

The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake

PAMELA O'CONNOR[†]

In order to harmonise the Australian Torrens statutes, it is necessary to agree upon a common set of rules delimiting the claims that may be made against a registered owner arising from adverse possession, encroachment by buildings, or improvement of land under a mistake. The Australasian and overseas experience of various rules of adverse possession, mistaken improver and building encroachment statutes is analysed, to identify and evaluate the options and outline a recommended approach.

AFTER a century and a half of operation of the Torrens system in Australia, there is renewed interest in the harmonisation of the State and Territory Torrens statutes.¹ One of the major obstacles to harmonisation is the lack of a common approach to claims against registered owners based on adverse possession and encroachment of buildings. The statutory provisions of the States and Territories are very diverse and have been much amended.² This article analyses the Australian, New Zealand and overseas experience with different approaches to adverse possession and encroachment, in order to identify trends, to draw conclusions

[†] Associate Professor of Law, Monash University.

1. Each Australian State and Territory, and New Zealand, has its own 'Torrens' statute regulating the operation of the system of registered land title within its jurisdiction. The current statutes are Land Titles Act 1925 (ACT), Real Property Act 1900 (NSW), Land Title Act (NT), Land Title Act 1994 (Qld), Real Property Act 1886 (SA), Land Titles Act 1980 (Tas), Transfer of Land Act 1958 (Vic), Transfer of Land Act 1893 (WA), Land Transfer Act 1952 (NZ).
2. The original cause of divergence was that the early Torrens statutes failed to indicate whether the Limitation Acts applied to registered land. Courts in Australia and other Torrens jurisdictions took different views as to whether adverse possession applied unless expressly excluded by statute, or whether it was inconsistent with the indefeasibility provisions. See further MM Park *The Effect of Adverse Possession on Part of a Registered Title Land Parcel* (PhD thesis, University of Melbourne, 2003) 119-127, 138-143. A summary of the history of the Australian provisions is found in MM Park & IP Williamson 'An Englishman Looks at the Torrens System: Another Look 50 Years On' (2003) 77 ALJ 117, 122-123.

about what works, and to suggest some principles that might guide the development of a common approach.³ Since Australia and New Zealand may at some time wish to integrate their e-conveyancing systems, it is assumed that any common approach for Australia should also take account of New Zealand approaches and experience.

Traditionally, the issue has been defined as whether the doctrine of adverse possession should or should not apply to registered (Torrens system) land in such a way as to allow enforcement of possessory claims against a registered proprietor. Defining the question in those terms is too constraining. It elides the differences between possessory claims to whole parcels of land (squatter problems) and disputes over the location of boundaries (boundary problems), between possession arising from deliberate or reckless trespass and possession arising from honest mistakes about title or boundaries. It also leads us to overlook rules and approaches besides adverse possession that might prove useful. It is preferable to define the question in functional terms that owe nothing to the concept of adverse possession or other specific doctrines. We should ask whether, and under what circumstances, we should allow the enforcement against a registered owner of rights acquired through occupation or possession of the land, or through building upon or improving the land or any part thereof, without the consent of the registered owner. We then need to identify which rules or doctrines are best suited to achieving the desired outcomes.

Since this article is concerned with harmonisation of the Torrens statutes, it is not necessary to consider whether a different rule or rules should apply to unregistered land, vestiges of which still exist in some jurisdictions. The Torrens system modifies the general law rules of conveyancing. It is based on two *registration principles* that are intended to promote security of title and security of transaction. The first is that the certificate of title is conclusive as to the ownership of the land.⁴ The Torrens statutes provide that the person shown on the folio of the register as the owner is indeed the owner and holds subject only to the interests notified on the register and other statutory exceptions.⁵ The second registration principle is that as a general

