

AN OVERVIEW OF ADVERSE POSSESSION IN AUSTRALIA WITHIN THE FRAMEWORK OF THE TORRENS SYSTEM OF LAND REGISTRATION AND COMMENT ON A RELATED COURT CASE.

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Abstract

In October 2008, a decision was made in the Land Court of Queensland regarding an appeal against an annual valuation of land pursuant to the *Valuation of Land Act 1944* (Qld). Aside from the fundamental issue regarding valuation of the subject land, the case, *Tardent v Department of Natural Resources, Mines and Water* [2008] QLC also raised issues regarding adverse possession and access by encroachment on land gazetted as a nature conservation reserve. Given that each state and territory adopted the Torrens system of land registration and within the framework of legislation for each state and territory a degree of uniformity of solution could be expected? Surprisingly if the scenario was applied to the other states and territories a wide variety of solutions is possible depending upon individual state legislation. The solutions range from easement creation to adverse possession to revocation of nature conservation reserve which emphasises the need for property law reform within the states and territories. The aim of this paper is to examine state legislation to determine the likely most probable solution for the states and territories given the elements of the case and the conclusion will highlight the desire for standardised state legislation and operation of the Torrens system of land registration.

Introduction to adverse possession

Adverse possession is a doctrine of land law whereby a person either occupying or in possession of land legally owned by another may acquire ownership and title to the occupied land. There is no payment for either purchase or compensation for dispossession unless so ordered by judgment in a court of law and the application of adverse possession varies considerably across jurisdictions. For a claim for adverse possession to succeed there are a number of common law requirements that need to be met, typically the following common law elements are required:

- Actual possession, such that the legal owner has a cause of action for trespass. The occupier must act as though they own the property and use the land;
- Continuous and uninterrupted, possession must represent continuous uninterrupted occupation and use of the land. Occasional activity interspersed by periods of inactivity fails the test of continuous and uninterrupted possession;
- Hostile, possession must be adverse to the interests of the legal owner and without permission of the legal owner;
- Exclusive, possess the land to the exclusion of the legal owner and not share possession with the legal owner;

- Open and notorious, use the land in a manner so as to place the legal owner on notice that a trespasser is in possession; and
- Time, a statute of limitations applies for a definite period of time which outlines the limitation of actions that can be taken. For adverse possession this represents the time period for actual, continuous, hostile, exclusive and open possession by the occupier and also represents the time period by which the legal owner can legally dispossess the trespasser. Around the globe, the required time period can vary from as little as 3 years to as many as 30 years or more.

The doctrine of adverse possession primarily grew out of the need to award title to land through occupation and use of land particularly unregistered and unoccupied land and also provided a mechanism to restrict the actions of dispossessed owners by applying a statutory time period for reclamation of possession.

Application of adverse possession across the states and territories

Land title registration schemes exist to create and promote certainty of land title. Critics of adverse possession point out that possessory title actively encourages a deliberate trespass and entry onto land owned by another to take possession, with the knowledge that they could be rewarded with land title as a result of a wrong doing. Throughout Australia, as parcels of land became registered title land by the Torrens system of title registration, conflict could be created in the cornerstone concept of indefeasible title between registration of title by the legal owner as per details recorded in the register as opposed to possessory title where title is gained by occupation of the land. As stated by Park (2003), Torrens himself recognised the need to enable adverse possession as a means to obtaining title to land primarily as an equitable reward to occupants of land whom contributed significant resources to the development of the land in question. The law has sought to balance competing land interests through the doctrine of adverse possession. The inconsistency of logic and conflict between protecting the paramountcy of interests and indefeasible title of the registered owner as against title being obtained by the mere act of possession of land, led to differing interpretations and application of adverse possession across Australian states and territories. The issue of adverse possession received its most prominent national exposure through a decision of the Tasmanian Supreme Court to uphold title by adverse possession in *Woodward v Wesley Hazell* [1994] TASSC. Some of the distinguishing features of adverse possession across Australia lay with whole-parcel and part-parcel claims for adverse possession and the issue of encroachment.

