

Resource material for presentation by P.Davies on Saturday, September 11th, 2011.

Reflections on role of the cadastral surveyor in the State landownership system (SLS)

The presentation will be drawing upon elements of the legislation that is set out below.

Particularly note pages 11-16 extracted from Victorian Law Reform Commission on Review of Property Law Act – also refer to associated notes on *mistaken improver*.

Property Law Act 1958

PART VII SURVEY BOUNDARIES (Also refer to Pages 11 -16 on VLRC Consultation paper)

267. Definition

In this Part document of title includes any Crown grant or Crown lease or any folio of the Register deed of conveyance partition release or assurance or other deed will lease written contract or writing.

268. Crown survey boundaries as marked on the ground to be deemed the true boundaries

The survey boundaries of any Crown section portion allotment or other parcel of land marked on the ground at the time of the Crown survey thereof, and shown by survey posts pegs trenches or other survey marks shall, as to any such parcel of land heretofore or hereafter granted or demised by the Crown, be and be deemed to have been the true boundaries of such parcel of land whether such boundaries upon admeasurement are or are not found to be of the same dimensions or to include the same area as the boundaries or description of such parcel given in the Crown grant or Crown lease thereof.

269. Crown grant or lease to be deemed to convey the land within the survey boundaries

Every Crown grant and Crown lease purporting to convey a section allotment or other parcel of land, whether describing it by a distinguishing number or letter or by metes and bounds or otherwise, shall be deemed to convey the land included within the survey boundaries of such parcel of land marked on the ground in the Crown survey thereof, notwithstanding any discrepancy between the dimensions of such survey boundaries or the area they include and the dimensions or area expressed in such grant or lease or shown in any plan used in connection with the alienation by the Crown of such parcel of land.

270. As to aliquot parts of Crown sections having excess of area

Where a Crown section has been subdivided by the Crown into allotments or portions of equal area, and by reason of excessive measurements in the original Crown survey the area of the section as marked on the ground by the survey boundaries exceeds the sum of the areas of all the allotments or portions as shown by any plan or description used at the Crown sale or as deductible from any Crown grant of any such allotment or portion, the total excess of area of the section shall be deemed originally distributable amongst the allotments or portions equally; and every Crown grant purporting to be a grant of one of such allotments or portions shall where the original subdivisional survey boundaries thereof do not exist, or if not inconsistent with such boundaries where they do exist, be construed to be a grant of such aliquot part of the total area included within the survey boundaries of such section as is obtained by dividing such area by the number of original allotments or portions.

271. How Crown survey boundaries may be proved in the absence of survey marks

When the survey marks of any line constituting one of the original boundary lines of any Crown section allotment or other Crown parcel of land have been removed or obliterated but it is proved in some court of competent jurisdiction or (where the land is under or is proposed to be brought under the Transfer of Land Act 1958) to the satisfaction of the Registrar of Titles that certain buildings fences walls or other improvements of a permanent nature or a succession of such improvements-

- (a) have ever since the removal or obliteration of such survey marks agreed in position with such original boundary line or with the particular portion thereof required to be established; or
- (b) have for the period of fifteen consecutive years been accepted and regarded by the vendors purchasers owners and occupiers for the time being of such parcel of land as agreeing in position with such original boundary line; or
- (c) have for the period of fifteen consecutive years been accepted and regarded by the vendors purchasers owners and occupiers for the time being of any portion of such parcel of land bounded by such Crown boundary line or by a portion thereof as agreeing in position with such original boundary line or such particular portion thereof-

such proof as aforesaid shall for all purposes be deemed and received as sufficient prima facie evidence of the true position of such original Crown survey boundary line or of such particular portion thereof as the case may be.

272. Margin of error allowed in description of boundaries

From and after the first day of August One thousand eight hundred and ninety the dimensions of the boundaries of any parcel of

land as stated in any document of title now made or hereafter to be made relating to such land, or as represented on any plan drawn on and referred to in any such document of title, shall unless such construction is expressly negated or modified by such document of title or contract be construed as though the phrase "a little more or less" immediately followed and referred to the dimensions so stated or represented; and such phrase shall in all cases whether so implied or expressed be deemed to cover any difference between the dimensions so stated or represented as aforesaid and the actual dimensions of such boundaries as found by admeasurement on the ground, when such difference does not exceed the following limits, that is to say, a limit of 50 millimetres for any one boundary line irrespective of its length where the length does not exceed 40.30 metres, but where it exceeds 40.30 metres a limit equivalent to one in five hundred computed upon the total all be brought by reason or in respect of such difference (whether of excess or deficit) where it does not exceed the aforesaid limits; and in any case where such difference does exceed such limits an action for damages or compensation in respect thereof shall lie in respect of such excess only.

273. Provisions of Part to apply to land under general law and Transfer of Land Act 1958

The provisions of this Part shall apply to land whether under the general law or under the operation of the Transfer of Land Act 1958, and shall where applicable be acted upon by the Registrar of Titles in dealing with any application to bring land under the Transfer of Land Act 1958, or to have any folio of the Register amended as to boundaries, and also in any investigation in the Office of Titles as to boundaries.

Transfer of Land Act

5. Registrar of Titles

- (1) A Registrar of Titles may be employed under Part 3 of the Public Administration Act 2004 to have the charge and control of the Office of Titles and to carry out the duties and functions vested by or under this or any other Act in the Registrar of Titles.
- (2) Any Deputy Registrars of Titles and any Assistant Registrars of Title and other employees that are necessary for the purposes of this Act may be employed under Part 3 of the Public Administration Act 2004.
- (3) Anything by this or any other Act appointed or authorized or required to be done or signed or initialled by the Registrar may be done or signed or initialled by any such Deputy Registrar or Assistant Registrar and shall be as valid and effectual as if done or signed or initialled by the Registrar.
- (4) Any reference to the Commissioner of Titles in any Act Order in Council regulation instrument or document shall be deemed and taken to refer to the Registrar of Titles unless the context otherwise requires.

15. Application (survey) conversion scheme

- (1) An entitled person may apply under this section to the Registrar to have the land brought under this Act.
- (2) An application must be in the prescribed form and the applicant must lodge with the application-
 - (a) a plan of survey of the land (with an abstract of field records) certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfies the Registrar as to description; and
 - b) – (d) Not relevant to discussion.....
 - (e) a legal practitioner's certificate relating to the title to the land; and
 - (f) if the applicant's title to the land is claimed by possession, the material on which the legal practitioner's certificate is based.
- (3) Not relevant to discussion
- (4) If in respect of land the provisions of subsection (1) and of subsection(2)(a), (b), (c), (d) and (e) and of sections 26Q and 26R are complied with and the deeds lodged show a good root of title which is at least 30 years old, the Registrar may create-
 - (a) an ordinary folio; or
 - (b) a provisional folio on which there is recorded a warning in the form of Part III of the Fifth Schedule, a warning in the form of Part IV of the Fifth Schedule or both those warnings, as the Registrar considers appropriate.
- (5) If in respect of a title to land claimed by possession, the provisions of subsection (1) and subsection (2)(a), (d), (e) and (f) and of sections 26Q and 26R are complied with, the Registrar may create-
 - (a) an ordinary folio; or
 - (b) a provisional folio on which there is recorded a warning in the form of Part III of the Fifth Schedule, a warning in the form of Part IV of the Fifth Schedule or both those warnings, as the Registrar considers appropriate.
- (6) & (7) not relevant to discussion

26P. Removal of warning relating to title dimensions

- (1) The registered proprietor of the land in a provisional folio on which there is recorded a warning in the form of Part IV of the Fifth Schedule may apply to the Registrar in the prescribed form to have the warning deleted from the folio.
- (2) An application under subsection (1) must be lodged with a plan of survey of the land (with an abstract of field records) certified by a licensed surveyor.
- (3) If the Registrar is satisfied that the land in the plan of survey represents the land actually and bona fide occupied by the applicant and purporting to be so occupied under the provisional folio, the Registrar may delete the warning

- from the folio and make any necessary amendments to the Register.
- (4) This section does not prevent an applicant under subsection (1) from including in the application by separate definition in the plan of survey lodged with the application such additional land as the applicant claims by possession or otherwise.
 - (5) If an application includes additional land in accordance with subsection (4), the Registrar must cause notice of the proposed creation of the folio to be given in accordance with section 26Q.
 - (6) In addition to the requirements of sections 26Q and 26R, the provisions of this Act relating to the granting of vesting orders by the Registrar as are appropriate to land which is, and land which is not under the operation of this Act, apply to the land included in the application.
 - (7) This section does not limit section 106(e).
 - (8) Section 102 applies to an application under this section as if it referred to an application under this section instead of an application to bring land under this Act.