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3. It is not the purpose of this article to discuss the elements of the doctrine of adverse possession, which are adequately reviewed in standard texts. See eg A Bradbrook, SV MacCallum & AP Moore *Australian Real Property Law* 3rd edn (Sydney: Lawbook, 2002) ch 16; S Jourdan *Adverse Possession* (London: LexisNexis, 2003).
 4. Each of the Australasian statutes includes a provision stating that a certificate of title is conclusive evidence that the person shown therein as the registered proprietor of an estate or interest in the land is seized of such an estate or interest. See eg Transfer of Land Act 1958 (Vic) s 41. The full list of provisions is found in B Edgeworth, CJ Rossiter & MA Stone *Sackville & Neave's Property Law: Cases and Materials* 7th edn (Sydney: LexisNexis, 2004) para 5.28.
 5. This is provided by the 'indefeasibility provision' found in all the Torrens statutes. See eg Transfer of Land Act 1958 (Vic) s 42 and the other statutes listed in Sackville & Neave *ibid*, para 5.20. In jurisdictions where rights acquired by adverse possession can be asserted against a registered owner, the rights are expressed to be a statutory exception to the indefeasibility provision.

rule, legal estates and interests in registered land pass only by registration.⁶ While neither principle is absolute, both are difficult to reconcile with the propositions that a legal fee simple can be acquired by long possession without registration, and that the title so acquired should prevail against the registered proprietor.⁷

This article deals seriatim with five different categories of possessory claim that arise under the Australasian Torrens statutes:

1. Whole or part parcel claims over land vested in a public authority;
2. Whole or part parcel claims to land where the registered owner is missing or where there has been an informal transfer or transmission on death;
3. Whole parcel claims to land owned by a known and objecting registered proprietor, where the claimant (or predecessor through whom he or she claims) was a deliberate trespasser;
4. Whole parcel claims to land owned by a known registered proprietor, where the claimant (or predecessor through whom he or she claims) took possession under a claim of right or a mistake as to title or the identity of the parcel; and
5. Boundary encroachment. These are part parcel claims against a registered proprietor who wishes to assert rights over land that lies between the boundary shown on the registered land description and the boundary of the land as actually occupied by the claimant.

Different policy considerations apply to these five categories, and each presents a different set of options for a rule.

1. PUBLIC LANDS

There is a trend in Australia to exempt Crown land altogether from the limitation provisions for an action to recover land, and to extend this immunity to other categories of government or public land.⁸ For example, section 7 of the Limitation of Actions Act 1958 (Vic) provides that the right, title or interest of the Crown to any

6. This is the effect of the 'sterility' provision found in each of the Torrens statutes: see eg Transfer of Land Act 1958 (Vic) s 40(1). For a list of the provisions, see Bradbrook, MacCallum & Moore above n 3, para 4.78. *Barry v Heider* (1914) 19 CLR 197 established that the sterility provisions do not prevent the existence of unregistered or equitable interests in registered land.

7. Park above n 2, *passim*. The Canadian Torrens statutes (with the exception of Alberta) prohibit adverse possession against a registered owner pursuant to a general view in Canada that to permit it is inconsistent with the conclusiveness of the register: S Petersson 'Something for Nothing: The Law of Adverse Possession in Alberta' (1992) 30 Alberta L Rev 1291, 1294-1295; MJ Mossman & WF Flanagan *Property Law: Cases and Commentary* 2nd edn (Toronto: Emond Montgomery Publications, 2004) 171.

8. Bradbrook, MacCallum & Moore above n 3, para 6.05.

land shall not be in any way affected by reason of any possession of such land adverse to the Crown. In 1993, similar immunity was extended to land held by the Public Transport Authority and Railtrack Victoria, and in 2004, a new section 7B was inserted to make similar provisions in respect of council lands. The Law Reform Commissioner of Tasmania recommended in 1995 that adverse possession not apply to any Crown land or other public use land.⁹ New Zealand does not allow an application for registration based on possession against land owned by the Crown or a local authority or held by a registered trust for any public purpose.¹⁰ Queensland gives similar immunity to land owned by the State or local government.¹¹

There are two main justifications for exempting government land from the general limitation provisions on recovery of land. In the USA, where most States do not permit adverse possession against government land on the same terms as private land, it is said that the State owns the land on trust for the community and for future generations, who should not lose their patrimony because of the negligence of state officials in failing to eject trespassers.¹²

The second justification is that government agencies own many widely dispersed parcels of unfenced land which are difficult or costly to patrol against trespassers.¹³ Boundary encroachments, in particular, are difficult for government employees to detect without undertaking a re-survey. This creates a risk that public land will be eroded by deliberate encroachments such as occurred in *Monash City Council v Melville*.¹⁴ A Melbourne suburban council lost 428 square metres of land (worth \$75 000) when adjacent landowners fenced a 20 foot strip of a council reserve with their own land, with the intention (as Eames J inferred)¹⁵ of acquiring it through adverse possession. The council failed to notice that the fence was off-boundary.

