1985 Hazell took up residence of his farm house.

In 1990 Woodward received an offer from a third party to purchase the disputed 14 acres, which is the reason the application arose. Woodward then mentioned this offer to Hazell who claimed that his family had exclusive and uninterrupted possession for more than 12 years and had also acquired the estate in fee simple. Hazell then went to apply for a vesting order to vest the disputed land in his name, and subsequently Woodward lodged a caveat under the Tasmanian *Land Titles Act* 1980 and commenced proceedings to recover his land.

The court proceedings concluded that Hazell had the belief that the land belonged to Calvert, and subsequently Hazell used the land to the exclusion of all others. Therefore Woodward had been dispossessed for more than 12 years, the limitation period of Tasmania. Hazell was found to have had the required intention to possess the land to the exclusion of all others including the true owner as Hazell thought the land was part of his property which he held in fee simple.

2.3.2 LIMITATION OF ACTIONS

Limitations of actions are closely related to adverse possession and prescription. A distinction between the two is the notion that adverse possession originated from legislature as a way to minimise disputes over land titles, whilst prescription was created by common law courts as a rule to preserve the long enjoyed and undisputed right.²⁵

Prescription is well defined as 'the right which a possessor acquires to property by reason of the continuance of his possession for a period of time fixed by the laws'.²⁶ This right or obligation is enjoyed for a long period of time without interruption, and if a person has enjoyed quiet and uninterrupted possession of anything for a long period it is considered a just right.

²⁵ Park, above n 12, 66.

²⁶ Henry Black, *Black's Law Dictionary*, (6th ed, 1991) 930.

Prior to 1833 adverse possession had no time requirement to satisfy and the adverse occupation of land simply could not give title to an adverse possessor. All the statute could offer was a defence strong enough to defeat the titleholder. This was the case until law reforms came into play in 1833. These reforms could extinguish the true titleholders' title after the completion of a limitation period. While the reforms could extinguish a titleholders' title, it could not bestow title to the adverse possessor. Due to the reform there is no practical difference between adverse possession and prescription anymore.

A time limit is imposed on land owners of jurisdictions which permit adverse possession. The purpose is to allow the registered proprietor to exercise his rights when dispossessed. There are several justifications for this.²⁷ Firstly and most importantly is the fact that it is in the public interest to encourage certainty and predictability. Also it seems reasonable that if a person has taken possession of the land and over time has made the parcel of land his home for a significant period of time without interruption, the possessor is entitled to peace of mind. Another justification is the fact that if the registered owner does not enforce proprietary title due to negligence, or being tardy, the public interest favours the possessor. This goes against the owner and his/her right to regain possession. This justification is enforced by spoken words of *Sir Thomas Plumed MR in Marquis Cholmondeley v Lord Clinton* (1820).

‘It is better that the negligent owner who has omitted to assert his right within the prescribed period should lose his right than an opening should be given to interminable litigation.’²⁸

If the possessory title owner is defeated by the registered proprietor after years of developing the land, it would be judged unfair and would certainly bring some form of hardship. The idea behind limitations on actions is essentially that there should be a period after which the registered proprietors' right to impose an action ceases. Time restrictions of this kind tend to encourage prompt action.

Each of Australia's jurisdictions has a limitation period which enforces rights over land and these time requirements are listed in Table 2.2 below.

²⁷ Samantha Hepburn, *Principles of property Law* (2nd ed, 2001), p 67.

²⁸ *Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1; 37 ER 527, p 577.

Table 2.2 Length of limitation periods for Australian jurisdictions with adverse possession provisions.

Jurisdiction	Queensland	New South Wales	Victoria	Tasmania	Western Australia	South Australia
Length of Limitation (Years)	12	12	15	12	12	15

The ACT and NT do not allow adverse possession as a means to gain registration as proprietor of land. Appendix C details time requirements for adverse possession in the United States of America, although many jurisdictions in the USA never adopted the Torrens system.²⁹ Time ranges from three to 30 years, with most states being 10 to 20 years. For a full list refer to Appendix C.

In England, transactions which occurred before 13 October 2003, the date the *Land Registration Act 2002* (ENG) came into force, are governed by section 75(1) and 75(2) of the *Land Registration Act 1925* (ENG), in which case the limitation period is 12 years. When the *Land Registration Act 2002* was introduced, the adverse possessor could apply for registered title after a period of 10 years.³⁰

In some instances adverse possession can be sought over Crown land, not just freehold land for example. There are different provisions in each state in Australia. Only Tasmania and New South Wales allow for adverse possession to be claimed against the Crown. For these states the limitation period is 30 years.³¹ Where there are no provisions with regards to Crown lands the *Crown Suits Act 1769* comes into play. With this Act the Crown can be barred by adverse possession after a period of 60 years. There is sense in providing provisions for adverse possession against the Crown. Due to the fact the Crown has a large amount of land it can be difficult to manage land exclusively.

²⁹ Cora Jordan et al, *Neighbor Law Fences, Trees, Boundaries, & Noise*, (6th ed, 2008), p 179.

³⁰ *Land Registration Act 1969* (ENG) s 6(1).

³¹ *Limitation of Actions Act 1969* (NSW) s 27(1); *Limitation of Actions Act 1974* (Tas) s (10)(4).

It is a method to prevent to be adverse possessors from taking large chunks of Crown land.

2.4 INCOMPLETE ADVERSE POSSESSION

Incomplete adverse possession is essentially just another phrase for adverse possession which has not been fully developed, is not organized, and lacks order. There are several variations in which the time period of adverse occupation has not, or is not capable of developing into a period which can invoke a limitation statute as defence against a registered land owner. One variation is where the limitation period has started but cannot finish because the doctrine of adverse possession has not been recognised as a foundation of title acquisition.³² Another variation takes place where the required statutory period has been suspended.

2.4.1 ADVERSE POSSESSION WHICH IS NOT RECOGNISED IN A JURISDICTION

Possession has sufficient legal status on the occupier to exclude all others with a lesser legal right. This is the case where due to the jurisdiction the occupier is prohibited from acquiring title because the limitations statute is not applicable.³³ The adverse possessor has a better title than the entire world except the registered proprietor. If this is the case then only the registered proprietor has the capability to remove the adverse possessor, and the adverse possessor can never gain registered title through adverse possession. All Canadian provinces treat registered land in this manner, with the exception of Alberta which has a limitations statute on registered land.³⁴ Other Canadian provinces which do not allow for adverse possession of land include Ontario, British Columbia, and Manitoba, Saskatchewan, New Brunswick, and Nova Scotia.³⁵ In these jurisdictions the adverse possessor holds some limited rights, but cannot gain an indefeasible registered title.

³² Park, above n 12, 67.

³³ Park, above n 12, 67.

³⁴ Park, above n 12, 68.

³⁵ Ibid.

2.4.2 PERIOD OF ADVERSE POSSESSION INSUFFICIENT TO INVOKE DEFENCE OF REGISTERED TITLE WHERE ADVERSE POSSESSION IS RECOGNISED IN THE JURISDICTION

Limitation statutes in jurisdictions which allow for adverse possession have a fixed time period which must be satisfied. The adverse possessor has to have occupied the land for a period of time sufficient to qualify for the statute of limitations. If the period of time has been satisfied then the adverse possessor has a better title than the entire world except of the true owner of course, who is barred from ejecting the adverse possessor. Adverse possessors whose period of occupation is insufficiently matured still have the legal status to exclude lesser rights in the land.³⁶ Jurisdictions which allow for acquisition of title through adverse possession generally allow for the limitation period to be satisfied by the accumulation of time periods of previous possessors. So if one is dispossessed by another adverse possessor, then the newer occupier acquires the rights of the previous occupier. It is essential that these time periods be continuous. This is because if dispossession of the true owner ceases, then the limitation period against the true owner will cease.³⁷ This addition of successful adverse possession is termed 'tacking'.

The adverse possessor effectively transfers possession to the new possessor who will benefit from the accrued time. Therefore the second occupier only needs to occupy for a period such that the total time is enough to invoke the limitations statute.

Under s 70 of the *Land Registration Act* 1925 of England it is stated that rights, or rights being acquired under the Limitation Act are overriding interests.³⁸ This means that any accrued time by one adverse possessor, which is insufficient to extinguish the true owner's title, is counted if and possessor goes into a transaction of the land. The following scenario explains this well. If possessor A has been occupying B's land for 9 years, then B chooses to sell to C, and A still adversely occupies land registered to B, then A only needs to continue adverse occupation for X amount of years in order to defeat C's ability to extinguish A from the land.

This type of tacking is allowed in two jurisdictions including Victoria and Western

³⁶ Elizabeth Cooke, 'Adverse possession-some problems of title in registered land' (1994) 14 *Legal Studies* 4.

³⁷ Park, above n 12, 69.

³⁸ Land Registration Act 1925 (ENG) s(70).

Australia. In jurisdictions which do not allow for adverse possession, such as the ACT, and NT, no combination of tacking is allowed.

Another variation is when adverse possession has not reached the stage where the documentary owner can be defeated and the registration of a transaction by the true owner has what could be described as a cleaning or renewing action.³⁹ Once this renewing action has occurred, the time period on the limitation period re-commences. This provision was adopted in the early Torrens statutes of Australia. Essentially any period of occupation by the possessor adverse to the true owner which has accrued before the issue of a new certificate of title becomes irrelevant. The accrued rights of the adverse possessor are extinguished as the new certificate is created. If the adverse possessor has been in possession for a sufficient time period to invoke a limitation period as a defence, but has not taken the necessary legal steps to dispossess the true owner, then the dispossessed proprietor and a third party can defeat the adverse possessors' interest.⁴⁰

Singapore was an example of a jurisdiction which allowed for the concept of the cleaning/renewing action before legislative provisions were abolished in March 1994. The provisions allowed for accrued time to be cleaned at any time prior to the occupier applying for registration.⁴¹

2.4.3 UNCOMPLETED PERFECTION OF ADVERSE POSSESSION NOT RECOGNISED IN THE JURISDICTION

One more component of incomplete adverse possession is where the adverse possessor has occupied the land for a sufficient period of time to invoke the limitations statute, but has not applied for registered proprietor. So the adverse possessor has sufficient time to apply for adverse possession, but has not entered into the register.

There are some jurisdictions which require the adverse possessor to complete the time period to invoke the limitations statute, and then also successfully apply for entry into the register and be registered as the registered proprietor. Until registration occurs the

³⁹ Park, above n 12, 72.

⁴⁰ Park, above n 12, 73.

⁴¹ Lexloci Pty Ltd, *No Adverse Possession if No Application Made in Time* (2005), <<http://www.wwlegal.com/Article273.html>> at 23 April 2009.

existing registered proprietor still has better title. Examples of jurisdictions which follow this method include the Canadian province of Alberta, and NSW Australia.⁴²

In jurisdictions which require registration to perfect the title, the rights of the adverse possessor will not bind to any successive adverse possessors. The right of the adverse possessor is not overriding until registration occurs.

For jurisdictions which do not require the adverse possessor to register his/her interest, until the limitation period is passed, the registered proprietor holds the estate on trust for the adverse possessor.⁴³ England and Tasmania used this principle in their relevant statutes until England and Tasmania amended their legislation in 2002 and 2001 respectively.

2.5 PART PARCEL VERSUS WHOLE PARCEL ADVERSE POSSESSION

Variations in boundaries associated with part parcel adverse possession have been dealt with adverse possession generally, if at all. Powell-Smith (1975) recognised that 'boundaries are frequently varied in this way by minor encroachments upon neighbouring property, often when walls are rebuilt or wooden fences are re-erected.'⁴⁴ Miceli and Turnball (1997) view the doctrine of adverse possession as but one solution to the problems associated with boundary errors in real property.⁴⁵ Prior to the 1833 English reforms adverse possession of part of a whole parcel was not fully recognised, and was regarded as adverse possession of the whole. This has changed since the 1833 reforms.

Park (2003) has the notion that because of the very few commentaries and legal decisions, the practice of part parcel adverse possession requires speculation.⁴⁶

Land boundaries may change over time. Occupiers can often be mistaken about where true boundary lines are. As the survey boundaries are invisible lines as such. Occupiers will often build improvements to the land without having the land resurveyed. Part

⁴² Park, above n 12, 74.

⁴³ Park, above n 12, 74.

⁴⁴ Powell-Smith, *The law of Boundaries & Fences*, (2nd ed, 1975) 15.

⁴⁵ Miceli J and Turnball G.K., *Land title system and incentives for development* (1997) 21.

⁴⁶ Park, above n 12, 78.

parcel adverse possession is one tool to correct for boundary disputes where there are differences between true and occupational boundaries.⁴⁷ In other words registered versus unregistered boundaries. Australasian jurisdictions except the ACT allow for the settlement of boundary disputes and the adjustment of boundaries.⁴⁸ This can be done through part parcel adverse possession, boundary encroachment laws, or both. Through the process of adverse possession the adverse possessor could transfer the part of the parcel of land to their land title.

With regards to part parcel adverse possession, the most prominent relationship is probably that of the neighbours who occupy adjacent land parcels. There are two part parcel adverse possession situations which arise. Firstly adjacent land parcels can have boundary disputes over a strip of land between the land parcels. This is the most common situation for part parcel adverse possession. It usually arises because of dispute over the location of the fence. The other situation is when there is a boundary dispute over an irregular portion of land or essentially any portion of land which less than a whole parcel.

The notion that part parcel adverse possession is different to whole parcel possession is supported by the fact that some jurisdictions refuse to recognise long standing adverse possession.⁴⁹

2.6 ALTERNATIVES TO PART PARCEL ADVERSE POSSESSION

The main alternative to part parcel adverse possession is statutory encroachment which is a means to resolve disputes involving encroachments onto adjoining lots. The other alternative is the statutory recognition of a small margin of error in the location of boundaries.

Statutory encroachment is described by Park and Williamson (2003) as ‘a specialised adjudicator is empowered with wide discretionary powers to resolve disputes involving

⁴⁷ Park M and Williamson I, *The effect of Adverse Possession to part on a future Australian Cadastre*, (1999).

⁴⁸ Park M and Williamson I, *The need to provide for boundary adjustments in a registered land system*, (2003) 2.

⁴⁹ Park, above n 12, 85.

small encroachments across a boundary into the adjoining lot.’⁵⁰ As an alternative to part parcel adverse possession, statutory encroachment has been adopted in many jurisdictions which do not permit adverse possession of either whole or part parcel.

Encroachment legislation was introduced for boundary location adjustment, whilst whole parcel adverse possession was to provide transfer of title of a whole parcel of land if specific conditions are met. Park (2003) makes the statement that ‘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.’⁵¹ So part parcel adverse possession can be differentiated by the fact that the cases are dealing with boundary location ‘space’ versus ‘time’, being the statutory period.

The position of Australian jurisdictions with respect to the adoption of statutory encroachment is varied. Victoria permits part parcel adverse possession, but has no provisions for statutory encroachment. New South Wales and the Northern Territory do not allow for part parcel adverse possession, but allow for statutory encroachment. And Queensland, South Australia, and Western Australia permit both. The Australian Capital Territory permits neither. Tasmania permitted part parcel adverse possession until 2001 when new amendments were put into place. After 2001 statutory part parcel adverse possession was discouraged, and statutory encroachment is not permitted in Tasmania. Park and Williamson (2003) states that both Queensland and South Australia favour the application of encroachment over part parcel adverse possession.⁵²

With regards to other countries, England does not permit statutory encroachment, but permits part parcel adverse possession since the introduction of the *Land Registration Act 2002* (ENG). New Zealand prohibits part parcel adverse possession, but allows for statutory encroachment. New Zealand introduced encroachment into its land law statute through the *Property Law Amendment Act 1950* (NZ). This happened at a time when New Zealand specifically disallowed title through adverse possession. In Canadian provinces only Alberta permits both part parcel adverse possession and statutory encroachment. The rest of Canada’s provinces permit statutory encroachment only.

⁵⁰ Park and Williamson, above n 48, 2.

⁵¹ Park, above n 12, 86.

⁵² Park and Williamson, above n 48, 13.

Table 2.3 A summary of the approaches used by various jurisdictions with respect to boundary adjustment. While some jurisdictions have provisions for part parcel adverse possession, there are restrictions.

Jurisdiction	Boundary Adjustment Method	
	Part Parcel	Encroachment
ACT	N	N
NT	N	Y
NSW	N	Y
QLD	Y	Y
VIC	Y	N
SA	Y	Y
WA	Y	Y
TAS	Y	N
NZ	N	Y
ENG	Y	N
CAN (Alberta)	Y	Y
CAN (Other)	N	Y

2.6.1 THE DOCTRINE OF ACQUIESCENCE

At the most basic level, boundary by acquiescence is the laying out or adoption of a boundary in a particular location by a person. This boundary is allowed to remain undisturbed by the affected neighbour. The doctrine has the desire for stability in the land parcel in order to discourage litigation.

The rule of acquiescence promotes the peaceful resolution of boundary disputes. A claim of acquiescence requires proof based upon the importance of the evidence. Acquiescence is ‘less stringent than the clean and cogent evidence standard used in adverse possession and prescriptive easement cases’.⁵³ Unlike adverse possession claims, the concept of acquiescence does not require that the possession has to be hostile or without permission. The acquiescence of predecessors in title can be ‘tacked’ in order for occupiers to establish the required time period.

⁵³ Joel Leininger, ‘Boundaries by Acquiescence’ (2008) Oct *The American Surveyor* 69-70.