60. Application for order by person claiming title by possession

- (1) A person who claims that he has acquired a title by possession to land which is under this Act may apply to the Registrar in writing in an appropriate approved form, accompanied by a plan of survey (with an abstract of field records) of the land certified by a licensed surveyor or any other plan, diagram or document describing the land which satisfies the Registrar as to description, for an order vesting the land in him for an estate in fee simple or other the estate claimed.
- (2) The Registrar shall cause notice of the application to be advertised once at least in a newspaper circulating in the city of Melbourne or in the neighbourhood of the land and to be given to any person he thinks proper including every person appearing by the Register to have any estate or interest in the land.
- (3) The applicant shall cause a copy of the notice to be posted in a conspicuous place on the land or at such place as the Registrar directs and to be kept so posted for not less than 30 days prior to the granting of the application.
- (3A) A notice under subsection (3) must be posted on the day on which the application is advertised under subsection (2).
- (4) The Registrar shall appoint a period of not less than 30 days from the publication of the advertisement or service of the notice after the expiration of which he may, unless a caveat is lodged as hereinafter provided, grant the application altogether or in part.

61. Caveat – not relevant to discussion

62. Power to make vesting order

- (1) Subject to this Act after the expiration of the period appointed the Registrar if satisfied that the applicant has acquired a title by possession to the land may make an order vesting the land in the applicant, or in such person as the applicant directs, for an estate in fee simple or other the estate or interest acquired by the applicant free from all encumbrances which have been determined or extinguished by such possession and free from any easement recorded as an encumbrance which has been proved to the satisfaction of the Registrar to have been abandoned by reason of non-user for a period of not less than thirty years.
- (2) Where a vesting order is so made the Registrar shall-
 - (a) make any amendments to the Register that are necessary to give effect to the vesting order;
 - (b) create in the name of the applicant, or of any person the applicant directs, a new folio of the Register, dated as at the date of making the vesting order-
 - (i) for an estate in fee simple or other estate acquired in the land described in the vesting order, free from all encumbrances extinguished under subsection (1); or
 - (ii) at the Registrar's discretion, consolidating the land describe applicant.
- (3) If the applicant or such other person dies before the vesting order is made the land shall be registered in his name and shall pass in like manner as if the folio of the Register had been created before the death.
- (4) As soon as practicable after making a vesting order, the Registrar must notify the Council of the municipal district where the land is located.
- (5) In this section, encumbrance includes, but is not limited to, any estate, interest, mortgage, charge, right, claim, demand, caveat, lease, sub-lease, restrictive covenant or statutory charge or an agreement under section 173 of the Planning and Environment Act 1987.

72. Notification of easements in Register

- (1) A folio of the Register may contain a recording to the effect that the land therein described is subject to or has appurtenant thereto an easement.
- (2) Upon application in an appropriate approved form the Registrar shall on the relevant folio of the Register make a recording of any easement over or upon or appurtenant to any land under this Act which the Registrar is satisfied has been created by compulsory acquisition in accordance with Section 36 of the Subdivision Act 1988 or by any instrument deed or other written document or recognized by an order of any court or award of an arbitrator.
- (2A) Subsection (2) does not apply to the creation of an easement-
 - (a) which is part of a plan of subdivision or consolidation; or

- (b) if the creation of the easement is authorised by a planning scheme or permit under the Planning and Environment Act 1987;
- (2B) The Registrar may accept a legal practitioner's certificate as evidence of the creation of an easement over or upon or appurtenant to any land under this Act.
- (3) When in any folio of the Register or instrument an easement is referred to or created or reserved by the use of the words "Together with [or Reserving] a right of carriage-way over" [specifying the roads subject to the easement and referring to a map or plan of subdivision] such words shall have the same effect and shall be construed as if the words contained in the Twelfth Schedule had been inserted in the folio of the Register or instrument.
- 73. Removal of easement etc.**
- (1) A registered proprietor may make application in an appropriate approved form to the Registrar for the deletion from the Register of any easement in whole or in part where it has been abandoned or extinguished.
- (1A) Subsection (1) does not apply to the removal of an easement in whole or in part if-
- the removal is part of a plan of subdivision or consolidation; or
 - the removal is authorised by a planning scheme or permit under the Planning and Environment Act 1987; or
 - Section 36 of the Subdivision Act 1988 applies to the removal.
- (1B) A registered proprietor may make application in the appropriate approved form to the Registrar for a declaration that the whole or a part of an easement has been abandoned or extinguished if the removal of the easement is mentioned in subsection (1C) The Registrar must give to each person who appears by the Register to have an estate or interest in the land benefited by the easement notice of the application and, if the Registrar is of the opinion that the easement has been abandoned or extinguished in whole or in part, must issue a written declaration to that effect to the applicant.
- (2) The Registrar shall give to every person who appears from the Register to have any estate or interest in the land to which the easement is appurtenant notice of the application and if he is of opinion that any such easement has been abandoned or extinguished in whole or in part shall make appropriate amendments in the Register.
- (3) Where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than thirty years, such proof shall constitute sufficient evidence that such easement has been abandoned.
- (4) Any person claiming an estate or interest in the land to which the easement to which subsection (1) applies is appurtenant may before the deletion of the easement from the Register lodge a caveat in an appropriate approved form with the Registrar forbidding the deletion, which caveat shall be subject to the same provisions and have the same effect with respect to the application for deletion as a caveat under section 26R against the creation of a folio.

73A Abandonment of easement of right of way

Upon an application to bring land under this Act or to amend a folio of the Register, if it is proved to the satisfaction of the Registrar that any land constituting a private road street or way or a portion of a private road street or way subject to an easement of right of way has been exclusively continuously and adversely occupied by the applicant or by him and those through whom he claims for a period of not less than thirty years the Registrar may notwithstanding anything to the contrary in this Act at his discretion create a folio of the Register for the fee simple of that land without recording any right or easement of way as an encumbrance thereon, and thereafter the said right or easement shall not be preserved by section forty-two.

95. Requirements as to surveys

- (1) In respect of any application under this Act or of any proposed subdivision of land under this Act the Registrar may require such surveys and plans to be made and lodged and such particulars of the boundaries and abutments to be furnished at the cost of the applicant or registered proprietor as the Registrar thinks fit.
- (2) All surveys required by the Registrar and except in accordance with the regulations or with the prior consent of the Registrar all plans lodged under this Division shall be made and certified by a licensed surveyor and, subject to the requirements of the Surveying Act 2004, shall comply with any requirements of the Registrar.
- (3) The Registrar may dispense with surveys in so far as there is sufficient survey information available to the Office of Titles.

96. Abutments used in description of land in certificate

- (1) In any folio of the Register the land may be described by its abutments in addition to but not in substitution for dimensions, **unless the Registrar specially authorizes the land or any boundary of the land to be described by abutments only.**
- (2) Mention of an abuttal in any folio of the Register shall not give title to the abuttal or be evidence of the title of any person who is referred to in the description as owner or occupier of the land upon which any abuttal stands or of any land constituting an abuttal.