South Australia

In the birthplace of the Torrens system of title registration, adverse possession is not specifically prohibited over registered land but title is unlikely to be successfully claimed if the legal owner objects.

The requirements for application are set forth in the *Real Property Act 1886* where s.251 provides that no title can be made by adverse possession except as provided in Part 7A of the Act. Amendments to the Act made in 1945 by the introduction of Part 7A - Title by possession of land under this Act ensure that claims for adverse possession are a rarity. Pursuant to s.80E of the Act, the Registrar-General is required to notify any person whom may have an estate or interest in land where a claim for

adverse possession has been lodged. The notice allows time for a person claiming an estate or interest to lodge a caveat forbidding the granting of the application. If the Registrar-General is satisfied the caveator is the registered proprietor then the application for adverse possession will be refused.

South Australia does not expressly preclude an application for part-parcel by adverse possession however the right to veto by the registered proprietor ensures that successful adverse possession claims for either whole-parcel or part-parcel lots are a rarity. However, South Australia utilises statutory encroachment legislation to deal with encroachment issues pursuant to *Encroachments Act 1944* s.4 Application to court in respect of encroachments whereby an either an adjacent owner or an encroaching owner can apply to the court for relief in respect of an encroachment.

Victoria

The state of Victoria allows application for adverse possession and the requirements for application are set forth in the *Transfer of Land Act 1958* where s.60 requires the Registrar where a claim for adverse possession has been lodged, to notify any person whom may have an estate or interest in land. The notice allows time for a person claiming an estate or interest to lodge a caveat forbidding the granting of the application. Unlike South Australia, there is no refusal of the application if the caveator expresses such an intention to forbid the application, consequently the Registrar may grant the application making an order vesting the land to the applicant if satisfied that the applicant has acquired a title by possession to the land.

Victoria does not expressly preclude an application for part-parcel by adverse possession but s.272 Margin of error allowed in description of boundaries of the *Property Law Act 1958*, acts as a boundary repair system. Victoria has utilised this section to define allowable survey error limit differences between boundary dimensions as stated and the actual dimensions of such boundaries as found by measurement on the ground. If the difference does not exceed e.g 50 millimetres for a boundary line irrespective of length where the length does not exceed 40.3 metres, no action shall be brought by reason or in respect of such difference. As a consequence in a state where statutory encroachments are not permitted, this section has allowed part-parcel adverse possession claims outside the error limits to be commonplace in Victoria. A search of the Australasian Legal Information Institute database identifies sixteen relevant adverse possession cases dating back to 1995 in the Supreme Court of Victoria involving part-parcel lots, e.g. *Malter v Procopets* [1998] VSC, *Kierford Ridge Pty Ltd v Ward* [2005] VSC, *Patsios v Glavinic* [2006] VSC, *Abbatangelo v Whittlesea City Council* [2007] VSC and *Koadlow v Bolland* [1995] VSC.

The use of part-parcel adverse possession as a boundary repair mechanism has its faults, particularly for a trifling error application and the issue of cost versus benefit. In one of the cases there was a suggestion that if the ‘palings were on the other side of the fence’ then the survey would be within the allowable limit and Justice Smith in summation in *Patsios v Glavinic* [2006] VSC stated ‘this was a case in which the costs, if the case was fought, were always going to grossly exceed any value of the land in question’, unfortunately such a scenario is a common-place occurrence.

New South Wales

The state of New South Wales allows application for adverse possession and the requirements for application are set forth in the *Real Property Act 1900* where s.45 provides that persons in possession may apply to the Registrar-General to be recorded in the register as the proprietor of that estate or interest in the land. The unusual aspect of New South Wales legislation lay in the drafted legalese for part-parcel applications that effectively limits part-parcel applications to certain situations only and most importantly the limitation action time period commences only against the registered proprietor as opposed to a chain of registered owners in other states e.g. Victoria. In addition, New South Wales utilises statutory encroachment legislation to deal with encroachment issues pursuant to *Encroachment of Buildings Act 1922* s.3 Encroachments whereby either an adjacent owner or an encroaching owner may apply to the court for relief in respect of an encroachment.