The quiet enjoyment by parties on either side of a boundary line over time results in that line becoming the actual boundary between parties. Many jurisdictions of the United States of America still use the doctrine of acquiescence. Some jurisdictions require:

- The original location of the boundary must be unknown for the doctrine to take effect. In others this element does not come into play.
- The boundary line has to be visible. In others this is not as important.
- Occupation must have continued for the prescriptive period. In others it must have occurred for an unspecified 'long period of time'.⁵⁴

Approaches to boundary by acquiescence are varied. Although it may be easy to determine current limits of occupation, determining longevity of that occupation is difficult.

2.7 ADVERSE POSSESSION AND EFFICIENCY

Several publications have been brought forward over the years with various economic justifications for adverse possession.⁵⁵ Adverse possession is but one way of reducing risks which are associated with land title transfer, and the conditions for the application of adverse possession seem to be designed to reduce costs of mistakes and errors in boundaries.⁵⁶ Also the same author goes on to state that search and verification costs are reduced due to the fact that the potential purchaser is assured of the validity of title to be transferred.⁵⁷ Although there is hesitance as to say whether or not these would be minor or major cost savings. Bouckaert and Depoorter (1999) claim that the higher the uncertainty of title of true ownership of a land parcel, the lower the transaction price

⁵⁴ Ibid.

⁵⁵ Netter J.M., Hersch P.H. and Manson W.D. (1986), *A economic analysis of adverse possession statutes*, 6 International Review of law and economics, 217-227; Bouckaert B. and De Geest G. (1998), *The Economic Functions of Possession and Limitation Statutes*, Essays in Law and Economics IV, 151-168; Miceli T.J. and Sirmans C.F., *An economic theory of Adverse Possession*, (1995) 15 International Review of Law and Economics, 162-173.

⁵⁶ Bouckaert B and Depoorter B, *Adverse Possession - Title Systems*, (1999) 3.

⁵⁷ Ibid.

will be.⁵⁸ In this sense adverse possession may reduce the certainty of ownership and title of land.

Miceli and Sirmans (1995) come to the conclusion that the requirements of adverse possession during the statutory period give the true owner the opportunity to discover boundary errors before the adverse possessor applies for title.⁵⁹ Similarly a diligent true owner would be given ample time to oust trespassers during this period.

2.8 THE CASE FOR ADVERSE POSSESSION

Differences between true and occupational boundaries are well recognised and the regular occurrence of such discrepancies.⁶⁰ Park (2003) states that ‘5% of land parcels can be expected to change materially in outline, shape, and area annually.’⁶¹ For example the Tasmanian law reform commissioner in 1994 indicated that one in twenty properties in Hobart have problems associated with their boundaries.⁶² Similarly in 1998 the Victorian parliamentary law reform committee gained evidence from the land registry that out of approximately 500000 dwellings around 80 applications for part parcel adverse possession occurred.⁶³

Park and Williamson (2003) observed that:

‘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 survey corroboration that the boundary corresponds exactly with that is shown on the registry plan.’⁶⁴

It is clear that long term occupation of land supported by adverse possession has reduced transaction costs. Also Park and Williamson (2003) argues that ‘the best argument favouring occupational boundaries over legal boundaries is the immense practical difficulties in restoring true legal boundaries.’⁶⁵

⁵⁸ Ibid.

⁵⁹ Miceli and Sirmans, above n 55.

⁶⁰ Park and Williamson, above n 48, 2.

⁶¹ Park, above n 12, 49.

⁶² LRCT (1995), *Report on Adverse Possession and other possessory claims to land*, Hobart, law Reform Commissioner of Tasmania.

⁶³ VPLRC (1998), *Review of the Fences Act 1968 Report*, Melbourne, Parliament of Victoria Law Reform Committee.

⁶⁴ Park and Williamson, above n 48, 3.

⁶⁵ Ibid 4.

There is the issue of what should be done about abandoned land. Should it be left alone, or should there be an incentive to promote efficient land use? LRCS (1989) has the notion that possession can create interests in land which should be abandoned.⁶⁶

Irving argues that there are five main arguments for the recognition of acquisition of title through adverse possession. These arguments include:

- (1) The law should discourage property owners from 'sleeping' on their rights.
- (2) Interminable litigation founded upon stale claims is undesirable.
- (3) The law should protect against the grave hardship which may ensue if an adverse possessor, who has occupied the property for a long period of time, is removed.
- (4) Title by adverse possession reduces the risks associated with conveyancing because defects are cured with time
- (5) Recognising title by adverse possession is economically efficient because it encourages productive use of land.⁶⁷

The UK law commission reports that there is hostile public criticism, and growing public disquiet with regard to adverse possession of both whole and part parcels.⁶⁸ Discrepancies in boundaries need resolution as to how to minimise its effects on the public, registered proprietor, and the adverse possessor. This brings one of the main aims of this project to rise, that being research into what may comprise a model or set of recommendations for the best practice of adverse possession.

2.9 THE MOVE TOWARDS A UNIFORM TORRENS SYSTEM IN AUSTRALIA

All Australian jurisdictions take slightly different approaches towards the application of adverse possession of Torrens Land. Park and Williamson (1999) suggest that 'the prohibition against part parcel adverse possession is the single greatest distinguishing

⁶⁶ LRCS (1989), *Proposals for a new Limitations Act*, Saskatoon, Law Reform Commission of Saskatchewan.

⁶⁷ Irving D K, *Should the law recognise the acquisition of title by adverse possession?*, (1994) Australian Property Law Journal, 112.

⁶⁸ Law Commission and H M Land Registry (1998), *Land Registration for the Twenty-first century: a consultive document*, London, HMSO.

feature of the various state schemes'.⁶⁹ It is also pointed out that this distinguishing feature does affect land markets of each jurisdiction. Also as a direct consequence the same author claims that the cadastral surveying practice and the definition of boundaries is also affected. Park and Williamson (1999) go onto state 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 of 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.’⁷⁰

Because of the fact that there are widely differing systems operating in Australia, reform of some or all of the jurisdictions approaches may occur in the coming years. Park and Williamson (2001) state that ‘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’.⁷¹ The different approaches to adverse possession in Australia can be characterised as being either permissive or absolute. It may well be the fact that if any reform occurs in the future, a compromise may be found in between the two.

Since the federation of Australia there have been several accounts of calls for unification of the Torrens statutes. Irving has suggested that the diversity of the Australian approach to adverse possession is a major inhibiting factor to the unification of Torrens statutes.⁷²

Australian jurisdictions have brought forward several major amendments to existing statutes. Most prominent are the recent reforms of Tasmania in 1980 and April of 2001, and Queensland in 1994.

The Law Council of Australia released ‘Model guidelines for a Harmonious System of Torrens Title’ in June of 2007. It discusses provisions of Torrens statutes with relation to comments collated from meetings of the Australian Property Law Group, consultation with State and Territory Law Groups, and the Law Institute. The document

⁶⁹ Park and Williamson above n 47, 5.

⁷⁰ Park and Williamson above n 47, 3.

⁷¹ Park M and Williamson I, *A uniform approach to boundary location discrepancies: Promoting and prescribing the reform of the Land Title Register*, (2001) 2.

⁷² Irving above n 67, 112.

details most aspects of Torrens statutes including adverse possession. It has the notion that if any major reform is to occur, adverse possession should be included.⁷³ It is also accepted in this document that an exception to indefeasibility should also apply to adverse possession. In general the comments suggest that a simple approach to title transfer would be good choice.

2.10 CONCLUSION

While there have been only several studies directly related to the aim of this project, there are a lot of sources which cover the doctrine of adverse possession in general. There are many components to the doctrine, some being more difficult to comprehend than others. Most of the recent studies conducted on Australia's position with respect to adverse possession have been performed by Park and Williamson rather than a wide variety of authors.

⁷³ Law Council of Australia, *Model Guidelines for a Harmonious System of Torrens Title*, (2007).

Chapter 3

METHODOLOGY

3.1 INTRODUCTION

The chosen methodology has been designed to cater for a simple but informative approach to the research. It has the aim of answering the hypothesis of this paper, which is defining a set of recommendations which could be thought of as a best practice of adverse possession principles.

This best practice aims to provide for a balanced approach to the application of adverse possession between Australian jurisdictions. Ideally the best practice should be reliable, simple, cheap, speedy, and suited to the needs of the community. As described by Theodore Ruoff in 1957, these were the ideals Sir Robert Torrens aimed to employ in the Torrens system when it was initially introduced in Australia in the 1860's.¹ It would be advantageous to select criteria which will minimise disputes between neighbours.

It is clear that the jurisdictions have major differences, but if possible it is important to investigate how today's differing approaches complement the basic ideals of what the Torrens system aimed to become. Through discussion this will give the insight needed to draw conclusions and recommendations.

3.2 CONCEPTUAL METHODOLOGY

The first major task of this thesis is to identify all existing legislation currently in force in Australian jurisdictions. This will take the form of existing Torrens statutes, limitations statutes, and any other relevant legislation such as encroachment and mistake legislation. At the same time case law is to be used to reinforce important aspects of legislation, or to identify key rulings. The end result of the first task is to have

¹ Theodore Ruoff, *An Englishman Looks at the Torrens System*, (1957).

identified all of the key features that uniquely define one jurisdiction's approach from another.

The second task is to select evaluation criteria for the discussion chapter. Appropriate evaluation criteria were shortlisted. It was decided that the major ideals of the Torrens system best represent evaluation criteria. Strengths and weaknesses of legislative provisions and schemes will be identified.

The third task is to perform an analysis of any boundary disputes by adverse possession over a defined time period for each jurisdiction. Any trends will be identified and used in the discussion.

Findings from this task will also be used to identify 'best practice criteria'. Best practice criteria would be provisions or legislative components relating to the doctrine of adverse possession which appear to complement the Torrens system more so than others, when discussed with the evaluation criteria. Justifications where appropriate will be important.

The approach is shown diagrammatically in Figure 3.1 and described in more depth in the next section.

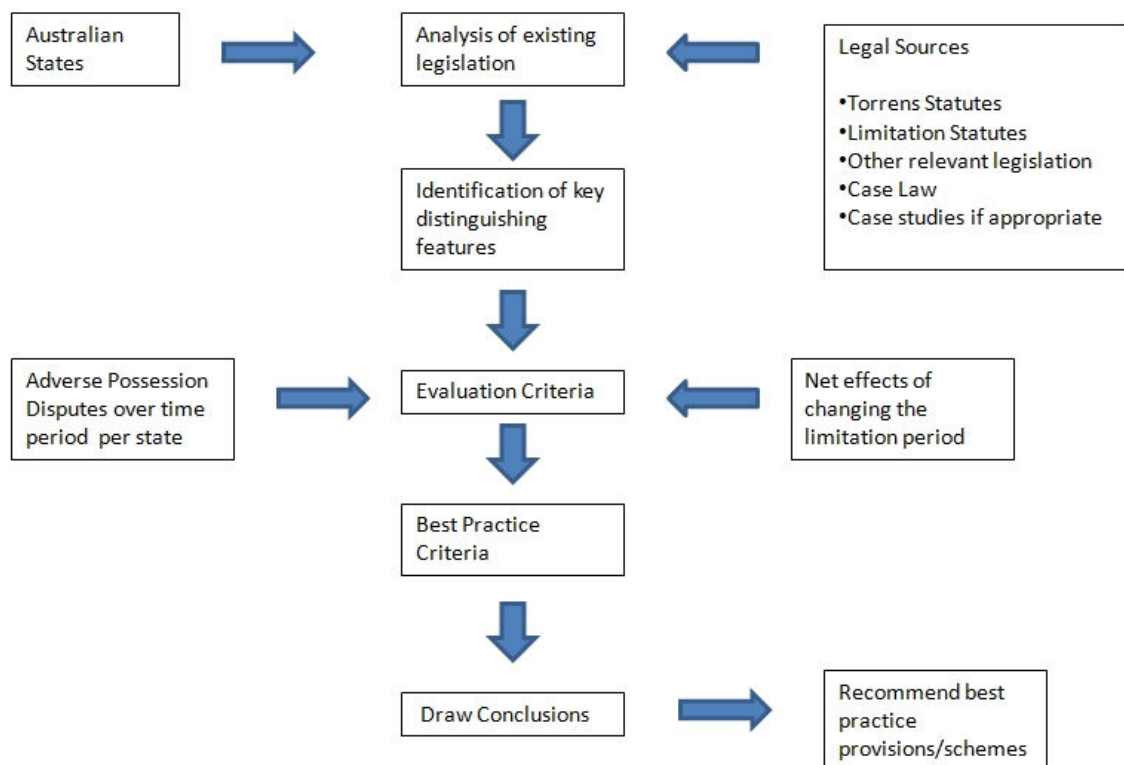


Figure 3.1 Conceptual methodology.

3.3 RESEARCH METHODOLOGY

To begin the research, analysis of provisions related to adverse possession contained within statutes of Australia is to be completed giving an understanding of the core differences between the differing approaches used by Australian jurisdictions. There are several pieces of legislation which are found in each jurisdiction of Australia which share common elements. These are listed in Table 2.1. It is important to identify distinguishing features used by each jurisdiction. In conjunction with the Torrens statutes several other statutes for each jurisdiction of Australia will be documented where appropriate. These include limitation, property law, crown law statutes, and other legislation.

In conjunction with relevant legislation, case law will be used to support arguments where appropriate. Case law for this thesis will be sought from three main sources which include textbooks, law reports, and from online sources.

Case studies will be used to identify key processes of legislation and important common law regarding adverse possession. Significant court rulings will form the basis of any case studies.

All reported disputes over land related to adverse possession should be done. The time limit imposed on this thesis means that the disputes have had to be limited to a timeframe of 15 years. Using online legal databases of educational institutes and that of the courts allows for court rulings to be analysed from 1994-2009. While some databases have rulings from the mid 1980s, in order to keep the comparison on even ground it has been decided to not use court rulings prior to the newest database which has recorded rulings from 1994.

Results from this analysis will be classified firstly as either an adverse possession claim over a whole parcel, or part of a parcel. The alternative to part parcel adverse possession, statutory encroachment, will be analysed also by the number of disputes. Furthermore part parcel adverse possession disputes will be divided into either a claim over a strip or irregularly shaped parcel of land. These results will be tabulated and observed to determine if there are any noticeable trends. Where there has been a long running dispute between the same plaintiff and defendant involving multiple court rulings, only one dispute will be recorded. The reason behind this is that the aim is to

determine how many unique disputes involving adverse possession there has been over the time period.

There will also be a discussion about the effects of changing the limitation period as to either shorten or lengthen the period of time. Limitation periods come to life through common law decisions or law reforms and can be very complex. All that can be done in this thesis is to identify the relationship between a short and long limitation period and the implications of changing the time in broad terms.

Evaluation criteria were shortlisted for the discussion of strengths and weaknesses of legislative provisions and schemes. The evaluation criteria included:

1. Cost: For example 'What are the minor or major costs for winning or losing a court case?'
2. Certainty & Security of Title: 'How certain is the true owner's title due to a provision or scheme?'
3. Minimise disputes over the land: 'Does the legislative provision promote or discourage disputes over the land?'
4. Indefeasibility: 'Is indefeasibility increased or decreased by using this Adverse Possession provision?'
5. Suited to the needs of the community – 'What are the net effects of these criteria on the public interest?' For example 'Does it increase disputes or litigation and court costs?'

From all of the preceding analysis it is thought that there will be ample information to make an informed decision as to what a set of best practice criteria may constitute. To determine these best practice criteria, unique elements of the jurisdiction's schemes will be looked at to see how well they complement the evaluation criteria. The dispute analysis will be useful in this regard.

Enough evidence should be collected to make informed decisions, although some subjective recommendations may be drawn.

Data will be sourced from several sources as listed below.

- Online legal databases such as the Australasian Legal Information Institute (AUSTLII) or LexisNexis AU.
- Supreme Court Online Databases.

- Libraries including the University of Southern Queensland Library.

3.4 CONCLUSION

Whilst the methodology is a fairly objective approach, some areas could be subjective in nature. An objective approach has been adopted where possible. The method has been split into several sections of work as to balance the workload. It is a process which should yield decent results with regards to the aim of this thesis and with respect to the imposed timeframe.

Chapter 4

RESULTS

4.1 INTRODUCTION

This chapter of the project aims to form a basis for the selection of best practice criteria. Sections in this chapter will be of a reporting nature, meaning that the primary data sources will be compiled together to give an informative analysis of relevant case law and legislation. Following this analysis there will be a discussion about the possible effects of changing the length of the limitation period and an analysis of disputes between property owners relating to adverse possession.

Where appropriate in depth explanations of Australian case law will be presented. The purpose of this is to help explain certain provisions a statute offers or provide detail for a better understanding of a statutes operation or judgement of case law.

4.2 ANALYSIS OF AUSTRALIAN JURISDICTIONS

A whole parcel is well defined in s 45B(1)(a) and (c) of the *Real Property Act 1900* (NSW):

- ‘(a) The whole of the land comprised in a folio of the register,
- (c) The whole of a lot or portion in a current plan ...’

Adverse possession of a whole parcel of land is permitted to some degree in all states of Australia with several states having strict provisions. It is strictly prohibited in the two territories. Part parcel adverse possession is not defined in a strict sense in any piece of legislation, although various provisions give an understanding of what it constitutes.

4.2.1 AUSTRALIAN TERRITORIES

Under s 69 of the *Land Titles Act 1925* (ACT) it is clearly stated that adverse possession all together is prohibited and the title of registered proprietor cannot be extinguished through virtue of the statute of limitations. Similarly under the *Land Title Act 2000* (NT) s 198(1)-(2) it is stated that a person does not acquire title under the Act through any length of adverse possession. Also the right of the registered proprietor is not barred by any length of adverse possession to recover his/her land.