97. Requirements as to plans of subdivision etc.

- (1) This Act and any subordinate instrument (within the meaning of the Interpretation of Legislation Act 1984) made under it apply to the Subdivision Act 1988 as if that Act formed part of this Act, and that Act must be read as one with this Act.
- (2) If a provision of the Subdivision Act 1988 or the regulations made under that Act is inconsistent with a provision of this Act or a subordinate instrument made under this Act, the provision of that Act or those regulations prevails.
- (3) Deleted

- (4) After the plan of subdivision has been approved or registered by the Registrar the numbers of the allotments or lots marked upon the plan may be used to describe the land for the purpose of dealings with any allotment or lot according to the plan of subdivision.
- (4A) After a plan of subdivision has been approved or registered by the Registrar under this section the Registrar may, in respect of each allotment or lot or other parcel of land recorded on the plan, create a folio of the Register by recording the description of the land and allocating a distinctive identifying reference to the recording.
- (4B) Where a folio of the Register is created under subsection (4A) in respect of an allotment or a lot or parcel of land, the allotment or lot or parcel may, for the purpose of a dealing with the allotment or lot or parcel, be described as the land contained in the folio of the Register.

97A Application for approval of plan of consolidation

- (1) Deleted.
- (2) Where the Registrar approves or registers a plan of consolidation he shall create with respect to the land delineated on the plan a single folio of the Register in which the land is described by reference to the plan, and shall forthwith delete any existing folio of the Register with respect to that land.
- (3) After a plan of consolidation has been approved or registered by the Registrar the land delineated thereon may be described by reference to the plan for the purpose of any dealings therewith under this Act.
- (3A) After a plan of consolidation has been approved or registered by the Registrar the Registrar may create a folio of the Register by recording the description of the land and allocating a distinctive identifying reference to the recording.

99. Application by proprietor for amendment of Register

- (1) A proprietor may make an application in an appropriate approved form
 - (a) of his own land, in any case in which the boundaries area or position of the land differ from the boundaries area or position of the land actually and bona fide occupied by him and purporting to be so occupied under the title in respect of which the folio of the Register was created, or in any case in which the description in a folio of the Register is erroneous or imperfect on the face of it;
 - (b) of the land of any other proprietor, where by reason of any error in survey or other misdescription part of such land is actually and bona fide occupied by the applicant together with the land described in the applicant's folio of the Register.
- (2) The Registrar shall send by post, to every person who appears from the Register to be affected by the application, notice that application has been made to amend the folio of the Register in the manner specified together with a plan showing the effect of the application and appointing a time after the expiration of which the application may be granted unless a caveat is lodged forbidding the granting thereof.
- (3) The Registrar on the request in the approved form of any registered proprietor or his agent and upon payment of the fee (if any) fixed by the Registrar shall inform him as to whether the boundaries area and position of any land the subject-matter of any proposed application under this section are accurately shown on any plan of survey in the Office of Titles.

100. Caveats

Not relevant to discussion

101. Grant of application

- (1) The Registrar may grant any such application or any application to bring land under this Act although the folio of the Register to be created or the amendment to be made may affect land comprised in any other folio of the Register if it appears that the land so affected has been included in such other folio of the Register by reason of some error in survey or other misdescription unless the title to the land so affected has been theretofore determined against the applicant in a contested proceeding in which the right to such land was in question.
- (2) Upon granting any such application the Registrar shall make any amendments to the Register that are necessary because of the granting of the application.
- (3) Any such amendment shall unless the Registrar otherwise directs be deemed to have been made as on the date when the application was lodged with the Registrar and bear date accordingly.
- (4) The Registrar shall give notice in writing of the amendment to the proprietor of the land comprised in any folio of the Register certificate of title to the person entitled to it.

102. Adjustment of discrepancies in boundaries

- (1) If land included in any application to bring land under this Act or in any folio of the Register or lodged plan of subdivision is found by reason of erroneous measurements in the original survey to exceed or fall short of the dimensions given the Registrar may create a new folio of the Register or amend the recordings in the Register to accord with the dimensions marked on the ground or otherwise to adjust equitably the discrepancy.
- (2) The Registrar may-
 - (a) in appropriate cases, make a distribution among the allotments or lots concerned of any surplus area; or
 - (b) where the proprietor of an allotment or lot or his predecessor in title has been for over fifteen years in possession of any of such surplus, include in the folio of the Register of such proprietor so much of such surplus so held in possession as does not exceed the area attributable to his allotment or lot; or

(c) in any case, make such adjustments as the Registrar considers equitable and expedient.**103. General provision as to correction of errors etc.**

- (1) In any proceeding in a court relating to any land or any instrument or dealing in respect thereof if the court directs the Registrar to make any amendments to the Register or otherwise to do any act or make any recordings necessary to give effect to any judgment decree or order of the court the Registrar shall obey such direction.
- (1AA) In any proceeding in VCAT relating to land or any instrument or dealing in respect of land, if VCAT directs the Registrar to make any amendment to the Register or otherwise to do any act or make any recordings necessary to give effect to an order of VCAT, the Registrar must obey that direction.
- (2) (a) The Registrar may upon such evidence as appears to him sufficient correct errors in the Register or in any plan of subdivision or unregistered instrument and supply entries or recordings omitted to be made therein under the provisions of this Act, but in any such case he shall not erase, delete or render illegible the original entry or recording, and shall indicate on that entry or recording the date on which the correction or recording was made.
- (b) Every correction recording or entry under subsection (2)(a) shall have the like validity and effect as if the error or omission had not occurred, but without prejudicing any rights accrued from any recording made in the Register prior to the actual time of correcting the error or supplying the omitted entry or recording.

104. Registrar to require production of documents as evidence etc.

- (1) The Registrar may for the purposes of this Act require any person to submit any documents or give any information or comply with any requisition relating to any land.
- (2) The provisions of sections fourteen to sixteen of the Evidence Act 1958 shall extend and apply for the purposes of this Act as if the Registrar were a Board and the chairman of a Board appointed by the Governor in Council.
- (3) If the Registrar considers it necessary or appropriate to do so, the Registrar may by notice in writing served upon or sent by registered post to any person who has or may have the custody or control of any certificate of title require the person to bring the certificate of title into the Office of Titles within a period specified in the notice being not less than 30 days from the date it bears to be destroyed inspected or otherwise dealt with as the case requires.

106. Powers of Registrar

- (1) The Registrar-
- (a) may record a caveat on behalf of the Crown, a minor or a person of unsound mind-
- (i) to prohibit any transfer or dealing with any land registered in the name of that person; or
- (ii) to prohibit dealing with any land in any case in which it appears that an error has been made by misdescription of that land or otherwise in any folio or folios of the Register; or
- (iii) for the prevention of any fraud or improper dealing;
- (b) may, in respect of any instrument, dealing or plan lodged with the Registrar under any Act, require the consent of the council of the municipality in the municipal district of which the land is situated before registering the instrument dealing or plan;
- (c) if it is proved to his satisfaction that any encumbrance recorded in the Register has been fully satisfied extinguished or otherwise determined and no longer affects the land, may make a recording to that effect in the Register;
- (d) whenever any question arises with regard to the performance of any duty or the exercise of any of the functions conferred or imposed on him by this Act, may state a case for the opinion of a court whose judgment shall be binding upon and given effect to by the Registrar;
- (e) may-
- (i) delete a folio from the Register; or
- (ii) create a new folio of the Register; or
- (iii) make any amendment of the Register or of any other instrument or document-wherever it is necessary to do so by reason of the operation of this or any other Act;
- (f) may take any other step necessary to protect the operation, effectiveness and integrity of the Register, including, but not limited to, the making of a notation on a folio of the Register.
- (2) Not relevant to discussion
- (3) Not relevant to discussion.

Transfer of Land Act 1958 - FIFTH SCHEDULE**PART II LIMITATIONS**

This folio is LIMITED [AS TO DESCRIPTION OF LAND or AS TO TITLE or AS TO BOTH DESCRIPTION OF LAND AND TITLE (as the case may be)] The probable or possible defects in title and outstanding estates and interests and the acts or matters that ought to be done or proved and the requisitions that ought to be complied with in order to justify the Registrar in creating an ordinary folio are set forth in the Registrar's minutes.

PART III-PROVISIONAL FOLIO**Warning as to Title**

This folio is subject to the qualification(s) numbers

in the legal practitioner's certificate relating to the land No.