In Melbourne, prior to the 2004 amendment exempting council land from adverse possession claims, councils were concerned at the cost of detecting encroachments and taking action to recover land. In a 2002 audit, the City of Port Phillip identified 330 cases of adverse possession upon council land, mostly involving the erection of fences across council laneways.¹⁶ Councils argued that the cost of monitoring lands and taking action against trespassers had become an unacceptable burden on

9. LRC (Tas) *Report on Adverse Possession and Other Possessory Claims to Land* Report No 73 (1995) para 9.4.3.

10. Land Transfer Amendment Act 1963 (NZ) s 21(a), (c), (d).

11. Land Title Act 1994 (Qld) s 98(1)(c).

12. J Dukeminier & JE Krier *Property* 5th edn (New York: Aspen, 2002) 162; see also LRC (Tas) above n 9, 32.

13. Victoria *Hansard* (LA) 16 Sep 2004 (Hon Mr Thwaites, Minister for Environment) 554-555. The Minister remarked that many councils 'hold large areas of unfenced land which people can easily encroach upon and not be detected to be doing so or be detected at significant cost'.

14. (2000) V Conv R 54-621; [2000] VSC 55 (Eames J).

15. *Ibid*, para 30.

16. K Simpson 'Exemption Frees State of Squatter Threat' *The Age* 13 Jun 2004.

ratepayers and taxpayers. The Victorian Government was persuaded by these arguments to exempt councils from the limitation provision for recovery of land.¹⁷

It appears that there is little support in England for such measures. The Law Commission for England and Wales reported in 2001 that a majority of persons consulted supported its recommendation that claims brought by the Crown to recover land (other than foreshore) should be subject to the same limitation period as a claim brought by any other party.¹⁸ Arguments about the cost of monitoring land and the difficulty of detecting squatters were acknowledged, but did not dissuade the Commission from its recommendation.¹⁹ The Commission did not quantify the costs of monitoring nor the value of public lands lost through adverse possession claims. It is possible that the costs in England are not high enough, nor opportunistic encroachments on public land common enough, to justify legislative intervention to put public land out of the reach of squatters.

In Australia and New Zealand, as in Canada and the United States, we seem to be moving towards consensus that adverse possession of any duration should not extinguish title to land held by the Crown, councils and certain public or private bodies which hold land for public purposes such as roads, parks, water catchment and supply, and public transport.

2. WHOLE PARCEL CLAIMS - MISSING OWNERS

New Zealand and several Australian jurisdictions that originally did not allow adverse possession against a registered owner subsequently amended their statutes to allow it, in order to resolve problems arising from missing owners and informal conveyancing.²⁰ The problems particularly affected areas where the original sales of Crown land coincided with mining booms, such as in parts of New Zealand, Victoria and western Tasmania.²¹ In these areas it has been known for owners to sell their lands without conveyancing formalities, or simply to abandon them if no buyer could be found at the time the owner wished to move on. Some parcels of land have been bought and sold off the register over decades, by occupiers who paid the rates and taxes. Since mortgage lenders will not accept possessory titles as security for loans, these properties tend to remain underdeveloped.²²

17. Victoria *Hansard* above n 13, giving his Second Reading Speech for the Limitation of Actions (Adverse Possession) Bill 2004.

18. Law Commission for England & Wales *Limitation of Actions* LC 270 (2001) paras 4.139–4.140. Its initial recommendation was made in its *Limitation of Actions* CP 151 (1998) para 13.126.

19. Law Commission of England & Wales, LC 270 *ibid*.

20. Jurisdictions that have made this change are South Australia in 1945, Queensland in 1952, New Zealand in 1963, and New South Wales in 1979: Park, above n 2, 121, 126.