The interest or estate of a registered proprietor is protected by the *Real Property Act 1900* s.45D Application for title by possession where a possessory application may not be made in respect of an estate or interest in land if:

The registered proprietor of that or any other estate or interest in the land became so registered without fraud and for valuable consideration, and the whole of the period of adverse possession that would be claimed in the application if it were lodged would not have occurred after that proprietor became so registered....

This limits adverse possession to applying to non-Torrens title land. Indefeasible title for the current registered proprietor against possessory title application is limited if the limitation period incorporates time accrued against previous registered proprietors.

Queensland

Queensland allows application for adverse possession and the requirements for application are set forth in s.98 Application by adverse possessor and s.108 Registering adverse possessor as owner of the *Land Title Act 1994*. S.108 of the Act provides that 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 the lot. A unique feature of the drafting of this legislation lay in s.98 of the Act where an application may not be made if the application relates to only a part of a lot and relates to possession arising out of an encroachment. An encroachment is defined as including the use of a wall, fence, hedge, ditch, garden bed or other way of marking the boundary between lots on a registered plan. The legislation states application can not be made for part of a lot but the Registrar can register an applicant as owner of part of a lot.

The confusion in drafting of the legislation led to an attempt to circumvent the intent of the legislation in *Sherrard & Ors v Registrar of Titles & Anor* [2003] QSC whereby an application was made for the whole of a lot but in reality was seeking possession of part of a lot (a fenced one metre wide strip of land). The Registrar initially rejected the application on the basis, '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.’

The applicants challenged the Registrar’s approach on the basis that it was legally wrong. However Chief Justice de Jersey dismissed the application in summary stating, ‘division five contemplates an application in respect of the whole of an existing registered lot as ordinarily understood, excluding an application in respect of part only of a lot; and to the extent to which s.108 envisages the possible outcome of registration over less than the whole, the legislature contemplated the situation where the evidence did not establish the asserted adverse possession of the whole.’ Chief Justice de Jersey agreed with the approach taken by the Registrar and ‘the application did not fall within the scope of s 99(1) of the *Land Title Act 1994* in that they concerned only part of a lot within the meaning of that provision.’

Issues of encroachment in Queensland are dealt with by the provisions of s.184 Application for relief in respect of encroachments of the *Property Law Act 1974* where either an adjacent owner or an encroaching owner may apply to the court for relief with respect to any encroachment. The application of statutory encroachment as a mechanism to solve possessory title issues is a method to solve boundary repair issues whereby the affected owner may be entitled to compensation pursuant to s.185 of the Act and the possessory owner may gain title or an interest in the land.

Tasmania

Tasmania received the most widespread media coverage of an adverse possession case in Australia - *Woodward v. Wesley Hazell* [1994] TASSC. The result of this decision caused substantial change to the application of adverse possession in Tasmania. Amendments in 1997 were similar to South Australian legislation although not worded as strongly, by allowing the owner to object to an application for adverse possession. Subsequent amendments effected in 2001 to the *Land Titles Act 1980* tempered the 1997 amendments. S.138 of the Act in order to validate the requirements for title by possession, the Recorder must consider whether the owner actually knew whether the possessor was occupying the land or not. In *Woodward v. Wesley Hazell* [1994] TASSC the owner claimed that the possessor occupied the land unbeknown to the owner. Another feature is the requirement for the applicant to produce evidence from at least one other person in support of the application.