One recent case exemplifies that some people are not aware that any claim to land through adverse possession within the ACT is certain to fail. In *Individual Homes Pty Limited (In liquidation) v Anthony Gilbert Martin and Sue Dolores Martin* [1999] ACTSC 139 the case involved determining whether any defence prevents the registered proprietor seeking possession of the property from the defendant. Despite the fact the continuing presence was thought to be adverse possession, the plaintiff was apparently unaware of the fact no time bar is capable of running against the plaintiff and title could never be achieved through adverse possession.

Due to the prohibitive nature of schemes used in both Australian Territories adverse possession of part of a parcel cannot be successful.

4.2.2 QUEENSLAND

Queensland's current approach with respect to adverse possession of whole parcels is more traditional in nature. The use of limitations provisions with registered title land and title acquisition is dependent upon the limitation period. Title is acquired by the adverse possessor upon the completion of the required limitation period. Section 185(1)(d) of the *Land Title Act 1994* (Qld) provides that matured adverse occupation is an exception to the indefeasible title that the registered proprietor has under s 184 of the same act. While unmatured adverse occupation would not survive registration of a transaction, matured adverse occupation would survive registration of a transaction. Queensland's current scheme does appear to be similar to that of Victorian and Western Australian schemes, in that adverse occupation by itself is enough to extinguish title and transfer it to the adverse possessor.

A recent Queensland adverse possession case used the fact that someone claiming possessory title to Torrens land must establish both the expiration of the relevant limitation period, and satisfaction of the common law requirements related to adverse possession e.g. *Bartha v O’Riordan* [2004] QSC 205. These provisions are found in the *Limitation of Actions Act 1974* (Qld) s 13 and s 14 and are extracted below.

‘13 Actions to recover land

An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person.

14 Accrual of right of action in cases of present interests in land

(1) Where the person bringing an action to recover land or some person through whom the person claims has been in possession thereof and has, while entitled thereto, been dispossessed or discontinued possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.’

Section 13 simply states that after 12 years action cannot be brought to recover the land from the date the right of action first accrued. Section 14 provides that the person entitled to bring an action to recover land who has been dispossessed or discontinued possession, the right of action is deemed to accrue from the date of dispossession or discontinuance.

In *RE Johnson* [1999] QSC 197 the applicant claimed that to apply s 29 of the *Limitation of Actions Act* would undermine the scheme of the Act, which is to permit persons in possession after completing 12 years of occupation to apply for registration as had been the case in previous legislation. This is not a correct assumption for either earlier legislation from 1952 or the present legislation. Section 29 is reproduced below.

‘Extension in cases of disability

29(1) If on the date on which a right of action accrued whether before or after the commencement of this Act for which a period of limitation is prescribed by this Act the person to whom or for whose benefit it accrued was under a disability, the action may be brought at any time before the expiration of 6 years from the date on which the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.

(2) Notwithstanding subsection (1) -

(a) ...

(b) an action to recover land or money charged on land shall not be brought by virtue of this section by a person after the expiration of 30 years from the date on which the right of action accrued to that person or a person through whom the person claims;

(c) ...'

In this case the identity of the true owner is not known, and the Registrar has decided that the applicant needed to establish 30 years adverse possession before they can apply for title. The applicant was under the impression that the time required is the same as in s 13 of the act, being 12 years.

Time begins to run only when a person capable of suing exists, and when all the facts have happened which are material to be proved to entitle a plaintiff to succeed.¹ So in context adverse possession starts to run when either: (a) the owner, though entitled to possession, is not in possession; and (b) the plaintiff is in adverse possession.

If the true owner abandons possession for whatever reason, or dies, and if no one takes possession, time will start to run again as soon as adverse possession is taken by another person. It is of no consequence whether or not the true owner knows he or she has been dispossessed.² The applicant's counsel viewed the limitation period in s 13 of the *Limitation of Actions Act* of 12 years as being relevant, and the provision contained under s 29 as being an allowance for an extension in specific circumstances. Section 13 of the *Limitation of Actions Act* describes the time period in a negative fashion, in that an action cannot be brought after the expiration of 12 years from the accrual of the right of action. Section 29 however uses positive terms that the action may be brought before six years from the end of the disability notwithstanding the period of limitation has expired. There are two possible interpretations of section 29. Firstly the limitation period cannot be extended as it allows an action to be brought after its expiration. Secondly it extends the period which would normally apply. It was found that the second interpretation applied here. The *Acts Interpretation Act* 1954 (Qld) was implemented in this instance using s 14.

When the right of action of the plaintiff is 'sui juris', the time for bringing an action to

¹ *Cooke v. Gill* (1873) L.R. C.P. 107 at 116.

² *Rains v. Buxton* (1880) 14 Ch.D. 537; *Powell v. McFarlane* (1977) 38 P. & C.R. 452 at 480.

recover land is 12 years, and where the plaintiff is not six years from ceasing to be under disability, up to 30 years from the accrual of right of action as provided under s 29.³ If the true owner identify is not found it will not expire until 30 years after the adverse possessor went into adverse possession. It simply aims to extend the limitation period until any possible claim to true ownership of the land has been barred.⁴

Under s 108 of the *Limitations of Actions Act*, the Registrar retains a residual discretion as to whether or not the applicant is the true owner.

Section 38 of the *Limitations of Actions Act* operates to postpone a period of limitation in an action based on the fraud of the defendant until the plaintiff has discovered the fraud or ought to have discovered it if reasonable diligence was used.⁵

Queensland has a rather prohibitive way of dealing with part parcel adverse possession applications. When part parcel adverse possession is brought forward to the registrar, an application under encroachment legislation is favoured.

Section 98(1) of the *Land Title Act 1994* (Qld) titled ‘Application by adverse possessor’ provides:

- ‘(1) An application may not be made under this division if the application-
- (a) Relates to only part of a lot; or...
 - (b) ...
 - (c) ...
 - (d) Relates to possession arising out of an encroachment’

Basically part parcel adverse possession claims have a legislative prohibition due to this section of the act. The alternative to part parcel adverse possession in Queensland is encroachment and mistake legislation under Part 11 of the *Property Law Act 1974* (Qld).

³ *RE Johnson* [1999] QSC 197 at [18].

⁴ *Ibid.*

⁵ *State of Queensland & Anor v Byers & Ors* [2006] QSC 334.

In the case *Sherrard & Ors v Registrar of titles & Anor* [2003] QSC 352 the applicants applied to the Registrar under Division 5 Part 6 of the *Land Title Act 1994* for registration as proprietors through adverse possession. The land subject to the case was an enclosed fenced off area, being part of a lot. The Registrar requisitioned the application based on the following terms quoted by de Jersey CJ:

‘I wish to advise that the Registrar will not entertain an application for title by adverse possession over part of a lot brought about by fencing not being erected on the correct surveyed boundary.

An application for title by adverse possession is not an appropriate mechanism for dealing with situations such as this.

An application for title by adverse possession cannot be made over part of a lot although the Registrar is empowered to register an applicant as owner of part of a lot.

The Registrar will not permit that requirement being circumvented by completing the application as if it were an application for the entire lot and then requesting adverse possession of part of that lot for which no property description exists.’⁶

The important passage to note here is the fact that the Registrar will not permit an application for title for ‘part of a lot’, although the Registrar is empowered to register an applicant as the owner of part of a lot. De Jersey CJ ends in statement that there is in fact another legislative regime which deals with the adjustment of property rights in situations of encroachment, this being the provisions found in Part 11 Division 1 of the *Property Law Act 1974*. The end result of this case was that the application was dismissed.

Section 104 of the *Land Title Act 1994* (Qld) contains details relating to the application of caveats. To object by caveat a person who claims an interest in the land, for example the registered proprietor, can lodge a caveat over the lot before the applicant becomes the registered owner of the lot. Section 104(1)-(3) contains provisions for the lapsing of a caveat. If the registrar is not satisfied that the caveator has an interest in the lot, or the interest has been extinguished by the *Limitation of Action Act 1974* (Qld) the caveat lapses. The registrar will give written notice requiring the caveator to start a proceeding in order to recover land in the Supreme Court within the six months after the notice is given. The time period is noted in s 105(4)(a). Under s 106 it clearly states that a further

⁶ *Sherrard & Ors v Registrar of titles & Anor* [2003] QSC 352 at [5].

caveat can never be lodged until the supreme courts allows for a further caveat to be granted.

A good example of a recent Queensland Supreme Court case which explains how caveats are applied in Queensland in some regards is RE Johnson [1999].⁷ In this case the true owner of the land has not been identified. In 1990 the applicant's father lodged an application for title by adverse possession but was rejected. In 1998 similarly the Registrar rejected an application by the present applicant. Once certain requirements are adhered to, the Registrar may register the adverse possessor. Under s 108 of Division 5 of the act, a person claiming an interest in a lot may lodge a caveat provided as shown below:

‘108 Registering adverse possessor as owner

The registrar may register the applicant as owner of all or part of the lot if the registrar is satisfied that the applicant is an adverse possessor of the lot or part of it and--

- (a) no caveat has been lodged by the day specified under section 103; or
- (b) if a caveat is lodged by the day specified under section 103--
 - (i) the caveat has lapsed or has been withdrawn, cancelled or removed; and
 - (ii) a further caveat has not been lodged under section 106.’

4.2.3 SOUTH AUSTRALIA

Both South Australia and Tasmania offer a system for whole parcel adverse possession which is similar in nature. In this application whilst a long term adverse possessor has the capability to apply to become the registered proprietor, the displaced registered proprietor is allowed to veto the application at any time prior to the granting of a new certificate of title. Registration can only occur in limited circumstances, and the registration of the adverse possessor can only occur in the absence of a veto by the registered proprietor. Adverse possession alone which satisfies the limitation period is not adequate to extinguish the registered proprietor's title. So occupation for the limitation period with a successful application to the register without a veto by the registered proprietor will extinguish the title of the registered proprietor.

⁷ [1999] QSC 197.

Section 251 of the *Real Property Act 1886* (SA) strictly prohibits adverse possession as a way to gain title. Part 7A of the *Real Property Act* is the only means of acquiring title through adverse possession. The approach by South Australia acts to prohibit adverse possession applications unless the registered proprietor has abandoned his/her land or has disappeared. One feature of this very limited form of adverse possession is that it is ineffective until registration is granted, and the adverse possessor does not override the registered proprietor's interests.

Under s 69(f) of the *Real Property Act*, it is stated that the certificate of title issued for land brought under the act, and every certificate issued with respect to the land is void to any person adversely claiming or trying to derive title under or through the registered proprietor. So the adverse possessor has a practical prohibition in his way with regards to gaining registered title through adverse possession.

South Australia's approach to caveats can be described as having a 'veto' effect by the registered proprietor. Section 80(f) of the *Real Property Act 1886* (SA) contains these provisions. Under s 80(f)(1) a person claiming an estate or interest in the land to which an application is lodged under Part 7a of the act, can at any time before the application is granted, lodge a caveat which forbids the granting of such an application. Essentially the registered proprietor is given the right of absolute veto over the adverse possessor. This is subject to the registrar confirming that in fact the registered proprietor is the correct person.⁸ Also it should be noted that if the registrar is not confident that the registered proprietor is indeed the true owner, than he/she will give notice to the caveator to take proceedings to the Supreme Court to confirm identity. This process under s 80(f)(7) involves deciding if the caveator is the true proprietor, or is entitled to any estate or interest derived through the registered proprietor. Section 80(f)(5) states that if the proceeding is not brought to court after the required time to declare his entitlement, or obtain a injunction to restrain the registrar from issuing a certificate to the applicant, the caveat will simply lapse. This is similar to Queensland where a lapsed caveat cannot be renewed without the permission of the court.

Only South Australia and Queensland offer variations of this 'veto' effect, although Tasmania gives a rate paying registered proprietor a similar power as discussed in the next section. Other jurisdictions offer a similar approach to that of Queensland.

⁸ *Real Property Act 1886* (SA) s 80(f)(3).

4.2.4 TASMANIA

Following the widely publicized and notorious Tasmanian case of *Keith George Woodward v Wesley Hazell Pty Ltd* [1994] TASSC 26, the question of adverse possession was brought to the Law Reform Commissioner at the time who reported his recommendations. It was to the dismay of many people that a registered proprietor could lose his registered title land if a neighbouring land owner adversely occupied a portion of his land unknowingly. The legislators of the 2001 amendment act for the *Land Titles Act* 1980 (Tas) introduced provisions which restrict the chances of an adverse possessor being able to acquire registered title. Except for cases of abandoned land by a disappeared proprietor, the registered proprietor's title is favoured. Acquisition of title based upon long continuing adverse occupation is prohibited. Tasmania distinguishes between whole and part parcel adverse possession since this recent amendment.

There is a retained provision from the *Land Titles Act* prior to the amendment relating to trusts along with new provisions which were brought into use in 2001 through the amendment. The 1980 trust provision allows the adverse possessor to use the beneficial title on the occupied land, whilst the 2001 provisions require the adverse possessor to apply to the Registrar who has to be certain that the land has been abandoned before the occupier can gain registration.

Crawford CJ, Slicer and Evans JJ stated in *Quarmby v Keating* [2008] TASSC 71 that two important provisions of the *Land Titles Act* 1980 are s 138(H) which provides that an application under PtIXB extends to land which is not registered land, and s 138(T), which provides that possessory title can be gained through Division 5 of the act 'but not otherwise'.⁹

Section 138(U)(1) of the *Land Title Act* provides for strict restrictions on title by adverse possession, which is reproduced in an extract below:

'S 138U Restriction on title by possession.

(1) For the purposes of an application to acquire title to any land by possession, any period during which council rates have been or are paid by or on behalf of the owner is to be disregarded.'

⁹ *Quarmby v Keating* [2008] TASSC 71 at [59].

If an owner has paid rates or they have been paid on behalf, than any accrued time by the adverse possessor towards application for registered title does not count. It is only when an adverse possessor has been in possession for 12 years, excluding any period during which rates were paid in the interests of the owner, that:

‘as to land that is not registered land, the provisions of the *Limitation Act* apply to extinguish the title of the documentary owner; and

•as to land that is registered land, s138W(2) deems the registered proprietor to hold the land on trust for the adverse possessor.’¹⁰

Crawford CJ, Slicer and Evans JJ suggest that s 138U(1) should be read in context of the legislation as a whole.¹¹

Tasmania has legislated to avoid the creation of ‘sub-minimum’ lots as per s 138Y of the *Land Titles Act* 1980 (Tas). Prior to the amendments which enacted these provisions, *Keith George Woodward v Wesley Hazell Pty Ltd* [1994] was the most notorious adverse possession claim over part of a parcel. In recent times the series of *Quarmby v Keating* cases have shown how the doctrine is applied to part parcel claims. In *Quarmby v Keating & Qasair Investments Pty Ltd* [2007] TASSC 65 the actions arose out of a dispute over a strip of land between 4-5 metres wide on the boundary shared by each party. The plaintiff’s claim was dismissed primarily due to the *Land Titles Amendment (Law Reform) Act* 2001 of the *Land Titles Act* 1980 which effectively created a practical prohibition on adverse possession claims.

The *Land Titles Amendment (Law Reform) Act* of 2001 which commenced in April 2001 affects all applications since the date of introduction. The changes enacted in this amendment and the principles are well explained in *Natural forests v Turner* [2004] TASSC 34. The respondent submitted that if s 138U was absent he would have an arguable case that he had been in adverse possession of part of the applicants’ land since 1986. He argued therefore his caveat should remain to protect his interest until it was determined as to whether he was the registered proprietor. Underwood J went on to decide that three questions should be answered. These questions are extracted below.

¹⁰ Ibid at [61].

¹¹ Ibid at [62].

‘(1) Is the applicant the registered owner of all the land comprised in the certificates of title volume, being the lands the respondent has lodged the caveat on?’

(2) If yes, have council rates been paid on or behalf of the applicant for any period, what periods?

(3) If yes, what (if any) periods are to be disregarded?’¹²

The *Land Titles Amendment (Law Reform) Act* 2001 also enacted s 138W. Underwood J discusses the workings of the amendment which is extracted below.

‘It provides that the Limitation Act applies to the title of the registered proprietor but subs(2) modifies its effect so that instead of the registered proprietor’s title being extinguished by the Limitation Act, the registered proprietor is taken to be holding the land in trust for the person entitled by virtue of 12 or more years’ adverse possession. Subsection (4) provides that a person who claims that the registered proprietor so holds the land in trust for him or her may apply to the Recorder for a vesting order, thus conferring the legal estate upon the applicant.’¹³

So based upon s 138T to s 138Y, the applicant’s contention was that: at 12.

‘1. The respondent can only become registered proprietor of any of the applicants land by applying to the Recorder of Titles in accordance to the provisions of the Act and S 138W.

2. For the purpose of answering the three questions above, the respondent had adversely occupied part of the applicants land for time greater than 12 years.

3. Due to S138U, the whole of the period should be disregarded. This would happen as soon as the respondent applied to become registered proprietor in accordance to S138W.

4. Therefore the respondent cannot succeed and the caveat will be removed.’¹⁴

The new provisions introduced by the *Land Titles Amendment (Law Reform) Act* 2001 make it rather hard for an adverse possessor to claim title through the doctrine of adverse possession. It would appear that the amendments were aimed to keep boundary disputes based upon adverse possession to a minimum.

It should be noted that there was a transitional provision introduced to deal with applications before the amendment act was introduced in 2001. This can be found in s 19 of the *Land Title Act* 1980 (Tas).

¹² [2004] TASSC 34 at [6].

¹³ [2004] TASSC 34 at [10].

¹⁴ [2004] TASSC 34 at [12].