PART IV-PROVISIONAL FOLIO**Warning as to Dimensions**

Any dimension and connecting distance shown is based on the description of the land as contained in the General Law Title and is not based on survey information which has been investigated by the Registrar of Titles.

PART V-PROVISIONAL FOLIO**Warning as to subsisting interests**

This title is based on General Law documents which have not been investigated by the Registrar of Titles. Subsisting interests under the General Law may affect this title.

Limitation of Actions Act**Division 3—Actions to recover land and rent****7 No title by adverse possession against Crown**

Notwithstanding any law or enactment now or heretofore in force in Victoria, the right title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any way affected by reason of any possession of such land adverse to the Crown, whether such possession has or has not exceeded sixty years.

7A No title by adverse possession against PTC or Victorian Rail Track

Despite any rule of law or provision made by or under this or any other Act but without limiting section 7, the right, title or interest of Victorian Rail Track established by Division 2 of Part 2 of the **Rail Corporations Act 1996** to or in any land is not, and must be taken never to have been, affected by reason only of any possession of that land adverse to Victorian Rail Track, irrespective of the period of that possession.

7AB No title by adverse possession against water authorities etc.

Despite any rule of law or provision made by or under this or any other Act, but without limiting section 7, the right, title or interest—

- of an Authority, within the meaning of the **Water Act 1989**; or
- of the Melbourne Water Corporation under Part 6 the **Melbourne Water Corporation Act 1992**; or
- of a licensee under Division 1 of Part 2 of the **Water Industry Act 1994**—
- to or in any land is not affected by any possession of that land adverse to the Authority, Corporation or licensee (as the case requires) irrespective of the period of that possession.

7B No title by adverse possession against Councils

- (1) Despite any rule of law or provision made by or under this or any other Act, but without limiting section 7, the title of a Council to council land is not affected by reason only of any possession of that land adverse to the Council, irrespective of the period of that possession.
- (2) This section does not apply to a possession of council land adverse to a Council if—
 - an application for title to all or part of that council land based on that adverse possession is made to the Registrar before, or within 12 months after, this section commences; and
 - that adverse possession is for more than 15 years.
- (3) In this section—
Council has the same meaning as in the **Local Government Act 1989**;
council land means land of which a Council is a registered proprietor under the **Transfer of Land Act 1958**;
registered proprietor and **Registrar** have the same meanings as in the **Transfer of Land Act 1958**.

7C Adverse possession of common property

- (1) Despite any rule of law or provision made by or under this or any other Act but without limiting section 7, the right, title and interest of an owners corporation, or an owner of a lot affected by the owners corporation, in land which is common property affected by the owners corporation is not affected by reason only of any possession of that land adverse to the owners corporation or the lot owner by another owner of a lot affected by the owners corporation, irrespective of the period of that possession.
- (2) Words and expressions used in this section have the same meanings as they have in the **Owners Corporations Act 2006**.

7D Action to recover land

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 him or, if it first accrued to some person through whom he claims, to that person:

Provided that if the right of action first accrued to the Crown the action may be brought at any time before the expiration of fifteen years from the date on which the right of action accrued to some person other than the Crown.

8 Accrual of right of action in case of present interests in land

- (1) Where the person bringing an action to recover land or some person through whom he claims—
- (a) has been in possession thereof; and
 - (b) has while entitled thereto been dispossessed or discontinued his possession—
- the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.
- (2) Where—
- (a) any person brings an action to recover any land of a deceased person, whether under a will or on intestacy; and
 - (b) the deceased person was on the date of his death in possession of the land, or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and was the last person entitled to the land to be in possession thereof—
- the right of action shall be deemed to have accrued on the date of his death.
- (3) Where—
- (a) any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him or to some person through whom he claims by a person who at the date when the assurance took effect was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged; and
 - (b) no person has been in possession of the land by virtue of the assurance—
- the right of action shall be deemed to have accrued on the date when the assurance took effect.

10 Accrual of right of action in case of future interests

Not relevant for discussion

Local Government Act**7. Power to fix road alignment**

- (1) A Council may fix the alignment of a road by a notice published in the Government Gazette.
- (2) If the road is vested in the Crown, or a body representing the Crown, the Council may only exercise this power after it has obtained the approval of the Surveyor-General after he or she has consulted the Surveyor and Chief Draughting Officer in the Office of Titles.
- (3) In the case of any other road, the Council may only exercise this power after it has obtained the approval of the Surveyor and Chief Draughting Officer in the Office of Titles.

206. Power of Councils over roads

- (1) The powers of a Council in relation to roads in its municipal district include the powers set out in Schedule 10.
- (2) Except as provided in section 207B(1), the exercise of a power under clause 2, 3 or 8(1)(a) of Schedule 10 does not in itself vest the land in a Council.

Local Government Act 1989 - SCHEDULE 10**POWERS OF COUNCILS OVER ROADS****1. Power to construct and maintain roads**

A Council may—

- (a) make, maintain and repair roads; and
- (b) fix and alter the level of roads.

2. Power to deviate roads

- (1) A Council may deviate a road through private land, Crown land or land held by licensees under the Land Act 1958 (whether or not the land is subject to any rights of way).
- (2) However, in the case of a proposed deviation—
 - (a) through Crown land; or
 - (b) which would result in the vesting of land in a Council under section 207B(2A)—
 this power may only be exercised after the Council has obtained the consent of the Minister administering the Land Act 1958.
- (3) Before starting any work to give effect to a deviation, the Council must publish a notice in the Government Gazette describing the deviation.

3. Power to discontinue roads

A Council may, in addition to any power given to it by sections 43 and 44 of the Planning and Environment Act 1987—

- (a) discontinue a road, or part of a road, by a notice published in the Government Gazette; and
- (b) sell the land from that road (if it is not Crown land), transfer the land to the Crown or itself or retain the land.

4. Power to take road making materials (Not relevant)
5. Power to name roads, erect signs and require premises to be numbered (Not relevant to discussion)
6. Power to establish survey marks
A Council may cause standard survey marks to be established in roads.

7. Power to fix road alignment

- (1) A Council may fix the alignment of a road by a notice published in the Government Gazette.
- (2) If the road is vested in the Crown, or a body representing the Crown, the Council may only exercise this power after it has obtained the approval of the Surveyor-General after he or she has consulted the Surveyor and Chief Draughting Officer in the Office of Titles.
- (3) In the case of any other road, the Council may only exercise this power after it has obtained the approval of the Surveyor and Chief Draughting Officer in the Office of Titles.

(It is interesting to note in the LGA 1958 – now repealed – there were two interesting statutory statements relating to the principles to be observed when fixing and alignment and also the import of a declared alignment in regard to properties impacted by the alignment. These details included in the following:-

- *In determining an alignment the proper authority shall endeavour to fix the alignment as nearly as possible in the position of the original alignment, so far as there is evidence of that original alignment, but it may depart from the original alignment if it appears expedient in the circumstances, and, in particular, if it appears that the re-establishment of that original alignment would give rise to the undue disturbance of any permanent carriageway-way, footway or other permanent works or of the occupation of any considerable number of allotments abutting the street*
- *The effect of the declaration is:-*
 - (a) *the alignment shall for all purposes become the boundary between the street and lands abutting on that street;*
 - (b) *all rights, titles and interests etc. as they refer to the street alignment before publication shall to the extent which they are inconsistent with the declared alignment be extinguished i.e. the land abutting the land abutting shall extend to the alignment and no further and where boundaries have to be extended to meet the alignment, each such boundaries is to be extended on its own proper line;*
- *All possessory rights to land forming part of the street as fixed by the alignment shall be extinguished upon publication, and no such right shall at any time thereafter arise.)*

8. Power to narrow or widen roads

- (1) A Council may-
 - (a) narrow or widen a road; and
 - (b) allow a person to make minor repairs or alterations to a building between the old alignment and the new alignment.
- (2) In relation to the establishment of permanent marks, the exercise of the power conferred by subclause (1)(a) is subject to the Survey Co-ordination Act 1958.
- (3) Before starting any work to give effect to the narrowing or widening of a road, the Council must publish a notice in the Government Gazette describing the narrowing or widening.