A significant point of difference with the other states lies with the inclusion of s.138W. Registered proprietor to hold land on trust whereby the estate of a registered proprietor is not extinguished by the *Limitation Act 1974*, and the registered proprietor of the estate is taken to hold that estate in trust for the person who is claiming to acquire possession. Consequently, a person who claims that the registered proprietor of an estate in registered land holds that estate in trust, may apply to the Recorder for an order vesting the legal estate of the land. The changes to the *Land Titles Act 1980* are couched in confusion between registered and unregistered land. The issue of beneficial ownership (right to use land in trust) whilst the registered proprietor retains title and holds the estate in trust for the claimed possessor, can be construed as hedging your bets when unsure of the outcome.

Tasmania does not allow part-parcel adverse possession claims through the application of s.138Y. Avoidance of sub-minimum lots whereby a sub-minimum lot are qualified by the provisions contained in s.109 of the *Local Government (Building and Miscellaneous Provisions) Act 1993*. The application of this provision would not have disqualified the possessory title gained in *Woodward v. Wesley Hazell* [1994] TASSC.

Western Australia

Western Australia allows application for adverse possession and the requirements for application are set forth in the *Limitation Act 2005* and the *Transfer of Land Act 1893*. The *Limitation Act 2005* specifies that the cause of action to recover land does not accrue until the land is in adverse possession as per Division 2 - Accrual of certain causes of action to recover land. The *Transfer of Land Act 1893* s.222 Person claiming title under statute of limitations may apply to be registered states any person claiming to have acquired an estate in land under a statute of limitations, may make application to be registered as proprietor and furnish such evidence as the Commissioner may deem necessary to prove title. A caveat against the application can be made pursuant to s.223A of the Act to allow time for title to be determined.

Similar to Victoria, Western Australia does not expressly preclude an application for part-parcel by adverse possession. However, similar to Queensland, Western Australia allows statutory encroachment. Provision for encroachment is made in the *Property Law Act 1969* pursuant to s.122 Power of Court to grant special relief in cases of encroachment where if it is proved to the satisfaction of the Court that the encroachment was not intentional and did not arise from gross negligence, may vest an estate in any part of the adjoining land and the payment by the encroaching owner of any compensation. In *Duarte v. Denby* [2007] WASC both the issues of encroachment relief and part-parcel adverse possession counter-claim were dealt with over an approximate 200mm wide strip of land, which highlights the depth of animosity created by land disputes over a piece of land valued at a mere \$3,000.

The territories - Australian Capital Territory and Northern Territory

The ACT does not permit the acquisition of title by possession to registered land adverse to the registered owner pursuant to the *Land Titles Act 1925*. S.69 Statute of limitations not to run against land under Act states title to land adverse to the title of the registered proprietor shall not be acquired by any length of possession by virtue of statute of limitation nor shall the title of a registered proprietor be extinguished by the operation of any such statute. This was upheld in *Individual Homes Pty Limited (In Liquidation) v. Anthony Gilbert Martin and Sue Dolores Martin* [1999] ACTASSC.

The Northern Territory does not permit the acquisition of title by possession to registered land adverse to the registered owner pursuant to the *Land Title Act 2000*, s.198 No title by adverse possession whereby a person does not acquire title to land under this Act by any length of adverse possession and the right of a registered owner of land to recover possession of the land is not barred by any length of adverse possession. Unlike the ACT, the Northern Territory allows statutory encroachment, similar to Queensland and Western Australia. Provision for relief in respect of encroachment lays with the *Encroachment of Builassess to 677 Tomewin Mountain Rddings Act 1982*, s.6 Powers of Court on application for relief whereby the Court may

make such order as it thinks fit with respect to the payment of compensation and the grant of any estate or interest to the encroaching owner.

Background to *Tardent v Department of Natural Resources, Mines and Water* [2008] QLC

In October 2008, a hearing and decision of the Queensland Land Court raised some interesting aspects in land law despite being an appeal relating to land valuation.