4.2.5 NEW SOUTH WALES

With respect to the scheme New South Wales offers, the issuing of a fresh certificate of title at any time before the limitation period has been satisfied, being 12 years, means that any time accrued by the adverse possessor does not count. The issuing of a new certificate has a cleaning or renewing effect. Therefore in order to become a successful applicant he/she must be in adverse occupation for the full period and apply to become registered as the proprietor before any new fresh certificate is issued. The provisions introduced in 1979 do not allow for application by the adverse possessor unless the whole of the limitation period is run against a person who is the current registered proprietor. This is evident in the *Real Property Act 1900* (NSW) in s 45D(4)(b) which is extracted below. This approach does offer a level of protection to the registered proprietor.

‘45D Application for title by possession

(b) the title of the registered proprietor of an estate or interest in the land would, at or before that time, have the statutes of limitation in force at that time and any earlier time applied, while in force, in respect of that land, and...’

In example if an adverse possessor had not occupied the land for the required time, then the transfer between a third party and the dispossessed registered proprietor would reset the accrued period of occupation by the adverse possessor when the third party became the registered proprietor.

Section 45(C)(1) explains that no title by adverse possession can be acquired by any length of possession adverse to the registered proprietor by virtue of the statute of limitations, being the *Limitation Act 1969* (NSW). This section implies that adverse possession of registered title cannot occur and is emphasised by a portion of the provision ‘...nor shall the title of any such registered proprietor be extinguished by the operation of such a statute.’¹⁵ Adverse possession of unregistered land can occur. Section 45(C)(2) accentuates that adverse possession of land in New South Wales can occur with land still under the old title system, being unregistered land.

New South Wales introduced a scheme in 1979 which permitted a limited form of adverse possession when compared to the veto schemes in operation in other jurisdictions. This variant is only used by New South Wales although in the past other

¹⁵ *Real Property Act 1900* (NSW) s 45(C)(1).

jurisdictions used similar approaches. Section 45D(1)(a) clearly holds that for a person to apply for title under the provisions of the Act, the land should be a whole parcel of land.

In *Nicholas v Andrew*¹⁶ a person had been in adverse possession of land and leased it over a period of 26 years. There were periods of several months with no occupation. The Supreme Court of NSW held that there had been continuity of possession sufficient to establish an adverse title and Hansen J stated that:

‘The question in such a case is whether the break in possession indicates a disconnection with the land or abandonment of the intention to possess such as to break the continuity of the adverse possession. As Gordon J said at 184 in giving the judgment of the Court, it is a question of fact in each case whether a trespasser has in fact abandoned his possession, and that question is not conclusively answered by showing that he may for a short time have ceased to be in physical occupation of the land. The conclusion in that case was that there was no lapse of time between the occupancy of one tenant and another that was more than would be in the ordinary case of a person holding land in the locality.’

New South Wales does not differentiate between whole and part parcels of land. An adverse possessor can apply to the Registrar General to be recorded in the Register as registered proprietor when in possession of part only of a whole parcel of land when the following criteria are met.¹⁷

1. A boundary that defines the land is not a boundary of the whole parcel, and an occupational boundary represents or replaces a boundary of the whole parcel.
2. Lies between such an occupational boundary and boundary of the whole parcel that is represents or replaces.

New South Wales had a unique approach to dealing with some part parcel adverse possession claims. A residue lot is an allotment consisting of a strip of land that was either intended to be a service lane, prevent access to a certain road, or created as prescribed by regulations of the *Real Property Act* 1900 s 45(D)(2)(b). For a person who is in possession of a residue lot and is the registered proprietor of an estate in fee simple which adjoins the residue lot can apply to the Registrar-General to become the registered proprietor of a consolidated lot.

¹⁶ *Nicholas v Andrew* [1920] 20 SR (NSW) 178.

¹⁷ *Real Property Act* 1900 (NSW) s 45(D).

4.2.6 *SHAW V GARBUTT* [1996] NSWSC 400

A New South Wales case which is a good example of the application of whole parcel adverse possession is *Shaw v Garbutt* [1996] NSWSC 400. The aim of the case was to determine as to whether the plaintiff has established a sufficient possessory title to gain certificate of title through s 45(E) of the *Real Property Act* 1900 (NSW). The disputed land was a medium sized lot used for partly garden and partly grazing. After reviewing the basic facts Young J chose to analyse the problem using the following process of investigation:

- A. *Are the conditions of s 45D (in particular subsections (1)(b) and (4)) of the Real Property Act 1900 satisfied as to allow the Registrar General, provided all requirements are met, to grant the plaintiff's application for registration under S 45E of that Act?*
- B. *When, for the purposes of the plaintiff's application, did time start running?*
- C. *Did time stop running at any stage prior to the expiry of the requisite twelve year period as a result of the conduct of the plaintiff and/or defendant?*
- D. *Has the plaintiff established that her possession during the relevant time period, was 'adverse'?*
- E. *What is the ultimate result of the litigation?*

This is a well set out approach to analyse the problem, although the steps will change as *Monash City Council v Melville* [2000] VSC 55 held that the peculiar facts and circumstances relevant to each specific case are to be applied accordingly.

- A. *Are the conditions of s 45D (in particular subsections (1)(b) and (4)) of the Real Property Act 1900 satisfied?*

Section 45(D)(1) (b) of the *Real Property Act* 1900 states that:

‘the title of the registered proprietor of an estate or interest in the land would, at or before that time, have been extinguished as against the person so in possession had the statutes of limitation in force at that time and any earlier time applied while in force, in respect of that land.’

A primary question to be asked is whether the defendant's title could have been indeed ‘extinguished’. The statute or statutes of limitation applicable to the case need to be determined. Whilst the term ‘statutes of limitation’ is not defined by the *Real Property*

Act 1900, it is assumed automatically that the *Limitation Act 1969* (NSW) is to be used. It is not necessary in this instance to consider earlier statutes of limitation as the period of adverse possession for this case commenced after the enactment of the 1969 Act.

It is also relevant to consider s 45D(4) of the *Real Property Act 1900* which acts to prevent the lodgement of a possessory application unless the whole period of adverse possession, twelve years for NSW, has run against the current registered proprietor if that proprietor became registered without fraud. In this case the defendant became registered proprietor of the land without fraud. The court cannot take into account any period of adverse possession by predecessors prior to the registration of the defendant which was in 1980. The plaintiff does not rely on possession prior to that date and is no obstacle to her claiming registration. Therefore the requirements of **A** have been met.

B. *When, for the purposes of the plaintiff's application, did time start running?*

Young J notes that time would have started running when two requirements are met, which include:

1. The defendant, though entitled to possession was not in possession of the property.
2. The plaintiff (or maybe her father) was in adverse occupation of the property.

The first requirement is clear in this case as the plaintiff was in possession for the required time at the exclusion of all others. Meanwhile the second requirement is governed by s 38(1) of the *Limitation Act 1969*.

It is noted that it is possible to count a period of possession that has been amassed by a predecessor in title.¹⁸ This can also be done when a series of trespassers who have not derived from each other, as long as there is continuous adverse possession.¹⁹ This was also the case under common law.²⁰

The earliest period of adverse possession against the defendant was counted from running from 1980.

C. *Did time stop running at any stage prior to the expiry of the requisite twelve year period as a result of the conduct of the plaintiff and/or defendant?*

¹⁸ *Shaw v Garbutt* [1996] NSWSC 400.

¹⁹ *Limitation Act 1969* (NSW) s 38(2).

²⁰ *Allen v Roughly* [1955] HCA 62; (1955) 94 CLR 98 at 131-132; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464 at 476.

Now that the point at which time is said to have started running, it was considered whether time was suspended or ceased to run prior to the expiry of the limitation period.

Young J holds that four events are of interest for this portion of examination, which include:

1. Defendant's institution of proceedings in ejectment in 1980.
2. The Defendant's entry into the property in 1981-1983.
3. The plaintiff offered \$3000 for the property in 1982.
4. The plaintiff's caveats lodged in her father's name in 1982 and her own name in 1994.

In this instance points 1, 2, and 4 are relevant because they could possibly interrupt running of the limitation period. Events 3 and 4 could acknowledge the defendant's title.

In *Symes v Pitt* [1952] VLR 412, Sholl J held that:

'There is considerable body of authority upon the question what is a sufficient resumption of possession to stop the period running. It is clear that paper claims do not have such an affect. ...An entry in assertion of title by the true owner is ineffective to interrupt the period, unless it amounts to a resumption of possession by him. ...But it appears to have long settled that it is unnecessary for the true owner, if he does retake possession, to stay in possession. It is immaterial how short the resumed possession may be.'²¹

1. Defendant's institution of proceedings in ejectment in 1980.

Section 39(a) of the *Limitation Act* 1969 provides that 'a formal entry on land is not of itself possession or evidence of possession of land'. The question is asked 'Is the issue of a summons a mere formal re-entry?' In this case the issue and service of summons may not be enough. If the defendant had shown in 1981 for an order for possession of the land, then time would have stopped running. Therefore because of the dismissal in early 1980, time began to run anew from 1981.

2. The Defendant's entry into the property in 1981-1983.

The defendant entered the property on several occasions after the proceedings were dismissed in 1981. It is important to determine whether the entries were anything than formal. Reference should be made to two cases *Hodgson v Thompson* (1906) and

²¹ *Symes v Pitt* [1952] VLR 412 at 430.

Scanlon v Campbell (1911) where surveying was held to have been sufficient in the relative circumstances.²²

Stronger evidence is required where the true owner knows the adverse possessor in order to resume possession. In this case the actions of the defendant on each occasion did not suffice the necessary level of animus possidendi. Also the entry of the defendant onto the land on various occasions did not stop time running.

3. The plaintiff offered \$3000 for the property in 1982.

At some time in 1982 the plaintiff went to the defendant's home and offered \$3000 for the property. Section 54(M) of the *Limitation Act* 1969 provides that where a person against whom the cause of action lies, confirms the cause of action, time stops running. It can be assumed that the offer of the plaintiff to pay the defendant \$3000 could be considered acknowledgement of the defendant of his right to title as required under section 54(2)(i) of the Act. A similar English case being *Edington v Clark* [1964] 1 QB 367 concluded that letters of offers from an adverse possessor to purchase land from the true owner, under the circumstances, were considered to constitute acknowledgement.

Several cases have tried to determine how far acts which may have intended to be gestures, have amounted to acknowledgement.²³

Although an offer was made and acknowledgement of the defendant existed, s 54(4) of the *Limitation Act* 1969 specifies that the acknowledgement must be in writing and signed by the maker, being the plaintiff. Therefore the plaintiff's offer can't be said to have involved the confirmation of the defendant's title to the land.

4. The plaintiff's caveats lodged in her father's name in 1982 and her own name in 1994.

The caveats submitted referred to both the claim of adverse possession, but also to the fraudulent dispossession of the interest of George Shaw to the property. Young J asks 'could these caveats be characterised under s 54(2)(i) as an implicit acknowledgement of the defendant's right or title to the property such as to found a confirmation which would stop time running?' Australia doesn't appear to have any Australian or English

²² *Hodgson v Thompson* (1906) 6 SR (NSW) 436 at 440; *Scanlon v Campbell* (1911) 11 SR (NSW) 239.

²³ *Doe d Curzon v Edmonds* [1840] EngR 62; (1840) 6 M & W 295; 151 ER 421; *Cahuac v Cochrane* (1877) 41 UCR (QB) 436; *Johnston v Smith* [1897] 2 IR 82.

authority on the matter.²⁴ *Urban v Urban* [1994] 21 Alta LR (3d) 405 was of use in this instance. In this case a caveat was lodged for adverse possession and also to the original entitlement of the land by means of an agreement with the plaintiff's father. The true owner pursued the case that the acknowledgement of the owners' title meant that there was implicit acknowledgement with respect to the limitation statute. The Alberta Court of Appeal rejected this and stated that a claim of original entitlement and for adverse possession could exist together.²⁵

Young J concluded that no other events occurring after the time starting anew in October 1981 had stopped the running of time prior to the expiration of the limitation period in October 1993.

D. Has the plaintiff established that her possession during the relevant time period was "adverse"?

So far the requisite limitation period of 12 years had been proven to have occurred without interruption. Now there is investigation into whether the possession during this period was 'adverse'. Case law requires investigation as the *Limitation Act* 1969 NSW s 38(4)(a) only states 'adverse possession is possession by a person in whose favour the limitation period can run'.

Underwood J in *Woodward v Wesley Hazell Pty Ltd* [1994] had two criteria in which possession must consist of:

'It is well established by authority that to dispossess the owner of the fee simple there must be actual possession of the land without licence. That possession must consist of:

1. an appropriate degree of exclusive physical control of the land in question; and
2. an intention to possess that land to the exclusion of all others including the true owner.'²⁶

This question relates to whether or not the possession is actual, open, continuous, and exclusive, and without license from the true owner, or as *Mulcahy v Curramore* [1974] stated the possession has to be open, not secret, peaceful, not by force, and adverse, and not by consent of the true owner.²⁷ Young J holds that the plaintiff made no secret of the fact he occupied the premises for the whole

²⁴ Above n 18.

²⁵ *Urban v Urban* [1994] 21 Alta LR (3d) 405 at 409.

²⁶ *Woodward v Wesley Hazell Pty Ltd* [1994] ACL 355 Tas 1; 1994 3 Tas LR 481.

²⁷ Above n 20.

limitation period. As all circumstances need to be investigated, it should be noted that the plaintiff had made significant improvements to the property. And also it is important to know if the plaintiff voluntarily paid rates as this is considered of high significance as to whether the plaintiff was in adverse possession.²⁸ The plaintiff in this case wanted to pay rates, but could not as the true owner was already paying. Although Young J states that this is not fatal to the plaintiffs claim.²⁹ So although the rates were already paid by the defendant, this doesn't hold against the plaintiffs claim for possessory title.

The defendant filed affidavits with several excuses for not doing very much with the land. The main reason was Mrs Shaw's partner, Mr Connolly, who in his actions fulfilled the necessary animus possidendi to exclude all others, including the defendant through various means. The plaintiff was found to have acted as the owner based upon intention and being notorious and hostile.

E. What is the ultimate result of the litigation?

The plaintiff was entitled to the declaration that he sought, that being to be granted Torrens title through the process of adverse possession.

4.2.7 VICTORIA

Another variant is both used by Western Australia and Victoria. This variant allows for unmaturing rights to survive a transaction that is registered. The schemes in both Victoria and Western Australia offer less protection for the dispossessed proprietor than in Queensland. Both the *Transfer of Land Act 1958 (Vic)* and *Transfer of Land Act 1893 (WA)* do not differentiate between whole and part parcel adverse possession.

The title registration scheme present in the Victorian variant does not have any requirement for registration in order to perfect title. This scheme is an exception to the commonly quoted '*[t]he Torrens system of registered title... is not a system of registration of title but a system of title by registration.*'³⁰ So title can be acquired by occupation alone. Title acquired through this occupation can exist independently without registration required by other schemes.

²⁸ *Bank of Victoria v Forbes* (1887) 13 VLR 760.

²⁹ See *O'Neil v Hart* [1905] VLR 107 at 120; *Robinson v Attorney General* [1955] NZLR 1230, 1235; *Kirby v Cowderoy* [1912] AC 599; *Martin v Brown* (1912) 31 NZLR 1084, 1091-4.

³⁰ *Breskvar v Wall* (1971) per Barwick CJ at S15.

Rights founded upon adverse occupation within the Victorian Scheme have an overriding nature with respect to the registered proprietor. The registered proprietor is bound by this overriding interest. If for example an adverse possessor does not apply for registration, then the dispossessed proprietor is unable to clear the title from this unperfected interest.

Both Victoria and Western Australia offer rights with regards to adverse possession which are minimal in nature. They offer only minor provisions in Torrens statutes in order to change necessary details and cover aspects outside of English real property law. This concept is termed *mutatis mutandis* which simply means ‘the necessary changes have been made’.

Section 42(2)(b) of the *Transfer of Land Act 1958* (Vic) provides that the land which is included in any folio of the Register or registered instrument shall be subject to ‘any rights subsisting under any adverse possession of the land’. Section 8 of the *Limitation of Actions Act 1958* provides that no action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to that person. Section 9 of the *Limitation of Actions Act 1958* provides where the person bringing an action to recover land has been in possession and has been dispossessed, the right of action is deemed to have accrued on the date of the dispossession. And by s 18 of the *Limitation of Actions Act 1958*, at the expiration of fifteen years from the date of dispossession, the title of that person to the land shall be extinguished. Section 23 of that Act provides for the extension of the limitation period should the person with a right to recover the land be under a disability, being a six year period.

In *Guggenheimer v Registrar of Titles* [2002] VSC 124 Balmford J concluded for the plaintiffs to succeed they need to show that for a continuous period of 15 years they have possessed the land adversely to the person who had the right to recover the land.³¹

Of notable interest in *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215 in relation to possession by a tenant, a tenant can acquire adverse possession on behalf of the landlord.³²

³¹ *Guggenheimer v Registrar of Titles* [2002] VSC 124 at [4].

³² *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215 at [130]; see *Doe d Lewis v Rees* (1834) 6 C & D 610.

Of all Australian jurisdictions, Victoria has by far had the most claims for adverse possession of land less than a whole parcel. A significant proportion of the claims have been over boundary disputes between adjoining land owners, in the sense of encroaching fences or fixtures to the land which in some way have caused a regular or irregularly shaped parcel of land to which the dispute is related. This is most likely due to the fact that the provisions that Victoria offers do not distinguish between whole and part parcel adverse possession as stated earlier.

In recent times, there have been nine significant cases of this nature since 1995, with the most recent being *Johnson & Anor v Morrison & Ors* [2009] VSC 72. In this case the Morrisons lodged an application under s 60(1) of the *Transfer of Land Act 1958* (Vic) seeking title through adverse possession to a 'strip of land'. Consequently the Johnsons claimed they were the owners of the strip. After examination using common law principles, it was found that the plaintiff's case was more favourable.³³ It should be noted that the value of the land was no than \$5000.