Other powers not relevant to discussion.

Surveying Act 2004

Under the provisions of the *Surveying Act 2004*, two of the functions of the Surveyor-General are to "set and monitor standards for surveying and survey information" and to "monitor surveying matters affecting the Victorian cadastral system". In accordance with these functions, the Surveyor-General of Victoria issues Practice Directives to provide advice to Licensed Surveyors in the interpretation of relevant aspects of the acts and regulations relating to surveying.

Surveyor-General Consent to Crown Boundary Determinations

A traditional role of the Surveyor-General, now set out the *Surveying Act 2004*, is the formal determination of Government Road alignments and/or Crown land boundaries. The Surveyor-General's consent is primarily sought in situations where insufficient land exists to maintain widths of government roads; where differences exist within parcels such that title dimensions cannot be maintained to adjoining Crown land; or, where parcel boundaries are defined by a relationship to a water feature such as a river, lake or the sea.

Surveyors are advised to seek consent to the position of the alignments of Government roads and other Crown

boundaries prior to plans of subdivision being lodged with Land Registry. The Surveyor-General will not provide consent without receiving a formal request from the surveyor and the provision of supporting documentary evidence. The provision of Consent involves a process similar to that of processing applications under the *Transfer of Land Act 1958* and a similar amount of time to complete.

Consideration of the Width of Roads

From time to time, surveyors adopt alignments without close consideration to, or awareness of, the impact of their decisions on the land within the road "reserve". It appears this situation arises when surveyors fail to either survey an area of sufficient extent or to actually measure the widths of the road.

The introduction of the *Road Management Act 2004*, and the resultant administrative processes, highlights the need for surveyors to measure, record and give due consideration to occupation across and along streets and roads throughout Victoria when determining street and road alignments.

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42. Functions and powers of Surveyor-General

- (1) The Surveyor-General has the following functions—
 - (a) to set and monitor standards for surveying and survey information;
 - (b) **to monitor surveying matters affecting the Victorian cadastral system;**
 - (c) to advise the Minister and the community on surveying matters;
 - (d) to be responsible for the surveying infrastructure of Victoria, including the survey control network, and to prosecute offences against sections 38 and 39 and other offences involving the survey control network;
 - (e) **to be responsible for the correct positioning of Crown boundaries of land, whether or not the land has been alienated from the Crown or subdivided;**
 - (f) to correct defects in Crown descriptions of land, whether or not the land has been alienated from the Crown or subdivided;
 - (g) **if the Surveyor-General considers it appropriate to do so, to resolve disputes over boundary determinations that affect the Victorian cadastre;**
 - (h) **to advise on the position of the State borders;**
 - (i) if the Surveyor-General considers it appropriate to do so, to maintain records of the status of land in Victoria and verify and certify the status of that land;
 - (j) to register Crown survey plans;
 - (k) to prepare, or cause to be prepared, sign or approve plans of survey under any Act;
 - (l) to co-ordinate and provide access to survey and other information relating to land in Victoria;
 - (m) to provide surveying services in respect of government projects and government land dealings;
 - (n) to be a member of the Electoral Boundaries Commission under the **Electoral Boundaries Commission Act 1982**;
 - (o) to certify copies of maps, plans, documents or papers as provided by any Act;
 - (p) to perform any other functions conferred on the Surveyor-General by or under this or any other Act.
- (2) The Surveyor-General has and may exercise all the powers necessary to perform his or her functions.

43. Delegation

The Surveyor-General, by instrument, may delegate to any licensed surveyor, or class of licensed surveyors, employed under Part 3 of the **Public Sector Management and Employment Act 1998** any power or function of the Surveyor-General relating to the certification of plans.

Road Management Act 2004

13. Power to fix boundary of road

- (1) The coordinating road authority may fix the boundary of a road by a notice published in the Government Gazette.
- (2) Subsections (3) and (4) do not apply to VicRoads if the land affected by the fixing of the boundary is freehold land owned by VicRoads.
- (3) **If the road is vested in the Crown, or a body representing the Crown, a coordinating road authority may only exercise this power after it has obtained the approval of the Surveyor-General after he or she has consulted the Surveyor and Chief Draughtsman in the Office of Titles.**
- (4) **In the case of any other road, a coordinating road authority may only exercise this power after it has obtained the approval of the Surveyor and Chief Draughtsman in the Office of Titles.**
- (5) **If a coordinating road authority fixes the boundary of a road under this section, the land affected by the fixing of the boundary becomes part of the road without the need for a declaration.**
- (6) The fixing of a boundary under this section may be included in the notice in which the declaration under section 11 is made.
- (7) A notice under this section is not a subordinate instrument for the purposes of the Interpretation of Legislation Act 1984 .

Survey Boundaries – Property Law Act Part VII
(Extracts taken from the Victorian Law Reform Commission consultation paper relating to
the Review of the Property Law Act 1958 – reproduced with permission)

12.1 Part VII of the Property Law Act preserves reforms originally introduced in 1885 to settle the boundaries of land parcels in cases where the land description in title deeds did not match the Crown survey boundaries marked out on the ground.³⁴³ Discrepancies may arise where there were errors in the original survey, or where survey markers on the ground have been obliterated. Sections 268–270 enable the identity and boundaries of a land parcel to be determined by reference to the survey markings on the ground.

12.2 Section 270 was introduced to deal with excessive measurements in original Crown surveys. It seems that it was at one time the practice for government surveyors to use a survey chain that was over the standard length.³⁴⁴ This led to a problem where the area of the Crown section as marked out on the ground by the survey boundaries exceeded the total of the areas of the individual allotments in the Crown subdivision as described in the title documents. Section 270 provides that where a Crown section has been subdivided by the Crown into allotments of equal area, the excess area is to be distributed equally among the lots.

12.3 The Registrar considers that it would be useful to extend section 270 to two cases that are not presently covered. The first case is where the Crown subdivision of a section creates allotments of unequal area. The second is where the area of the Crown section as marked out on the ground is less than the total areas of the allotments in the Crown subdivision.

Proposal

12.4 We propose that the requirement of equal portions or allotments should be removed, and that the rule should be that the excess area or the shortage in area is distributed among the allotments in proportion to their respective areas.

Should section 270 be extended to enable the distribution of shortages as well as excess of measurement, in proportion to the respective areas of the allotments?

A mistaken improvement relief provision

12.5 Wallace observes that errors in identification of land in Victoria 'are inevitable owing to the nature of the country, the impermanence of survey markers, the obliteration of pegs and fences through bushfires and the inaccuracy of original Crown surveys'.³⁴⁵ Errors can be costly, where they lead to improvements being erected on the wrong land, or across a Crown boundary line.

Mistaken improvers at Common Law

12.6 In the absence of a statutory relief provision, the improvements become fixtures on the land,³⁴⁶ and the mistaken improver generally loses all rights to use or remove them, while the landowner receives an undeserved windfall. This is currently the position in Victoria.

12.7 In the leading Victorian case, *Brand v Chris Building Society*,³⁴⁷ the plaintiff was granted an injunction to stop a builder from demolishing a new home which the builder had erected on the plaintiff's land under an honest mistake as to the identity of the lot. The plaintiff took action as soon as he learned of the construction. The court held that there was no jurisdiction to refuse the injunction on the basis that the plaintiff would be unjustly enriched by retaining the improvement on his land.³⁴⁸

12.8 Although there have been some developments in the law of unjust enrichment since *Brand v Chris Building Society* was decided, it is very unlikely that a mistaken improver who makes unsolicited improvements to the land of another under a mistake would succeed in a claim for compensation on the basis of unjust enrichment or estoppel.³⁴⁹

12.9 In 1973, the Queensland Law Reform Commission considered the mistaken improver problem and the Victorian decision in *Brand v Chris Building Society*. The Commission observed that 'the incidence of building on one allotment in mistake for another is surprisingly large, most practising members of the profession having encountered it on one or more occasions'.³⁵⁰ It concluded that a relief provision was not merely desirable but necessary.³⁵¹

³⁴³ Wallace (1984), above n 4, 317.