A property in the Gold Coast hinterland encroached upon a neighbouring property (Nicoll Scrub national park) with approximately 53 square metres of concrete driveway that provides access to the property off Tomewin Mountain Road which generally runs north/south and is a steep winding two lane bitumen sealed carriageway with earth verges. The road frontage for the land in question is approximately 290 metres in length. The land slopes very steeply upward in an easterly direction from the road and is heavily timbered along the road frontage. Due to the nature of the topography of road and land, the natural position of an access point for the land would be as close as possible to the south-western corner of the land. Consequently an internal concrete access road was constructed near the south-western corner. The access was negotiated with the Gold Coast City Council in the mid 1980's. Unfortunately the vehicular access point to the land, that is where it exits from road to private property, in fact crosses and is located on adjoining land under the control of the Environmental Protection Agency of Queensland (EPA) - Nicoll Scrub national park. According to the appellant, the only sensible and practical access to the land is by way of the present encroachment, due to the prohibitive cost of approximately \$300,000 to construct an alternative access. Consequently the owner was seeking an outcome that would maximise the sale price at minimal cost to the landholder and would depend upon the goodwill of the EPA. The EPA was presented with this data and after deliberation insisted the owner seek alternative access and remove the encroachment.

Fig. 1: Image of access to 677 Tomewin Mountain Road (Source: Gold Coast City Council)



The appeal against an annual valuation of land under the *Valuation of Land Act 1944* was allowed and in orders made by the Member of the Court, Mr R.S Jones, the annual valuation was reduced substantially. Furthermore, regarding the future sale of the lot benefitted by the access, the Member of the Land Court Mr R.S Jones found:

In the circumstances of this appeal, the evidence and the conclusions I have reached...lead me to decide that a prudent vendor and prudent purchaser would settle on a price.....that involves a discount of about forty five percent of the valuation.....In my opinion, such a discount would be a fair compromise between the prudent purchaser seeking to minimise his risk of exposure on the purchase and the prudent vendor seeking to maximise his price, while having to recognise the very real problems associated with the existing access arrangements. In this context I do not accept.....evidence to the effect that land without legal vehicular access would be impossible to sell at any price.

The owner will have difficulty in selling the property unless the owner is willing to sell for a substantially reduced market value compared to similar properties in the area.

Analysis and results

There are five likely outcomes for the landholder:

- part-parcel adverse possession title issued;
- creation of an easement or right of way over part of the national park (or lease/licence);
- alteration of national park boundaries and subject land;
- creation of new road and revocation of part of the national park; or
- construct a new access point

For each state, the following analysis considers the author's most likely solution, outside of construction of a new access point.

Queensland

Evidence presented to the hearing mentioned s.180 of the *Property Law Act 1974* and the issue of adverse possession as possible solutions. Both were discounted as solutions to the impasse as they are not binding on the Crown. S.180 Imposition of statutory rights of user in respect of land, *Property Law Act 1974* allows:

where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (**the dominant land**) that such land, or the owner for the time being of such land, should in respect of any other land (**the servient land**) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order. A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise...

The *Nature Conservation Act 1992* does not provide in s.34 dealing with land interests in protected areas, for the grant of easements over national parks, thus is not a viable option. The creation of an easement is not mentioned as an interest in a protected area in the *Nature Conservation Act 1992*, Subdivision 3 Interests in protected areas, s.34 Leases etc. over protected areas merely permits interests as follows:

A lease, agreement, licence, permit...in relation to, land in a protected area....may be granted...A lease, agreement, licence, permit or other authority

mentioned in subsection (1) must be consistent with - the management principles for the area; andthe management plan.

Given that easements are not mentioned as an interest in the Act, s.39 Creation of interests in protected areas states: ‘Despite any other Act, an interest in land in a protected area may be created only in accordance with this Act.’

Possessory title by adverse possession is not permissible pursuant to s.6(4), *Limitation of Actions Act 1974* which states: ‘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 for any period whatever.’

In addition to the *Limitations of Actions Act 1974* statute, s.98 Land Title Act 1994 Application by adverse possessor, states:

An application may not be made under this division if the application - (a) relates to only a part of a lot.....is for a lot the registered owner of which is - the State or another entity representing the State; or.....relates to possession arising out of an encroachment.