Another recent case being *Sztainbok v Cooper & Ors* [2008] VSC 577 is another part parcel 'strip' case in which the disputed land was on two separate allotments and totalled 6.4 square metres on one, and 11.2 square metres on the other allotment. The plaintiff claimed to be entitled to these portions of land by reason of adverse possession and had possessed the land for at least 15 years. In this period of 15 years the defendants had not asserted their right to recover the land contained in the two portions. The plaintiff claimed a declaration accordingly to vest land in the plaintiff under s 116A(3)(c) of the *Transfer of Land Act 1958* and an injunction to prevent the defendants from entering the disputed land, and costs. The Heads of Agreement stated the terms of settlement which involved several manipulations to the boundary, and costs to be paid by the defendants of \$25 000. For such a small area of land this is a large price to pay for the defendants to not assert their right to possession of their land. This case was drawn out due to breaches in contract of matters relating to the terms of settlement.

Another similar case arose as the result of a dispute which arose during the reconstruction of a fence which once separated two properties and at the time was in disrepair. Harper J in *Glavinic v Patsios & Ors* [2008] VSC 194 was amazed at how both parties in the case had an inability or unwillingness to look at the matter by asking

³³ *Bayport Industries Pty Ltd v Watson* [2002] VSC 206 at [39]; *Riley v Pentilla* [1974] VR 547, 561-2.

themselves ‘where the true boundary is?’ given the information they both had.³⁴ No order for costs was given due to the fact that neither party made a relevant offer, and no party accepted an offer as a result. This is partly due to the fact that the surveyor in charge of defining the disputed boundary found that the true position of the boundary was 0.05m within the defendant’s boundary. The plaintiff dropped his claim partly on this basis.

Yet another case commonly referred to in recent court cases is *Bayport Industries v Watson* [2002] VSC 206. Ashley J in this case reproduces Slade J’s applicable principles from *Powell v McFarlane* [1979].³⁵ This is a commonly used set of common law rules and principles which is reproduced in a similar manner in other cases such as *Jones v State of Queensland* [2000] QSC 267. See Appendix B to view these principles.

The long running case of *Malter & Anor v Procopets* [2000] Brooking, Phillips, and Charles JJ.A when referring to the 1998 case in the Supreme Court, stated that the Judge had found:

‘that at all relevant times the appellants believed that the fence was on the boundary. It follows from this that they believed themselves to be the owners of the disputed strip during the whole of the period in respect of which they claimed to have been in adverse possession of it. The judge accepted that this mistaken belief would not prevent the acquisition of title by adverse possession.’³⁶

This was supported by decisions of Pennycuik J in *Bligh v Martin* [1968]³⁷ and by decisions of the Court of Appeal.³⁸ In *Lutz v Kawa* the Alberta Court of Appeal observed that ‘to show such a belief would be added support for the fact of his own possession.’³⁹

In *Malter & Anor v Procopets* [2000] Brooking JA states that:

‘The most common case in which a possessory title is asserted in Victoria is, in my experience, one like the present, in which the fence dividing two residential allotments departs slightly from the title boundary and the adjoining owners have for many years assumed that there was no encroachment; in such a case it has never, so far as I am aware, been suggested that it is an answer to the possessory

³⁴ *Glavinic v Patsios & Ors* [2008] VSC 194 at [41].

³⁵ *Powell v McFarlane* [1979] 38 P and CRL 452 at 470-472.

³⁶ *Malter & Anor v Procopets* [2000] VSCA 11 at [5].

³⁷ *Bligh v Martin* [1968] 1 W.L.R. 804.

³⁸ *Williams v. Usherwood* (1981) 45 P. & C.R. 276 ; *Pulleyn v. Hall Aggregates (Thames Valley) Ltd.* (1992) 65 P. & C.R. 276; *Hughes v. Cork* [1994] EGCS 25.

³⁹ *Lutz v. Kawa* (1981) 112 D.L.R. (3d) 271 at 282-3; (1980) 23 A.R. 9.

claim that the persons said to have been in adverse possession believed themselves to be the owners of the strip of land.⁴⁰

Unfortunately this situation like many others in Victoria in recent history has led to what Brooking JA describes as an ‘unhappy case’ which shows how disputes between neighbours over encroachments tend to generate litigation with costs out of proportion to the value of the land. In this case the land was valued at about \$6500 and the court costs totalled many thousands more.

Two recent notable cases in which adverse possession was claimed over part of a whole land parcel, and were of irregular in shape include *Kierford Ridge Pty Ltd v Ward*⁴¹ and *Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd*.⁴² Particular attention is paid to the principles laid out in *Powell v McFarlane & Anor*, *Bayport Industries Pty Ltd v Watson*, and *Malter v Procopets in Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd*.⁴³

Kierford Ridge Pty Ltd v Ward [2005] VSC 215 deals with an irregularly shaped piece of land of 2.35m x 1.105m which is on the title of the first and second defendants. Hansen J based on the submissions aimed to identify two issues in this case which included:

‘The submissions of the parties identified two key issues, namely:

(a) Whether there was evidence of continuous, exclusive and adverse possession of the disputed land for 15 years. This raised an issue of fact as to when the disputed land had been built on by

the plaintiff or its predecessors.

(b) Whether the occupation of the disputed land was with the intent to possess the land adversely to the defendants and their predecessors in title.’⁴⁴

Based upon the evidence submitted from both sides and the sound rules provided by *Powell v McFarlane* determined that the plaintiff succeeded in his claim. Particular reference was also given to the observations of Ashley J in *Bayport v Watson*.

⁴⁰ [2000] VSCA 11 at [5].

⁴¹ [2005] VSC 215.

⁴² *Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd* [2006] VSC 314.

⁴³ *Ibid* at [47]-[51].

⁴⁴ *Above* n 41 at 17.

4.2.8 WESTERN AUSTRALIA

Parker J in *Radonich v Radonich & Anor* [1999] WASC 165 sets out the principles required to establish adverse possession. Although this case uses the *Limitation Act 1935* (WA), it is of importance none the less. Parker J states:

‘The nature of possession required to establish adverse possession under s 5 of the Limitation Act 1935 is, I consider, well laid down. In deciding whether there is adverse possession the possession must be adverse in the sense that the person claiming it is using it to the exclusion of the owner (*Littledale v Liverpool College* [1900] 1 Ch 19; *Clement v Jones* (1909) 8 CLR 133; *Kynoch Ltd v Rowlands* [1912] 1 Ch 527). The possession must be continuous (*Trustees, Executors & Agency Co Ltd v Short* (1988) 13 AC 793). To sum up in the words of Gavan Duffy J, in *Maguire v Browne* (1913) 17 CLR 365 at p 369: ‘The dispossession and discontinuance contemplated by this section have been held to connote the existence of a person to be protected by the statute who has dispossessed such owner and kept him dispossessed for a period of 12 years, or the abandonment of possession for such a period by the owner and the possession by some other person during the same period.’⁴⁵

Also it is convenient to examine the concept of actual because with respect to the actual possession of the land, the particular circumstances will determine the weight of the acts of occupation on which the claim is based. ‘Its size, its location, and the use which an owner might reasonably be expected to make of it are vital considerations’⁴⁶

Hence, in the decision of the court in *Ghilarducci v Ghilarducci* (1993), Malcolm CJ concisely summarised the position, in the context of s 9:

‘The acquisition of a possessory title by adverse possession in Western Australia requires the adverse possessor to be in continual possession of the relevant land without the license of the true owner and to the exclusion of the true owner for a period of not less than 12 years’⁴⁷

The state of Western Australia currently has in force the *Limitation Act 2005* (WA). Although this is currently in force, the *Limitation Act 1935* (WA) is still used frequently in conjunction with this act. Under s 9(1) of the *Limitation Act 2005* it is stated that the act does not affect the operation of any other limitation provision in another written law except for s 28(3) and (5).

⁴⁵ *Radonich v Radonich & Anor* [1999] WASC 165 at [163].

⁴⁶ *McWhirter v Emerson-Elliott* (1960) WAR 208, at 213; *Murnane v Findlay* (1926) VLR 80.

⁴⁷ *Ghilarducci v Ghilarducci* (1993) 134 ANZ Conv R 331 at 332 at 5.

Western Australia as provided under s 4 and s 5 of the *Limitation Act* 1935 allows the right of the adverse possessor to be brought 12 years after the adverse possession of the subject land. In *Petkov & Ors v Lucerne Nominees Pty Ltd* [1992] Murray J held that the 12 year limit imposed upon the registered proprietor under s 4 of the Act meant that the right of action against an adverse possessor is not limited to the period of possession.⁴⁸ Murray J noted that it included the predecessor's title and also that there must be a conscious intention to possess the subject land which is at the exclusion of all others.

It is important to be aware of one of the exceptions to indefeasibility under s 68 of the *Transfer of Land Act* 1893 (WA). If a neighbour trespasses upon the land in question and takes possession of it by building an item which encroaches onto adjoining land then after the expiration of 12 years occupation, through the application of the *Limitation Act* 1935 the true owner loses his/her right to complain of the trespass. So even though the adverse possessor is encroaching in bad faith, he/she is able to defeat any claims and is deemed to be the owner.⁴⁹

In *Executive Seminars Pty Ltd v Peck & Ors* [2001] WASC 229 the issue of whether or not the plaintiff and defendant had an agreement pursuant to the order of a lease or license was brought up. It is clear that if such an agreement was present then the adverse possession would not be 'adverse'. The possession must be adverse and not at the permission of the true owner. It was the view of His Honour that the encroachment was used in a consensual manner and therefore cannot have an adverse relationship which is required by common law principles.⁵⁰ Therefore the plaintiff was not able to proceed on that ground.

Claimants of Part Parcel adverse possession in Western Australia stand by a claim of either adverse possession or right of prescriptive easement.⁵¹

A recent case involving a claim of title for less than a whole parcel of land is *Duarte Anor v Denby & Ors* [2007] WASC 94. In this case the parties went to court in dispute over a piece of land, irregularly quadrilateral in shape. The dimensions were 56 metres long, 10cm at one end, and moving back to 33cm at the rear of the block. The portion of

⁴⁸ *Petkov & Ors v Lucerne Nominees Pty Ltd* [1992] 7 WAR 163.

⁴⁹ *Executive Seminars Pty Ltd v Peck & Ors* [2001] WASC 229 at [200].

⁵⁰ *Ibid* at 204.

⁵¹ *Ho Lai WA Ng & Ors v The Owners of Tranby-On-Swan Strata Plan 2232 & Anor* [1998] WASC 65.

land was valued at less than \$3000. The plaintiffs claimed a declaration that they were the sole proprietors of the disputed land, and the defendants claimed that the land was passed to them through adverse possession. The real issue in this case was to determine whether the fence ran along the true boundary within a time before the plaintiffs claim was extinguished by the *Limitation Act 1935* (WA) or whether the true boundary and the fence had never aligned or at least never aligned within the requisite 12 year period. The defendants counterclaim was dismissed as the boundary was resurveyed along with the fact the defendant failed to prove sufficient possession of the portion of land for the 12 year period.

The *Limitation Act 2005* (WA) does have a provision for land which is held upon trust including a trust for sale. This is found under s 78 of the Act. If the limitation period for an action has expired or a court extends the time for a trustee to recover land, and the trustee didn't commence an action to recover land before the end of the extended period, then the estate of the trustee is not extinguished as long as the action to recover land has not accrued or been barred by the Act.⁵² Also under s78(2) if the land is held on a trust including a trust for sale, an action to recover land can be brought by trustee or on behalf of any entitled person, or if the trustee would be barred by this act apart from this provision.

The approach of Western Australia is similarly followed by Victoria under s 11 of the *Limitation of Actions Act 1958* (Vic). Under s 11(2) the legal estate shall not be extinguished as long as the right of action to recover the land has not accrued or been barred by the Act.

4.3 ADVERSE POSSESSION OF COUNCIL AND CROWN LAND AND ITS AGENTS

A significant percentage of land in Australia is owned by the Crown or its agents. Due to the fact the Crown has such a large area of land it is difficult to manage and monitor the land exclusively. Many agents of the crown such as water authorities and those defined by various statutes are immune from claims founded upon adverse possession. This is one way to stop large portions of land from being lost to adverse possession.

⁵² *Limitation Act 2005* (WA) s 78(1).

Victoria does permit adverse possession of council land. Details as such are found under s 7B of the *Limitation of Actions Act* 1958 (Vic). Section 7B(b) states that adverse possession of land adverse to a Council is possible if the length of possession has been for more than 15 years.⁵³

A fairly recent Victorian case being *Monash City Council v Melville* [2000] VSC 55 exemplifies a case dealing with council land. The Melvilles applied to the Registrar of titles pursuant to s 26E of the *Transfer of Land Act* 1958 to bring an area of general law land under the operation of the Act. They claimed to be entitled to the disputed land which was owned at the time by the Monash City Council who received the land through succession from another council. Once the case for adverse possession was known to the Monash City Council, they lodged a caveat under s 26R. The Melvilles counterclaimed on the reason that they had acquired title by possession.

Since the possession was of length significantly longer than 15 years, by s 8 of the *Limitation of Actions Act* 1958 no action for the recovery of land may be brought after the expiration of 15 years from the date on which the right of action accrued. Also by s 14 the right of action cannot accrue unless the land is subject to adverse possession. So in this case whilst the Melvilles had a solid declaration as to their possessory interest by adverse possession, the peculiar facts and circumstances relevant to this specific case needed also to be applied.

Eames J concluded that in order for the claim of adverse possession to succeed several criteria must succeed which include the fact that for the relevant period the possession should be:

- To the exclusion of all others
- It constitutes the appropriate degree of actual possession
- The possession must be actual, open (without stealth)
- Continuous
- Exclusive (without a license from the registered proprietor)

⁵³ *Limitations of Actions Act* 1958 (Vic) s 7B(2).

Eames J also notes that Enclosure by itself is ‘prima facie’ evidence of the requisite intention, which is well exemplified in *Buckinghamshire County Council v Moran* [1989].⁵⁴ In this case the physical features of the land were relevant because of a natural dip in the topography as this would affect fencing capabilities.

A rule used in this case as per Eames J is the fact that for the dispossession of the owner’s rights to have occurred, acts must have occurred over the land which were inconsistent to that of which the owner intended to use it.⁵⁵ Eames J held that in later cases this rule was modified to account for the examination of all the facts and evidence and circumstances of the case as to whether those facts demonstrated that adverse possession had indeed occurred.⁵⁶ In this case the requisite intention was present along with acts which led to the conclusion that adverse possession had occurred for the requisite period. The defendants, the Melvilles won this case.

Seven years later another application for possessory title arose for land owned by Whittlesea City Council. Pagone J held:

‘For Mrs Abbatangelo to succeed in her claim she must show, as Eames J said in *Monash City Council v Melville*, that for 15 years she had “both factual possession, to the exclusion of others, and the requisite intention to possess the claimed land to the exclusion of others.” To establish actual possession, as his Honour said, the possession “must be actual, open (that is without stealth), continuous and exclusive (and without the licence of the actual owner)”. There are, in other words, two facts which Mrs Abbatangelo must establish for her claim to succeed. The first is her continuous possession of the disputed land for the requisite period; that is, she must show her continuous exclusive physical control of the disputed land with the documentary owner being out of possession for 15 years. The second is an intention, held simultaneously with possession, to exclude the world at large, including the owner with the documentary title, by exercising exclusive control and with such intention being made clear to the world.’⁵⁷

Victoria clearly holds under s 7 of the *Limitation of Actions Act 1958* (Vic) that there is no adverse possession against Crown land whether or not it has or has not exceeded 60 years. Section 7A similarly provides that no adverse possession can occur on Rail corporations and section 7AB holds the same for Water authorities as defined under the relevant legislation, although adverse possession of council land is permitted.

⁵⁴ *Buckinghamshire County Council v Moran* [1989] 3 WLR 152 at 166-168 per Slade J.

⁵⁵ *Monash City Council v Melville* [2000] VSC 55 at [31].

⁵⁶ [2000] VSC 55 at [32].

⁵⁷ *Abbatangelo v Whittlesea City Council* [2007] VSC 529 at [5].

The plaintiff held a good claim and was found owner of the disputed land by adverse possession. The defendant's title was extinguished pursuant to s 18 of the *Limitation of Actions Act* 1958. Also the defendants counterclaim failed as the plaintiff satisfied the necessary rules.

Section 76 of the *Limitation Act* 2005 (WA) clearly states that:

'Despite any law that is, or has been, in effect the right, title or interest of the Crown to, or in, any land is not affect in any way by any possession of such land adverse to the Crown, and is to be taken as never having been so affected.'

Therefore it is clear that any claim by an adverse possessor against the Crown, or interest of the Crown, is sure to fail. In *Water Corporation v Hughes* [2009] WASC 152 the Water Corporation claims that a couple, Mr and Mrs Hughes, has unlawfully entered upon their land and constructed works which have led to an encroachment. In defence of the claim of the Water Corporation Mr and Mrs Hughes assert that they had acquired through their predecessors in title the right to the portion of the lot which is subject to the dispute, and occupy by adverse possession.

Section 4 of the *Water Corporation Act* 1995 (WA) created the water corporation and s 5 of the Act provides that:

'The corporation is not an agent of the Crown and does not have the status, immunities, and privileges of the Crown.'