³⁴⁴ Robinson (1992), above n 27, 500, citing *Ex parte Rowan* (1883) 9 VLR 286, 287.

³⁴⁵ Wallace (1984), above n 4, 319. ³⁴⁶ See definition of 'land' in s 18 of the Property Law Act 1958 (Vic). ³⁴⁷ *Brand v Chris Building Society* [1957] VR 625.

³⁴⁸ *Brand v Chris Building Society* [1957] VR 625, 263. See also, *Chateau Douglas Hunter Valley Vineyards Ltd v Chateau Douglas Hunter Valley Winery and Cellars Ltd* [1978] ACLD 258.

³⁴⁹ Simone Degeling and Brendon Edgeworth, 'Improvements to Land Belong to Another' in Lyria Bennett Moses et al (eds) *Property and Security: Selected Essays* (2010) 288–90.

³⁵⁰ Queensland Law Reform Commission 16 (1973), above n 27, 105.

³⁵¹ Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing QLRC Rep No 16 (1973)

Mistaken improver provisions

12.10 The idea for the mistaken improver provisions comes from US States and Canadian provinces, many of which have statutes that empower a court to grant discretionary relief to a person who annexes chattels to the land of another or makes lasting improvements in the mistaken belief that the land is his or her property. The statutes were originally enacted to encourage settlement and development of land at a time when land records were

deficient. The statutes are intended to provide relief against the unjust enrichment of a landowner who benefits from another's mistaken expenditure.³⁵²

12.11 Under the Canadian statutes, relief is available both for mistakes of identity (where the improver mistakes someone else's land for his or her own), or for mistakes of title (where the improver wrongly believes that he or she has title to the land).

12.12 The Queensland Law Reform Commission's recommendations led to the enactment of Division 2 of Part 11 of the Property Law Act 1974 (Qld). An application for relief under the Division may be made where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that the land is the person's property or the property of a person on whose behalf the improvement was intended to be made. If the court thinks it is just and equitable that relief should be granted, it has power to make one or more of the following orders:

- that the whole or part of land on which the improvement stands be vested in the applicant;
- that the improvement be removed;
- that compensation be paid to any person; and
- that a person have or give possession of the land or improvement or part thereof for a specified period and on specified terms and conditions.

12.13 The Northern Territory has adopted a provision based on the Queensland model.³⁵³ New Zealand and Western Australia have also enacted relief provisions, but in those jurisdictions the relief is limited to mistakes of identity.³⁵⁴ The provisions apply where a building has been erected by a landowner because of a mistake as to boundaries or the identity of a piece of land.

12.14 The Queensland and Northern Territory provisions are more broadly expressed, and encompass mistakes as to title. An example of a mistake of title occurred in a Queensland case in which a purchaser of land undertook the construction of a home in the mistaken belief that it had acquired a beneficial interest from an intermediate vendor, and lost the land when the vendor defaulted under the head contract.³⁵⁵

Forum

12.15 Jurisdiction to hear applications under a mistaken improver provision could be given to the Real Property List of the Victorian Civil and Administrative Tribunal (VCAT). The Property List of VCAT already has jurisdiction under Part IV of the Act (co-owned land and goods), and for that purpose it must be constituted by or include a member who, in the opinion of the President, has knowledge or experience in property matters.

12.16 Alternatively or additionally, jurisdiction could be given to the Supreme and County Courts, or to the Magistrates' Court as well. The shared jurisdiction model would be consistent with the Government's Justice Statement 1, which advocates the resolution of matters at the lowest level in order to reduce costs and improve access to justice.³⁵⁶ It is likely that relatively few applications would fall within the jurisdictional limit of the Magistrates' Court, which is currently \$100,000 in civil matters.

Should Victoria adopt a mistaken improver relief provision? If so, should it encompass mistakes as to identity as well as mistakes as to title?

If Victoria adopts a mistaken improver provision, which court, courts or tribunal should have jurisdiction?

A building encroachment relief provision

12.17 As land is becoming more valuable and more densely occupied, disputes over encroachment of buildings, fences, footings and overhangs across parcel boundaries are increasing, and cause disputes between neighbours.

12.18 An 'encroachment' means a building that is partly on one piece of land and partly on another piece of land, and crosses a boundary marked out on the Crown survey. It may include an overhang or footings.

12.19 Building encroachments may arise through a landowner's deliberate or careless failure to check the location of boundaries before construction. They may also occur through no fault on the part of the landowner whose building encroaches onto neighbouring land. The encroachment may be due to an honest mistake by the current landowner, by the landowner's predecessor, by a builder, or even a common mistake by both the affected landowners about where the Crown boundary lies.³⁵⁷ Errors in Crown surveys and displacement of survey markers can also contribute to mistakes by landowners and builders.

Provisions for determining and adjusting

12.20 A related type of dispute arises where a dividing fence or wall must be constructed or replaced, and the location and position of the boundary is unclear or disputed. There are several provisions under which the location of a disputed boundary can be determined.

³⁵² Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33(1) The University of Western Australia Law Review 31 40-42.

³⁵³ Encroachment of Buildings Act 1982 (NT) Part 11.

³⁵⁴ Property Law Act 1952 (NZ) s 129A; Property Law Act 1969 (WA) s 123.

³⁵⁵ Ex parte Karynette Pty Ltd (1982) 2 Qd R 211.

³⁵⁶ Hansard, Assembly, 2 Sept 2009, 2984 (The Hon Mr Batchelor, MLA).

³⁵⁷ O'Connor (2006), above n 352; Pamela O'Connor, 'An Adjudication Rule for Encroachment Disputes: Adverse Possession or a Building Encroachment Statute?' (2007) 4 (Modern Studies in Property Law 197.

12.21 First, there is provision in section 7 of the Fences Act 1968 (Fences Act) for the Magistrates' Court to determine the position of a dividing fence where the relevant landowners cannot agree, or to appoint an arbitrator to determine the matter. Section 5 of the Fences Act provides for 'the nearest magistrate' to determine the location of dividing fences, and to award compensation for loss of occupation, but the provision applies only where a waterway forms a natural boundary. Claims by adverse possession are excluded in relation to land adjacent to

water boundaries only.³⁵⁸

12.22 Second, under section 271 of the Property Law Act, the Registrar is empowered to shift a boundary from its original position in the Crown survey. The Registrar's power under section 5 is of limited application, and the requirements of the section must be strictly complied with.³⁵⁹ The power may be exercised where:

- the original survey marks have been removed or obliterated, and
- for a period of at least 15 years the owners and occupiers of both land parcels have regarded a fence, wall or other building as marking the original boundary.

12.23 Third, a landowner who occupies adjacent land under a genuine mistake about the location of the boundary can apply to the Registrar under section 99 of the Transfer of Land Act for amendment of the land description in the register. The Registrar can amend the boundaries, area or position if the registered description is patently in error, or if it differs from the land as 'actually and bona fide occupied by [the applicant] and purporting to be so occupied under the title'.³⁶⁰ The Registrar must first give notice to every person with an interest in the land, and may proceed to make the amendment only if nobody lodges a caveat within a specified time.³⁶¹

Boundary disputes under the current legislation

12.24 Apart from the limited provisions summarised above, disputes about encroaching buildings and the location of dividing fences are regulated by the law of trespass and the law of adverse possession.

12.25 A landowner is entitled for the first 15 years to require the neighbour to remove an encroaching fence, wall or other structure erected without the landowner's permission, and may sue in trespass for damages or an injunction. The court has a discretion to refuse an injunction and award damages instead, but such an order does not authorise continuation of the encroachment.