It was established in *Sherrard & Ors v Registrar of Titles & Anor* [2003] QSC that a claim for adverse possession must be made for the whole of a lot as against part of a lot. Given that an easement can not be created over land under the *Nature Conservation Act 1992* and a lease over the land would be an undesirable outcome failing to secure access in-perpetuity, further avenues need exploration.

Away from constructing a new access point, the answer lies in providing a small dedication of national park as road reserve (~ 100 m²). This would require the assent of the Legislative Assembly (Queensland Parliament). The *Nature Conservation Act 1992*, s.32 Revocation of protected areas states: ‘The Governor in Council may, by regulation, revoke the dedication of a protected area in whole or part.’

The prohibitive cost of relocating the driveway on steep mountainous land and the associated destruction of native vegetation adjacent to a nature conservation area are not desirable outcomes for either party. The creation of a road reserve requires revocation of a protected area by the legislative assembly which requires significant parliamentary time and resources plus associated land title and survey costs.

For a practical resolution and solution that does not place an inordinate burden upon the landholder nor particularly harm the interests of the crown, revocation would be the most opportune outcome for the landholder.

South Australia

In normal circumstances it is unlikely that adverse possessory title would be granted if the legal owner objected. Based upon the proceedings presented at court, the EPA would certainly object. In *Land Management Corporation v. Dalaya* [2007] SASC it was upheld that an application for possession over public lands failed to establish the right to possession.

Pursuant to the *National Parks and Wildlife Act 1972*, s.35 dealing with the control of reserves states:

The relevant authority may grant a licence to, or enter into an agreement with, a person authorising that person....to enter and use a specified reserve pursuant to the licence or agreement for a specified purpose or purposes....subject to such terms, conditions and limitations (including the payment of a fee, a bond or other charge) as the relevant authority thinks fit.

Whilst not specifically including granting of an easement, it does not specifically preclude the creation of an easement pursuant to s.5 *Crown Lands Act 1929*. A licence can be terminated any time at the whim of the grantee.

Pursuant to the *National Parks and Wildlife Act 1997*, s.41A Alteration of boundaries of reserves: ‘The Governor may, by proclamation made on the recommendation of the Minister, alter the boundaries of a reserve for the purpose of making, or allowing for the making of, minor alterations or additions to a public road that intersects, or is adjacent to, the reserve.’

Such a proclamation and alteration of the boundaries of the national park would be the most opportune outcome for the landholder.

Western Australia

Similar to Queensland, possessory title by adverse possession against crown land is not available pursuant to s.76 No title by adverse possession against Crown, Limitation Act 2005 where ‘land is not affected in any way by any possession of such land adverse to the Crown, and is to be taken as never having been so affected.’

Pursuant to s.100 and 101 of the *Conservation and Land Management Act 1984* both leases and licences can be granted over areas of national park subject to certain terms and conditions. Similar to South Australian legislation, whilst not specifically including granting of an easement it does not specifically preclude the creation of an easement.

Like the South Australian legislation, boundaries to national parks can be altered pursuant to s.45 of the *Land Administration Act 1997* whereby land can be excised for the purpose of public utility services. If the Minister proposes to excise an area from a reserve for the purpose of creating a road, the Minister must cause that proposal to be laid before each House of Parliament. Alteration of the boundaries of the national park would be the most opportune outcome for the landholder.

The territories - Australian Capital Territory and Northern Territory

Pursuant to the *Land Titles Act 1925*, s.69 Statute of limitations not to run against land under Act, possessory title by adverse possession over a registered title is not possible in the Australian Capital Territory. Licences only are permitted over reserved areas in the *Nature Conservation Act 1980* Part 11 Licences. Pursuant to the *Land Title Act 2000*, s.198 No title by adverse possession, possessory title by adverse possession over a registered title is not possible in the Northern Territory.