Mr and Mrs Hughes contend that they have been in possession of the subject land since 1987. What this means is that proceedings were commenced after the repeal of the *Limitation Act* 1935 (WA) and before the commencement of the *Limitation Act* 2005. Therefore it was primarily resolved using the 1935 Act.⁵⁸

Interestingly both sides did not identify whether or not an agent of the Crown can be equated to the Crown for the purpose of immunity from adverse possession. While it is not uncommon for statutes to expressly provide entities such as the Water Corporation with immunity from adverse possession, this is not the case with the *Water Corporation Act*.

⁵⁸ *Water Corporation v Hughes* [2009] WASC 152 at [19].

Section 36 of the *Limitation Act 1935* act states that ‘*the right, title, or interest of the Crown to or in any land*’. The wording of the language is inconsistent to any legislative intention for differentiating between an interest which the crown holds, and an interest it holds through an agent, with the word ‘agent’ used in a public law sense.⁵⁹

It was found that due to the structure of s 68 of the *Transfer of Land Act 1893* (WA) that Mr and Mrs Hughes may not have the capacity to acquire rights by adverse possession when the Crown has an interest in the land. Section 36 of the 1935 was used instead of s 68 of the *Transfer of Land Act 1893*. Due to the breadth of language used in s 36 of the *Limitation Act 1935* the immunity from adverse possession applies to any interest of the Crown in any land subject of adverse possession, including an interest of the Crown in land which has been alienated. Therefore the contention of adverse possession with the subject land must be rejected.

New South Wales under the *Crown Lands Act 1989* holds that adverse possession may not be established against the Crown or any person holding land on trust for a public purpose.⁶⁰ Also under s 45D(3) it states that no possessory application can be made in respect of any estate or interest in any land which is of the Crown, statutory body, corporation, or council.

Queensland does not allow for adverse possession of crown or council land. Provisions are found under s (6)(4) of the *Limitation of Actions Act 1974* (Qld). South Australia does not appear to have any legislation directly regarding the matter but since adverse possession is restricted it is not possible anyway.

Both New South Wales and Tasmania allow for adverse possession of Crown land.⁶¹ In both jurisdictions a cause of action to recover land is not maintainable by the Crown if brought after the expiration of a limitation period of 30 years.

4.4 OTHER IMPORTANT LEGISLATION

It is legislated in several jurisdictions that when occupiers agree on a line of fence say around a watercourse, or natural boundary, that the occupation on either side of the line

⁵⁹ [2009] WASC 152 at [32].

⁶⁰ *Crown Lands Act 1989* (NSW) s 170(1).

⁶¹ *Limitation of Actions Act 1969* (NSW) s 27(1); *Limitation of Actions Act 1974* (Tas) s (10)(4).

of fence is not deemed to be adverse possession and cannot affect the title or possession of any adjoining lands. The *Fences Act* 1968 (Vic) under s 5 titled 'Where watercourse is a natural boundary, occupiers may agree on line of fence' contains Victoria's provisions. Jurisdictions which offer provisions for essentially the same purposes with the only difference being the wording include Tasmania, New South Wales, Queensland, South Australia, and Western Australia.⁶²

Section 230 of the *Transfer of Land Act* 1893 (WA) states the abandonment of an easement can be presumed after 20 years of adverse possession. Any easement affecting the subject land and brought under the Act that has not been enjoyed for at least 20 years, subject to s 69 of the Act is therefore not preserved by s 68 of the Act. The commissioner has discretion on this.

Of notable interest is an issue brought up in *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 about the application of s 272 of the *Property Law Act* 1958 (Vic) titled 'Margin of error allowed in description of boundaries'. When dimensions shown on the plan are different to those found measured on the ground, as long as the difference doesn't exceed 50mm in 40.3m, or where the boundary line is longer than 40.3m doesn't exceed 1 in 500 when computed upon the total length of the boundary line, no action can be brought for such a difference.⁶³ Smith J expressed the view that:

'The section expressly introduces a margin of error for the dimensions appearing on title documents. It does not introduce such margins for error when it refers to the actual title boundary "as found by admeasurement on the ground".⁶⁴ As a result, it cannot have any application to question of the extent of any encroachment over the actual title boundary...'

It would appear that the provision is an allowance for error in dimensions appearing on title documents and nothing else. Therefore the provision cannot be related to encroachment or adverse possession cases of less than a whole parcel. No comparable provisions could be found in any other Australian jurisdiction.

⁶² Boundary Fences Act 1908 (Tas) s 17; *Dividing Fences Act* 1991 (NSW) s 14; *Dividing Fences Act* 1953 (Qld); *Fences Act* 1975 (SA) s 17; *Dividing Fences Act* 1961 (WA) s 15.

⁶³ *Property Law Act* 1958 (Vic) s 272.

⁶⁴ *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 at [7].

4.5 EFFECT OF CHANGING THE LIMITATION PERIOD

Currently Australian jurisdictions offer limitation periods of either 12 or 15 years for adverse possession claims. Limitation periods for Australian jurisdictions can be viewed in Table 2.2. International jurisdictions offer limitation periods of between 3 and 30 years, with an average of about 15 years. Limitation periods are generally based upon common law judgements and do not change very often. Changing the limitation period for any reason would move to the favour or detriment of any or a combination of interests of the parties involved. For the purpose of this discussion the interests can be broken down into interests of the registered proprietor, the adverse possessor, and the general public at large. The following sections aim to identify how changing the limitation period may positively or negatively affect these interests.

4.5.1 REGISTERED PROPRIETOR VERSUS ADVERSE POSSESSOR

The Supreme Court can determine ownership of a parcel of land by reference to two types of evidence. Firstly there is the testimony of witnesses about past transactions and dealings, and testimony about who is currently in possession and enjoying the associated rights. In general as time goes on, witness testimony about past transactions decreases in reliability. In contrast evidence of current possession does not grow less reliable over time. So as the period of possession increases the evidence associated to that possession becomes more reliable. A person who has been living on land for 15 years is much more likely to be the true owner when compared to a person who has only lived on the land for 15 days or months. Referring to Figure 4.1 below, at some point in time the line crosses. At this point in time it is more probable that the evidence associated with the possessor is more likely to be correct when compared to a person who relies on transfers as evidence of the title.⁶⁵

If the adverse possessor is not disturbed during the limitation period, he/she has the ability to build up evidence based upon occupation and the necessary intent to control and exclude all others from the land. The longer the time the adverse possessor is left on the land, the stronger his/her claim is. By contrast, the registered proprietor has the strongest claim as the true owner of the land in the first few years of adverse occupation

⁶⁵ Stake J, 'The Uneasy Case for Adverse Possession' (2001) 89 Geo. L.J. 2419 at 2451.

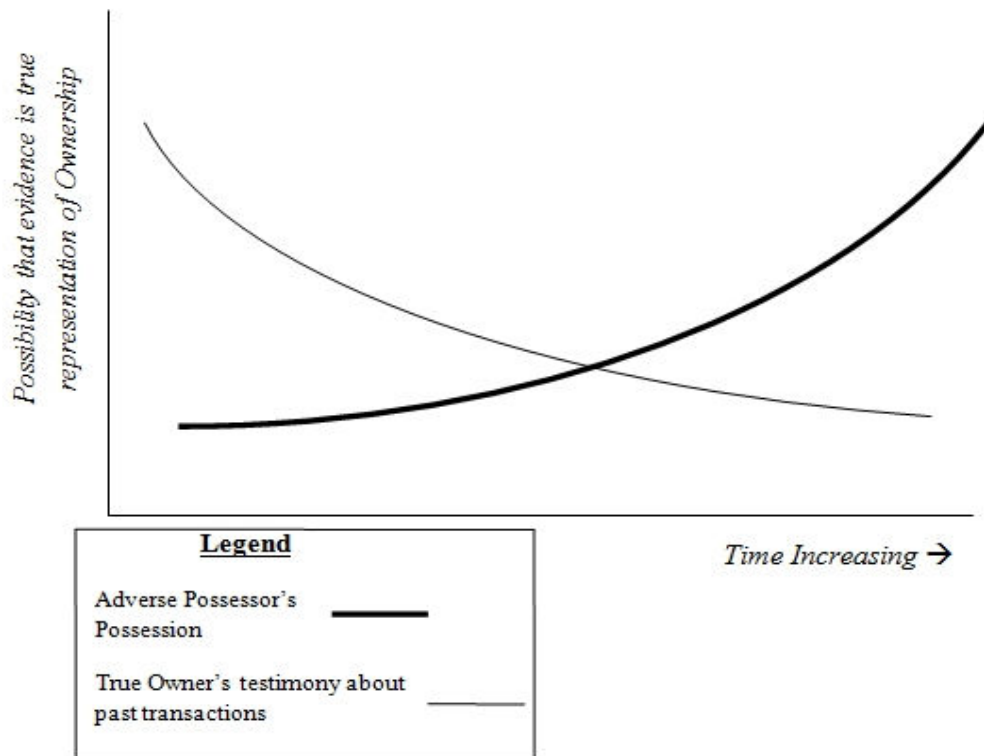


Figure 4.1 How time effects evidence. The longer time is left to run, the less reliable a True Owner's testimony becomes. At the same time the adverse possessor's possession becomes a better representation of true ownership.

if any. Although in jurisdictions such as South Australia if the registered proprietor still monitors the land and has not abandoned it then the 'veto' can be used for ejection. So there is a trade-off which needs to be considered so the length of the limitation period doesn't become too one sided.

Having a limitation period which is perhaps too long would offer little protection to the adverse possessor as it would be hard to establish the necessary requirements of adverse possession. The longer the limitation period, the harder it would be to achieve adverse possession as successful periods may have to be added together to satisfy the limitation period and this may not be allowed in certain jurisdictions.

Stake states that '... limitation periods have grown shorter over time, as land values have risen.'⁶⁶ The same author also states '...the protection of ownership calls for shorter

⁶⁶ Ibid at 2454.

limitation periods, pushing the optimum down'⁶⁷. From these statements it can be deduced that the level of protection varies with the value of the land. Therefore as witnessed in some States of America, shorter limitation periods have been put in place where the value of land is comparably high. This would be advantageous to the registered proprietor as he/she can pursue his/her right to recover the valuable land sooner. It would be unlikely that valuable land might be abandoned by the true owner in such a small period of time.

4.5.2 PUBLIC INTEREST

There is a direct relationship between the limitation period and litigation costs which are imposed upon the public interest. Sometimes Supreme Court and departmental costs related to the litigation is quite high when compared to the value of the land in question. With respect to part parcel adverse possession claims as seen in many Victorian cases, court costs and orders are very high and sometimes many times the value of the land subject to the dispute. The longer the limitation period, the more claims would arise as the adverse possessor has established a grasp on the disputed land. Adverse possession claims would decrease with a shorter limitation period as the true owner is more than likely to be monitoring the land then in say 20 years time, as the land might have been abandoned by then.

For every adverse possession claim the cost of such a dispute involves many factors and include, but not limiting to:

- Court Costs including the number of days in court
- Court Order which may involve requiring the removing of a fence, or improvements to the land
- External legal costs to Plaintiffs & Defendants
- Social costs of dispossession and neighbourly disputes
- Administration costs in Title Offices

Stake suggests that there is indeed an optimal limitation period which may have a balancing power.⁶⁸ In order to find this limitation period significant research would

⁶⁷ Ibid.

⁶⁸ Ibid at 2453.

have to be completed which is beyond the scope of this project as it is a complex issue with many variables including, but not limited to:

- Property location
- Use of property
- Land value
- Income from using the land if any
- Relationships of all persons involved

Figure 4.2 below is a simple graphical representation of the major possible effects of changing the limitation period. Firstly by shortening the period it will promote true owners to monitor the land as they should become aware of the consequences of a short limitation period with respect to adverse possession. For the public interest there would be the effect of increased adverse possession or regained possession of abandoned land by the adverse possessor and true owner respectively. One drawback is that bad faith adverse possessors may take advantage of the shorter limitation period. There could be certain advantages of efficient use of abandoned land being largely economic in nature.

In Australian jurisdictions such as South Australia due to the prohibitive nature of the Torrens statutes, adverse possession of land can only occur in limited circumstances and there is no other mechanism to facilitate for situations of long abandoned land or disappeared registered proprietors. The ACT prohibits adverse occupation altogether

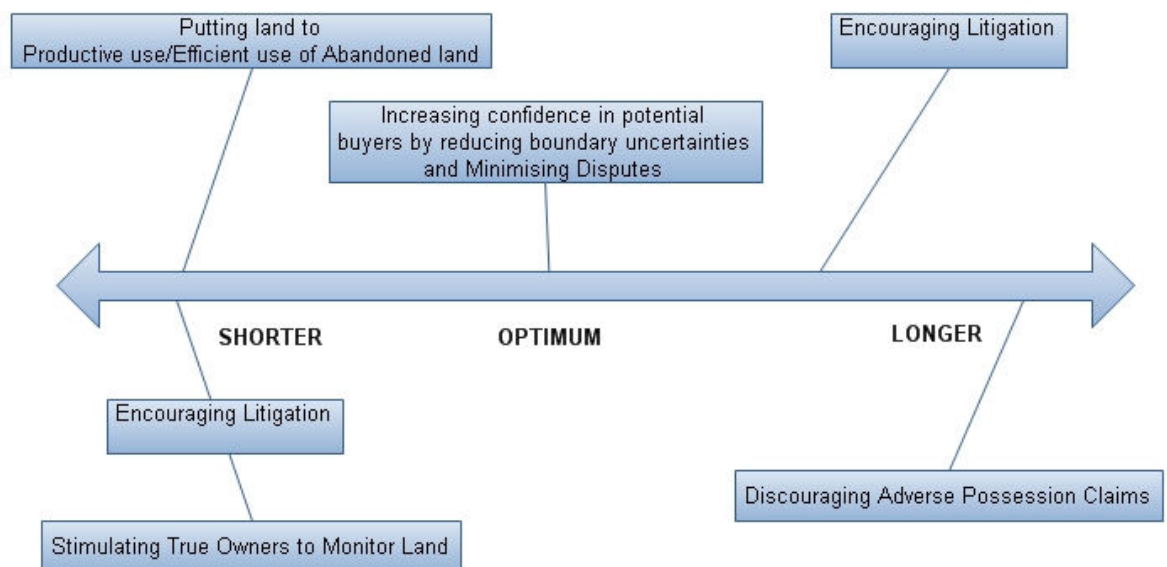


Figure 4.2 A graphical summary of the potential effects of changing the limitation period.

and goes for a fairly simplistic approach. If there are any discrepancies between the ‘de facto’ (occupational) and the ‘de jure’ (legal) boundary then the ‘de jure’ boundary is favoured. Neither of these jurisdictions have an appropriate mechanism to deal with abandoned land.

By making the limitation period longer the main effects are going to be the encouragement of litigation and discouragement of adverse possession claims. Litigation would similarly also be encouraged by shortening the limitation period.

On one hand if the period is increased to such a long time that it is near impossible to make a claim of adverse possession, then little to no disputes based upon adverse possession will occur. As a result some jurisdictions would be left with no effective mechanism to deal with boundary disputes. If the period was increased to say 20 to 30 years from 12 years, then most likely litigation would be encouraged. This is because as stated before the case for the true owner will be harder to prove as past testimonies become less reliable and harder to prove. Similarly the adverse possessors claim to title may become harder to prove, leading to more time spent in court, and a greater cost to the respondents and public interest. Maintaining all of the necessary requirements of the doctrine of adverse possession would become harder with a longer limitation period. An optimal limitation period could have a balancing effect of the two extremes of shortening or lengthening the period by too much or too little.

4.6 ANALYSIS OF DISPUTES RELATED TO ADVERSE POSSESSION

As the data sources were limited for this project, the time frame available for case law is 1994 to the present day. Whilst a comprehensive effort has been undertaken to identify all disputes, many may not have been reported, taken to court for legal proceedings, or could still be in the process of occurring. Below in Table 4.1 are the findings for the number of disputes over adverse possession per jurisdiction for each type of claim.

Claims over whole parcels are relatively evenly distributed for the more permissive schemes and the majority of which have occurred in Queensland, New South Wales,

Table 4.1 Table of Claims per Australian jurisdiction either over whole or part of a parcel, or encroachment disputes from 1994 to 2009. Appendix D lists these court cases.

Jurisdiction	Claim Over		
	Adverse Possession		Encroachment
	Whole Parcels	Part of a Parcel	
Queensland	4	1	5
New South Wales	4	2	7
Victoria	3	12	4
Tasmania	0	4	2
South Australia	1	0	6
Western Australia	2	4	3
Australian Capital Territory	1	0	0
Northern Territory	0	0	0

Victoria, and Western Australia. South Australia and the ACT have one dispute each, but each was prohibited by the Torrens statutes.

With respect to adverse possession disputes over part of a parcel Victoria stands out with by far the most claims being 12. The majority of the Victorian disputes were related to a ‘strip’ of land between adjoining landowners which either had a fence in the wrong position or was poorly fenced. Nine such disputes have occurred in Victoria in the last 15 years. Tasmania and Western Australia have had four disputes each. Of Tasmania’s four cases two of which have occurred since the *Land Titles Amendment (Law Reform) Act 2001* was put into place. Both of these cases were dismissed based upon provisions introduced by the amendment act. Queensland only showed one dispute over part of a parcel and this case specifically mentioned the fact that encroachment legislation is favoured in Queensland.

Cases over the encroachment of buildings or fixtures show a relatively even distribution of disputes. There have been encroachment cases in Tasmania and Victoria but there were no encroachment provisions currently in force in these jurisdictions and the Victorian cases were dealt with by alternative means.

‘Strip’ cases appear to be most prevalent in Victoria and Western Australia. Overall there have been 38 disputes involving adverse possession, and 27 disputes regarding

encroachments which have made it to the Supreme Court. There could be many more disputes settled outside of court through negotiation.