12.26 The right to sue arises when the encroachment or trespass commences but expires if legal proceedings are not commenced, and the land is not recovered, before the limitation period expires. In most cases the limitation period is 15 years.³⁶² The running of the limitation period is unaffected by changes in ownership of the properties.³⁶³

12.27 So long as the trespass continues, the encroaching neighbour may be deemed to be in adverse possession of the boundary strip or portion of land on which the encroachment extends. Fencing in or building on part of a neighbour's land is strong evidence of adverse possession, but all relevant circumstances must be evaluated.³⁶⁴

12.28 Once the limitation period expires, the landowner's title to the portion of land affected by the encroachment is automatically extinguished, without notice or compensation.³⁶⁵ The adverse possessor can subsequently apply to the Registrar for an order vesting title to the land portion in the applicant, and can have the portion consolidated with his or her adjacent land.³⁶⁶

Problems with the adverse possession rule in boundary disputes

12.29 The law of trespass and adverse possession as explained above applies to land upon which a neighbour's building encroaches, and also to portions of land enclosed with a neighbour's land as a result of the misplacement of a dividing fence off-boundary.

12.30 In 1998, the Law Reform Committee of the Parliament of Victoria reported on its review of the Fences Act.³⁶⁷ Although the Committee's terms of reference did not extend to the rule of adverse possession in disputes relating to the placement of fences, the Committee reported a high level of concern expressed in submissions about the perceived unfairness in the operation of the rule. The Committee said:³⁶⁸

Highly charged emotions may be generated in some fencing disputes by the perception that one neighbour has 'deliberately' or 'fraudulently' positioned the fence to his neighbour's disadvantage and ought not to benefit from such conduct. Conversely, anger may arise from the fact that a mistake in the location of a fence, of which neither party was aware, should become the basis for a claim to ownership of land that forms part of one party's title.

It became apparent to the Committee in the course of its Inquiry, not only that members of the public felt threatened by the law of adverse possession and the potentially high costs of contesting a neighbour's claim, but that there is considerable confusion as to how the law applies in certain common situations involving off boundary fences. This is understandable given that the legal principles that are relevant in such cases are complex and highly technical and not always easy to apply to the facts of a given case.

³⁵⁸ Fences Act 1988 (Vic) s 5(4); compare this with section 7 which does not exclude adverse possession.

³⁵⁹ Wallace (1984), above n 4, 318.

³⁶⁰ Transfer of Land Act 1958 (Vic) s 99(1) (a).

³⁶¹ Transfer of Land Act 1958 (Vic) s 99(2). ³⁶² See Division 3 of Part 1 of the Limitation of Actions Act 1958 (Vic).

³⁶³ Transfer of Land Act 1958 s 42(2)(b); Limitation of Actions Act 1958 s 8; *Mulcahy v Curramore Pty Ltd* [1974] 1 NSWLR 737, 746.

³⁶⁴ Enclosure of land by fencing is not always sufficient to prove adverse possession. See *Bradbrook* (2007), above n 32, 684–95.

³⁶⁵ Limitation of Actions Act 1958 (Vic) ss 8, 18.

12.31 The Committee recommended that the desirability of introducing encroachment of buildings provisions into Victorian law be further investigated.³⁶⁹

Building encroachment laws in other 12.32 Five Australian jurisdictions and New Zealand have special legislation dealing with encroachment by buildings, of which four are based on the Encroachment of Buildings Act 1922 (NSW).³⁷⁰ The Canadian provinces of Manitoba, British Columbia and Nova Scotia also have relief provisions for building encroachments.³⁷¹

12.33 The New South Wales Act confers jurisdiction on the Land and Environment Court to grant or refuse such relief as it deems proper in the circumstances, including an order for the removal of the encroachment, the regularisation of the encroachment through an order for a transfer, lease or easement of the affected land portion, and payment of compensation.³⁷² An application may be made by either the landowner whose land is encroached

upon or the owner of the encroaching structure.³⁷³

12.34 The Act sets out a range of discretionary factors to be considered by the court in determining an application, including:³⁷⁴

- the situation and value of the subject land;
- the nature and extent of the encroachment;
- the character of the encroaching building, and the purposes for which it may be used;
- the loss and damage which has been or will be incurred by the adjacent owner;
- the loss and damage which would be incurred by the encroaching owner if he or she were required to remove the encroachment; and
- the circumstances in which the encroachment was made.

12.35 In 1973, the Queensland Law Reform Commission reviewed the operation of its encroachment of buildings provision, which was based on the New South Wales provision and first enacted in 1955. The Commission reported that the provision 'worked reasonably well, and few practical problems seem to have arisen in its application and enforcement'.³⁷⁵

Can building encroachment be dealt with under a mistaken improver provision?

12.36 While Ontario has a single relief provision for both mistaken improvers and building encroachments, this arrangement is not ideal.³⁷⁶ The two types of provision have a different purpose and a different scope of application. A mistaken improver need not be the owner or occupier of neighbouring land, and the mistake may relate to the identity of a land parcel or title to a parcel. For example, the applicant for relief may be a builder who has erected a home on the wrong lot, like the builder in *Brand v Chris Building Society*. The purpose of a mistaken improver provision is to prevent unjust enrichment at the improver's expense.

12.37 Building encroachment provisions apply where one neighbour has encroached onto a part of a neighbouring land parcel. The quantum of land affected is typically very small, and the loss resulting from removal of the building may be high. The building is usually of no economic benefit to the owner of the land on which it stands, so there is no unjust enrichment. The object of the provisions is to allow a court to give relief to the encroaching neighbour on just terms, while discouraging deliberate or careless encroachment.³⁷⁷

Building encroachment and adverse

12.38 The jurisdictions which have enacted a building encroachment provision usually do not allow the encroaching owner to acquire title to the portion of land or boundary strip by adverse possession. New South Wales allows adverse possession claims as to whole parcels only.³⁷⁸ Queensland allows applications to register a title acquired by adverse possession but not as to 'encroachments'.³⁷⁹ Tasmania does not allow adverse possession claims that would result in the creation or continuation of 'sub-minimum lots' without the consent of the council.³⁸⁰ New Zealand excludes claims made because a fence or other boundary feature is not on the true boundary.³⁸¹ The Northern Territory does not allow acquisition of title to whole or part parcels by any period of adverse possession.³⁸²

12.39 The overall result in those jurisdictions is that a court may in an appropriate case order an adjustment of property rights where the subject land has been built upon. Where the land has been merely enclosed with and used as part of adjacent land for any period of time, the boundary indicated by the Crown survey prevails.

366 Transfer of Land Act 1958 (Vic) Part IV, Div 5.

367 Parliament of Victoria, Law Reform Committee, Review of the Fences Act 1968: Report (1998).

368 Parliament of Victoria, Law Reform Committee, Review of the Fences Act 1968: Report (1998) para 6.5.

369 Parliament of Victoria, Law Reform Committee, Review of the Fences Act 1968: Report (1998) para 5.47 and rec 65.

370 Property Law Act 1974 (Qld) Part 11, Div 1; Encroachment of Buildings Act 1982 (NT); Property Law Act 1969 (WA) s 122; Encroachments Act 1944 (SA); Property Law Act 1952 (NZ) s 129.

371 British Columbia: Property Law Act, RSBC 1996, cl 377, s 36; Manitoba: Law of Property Act, CCSM, cl L90, s 28; Nova Scotia: Land Registration Act, S.N.S.2001, cl 6, s 76(3)

372 Encroachment of Buildings Act 1922 (NSW) s 3(2).

373 Encroachment of Buildings Act 1922 (NSW) s 3(1).

374 Encroachment of Buildings Act 1922 (NSW) s 3(3).

375 Queensland Law Reform Commission 16 (1973), above n 27, 104.

376 Ontario: Conveyancing and Law of Property Act RSO 1990, cl C34, s 37(1).

377 O'Connor (2006), above n 352, 62. 378 Real Property Act 1900 (NSW) s 45D. 379 Land Title Act 1994 (Qld) s 98.

380 Land Titles Act 1980 (Tas) s 138Y. These are lots which do not mean the planning requirements for a lot in an urban or country building area: O'Connor (2006), above n 352, 45.