The Commonwealth retains responsibility for managing many of the national parks in the Northern Territory pursuant to the *Environment Protection and Biodiversity Conservation Act 1999*. The introduction of the *Territory Parks and Wildlife Conservation Act 2007* formalised the administration of reserves held by certain organisations e.g. Northern Territory Reserves Board. Pursuant to that legislation s.16 Restriction on disposal states that no right, title or interest held in respect of land within a park or reserve shall be sold, leased or otherwise disposed despite subsequent legislation s.25AR Lease of park or reserve not a subdivision dealing with leases inside a park or reserve with regard to a joint management plan. If the land is classified as a sanctuary then pursuant to s.13 Revocation of parks, reserves or sanctuaries the administrator may change the boundaries of a sanctuary.

The solution in the territories depends upon whether the land is administered by either commonwealth or territory legislation.

Victoria

Similar to Western Australia and Queensland, possessory title by adverse possession against crown land is not available pursuant to the *Limitation of Actions Act 1958*, s.7 No title by adverse possession against Crown which states: ‘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.’ The specification in the legislation of a term of 60 years is unusual and longer than other states. It is interesting that s.7B No title by adverse possession against Councils was presumably drafted ostensibly to protect council land but the section states: ‘This section does not apply to a possession of council land adverse to a Council if that adverse possession is for more than 15 years.’ This section essentially offers no protection at all as 15 years is the limitation period anyway and was confirmed in *Abbatangelo v Whittlesea City Council* [2007] VSC where this section was not relied upon at all in court transcripts despite being inserted with the November 2004 amendments to the Act.

A unique aspect of Victorian state legislation dealing with national parks as compared to other state legislation lay with amending legislation to the *National Parks Act 1975* through Division 4 - Special provisions relating to particular parks. The usual section dealing with creation of tenancies and licences exists as s.26A Tenancies or licences for certain purposes, however Division 4 allows amendments in relation to special provisions for individual parks e.g. access rights through various national parks and an access easement granted to the commonwealth in Point Nepean national park resulting in 122 versions of the Act since assent in 1975. There is no provision in the Act for amending boundaries in a national park which presumably would require either a special provision or an act of parliament for revocation as there is no provision for revocation in the *Crown Land (Reserves) Act 1978* outside of some limited circumstances. When crown land requires revocation an act of parliament is required e.g. *Land (Revocation of Reservations) Act 2008* or *National Parks (Yarra Ranges and Other Amendments) Act 1995*.

Either an access easement could be granted over an area of national park as a special provision or the area would require revocation as an act of parliament.

Tasmania

Possessory title by adverse possession over crown land is available with limitations pursuant to the *Limitation Action Act 1974* whereby in s.10 Adverse possession of land the crown is specifically allocated a period of 30 years to instigate an action to recover land. The limitation period does not apply if the crown chooses to recover land if at any time the land has been reserved road, reserved from sale or reserved in any crown grant, which allows the crown to recover land if an application was made for possessory title. The standard provisions apply regarding the grant of leases and licence in the *National Parks and Reserves Management Act 2002*, s.48 Minister may grant leases. There is no provision for revocation in the Act and the provisions of the *Nature Conservation Act 2002* would apply; s.21 Revocation of reservations, where the Governor may declare by

proclamation that any area of land ceases to be, or to form part of, reserved land where a draft of the proclamation has been first approved by each House of Parliament. A proclamation and revocation of part of the national park would be the most opportune outcome for the landholder.

New South Wales

Similar to Victoria, Western Australia and Queensland, possessory title by adverse possession against crown land is not available pursuant to the *Crown Lands Act 1989* s.170 Limitation on acquisition of title by possession against the Crown which categorises a number of limiting conditions.

As opposed to other states, New South Wales has legislated to specifically allow the creation of an easement in a national park. Pursuant to the *National Parks and Wildlife Act 1974*, s.153 Easements, the Minister may grant an easement or right of way through, upon or in a national park which can just as easily be revoked. Similar to Victoria, an act of parliament is required to revoke part of a national park as per s.37 Revocation or compulsory acquisition of park or site.