There have been 23 disputes involving part parcel adverse possession in the last 15 years, 14 of which are ‘strip’ which is a majority. There are no other major trends which are apparent at first sight as data is rather limited. The distribution of disputes is shown in Table 4.2 below.

Table 4.2 Comparison of the number of ‘strip’ and ‘irregular’ part parcel adverse possession claims.

Jurisdiction	Part Parcel Adverse Possession	
	‘Strip’	‘Irregular’
Queensland	1	0
New South Wales	0	2
Victoria	9	3
Tasmania	1	3
South Australia	0	0
Western Australia	3	1
Australian Capital Territory	0	0
Northern Territory	0	0
	14	9
Number of Boundary Disputes	23	

4.7 CONCLUSION

Australian jurisdictions offer several unique approaches to applying adverse possession. On the one hand there is the prohibitive approach which specifically states there can be no adverse possession of any kind, and on the other hand there are schemes like what Victoria employs which is far more permissive. To a lesser extent Western Australia has a permissive approach. Tasmania offers an approach which is quite different to the rest of Australia. This is mainly due to the newly introduced provisions which allow for a

rate paying registered proprietor to veto an application for registered title by the adverse possessor.

Any change to the limitation period will affect either party to some extent, whether to the benefit or detriment of the party. Shortening the period will stimulate true owners to monitor their land more regularly and could help with the efficient use of abandoned land. Lengthening the limitation period would increase litigation and discourage adverse possession claims. Litigation would also be increased if the limitation period is shortened significantly. An optimal limitation period has potential to increase confidence in potential buyers as it would have a balancing effect of minimising boundary disputes.

Analysis of disputes over the past 15 years for Australian jurisdictions has shown a few trends. Easy access to more court rulings may have showed significantly more trends.

The next chapter aims to use evaluation criteria to determine what may constitute 'best practice' criteria.

Chapter 5

DISCUSSION

5.1 INTRODUCTION

There are four schemes of adverse possession with variants currently in use in Australian jurisdictions. Schemes include the prohibited, veto, cleaning/renewing, and overriding. Some are more prohibitive than others and there are various strengths, weaknesses, and limitations associated with the schemes.

This chapter aims to identify any notable strengths, weaknesses, and limitations of the schemes used by Australian jurisdictions with respect to the application of adverse possession. The dispute analysis performed in Chapter 4 along with relevant case law and legislation will be used as supporting material where appropriate. A set of 'best practice' criteria will be formed and justified.

5.2 SUMMARY OF AUSTRALIAN SCHEMES

Australian jurisdictions offer four schemes with respect to the application of adverse possession. These schemes are summarised in Table 5.1 below. Both of the Australian Territories have adopted the prohibition model and therefore neither adverse possession of whole or part of a land parcel can lead to an adverse possessor gaining registered title. Tasmania and New South Wales have both adopted the prohibition scheme also for cases concerned with only part of a land parcel. Tasmania adopted prohibitive provisions with respect to adverse possession of part of a land parcel in 2001. New South Wales does allow for a registered proprietor to acquire a 'residue lot' as defined under the *Real Property Act 1900* (NSW).

South Australia and recently Tasmania use the veto scheme in which the registered proprietor is capable of forbidding an application for registered title by the adverse

possessor. The South Australian approach is very prohibitive in nature, and unless the registered proprietor has abandoned the subject land for whatever reason, it is very hard to gain registered title through adverse possession. The Tasmanian variant is quite complex to understand but simply a rate paying registered proprietor can veto in a similar manner to which South Australia offers. Tasmania also requires that for any time in which the registered proprietor has been paying rates, any time accrued by the adverse possessor during this time does not count towards the timeframe towards application for registered title.

Table 5.1 Comparison of Whole Parcel and Part Parcel schemes in force today by Australian jurisdictions.

¹ The registrar can register a registered proprietor as the owner of a ‘residue lot’.

²Requirements for application are very restrictive and prohibitive in nature. It is practically impossible to gain title through adverse possession.

³Statutory provisions impose a practical prohibition.

⁴A application under encroachment legislation is favoured.

Schemes of Australian States	Possible Results	Jurisdiction	Whole Parcel Adverse Possession Possible?	Part Parcel Adverse Possession Possible?
Prohibited	Statute barred from acquiring Title	ACT	No	No
		NT	No	No
		Tas	-	No
		NSW	-	No ¹
Veto	Veto by Registered Proprietor OR Registration if Registered Proprietor has vacated the land	SA	Yes ²	Yes ²
	Veto by Rate Paying Registered Proprietor	Tas	Yes ³	-
Cleaning or Renewing action	Time resets upon transaction OR Registration once Adverse Possession satisfies Time.	NSW	Yes	-
Override Previous Register Entry	Title acquired after passage of time	Qld	Yes ⁴	Yes ⁴
	Title being acquired or acquired	Vic	Yes	Yes
		WA	Yes	Yes

New South Wales alone offers a scheme which can be described as having a cleaning or renewing action. If any fresh certificate of title is issued at any time before the limitation period has been satisfied for the adverse possessor, any time accrued by the adverse possessor does not count towards the timeframe for application. Therefore the issuing of a new certificate of title has a cleaning or renewing effect on the registered proprietor's title. Adverse possession can only occur with unregistered land in New South Wales as adverse possession of registered land is expressly prohibited.

Queensland, Victoria, and Western Australia use the overriding scheme with respect to the application of adverse possession. With this scheme title is acquired by the adverse possessor upon the completion of the required limitation period. Victoria and Western Australia allow for unmaturing rights to survive a transaction that is registered. Victoria and Western Australia do not have any requirement for registration in order to perfect title. The title acquired through occupation for the limitation period can exist independently without registration as required in other schemes.

A summary of the jurisdictions which do or don't distinguish between whole and part of a parcel of land is shown in Table 5.2 below. Queensland, South Australia, and Tasmania distinguish between whole and part of a land parcel. Western Australia, Victoria, and New South Wales do not distinguish between a whole parcel and part of a parcel.

Table 5.2 Jurisdictions of Australia which distinguish between whole and part parcels.

Jurisdiction	Whole Parcel	Part Parcel
Qld	Yes	Yes
WA	Yes	No
Vic	Yes	No
NSW	Yes	No
SA	Yes	Yes
Tas	Yes	Yes

With respect to adverse possession of Crown land and its agents, provisions are very restrictive in Australian jurisdictions as would be expected. Both New South Wales and Tasmania allow for adverse possession of Crown land after a limitation period of 30 years has been satisfied. Victoria does not allow for adverse possession of Crown land, land owned by rail corporations, or water authorities, although it is possible to gain title through adverse possession of council land after a period of 15 years. Adverse

possession of Crown land is not possible in New South Wales, South Australia, the Australian Territories, and Queensland.

5.3 LIMITATIONS OF AUSTRALIAN SCHEMES

5.3.1 PROHIBITION SCHEME

The prohibition scheme offers the highest level of indefeasibility and certainty & security of title to the registered proprietor. Of the two jurisdictions which use this scheme, the Northern Territory and Australian Capital Territory, only the Northern Territory has an alternative mechanism to cater for boundary disputes, being statutory encroachment. The Australian Capital Territory has no provisions for statutory encroachments and therefore no way to resolve boundary disputes such as the situation of encroaching adjoining boundaries. This could be seen as a weakness.

For a person in adverse possession of good faith for a long time, ejectment by the registered proprietor could bring financial hardship. The costs associated with the certainty of losing a claim for registered title through adverse possession in this situation would be high. The approach ensures that the number of disputes over land are very minimal, and do not happen very often.

Having no mechanism to resolve boundary disputes is not ideal and not suited to the needs of the community. Encroachment legislation should be available like the Northern Territory offers even if adverse possession is prohibited.

5.3.2 VETO SCHEME

There are two variations to the veto scheme used in Australian jurisdictions being those used by South Australia and Tasmania, both of which are considerably different. South Australia offers the registered proprietor an absolute veto against the adverse possessor. Meanwhile Tasmania's approach introduces complexities into the equation which severely restricts the chances of a successful adverse possession claim.

For an adverse possessor in South Australia who has achieved the required limitation period, completed improvements to the land, and calls the land home, once a caveat is lodged he/she will be ejected and most likely lose their livelihood. Although the scheme offers a very high level of indefeasibility and security of title to the registered proprietor, unless the registered proprietor is vacant or has abandoned the land, it is almost impossible to gain registered title through adverse possession of land.

With respect to boundary adjustments, although part parcel possession is allowed, in 15 years off disputes observed not one case had occurred in South Australia. Statutory encroachment is allowed in South Australia and the dispute analysis proved that disputes were dealt with encroachment legislation for the period observed.

Tasmania does not permit statutory encroachment since the major legislative amendment in 2001 to the Tasmanian Torrens statute. Similarly part parcel adverse possession is discouraged since the new restrictive provisions were introduced. Unique principles of the Tasmanian scheme have made it harder for adverse possession to occur. For example any period for which rates have been paid by the registered proprietor, that period of time does not count towards the adverse possessor's timeframe for application for registered title. Also registered land is deemed to be on trust by the registered proprietor for the adverse possessor entitled by virtue of 12 years or more adverse possession. These two concepts when used together make it significantly harder for any prospective adverse possessors to gain registered title through adverse possession. For example two cases, *Quarmby v Keating* [2008] TASSC 71 and *Natural Forests Pty Ltd v Turner* [2004] TASSC 34 were dismissed largely due to the implications of the new provisions.

The level of indefeasibility is quite high for the registered proprietor, and has increased since the amendments. The adverse possessor's chances of gaining registered title since 2001 has been greatly reduced. Statutory encroachment has been abolished in Tasmania and there is no effective means to rectify boundary disputes. This is not an ideal situation and probably not suitable to the needs of the community.

5.3.3 CLEANING/RENEWING SCHEME

This scheme is only used by New South Wales. The adverse possession of registered land is not permitted, although it is for unregistered land. If the registered proprietor has a transaction with a third party, any time accrued by an adverse possessor cannot count towards the timeframe for application for registered title. Whilst New South Wales doesn't allow for part parcel adverse possession statutory encroachment is allowed. There is a level of security for the registered proprietor associated with this scheme as 12 years if a relatively long period of time and there is a reasonable chance that a transaction may occur in this time.

Certainty and security of title and indefeasibility of registered land is very high as adverse possession is not possible for registered land. For unregistered land certainty and security of title and indefeasibility is not as high as adverse possession is possible. The number of boundary disputes related to adverse possession are minimised under this scheme as only four disputes have occurred over the last 15 years. Seven encroachment cases have occurred. This may indicate that statutory encroachment as a mechanism to resolve boundary disputes is used considerable more than adverse possession in New South Wales.

Overall it could be said that this scheme is well suited to the needs of the community. Whilst part parcel adverse possession is prohibited, statutory encroachment occurs for registered land, and adverse possession can only occur for unregistered land, which offers good security of title to the registered proprietor.

5.3.4 OVERRIDING SCHEME

This scheme as discussed in 5.2 is used by Victoria, Queensland, and Western Australia. The primary difference between these jurisdictions is that the Victorian and Western Australian scheme allow for unmaturing adverse possession to serve a transaction that is registered. So how could this be an issue? In example the registered proprietor may have just sold land to another person, and both parties are not aware of an adverse possessor in a secluded portion of the land, or even using the land exclusively. However unlikely, if this situation occurs and the adverse possessor becomes aware of the situation he/she would most likely stake their claim for registered title. The new registered proprietor's title could become extinguished, and the adverse possessor could

gain title, and no compensation would be awarded to the registered proprietor. Therefore significant financial hardship and other problems would occur.

Victoria has no provisions for statutory encroachment, and boundary disputes are governed solely by part parcel adverse possession. As shown in the dispute analysis the majority of adverse possession cases in the past 15 years for Victoria has been between adjoining land owners over a 'strip' of land. It is quite often the case that these portions of disputed land have a value of only a few thousand dollars. When proceedings are taken to the Supreme Court both parties are faced with out of proportion legal costs. For example in *Malter & Anor v Procopets* [2000] VSCA 11 the value of the disputed land was \$6500 and the court costs were tens of thousands more. In this case Brooking JA describes the situation of a 'strip' dispute as '...an unhappy case which shows how disputes between neighbours over encroachments tend to generate litigation with costs out of proportion to the value of the land.' The situation will arise that one of the adjoining land owners in a 'strip' case will be lumped with significant court costs, and perhaps an order to re-fence the boundary. This is not ideal as no compensation is available and financial hardship will be suffered. A major downside is that costs are incurred on the public interest as well due to this type of litigation occurs more regularly.

The approach of Victoria and Western Australia offer less protection for the registered proprietor than the Queensland scheme. Although Western Australia offers statutory encroachment as an alternative to adverse possession, unlike Victoria, no major trends showed in the dispute analysis.

Victoria permits adverse possession of council land as discussed, and is the only jurisdiction in Australia which has permissive legislative provisions. A council may not be able to monitor all of its land and this is probably why some adverse possession cases have involved council land in recent years, but it is hard to develop a justification to support it. A council services the community for many reasons and is an important need of the community.

5.4 PROPOSED BEST PRACTICE CRITERIA

1. The Torrens title system should require the compulsory registration of all eligible interests with respect to the doctrine of adverse possession.

Both Victoria and Western Australia allow for adverse possession interests which can survive a registered transaction. This leaves a level of uncertainty in the land market as some eligible interests which could be registered are not registered. The Registration of title involves the recording of all interests subsisting in each parcel of land. This is one reason as to why a prospective buyer or registered proprietor can expect to have a level of confidence and security of title. In order to suit the needs of the community, any interest which is eligible to be registered should be registered. Having a matured adverse possession claim still exist after the limitation period has expired will possibly lead to litigation in the future.

2. A scheme which has provisions for part parcel adverse possession should also offer statutory encroachment as an alternative and statutory encroachment should be provided for Australia wide and be favoured over part parcel adverse possession claims.

Under a system of registration of title, provision is made for compensation to be paid to persons who suffer loss. Where there is adverse possession as part of the Torrens system no compensation is possible. If an alternative method of boundary repair is available such as statutory encroachment, compensation is possible if the parties involved wish to pursue that legal pathway over an adverse possession claim. Both Victoria and Western Australia have had a number of 'strip' adverse possession cases, with Victoria having significantly more disputes of this type. As is often the case the disputes are over a small encroachment between adjoining fences and the disputes between the neighbours are often bitter and long lasting. In the end somebody will lose that 'strip' of land or be ordered to remove fencing, build a new fence, or pay damages. This will incur substantial financial problems to the losing party, or even both parties. Having an alternative means to deal with the dispute may reduce costs to both parties and possibly the public interest.

3. If the limitation period is ever modified or made uniform in Australia, there is no reason to drastically increase or decrease the time required.

From research performed in this project, it is apparent that there are advantages and disadvantages associated with drastically changing the limitation period. No justification can be found to recommend any major change to the length of the limitation period. Although reducing the limitation from 15 years to 12 years would not have any major ramifications as compared to a larger change. England in 2002 increased the limitation period to 12 years from 10 years. While there has been a trend to gradually decrease the length of the limitation period over time, it would appear that 12 years is a world average. Currently 12 years is used by England, Queensland, New South Wales, Tasmania, and Western Australia. In the United States of America roughly one third of jurisdictions which have provisions for adverse possession have a limitation period of 10 years. So it could be suggested that a limitation period of 10-12 years is roughly a worldwide standard for adverse possession.

4. The ideal schemes which if ever to be implemented Australia wide should be exclusively the cleaning/renewing system of New South Wales or the overriding scheme used by Queensland, or a combination of the two.

Either scheme as currently offered by New South Wales and Queensland offer a good level of security and certainty of title and indefeasibility to the registered proprietor. Both schemes offer statutory encroachment as an alternative boundary repair mechanism which is considered a benefit as compensation is offered. Whilst New South Wales does not permit adverse possession of registered land, but only unregistered land, a transaction with a third party and the registered proprietor means that any time accrued by the adverse possessor cannot count towards the timeframe for application, offers a level of security to the registered proprietor. In Queensland an encroachment application is favoured over an adverse possession claim and this would be beneficial to the plaintiff or defendant or both as compensation is offered by encroachment legislation. Adverse possession does have certain benefits such as permitting boundaries as they appear on the ground or as a method for resolving boundary discrepancies and disputes. Therefore the doctrine should remain to a degree instead of being abandoned.

It is hard to recommend a scheme such as what Victoria currently uses due to the fact that matured adverse possession rights can survive registered transactions and there is no requirement to register adverse possession interests once they are eligible for registration. This in combination with no offering of an alternative to adverse possession is not an ideal situation. Similarly Tasmania's approach is very restrictive with respect to adverse possession and statutory encroachment is not possible anymore so there is no easy path to resolve boundary disputes.

If Australia decides to restrict the doctrine substantially, a veto scheme similar to that of South Australia but perhaps not as strict would be a good compromise. While the registered proprietor would be assured that adverse possession is generally not going to happen, instances of adverse possession of abandoned land would occur from time to time and ensure that land is used for a purpose.

5.5 CONCLUSION

This chapter has provided a summary of adverse possession schemes currently used by Australian jurisdictions and detailed any major strengths, weaknesses, and limitations any of the schemes have with respect to their application of adverse possession. It is apparent that some legislative provisions are more restrictive or lenient than others and a compromise lies somewhere in between. A set of 'best practice' criteria was put together to exemplify what potentially may work well together.

Chapter 6

CONCLUSION

The purpose of the research was to review the application of adverse possession by Australian jurisdictions. This was done by comparing and contrasting variations in its application between states using relevant case law, legislation, and a case study. While there wasn't a large quantity of literature directly related to the project aim, there were many articles from international authors which proved useful.