21. Victoria *Hansard* (LA) Session 1907, 28 Aug 1907 (Hon Mr Lawson MLA) 890-891; LRC (Tas) above n 9, para 4.3.1.

22. Registrar-General's Office (NSW) *Working Paper on Application to Torrens Title Land of*

The regression to off-register conveyancing undermines the accuracy and completeness of the register. It can be rectified by allowing the registration of claims based on long-standing possession where the registered proprietor makes no objection to the application or cannot be contacted.²³ A suitable method is the use of a 'veto' rule,²⁴ under which the registered owner's title is extinguished, not by the operation of a limitation statute, but only by alteration of the register following an application by the adverse possessor for registration. The Registrar must attempt to notify the registered owner, who is entitled to object to the application and effectively to veto it.²⁵ The right to object may be exercised by lodging a caveat. It can be absolute, conditional, or restricted to certain categories of registered owner. For example, the right to object might be restricted to registered owners who have been paying or are paying the rates.²⁶ A veto rule is a flexible tool that can be used to filter adverse possession claims in various ways. Where the objection is absolute, as in South Australia and New Zealand,²⁷ the effect is that registration of title acquired by adverse possession is confined to cases where the registered owner has died, has sold the land without conveyancing formalities or has abandoned the land and has no interest in contesting the claim.

A rule that allows adverse possessors to acquire title against missing owners may encourage people to search for abandoned lands and take possession of them with a view to acquiring registered title. Some commentators regard this as desirable, as it tends to promote a more efficient allocation of land.²⁸ There is a need, however, to

Laws Relating to Limitation of Actions (1976) 5; GW Hinde & DW McMorland *Butterworths New Zealand Land Law* (Wellington: Butterworths, 1997) para 2.179. For an illuminating account of the problems of missing owners and their causes in Victoria, see Victoria, *Hansard* *ibid*, 889-892 (various speakers debating the Real Property (Limitation of Actions) Bill).

23. There may be an issue as to whether a purchaser let into possession is an adverse possessor. In *Hamson v Jones* (1989) 52 DLR (4th) 143, purchasers who took possession under colour of title (a void contract) were held to be in adverse possession: see Jourdan above n 3, 89-100.
24. On the form and use of the veto rule, see Park above n 2, 6.3.2.
25. *Ibid*.
26. Cf Land Titles Act 1980 (Tas) s 138U, which provides that time does not run against a registered owner during any period in which council rates have been paid by or on behalf of the owner. The rule does not apply if the council certifies that it is unclear who paid the rates. A similar result could be achieved by restricting the right of veto.
27. Real Property Act 1886 (SA) s 80F(3); Land Transfer Amendment Act 1963 (NZ) s 9. Queensland had a veto rule under the Real Property Amendment Act 1952 s 56(2), which was repealed in 1994: see Park, above n 2, 143.
28. R Posner *Economic Analysis of Law* 6th edn (New York: Aspen Publishers, 2003) 83. Posner assumes that if the squatter values the land more highly than the abandoning owner (who presumably values it at zero), the resulting allocation is more efficient. See also R Cooter & T Ulen *Law and Economics* (New York: Harper Collins, 1988) 156. Other commentators have argued that leaving land idle is not necessarily inefficient. Stake says that it 'may serve the beneficial purpose of holding it until its best use becomes clear': JE Stake 'The Uneasy Case for Adverse Possession' (2001) 89 Georgetown LJ 2419, 2436. Sprankling argues that adverse possession may encourage over-exploitation of wild lands:

ensure that claims of adverse possession are adequately proven, where no registered owner comes forward to contest them. The Tasmanian Auditor-General reported in 1997 that a number of persons working for government agencies, who had access to valuation or rating records showing which properties had ‘unknown owners’, had obtained title to lands by adverse possession after having themselves recorded as the rate-payer and paying all the rates and taxes owing.²⁹ In some cases it was suspected that the applicant’s claims relating to acts of adverse possession on the land were fraudulent.³⁰

Related to the missing owner problem is the case where a registered owner in possession of land holds a defeasible title, but nobody comes forward to rectify the register. The registered title may be defeasible because the registered owner gave no value for his or transfer,³¹ or is deemed to be party to fraud in the registration (eg, because his or her agent had actual or constructive knowledge of a fraud by a third party in circumstances where the knowledge is imputed to the owner).³² Only the running of the limitation period in favour of the registered owner can lay the competing claims to rest.³³ Without a rule of adverse possession to end the insecurity of defeasible title, the registered owner might never be in a position to invest safely in improvements.