381 Land Transfer Amendment Act 1963 (NZ) s 21(e).

382 Land Title Act 2000 (NT) s 98.

12.40 Western Australia is the only jurisdiction which has both a building encroachment provision and also permits acquisition of title by adverse possession. There has been little judicial consideration of the relationship between the provisions.³⁸³ If the encroaching owner is found to be in adverse possession, it appears that the encroachment relief jurisdiction can be exercised only in the period from the commencement of the encroachment until the expiry of the limitation period. Once the limitation period expires, the building owner has the best title to the subject land and the building is no longer an encroachment.

12.41 The Australian Capital Territory does not allow acquisition of title by adverse possession.³⁸⁴ South Australia permits the encroaching owner to apply for title to the portion of land on the ground of adverse possession for a specified period, but the application must be refused if the registered owner objects.³⁸⁵ In practice, this means that the registered owner can veto the application.

12.42 Victoria is the last and only jurisdiction in Australia that relies solely on adverse possession and the

Limitation of Actions Act 1958 (Limitation of Actions Act) to resolve disputes over misplacement of dividing fences and encroachments by buildings.

12.43 There are benefits as well as detriments in retaining the limitation period for actions to recover part parcels as well as whole parcels. It enables purchasers to some extent to assume that the boundaries of the land as physically enclosed and occupied are identical to the Crown survey boundaries, and to save the cost of a re-survey each time the land is purchased.³⁸³ If fences and other boundary markers have been in their current position for at least 15 years, it is likely that any claim by an adjacent landowner for recovery of land is barred by the Limitation of Actions Act.

12.44 Our proposal does not affect the current rules under which title to a whole parcel can be acquired by adverse possession for the limitation period. All Australian States have found it necessary to allow claims based on adverse possession, to deal with the problem of abandoned land and missing owners. As already noted, a number of jurisdictions retain the rule of adverse possession but do not apply it to encroachments. These jurisdictions recognise that encroachments and misplaced dividing fences raise different issues and require separate provisions. We propose that the wider application of the rule of adverse possession should be examined as part of the review of the Transfer of Land Act in the second stage of the property law reference.

12.45 The main options for dealing with part-parcel adverse possession claims, if a building encroachment provision is introduced, can be summarised as follows:

1. Leave the Limitation of Actions Act Part 1, Division 3 unamended. As in Western Australia, the relief provision would generally operate only for the limitation period. Fifteen years after the encroachment commenced, the title of the landowner to the portion of land on which the encroachment extends would be extinguished, and the neighbour in occupation of the building would have the best title to the portion. The building would no longer be an 'encroachment', as it would extend over land to which the building owner has acquired title by adverse possession.
2. Exclude the operation of the limitation provisions in relation to any portion of land over which an encroachment extends. The limitation provisions would continue to apply to a portion of the plaintiff's land on which no encroachment extends. Title could still be acquired by adverse possession where a portion of land has for at least 15 years been enclosed with adjacent land owned or occupied by a neighbour who possesses and uses it as part of his or her land.
3. Exclude the operation of the limitation provisions for actions against the owner or occupier of land adjacent to the plaintiff's land, relating to a portion of the plaintiff's land that is adjacent to the property boundary.
4. Allow the limitation provisions to operate only in relation to whole parcels of land, as in New South Wales.

12.46 Under each of the above options, the provisions in sections 99 and 271 of the Transfer of Land Act which empower the Registrar to adjust boundaries would still apply.³⁸⁷ The provision in section 7 of the Fences Act for determination of a boundary by a magistrate,³⁸⁸ would continue to apply, subject to the outcome of a review of that Act announced in the Attorney General's Justice Statement 2.³⁸⁹

Transitional arrangements

12.47 If options 2, 3 or 4 in para 12.45 are adopted, there would need to be a transitional provision. Landowners who have acquired titles at common law by adverse possession for the limitation period should be given a reasonable time to apply to the Registrar for a vesting order under Section 60 of the Transfer of Land Act.

³⁸³ In *Executive Seminars Pty Ltd v Peck* [2001] WASC 229 an encroaching owner claimed land on the basis of adverse possession and alternatively sought relief under the encroachment provision. The requirements for adverse possession were not made out on the facts.

³⁸⁴ Land Titles Act 1925 (ACT) s 198.

³⁸⁵ Real Property Act 1888 (SA) s 80F.

³⁸⁶ Malcolm Park and Ian Williamson, 'The Need to Provide for Boundary Adjustments in a Registered Title Land System' (2003) 48(Australian Surveyor 50–51.

³⁸⁷ See paras 12.22, 12.23.

³⁸⁸ See para 12.21.

³⁸⁹ Department of Justice [Victoria],

Attorney General's Justice Statement 2: The Next Chapter (2008), 16.

12.48 There is a further question as to whether the legislation should preserve the 'immature' possessory rights of persons who have been in adverse possession for less than the limitation period. The effect of preserving the rights would be that, if the landowner fails to institute legal proceedings or recover the portion of land, a limitation period which had commenced before the amendment would continue to run in favour of the person in adverse possession.

12.49 The legislative practice in Victoria has been not to preserve all immature possessory rights when restricting the scope of the limitation provisions. The Limitation of Actions (Adverse Possession) Act 2004 section 3, inserted section 7B into the Limitation of Actions Act, which exempts land owned by a council from claims of adverse possession. Section 7B(2) allowed an application to the Registrar to be made for up to 12 months after section 7B commenced, where the adverse possession was for more than 15 years. Otherwise, the amending Act did not preserve immature possessory rights acquired by adverse possession for less than 15 years. Amending Acts which inserted other exemptions from adverse possession, sections 7A, 7AB and 7C, did not preserve immature possessory rights.

Forum

12.50 If a building encroachment provision is added to the Act, the question arises as to which court or courts or tribunal is the most appropriate forum to hear the applications. The options are the same as for the mistaken

improver provision (see paras 12.15, 12.16).

12.51 The Magistrates' Court already deals with trespass claims arising out of building encroachments and misplaced dividing fences. If an encroachment relief provision is introduced, a defendant to an action in trespass may wish to apply for relief under the building encroachment provision. It would be convenient to allow the court to deal with both claims if the value of the portion of land under encroachment is within the court's jurisdictional limit. Otherwise the matter would have to be removed into the County or Supreme Court, which would add to the costs.

12.52 The Magistrates' Court requires parties to contested matters to submit the dispute to an alternative dispute resolution process before proceeding to a defended hearing. It is able to refer parties in all areas of Victoria to an appropriate alternative dispute resolution service.

Summary questions

Should section 270 be extended to enable the distribution of shortages, as well as excess of measurement, in proportion to the respective areas of the allotments?

Should Victoria adopt a mistaken improver relief provision? If so, should it encompass mistakes as to identity as well as mistakes as to title?

If Victoria adopts a mistaken improver provision, which court, courts or tribunal should have jurisdiction?

Should Victoria have a discretionary relief provision for building encroachments?

Should the limitation period for recovery of land continue to apply in relation to portions of land adjacent to a property boundary?

If the limitation provisions are amended, what provision should be made for persons in adverse possession of portions of land at the time the amendments come into force?

If Victoria adopts a building encroachment provision, which court or courts or tribunal should have jurisdiction?

Summary responses in regard to Part VII

Note: All provisions of this Part are expressed to apply to land under the Transfer of Land Act - see s 273

267 *Definition Retain.*

268 *Crown survey boundaries as marked on the ground to be deemed the true boundaries - Retain.*

269 *Crown grant or lease to be deemed to convey the land within the survey boundaries - Retain.*

270 *As to aliquot parts of Crown sections having access to area - Retain and amend. The requirement of equal portions or allotments should be removed, and the rule should be that the excess area or the shortage in area is distributed among the allotments in proportion to their respective areas. - Refer to Chapter 12*

271 *How Crown survey boundaries may be proved in the absence of survey marks - Retain. Refer to Chapter 12*

272 *Margin of error allowed in description of boundaries - Retain. The section allows a little latitude in the measurements shown on documents of title.68*

273 *Provisions of Part to apply to land under general law and Transfer of Land Act 1958- Retain and incorporate into general provision dealing with the application of the Act.*

New *Mistaken improver and building encroachment - Insert provisions for mistaken improver and building encroachment relief. Provisions to apply to registered land.*