Consequently a possible solution for the landholder involves the creation of an easement by the minister which represents the optimum outcome for the landholder.

Discussion

Consideration of the territories is ignored due to the doubt whether state or commonwealth legislation would apply to the scenario. The possible solutions for the landholder are tabled in Table 1 for the various states. The conditional outcomes are as follows:

- easement preferred over a lease or licence;
- responsible entity for the national park is amenable to resolving the situation to the benefit of the landholder and will not demand removal of the access point and construction of a new access point; and
- Victoria and New South Wales have two equal possible solutions.

Tab. 1: Possible solutions for the landholder by state

Possible solutions	State
Revocation by Act of Parliament	Victoria
	New South Wales
Revocation by Proclamation	Queensland
	Tasmania
Altered boundaries	South Australia
	Western Australia
Easement or right of way	Victoria
	New South Wales

In considering the possible solutions on a state by state basis for *Tardent v Department of Natural Resources, Mines and Water* [2008] QLC it is apparent that significant variation applies across the states in the application of the Torrens system of land registration of possessory title by adverse possession in Australia. Justice Pagone in opening in *Abbatangelo v Whittlesea City Council* [2007] VSC stated:

The doctrine of adverse possession has been long and well established and, whilst at one level may be said to reward a wrongdoing, at another level gives effect to other policy considerations including the provision of a practical means for regularising possessory claims against documentary owners who, for a lengthy period of time, have not asserted a higher title. The public has an interest in ensuring that a person in long term and undisputed possession is able to deal with land as owner. The law has long since accepted that it is more important that an established and peaceable possession should be protected than to assist the agitation of old claims.

Adverse possession is not a viable solution for the landholder. It is evident from the analysis that in the Torrens system of land registration, the primary conflicting elements for the application of adverse possession lay with indefeasibility of title, the issue of compensation by statutory encroachment legislation, dealing with part-parcel applications and the likelihood of an adverse possession claim being successful over registered land. A non-exhaustive summary of the variations in the application of adverse possession across the states is included in Table 2, as follows:

Tab. 2: Brief overview of elements of adverse possession and application

	STH AUS.	VIC.	NSW	QLD	TAS.	WA	NT	ACT
Adverse possession	limited	Y	limited	Y	Y	Y	N	N
Part Lot adv.poss.	N	Y	limited	N	limited	N	N	N
Stat. encroachment	Y	N	Y	Y	N	Y	Y	N
Court disputes	Y	Y	Y	Y	Y	Y	limited	limited
Limitation period	15 yrs	15 yrs	12 yrs	12 yrs	12 yrs	12 yrs	-	-

Analysis of the amount of litigation due to part-parcel legislation and statutory encroachment legislation at face value does not vary greatly between the states. Part-parcel adverse possession as opposed to statutory encroachment legislation is of particular interest as a boundary repair mechanism or solution to problem survey areas where occupation differs significantly from title dimensions or reinstatement by a cadastral surveyor and as McClelland (2001) stated:

Any mathematical solution based on distribution of excesses and shortages, and indeed, possibly based on original dimensions,...extreme caution because what may seem equitable on face value to all owners may not necessarily be equitable when considered in the light of improvements and occupation evidence on the ground.

It is apparent from Table 1 that only West Australia and Queensland apply adverse possession on a similar basis and the optimum majority elements across the states and territories may be adverse possession – yes, part lot adverse possession – no, statutory encroachment legislation – yes with a 12 year limitation period.

Conclusion

An overview of the application of adverse possession around Australia has been presented and whether adverse possession applies as a possible solution for a particular court case. The outcome of a standardised application of adverse possession across the states and territories within Australia whilst highly desirable is highly improbable given the expected difficulty in achieving agreement and amount of legislation requiring amendment.

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Biography:

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