In all the ‘missing owner’ cases, adverse possession provides a convenient method for recognising the claim of the person in long-standing and unchallenged possession so that the register can be brought up to date. The use of adverse possession to restore the marketability of land in such cases is endorsed by the UN Economic Commission for Europe in its Land Administration Guidelines and by the Law Commission for England and Wales.³⁴

JG Sprankling ‘An Environmental Critique of Adverse Possession’ (1994) 79 Cornell L Rev 816.

29. Auditor-General (Tas) *Land Information and Adverse Possession* Report No 22 (Nov 1997) 14.
30. *Ibid*, 15.
31. Apart from the Queensland and Northern Territory statutes, which extend indefeasibility to registered volunteers (Land Title Act 1994 (Qld) s 180; Land Title Act (NT) s 183), the Australasian Torrens statutes are unclear as to whether volunteers obtain indefeasible title on registration. New South Wales and Western Australian authority is in favour of it: *Bogdanovic v Koteff* (1988) 12 NSWLR 472; *Conlan v Registrar of Titles* (2001) 24 WAR 299, Owen J. Victorian authority is against it: *Rasmussen v Rasmussen* [1995] 1 VR 613, Coldrey J 634. In the other Australian jurisdictions and in New Zealand, the position is unclear. See generally Bradbrook, MacCallum & Moore, above n 3, para 4.64.
32. *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSW 576, Street J 583; *Russo v Bendigo Bank Ltd* [1999] 3 VR 376, 390-391 (Ormiston JA, Winneke P agreeing).
33. Ziff observes that adverse possession can ‘put to rest other claims that Torrens will not’: B Ziff *Principles of Property Law* 3rd edn (Ontario: Carswell, 2000) 125, n 32.
34. Law Commission for England & Wales and HM Land Registry *Land Registration for the Twenty-First Century: A Consultative Document*, LC 254 (London: HMSO, 1998) paras 10.13–10.14.

3. CLAIMANT IN POSSESSION AS RESULT OF INTENTIONAL TRESPASS

The English doctrine of adverse possession has traditionally made no distinction between good faith and bad faith adverse possessors.³⁵ ‘Good faith’ and ‘bad faith’ can have different meanings in different contexts. For present purposes, a good faith adverse possessor may be defined as one who takes possession of land in the belief that the land is his or her own; a bad faith adverse possessor takes possession without such belief. Provided that the adverse possessor demonstrates the requisite factual possession and animus possidendi, the law does not require good faith.³⁶ While this is also the general rule in the USA and Canada, it has not gone unchallenged there.³⁷ In some US States, the presence of good faith shortens the limitation period.³⁸ Four US States allow adverse possession only where the claimant entered under ‘colour of title’, meaning a claim based upon a document or judgment that is found to be defective.³⁹ In some US States and in Canada, entry under colour of title reduces the evidentiary burden and the nature of the acts required to establish adverse possession.⁴⁰

The failure of the law to require good faith in order to establish a title by adverse possession puzzles economic theorists since it appears to sanction a non-market mechanism for private takings.⁴¹ Miceli and Sirmans argue that squatters who may have made investments and improvements upon land acquire a ‘reliance interest’ that would be lost if the documentary owner could reclaim the land at any time.⁴² In their view, it makes sense to protect the reliance interest where the squatting was inadvertent, but they concede that it is ‘difficult (if not impossible)’ for courts to distinguish whether an encroachment was intentional or resulted from an honest mistake.⁴³