A review of literature showed that only one significant work had previously been completed by Park in 2003. A considerable proportion of the remaining literature was written exclusively by Park or Williamson, or by both researchers conjointly publishing the work. The basics of the doctrine of adverse possession are covered in many texts although some barely scrape the surface of the complexities of the doctrine. A comprehensive and detailed literature review was required to develop a proper understanding of the doctrine of adverse possession.

Results showed that there are four schemes of adverse possession currently in use in Australian jurisdictions, some of which have variations. Many differences in relation to the different approaches were observed. The case study of *Shaw v Garbutt* [1996] NSWSC 400 gave an insight into how complex an adverse possession dispute is to work with once proceedings have been taken to the Supreme Court. There are many variables associated with adverse possession which means that every case is unique.

An evaluation of any strengths, weaknesses, and limitations was performed in Chapter 5. It was evident that some schemes had legislative provisions which perhaps are not ideal. For example having no mechanism for resolving boundary disputes was seen as not fulfilling the needs of the community.

Several 'best practice' criteria were put together and were justified based upon findings of the research. Perhaps the most important finding was that the Victorian approach to the application of adverse possession tended to generate the most litigation, which is not ideal as increased levels of litigation has certain disadvantages. Offering statutory

encroachment as an alternative to adverse possession of part of a land parcel has been seen as an advantage.

There were several limitations with respect to what could be accomplished in this project. At the same time it was realised that further research with respect to the application of adverse possession in Australia and internationally needs to be done.

6.1 FUTURE RESEARCH

There are two main areas future research could concentrate on with respect to the application of adverse possession in Australia. These areas include research into what an optimal limitation period for Australia may be, and secondly research what scheme of adverse possession is best suited for uniform use throughout Australia.

Research into either of these areas or both areas could justify the completion of a PhD or Masters study by a person studying law or related discipline. Limited research has been conducted with respect to optimal limitation periods. This is most likely due to the complexities of the subject, or that the subject simply hasn't been regarded as an important research area. As land title systems become more complex in the future a need will arise for further research. Research into a uniform scheme of adverse possession for use Australia wide is likely to happen in the future.

Any future research may look at reviewing important case law relating to adverse possession over a significantly greater time period. The amount of case law easily obtainable for this project was a limitation of research as only 15 years was material was analysed. Reviewing more case law would require arrangements to be made to access state libraries throughout Australia.

Research conducted by this project, particularly the analysis of case law and legislation component, could be used as a foundation for future research. Significant time could be saved due to the fact that dissecting case law and legislation is a time consuming process. The literature review component of this research could also be valuable for anyone needing to know the basics of adverse possession or what major research has been completed.

Perhaps one of the biggest hurdles any future research has to face is constructing an appropriate methodology. The methodology used for this project experienced various difficulties and with any future research this is likely to be experienced again.

6.2 CLOSE

The aim of this research was to conduct a review of the application of adverse possession within the Torrens System of Land Regulation in Australia, by comparing and contrasting variations in legislation between states, and also forming recommendations of best practice.

Results showed that there are many differences between the four schemes used by Australian jurisdictions. Various strengths, weaknesses, and limitations were discovered when discussing these approaches. One of the more important findings was the fact that part parcel adverse possession when used by itself with no alternative legal pathway such as statutory encroachment, results with more disputes. Four elements of 'best practice' were identified and explained using various justifications.

A simple methodology was developed to achieve the aim and objectives of this project. The method used was proprietary as no existing method was available for implementation. Results and findings of the research were as expected.

The case for adverse possession will be debated in the future. As to whether the doctrine is restricted throughout Australia, abandoned altogether, or is allowed to exist in a more permissive scheme will remain to be seen. Adverse possession does have benefits and should be retained in some form in Australian jurisdictions if Australia moves towards a uniform Torrens system.

APPENDIX A: PROJECT SPECIFICATION

University Of Southern Queensland

FACULTY OF ENGINEERING AND SURVEYING

ENG4111/4112 Research Project
PROJECT SPECIFICATION

TOPIC: A REVIEW OF THE APPLICATION OF ADVERSE POSSESSION WITHIN THE TORRENS SYSTEM OF LAND REGULATION IN AUSTRALIA

SUPERVISOR: SHANE SIMMONS

ENROLMENT: ENG 4111 – S1, D, 2009
ENG 4112 – S2, D, 2009

PROJECT AIM: This project aims to conduct a review of the application of Adverse Possession within the Torrens System of Land Regulation in Australia by comparing and contrasting variations in its application between states, using relevant case studies and legislation.

PROGRAMME: Issue A, 24th March 2009

1. Study the background information relating to the Torrens System of Land Regulation and Adverse Possession.
2. Research previous studies on the application of Adverse Possession within the Torrens System of Land Regulation in Australia.
3. Review and understand the operations of relevant sections of statutes and case law in their application to the Torrens Titling System of Land Regulation.
4. Critically evaluate the strengths, weaknesses, and limitations of how each state of Australia's statutes utilise Adverse Possession.
5. Analyse the application of Adverse Possession between Australian States.
6. Recommend and perform research as to how the application of Adverse Possession by Australian States can be developed into a uniform system.
7. Submit an academic dissertation on the research.

AGREED

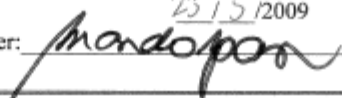
 (Student)

 (Supervisor)

23/03/2009

Examiner/Co-Examiner:

23/03/2009

 31/03/09

APPENDIX B: COMMON LAW PRINCIPLES OF ADVERSE POSSESSION

Common law principles of adverse possession extracted from *Bayport Industries Pty Ltd v Watson* [2002] VSC 206 at [39].

The applicable principles

39. • The law is clear enough. A number of the basic principles were summarised by Slade J in Powell v McFarlane[10]. Thus, pertinently:

"It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law: (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*animus possidendi*). (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession,... The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed... It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so. (4) The *animus possidendi*, which is also necessary to constitute possession,... involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow... the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisition *animus possidendi* and consequently as not having dispossessed the owner."

40. • To those principles should be added and/or highlighted the following:

[diamond] "When the law speaks of an intention to exclude the world at large, including the true owner, it does not mean that there must be a conscious intention to exclude the true owner. What is required is an intention to exercise exclusive control: see *Ocean Estates v Pinder* [1969] 2 AC 19. And on that basis an intention to control the land, the adverse possessor actually believing himself or herself to be the true owner, is quite

sufficient: see *Bligh v Martin* [1968] 1 WLR 804.^[11] [diamond] As a number of authorities indicate, enclosure by itself prima facie indicates the requisite animus possidendi. As Cockburn C.J. said in *Seddon v. Smith* (1877) 36 L.T. 168, 1609: 'Enclosure is the strongest possible evidence of adverse possession.' Russell L.J. in *George Wimpey & Co. Ltd. v. Sohn* [1967] Ch. 487, 511A, similarly observed: 'Ordinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the true owner.'^[12] [diamond] It is well established that it is no use for an alleged adverse possessor to rely on acts which are merely equivocal as regards the intention to exclude the true owner: see for example *Tecbild Ltd. v. Chamberlain*, 20 P. & C.R. 633, 642, per Sachs L.J."^[13] [diamond] A person asserting a claim to adverse possession may do so in reliance upon possession and intention to possess on the part of predecessors in title. Periods of possession may be aggregated, so long as there is no gap in possession^[14]. [diamond] Acts of possession with respect to only part of land claimed by way of adverse possession may in all the circumstances constitute acts of possession with respect to all the land claimed^[15]. The cases cited by counsel for the plaintiff were not this case, as counsel accepted. There, the adverse possessor had made active use of some of the disputed land. The question was whether that use constituted possession of the whole. In the present case the plaintiff rather pointed to active use of part of the land of which its predecessors were the paper title owners to assist a conclusion that they possessed and intended to possess all the enclosed land. [diamond] Where a claimant originally enters upon land as a trespasser, authority and principle are consistent in saying that the claimant should be required to produce compelling evidence of intention to possess; in which circumstances acts said to indicate an intention to possess might readily be regarded as equivocal^[16]. The present case is, I should say, factually different to the type of case to which this proposition essentially refers. [diamond] At least probably, once the limitation period has expired the interest of the adverse possessor, or of a person claiming through him, cannot be abandoned^[17].

APPENDIX C: ADVERSE POSSESSION REQUIREMENTS FOR U.S.A.

Time Required for Adverse Possession

A trespasser must occupy land for this long in order to claim ownership. (See also Appendix D for a state-by-state list of adverse possession statutes.)

State	Years Required	State	Years Required
Alabama*	10 (d or t)	Montana	5 (t)
Alaska	10, 7 (d)	Nebraska	10
Arizona	10, 5 (d, t), 3 (d)	Nevada	15 (t), 5 (d, t)
Arkansas	7 (d, t)	New Hampshire	20
California	5 (t)	New Jersey	30
Colorado	18, 7 (d, t)	New Mexico	10 (d)
Connecticut	15	New York	10
Delaware	20	North Carolina	20, 7 (d)
D.C.	15	North Dakota	20, 10 (d, t)
Florida	7 (d or t)	Ohio	21
Georgia	20, 7 (d)	Oklahoma	15
Hawaii	20	Oregon	10
Idaho	20 (t)	Pennsylvania	21
Illinois	20, 7 (t or d)	Rhode Island	10
Indiana	10 (t)	South Carolina	10
Iowa	10	South Dakota	20, 10 (t, d)
Kansas	15	Tennessee	7 (d)
Kentucky	15, 7 (d)	Texas	10, 5 (d, t), 3 (d)
Louisiana	30, 10 (d)	Utah	7 (t)
Maine	20	Vermont	15
Maryland	20	Virginia	15
Massachusetts	20	Washington	10, 7 (d or t)
Michigan	15	West Virginia	10
Minnesota	15 (t)	Wisconsin	20, 10 (d), 7 (d, t)
Mississippi	10	Wyoming	10
Missouri	10		

(d) You must have a document (even if it is invalid).

(t) You must have paid the taxes on the property.

*Alabama also recognizes ownership after simple possession for 20 years.

Current as of October 2007

**APPENDIX D: TABLES OF ADVERSE POSSESSION AND
ENCROACHMENT DISPUTES COVERED IN THE
DISPUTE ANALYSIS**

Queensland

Claim Over	Citation	Total
Whole Parcel	Re Johnson [1999] QSC 197 (19 August 1999)	
	Goodwin Anor v Gilbert Ors [2000] QSC 309 (11 September 2000)	
	Bartha v O'Riordan [2004] QSC 205 (25 June 2004)	
	Gilbert v. Goodwin [2005] QSC 84 (19 April 2005)	
		4
Part Parcel	Sherrard Ors v Registrar of Titles Anor [2003] QSC 352 (16 October 2003)	
		1
Encroachment	Eastgate Properties P/L v. J Hutchinson P/L [2005] QSC 196 (30 June 2005)	
	Shadbolt v Wise [2002] QSC 348 (31 October 2002)	
	Rapatten P/L v JJ Anderson Anor [1998] QSC 93 (14 May 1998)	
	Lang Parade Pty Ltd v. Peluso Ors [2005] QSC 112 (9 May 2005)	
	Sablebrook P/L v. Credit Union Australia Ltd [2008] QSC 242 (7 October 2008)	
		5

New South Wales

Claim Over	Citation	Total
Whole Parcel	Bartlett v Ryan [2000] NSWSC 807 (16 August 2000)	
	Americana Leadership College v Coll [2003] NSWSC 295 (15 April 2003)	
	Kerry Anne Bourke v Mark Kenneth Hooper [2007] NSWSC 1516 (7 December 2007)	
	Shaw v Garbutt [1996] NSWSC 400 (3 September 1996)	
		4
Part Parcel	Townsend v Waverley Council [2001] NSWSC 384 (14 May 2001)	2
	South Maitland Railways Pty Ltd v Satellite Centres Australia Pty Ltd [2009] NSWSC 716	
Encroachment	Gogard Pty Limited v Satnaq Pty Limited [1999] NSWSC 1283 (23 December 1999)	
	Campbell v Crane [2009] NSWSC 363 (8 May 2009)	
	Busways Management Pty Ltd v Milner [2002] NSWSC 969 (16 October 2002)	
	Black v Apps [2005] NSWSC 943 (20 September 2005)	
	Falletta v Cook [2008] NSWSC 431 (10 April 2008)	
	North v Marina [2003] NSWSC 64 (3 March 2003)	
	Finlayson v Campbell Matter No 4796/94 [1997] NSWSC 374 (4 September 1997)	
		7

Victoria

Claim Over	Citation	Total
Whole Parcel	Abbatangelo v Whittlesea City Council [2007] VSC 529 (13 December 2007)	
	Monash City Council v Melville [2000] VSC 55 (28 February 2000)	
	Guggenheimer v Registrar of Titles [2002] VSC 124 (22 April 2002)	3
Part Parcel	Michelotti Anor v Roads Corporation [2009] VSC 195 (14 May 2009)	
	Kierford Ridge Pty Ltd v Ward [2005] VSC 215 (20 June 2005)	
	Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd [2006] VSC 314 (28 August 2006)	
	Malter Anor v Procopets [2000] VSCA 11 (3 February 2000)	
	Traykof v Shanco Holdings Pty Ltd [2001] VSCA 56 (3 May 2001)	
	Bayport Industries Pty Ltd v Watson [2002] VSC 206 (12 June 2002)	
	Body Corporate No 435612 v Kaufer [2003] VSC 250 (11 June 2003)	
	Patsios v Glavinic [2006] VSC 92 (16 March 2006)	
	Sztainbok v Cooper Ors [2008] VSC 577 (18 December 2008)	
	Johnson Anor v Morrison Ors [2009] VSC 72 (3 March 2009)	
	JNM Pty Ltd v Adelaide Banner Pty Ltd [2009] VSC 327 (7 August 2009)	
	David Charles Koadlow v Geoffrey Robert Bolland [1995] VSC 8; [1995] VICSC 8 (24 January 1995)	12
Encroachment	Seitanidis Pty Ltd v Vassallo [2001] VSC 323 (27 August 2001)	
	PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd [2007] VSC 87 (2 April 2007)	
	David Charles Koadlow and Leonie Koadlow v Geoffrey Robert Bolland and Yvonne Bolland and the Registrar of Titles [1996] VSC 40; [1996] VICSC 40; [1997] 1 VR 633 (28 May 1996)	
	Beech v Building Appeals Board [2005] VSC 231 (30 June 2005)	4

Western Australia

Claim Over	Citation	Total
Whole Parcel	Radonich v Radonich Anor [1999] WASC 165 (13 September 1999)	
	Executive Seminars Pty Ltd v Peck Ors [2001] WASC 229 (29 August 2001)	
		2
Part Parcel	DUARTE ANOR -v- DENBY ORS [2007] WASC 94 (26 April 2007)	
	WATER CORPORATION -v- HUGHES [2009] WASC 152 (5 June 2009)	
	Ho Lai WA Ng Ors v The Owners of Tranby-On-Swan Strata Plan 2232 Anor [1998] WASC 65 (11 March 1998)	
	ANDREWS & ANOR -v- ROONEY & ORS [1994]	
		4
Encroachment	Capebay Holdings Pty Ltd v Marks Healy Sands [2002] WASC 287 (4 December 2002)	
	Executive Seminars Pty Ltd v Peck Ors [2001] WASC 229 (29 August 2001)	
	Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2001] WASC 87 (4 April 2001)	
		3

South Australia

Claim Over	Citation	Total
Whole Parcel	LAND MANAGEMENT CORPORATION v DALAYA [2007] SASC 54 (26 February 2007)	
		1
Part Parcel		
		0
Encroachment	STEVEN M CLARK NO 3 PTY LTD v NOACK [2004] SASC 249 (24 August 2004)	
	CARLIN ANOR v MLADENOVIC ANOR No. SCCIV-98-1537 [2002] SASC 206 (2 August 2002)	
	GLADWELL v STEEN No. SCGRG-99-628 [2000] SASC 143 (2 June 2000)	
	BUNNEY v THE STATE OF SOUTH AUSTRALIA No. SCGRG-99-209 [2000] SASC 141 (2 June 2000)	
	BADE v RURAL CITY OF MURRAY BRIDGE ANOR [2008] SASC 9 (18 January 2008)	
	KNOX ANOR v DWYER ANOR No. SCCIV-01-842 [2001] SASC 315 (3 September 2001)	
		8

Tasmania

Claim Over	Citation	Total
Whole Parcel		
		0
Part Parcel	Quarmby v Keating Qasair Investments Pty Ltd [2007] TASSC 65 (23 August 2007)	
	Keith George Woodward v Wesley Hazell Pty Ltd [1994] TASSC 26 (17 March 1994)	
	Ian Rumney Office Equipment Pty Ltd v Tasmania [1997] TASSC 70 (18 June 1997)	
	Natural Forests Pty Ltd v Turner [2004] TASSC 34 (22 April 2004)	4
Encroachment	Graham Davies-Smith and Audrey Davies-Smith v Superoo Pty Ltd [1994] TASSC 74 (10 June 1994)	
	Mr and Mrs B S Blazely v Mr and Mrs S v Whiley [1995] TASSC 26; (1995) 5 Tas R 254 (21 March 1995)	
		2

Australian Capital Territory

Claim Over	Citation	Total
Whole Parcel	Individual Homes Pty Limited (In Liquidation) v. Anthony Gilbert Martin and Sue Dolores Martin [1999] ACTSC 139 (16 December 1999)	
		1
Part Parcel		
		0
Encroachment		
		0

Northern Territory

Claim Over	Citation	Total
Whole Parcel		
Part Parcel		
Encroachment	None	

0