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35. Jourdan above n 3, para 3.24. A few US statutes require that the squatter entered in good faith or under ‘color of title’. From time to time a similar view is expressed by US courts, but the dominant view is against the existence of a good faith requirement: Dukeminier & Krier above n 12, 142-146.
36. *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804, Mummery J para 41(5): Jourdan above n 3, 174. See also *Monash City Council v Melville* (2000) V Conv R 54-621, where the applicants succeeded in their adverse possession claim although Eames J inferred that they had enclosed the land with the intention of acquiring it by adverse possession.
37. Dukeminier & Krier, above n 12, 145-46.
38. *Ibid.*
39. *Ibid.* The States are Georgia, Alabama, New Mexico and South Dakota.
40. *Ibid.*, 105; *Leichner v Windy Briars Holdings Ltd* (1996) 6 RPR (3d) 91 (sub nom *Leichner v Canada (Attorney-General)*) 31 OR (3d) 700.
41. TW Merrill ‘Property Rules, Liability Rules and Adverse Possession’ (1985) 79 *Northwestern Uni L Rev* 1122, 1134; TJ Miceli *Economics of the Law* (Oxford: OUP, 1997) 132.
42. TJ Miceli & CF Sirmans ‘An Economic Theory of Adverse Possession’ (1995) 15 *Int’l Rev of Law and Economics* 161, 161-62. Ziff argues that it is consistent with efficiency theory that the law should protect the ‘settled expectations’ of squatters who act in good faith under a mistake as to title or boundary: Ziff above n 33, 123-125.
43. Miceli & Sirmans, *ibid.*

Richard Helmholz concluded from a study of 850 US court decisions that courts manipulate the requirements for adverse possession so as to ensure that bad faith adverse possessors do not succeed against an objecting owner.⁴⁴ This led him to doubt the accuracy of the conventional view that good faith is not required to establish a title by adverse possession. In response to Helmholz's findings, Merrill asks: if good faith is indeed a sub silentio requirement for establishing title by adverse possession, why does US common law not require it expressly? He hypothesises that adverse possession is intended to operate as a mechanical rule; the costs of administering the rule would rise if the court were required to make findings about the state of mind of the adverse possessor in each case.⁴⁵ This would be particularly difficult, he says, where a squatter is 'tacking' his or her period of possession with that of an original dispossessor, whose subjective good faith at the time of the dispossession would also have to be proved.⁴⁶

Miceli and Sirmans and Merrill exaggerate the difficulty of the task of distinguishing the deliberate or intentional encroacher from the person who makes an honest mistake. Courts already make such findings under other statutes. For example, England's Land Registration Act 2002 requires the court hearing an adverse possession claim to determine, in some cases, 'whether the applicant (or any predecessor in title) has been in adverse possession for the preceding ten years in the reasonable belief that the land belonged to him'.⁴⁷ Another example: statutes providing relief to mistaken improvers usually require a finding that a person made improvements on the land of another in the belief that the land was his or her own.⁴⁸

It is submitted that a better explanation for the common law's failure to discriminate against bad faith adverse possessors is that the doctrine is over-inclusive. The common law requirements of adverse possession apply in a wide range of situations on a 'one size fits all' basis. In the 'missing owner' cases, policy indicates that it is better to recognise a long-standing possessory claim, even by a bad faith adverse possessor, than to leave the land effectively *res nullius*. In these cases, the State must either recognise the squatters' long-standing possessory title, or it must resume the land and either retain it as Crown land or re-grant it.⁴⁹ Governments are reluctant

44. R Helmholz 'Adverse Possession and Subjective Intent' (1983) 61 *Washington Uni LQ* 331. Helmholz's reading of the cases has been disputed by Cunningham: RA Cunningham 'Adverse Possession and Subjective Intent: A Reply to Professor Helmholz' (1986) 64 *Washington Uni LQ* 1.

45. Merrill above n 41.

46. *Ibid*, 1146.

47. Land Registration Act 2002 (UK) sch 6, paras (1)-(5). If the adverse possessor remains in possession and makes a further application after two years, the application will succeed: para (6).

48. The statutes are discussed below pp 40-45.

49. In 1907, the Victorian Legislative Assembly decisively rejected a motion to amend the Real Property (Limitation of Actions) Bill to provide that where an owner's title to land had been extinguished under the Limitation of Actions Act, the land should revert to the Crown. The arguments against the motion were confined to its adverse effects upon possessors in missing owner and encroachment cases: Victoria *Hansard* above n 13.

to require the resumption of land occupied by adverse possessors, other than for non-payment of rates, because of the disincentive to settlement and development. Since policy indicates that there should be no requirement of good faith in the missing owner cases, the common law does not require it in any case. The crude nature of the doctrine causes it to be over-extended for the benefit of bad faith possessors.

4. WHOLE PARCEL CLAIMS BY POSSESSOR IN GOOD FAITH

There is a trend in common law countries to protect registered owners against loss of title through adverse possession.⁵⁰ In the US Torrens jurisdictions, the statutes do not permit acquisition of title by adverse possession against a registered owner.⁵¹ The same is true in all the Canadian provinces that have title registration statutes, with the exception of Alberta.⁵² In many of these jurisdictions the potential unfairness of this rule is alleviated by the existence of ‘mistaken improver’ statutes (known in the US as ‘betterment’ or ‘occupying claimant’ statutes).⁵³ The statutes provide relief to a person who makes improvements on land owned by another in the mistaken belief that the land was his or her property. The statutes are primarily restitutionary in purpose, providing discretionary relief against the unjust enrichment of the landowner who benefits from the improver’s mistake.⁵⁴ They date from early colonial

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50. MM Park & IP Williamson ‘The Need to Provide for Boundary Adjustments in a Registered Title Land System’ (2003) 48 *Australian Surveyor* 50, 51. Among the jurisdictions that used to allow adverse possession but have now prohibited it are Singapore from 1994: see now Land Titles Act 1993 s 50; Malaysia from 1928 (Peninsular Malaysia) and 1966 (Penang and Malacca): see now National Land Code 1965 s 341; Fiji: Land Transfer Act Cap 131 s 39(2) and Part XIII; British Columbia: Land Registry (Amendment) Act, SBC 1905, c 31 prevented claims to adverse possession ripening in respect of indefeasible certificates of title issued after 1905.
 51. In only four US States is the Torrens system still used to any extent, and in all of these the statutes prohibit adverse possession and prescription against a registered owner: Minnesota: 29 *Minn Stat Ann* s 508.02; Hawaii: 7 *Haw Rev Stat* s 501-87; Massachusetts: *Mass Gen L*, c 185, s 53; Ohio: *LII Ohio Rev Code* s 5309.89. The Illinois Torrens statute was repealed from 7 January 1997.
 52. V Di Castri *Registration of Title to Land* (Canada: Carswell, 1987-) paras 842-848; Petersson, above n 7, 1294-1295 (listing the provisions). Nova Scotia allows adverse possession only for part parcel claims: Land Registration Act, SNS 2001, cl 6, s 75. Most Canadian jurisdictions have a system of registered title, but only in Western Canada is it called ‘the Torrens system’.
 53. Forty-two US States have such laws. They are listed in KH Dickinson ‘Mistaken Improvers of Real Estate’ (1985) 64 *North Carolina L Rev* 37, 42, n 28. The Canadian statutes are: Manitoba: Law of Property Act, CCSM 1987, cl L90, s 27; Alberta: Law of Property Act, RSA 2000 c-L7, s 69; Ontario: Conveyancing and Law of Property Act, RSO 1990, c C34, s 37(1); British Columbia: Property Law Act, RSBC 1996, c 399, s 36(2); Saskatchewan: Improvements Under Mistake of Title Act, RSS 1978 c1-L, s2; Nova Scotia: Land Registration Act, SNS 2001, c. 6, s 76(2).
 54. Fridman notes that the Canadian mistaken improver statutes go beyond the generally accepted concept of restitution, as they allow a forced transfer of land to the improver even where the improvement does not enhance the value of the land: GHL Fridman *Restitution* 2nd edn (Toronto: Carswell, 1992) 342.

times in North America and were introduced to encourage the settlement and development of new lands, at a time when land records and surveys were poorly organised.⁵⁵

Mistaken improver statutes

Mistaken improver statutes are also found in the Northern Territory and Queensland,⁵⁶ and, in more restricted terms, in New Zealand and Western Australia.⁵⁷ The Queensland and Northern Territory statutes provide relief –

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 is made or intended to be made.⁵⁸

The New Zealand and Western Australian statutes are expressed to apply where a building has been erected by a landowner because of a mistake as to boundaries or as to the identity of a piece of land.⁵⁹ This wording appears to exclude improvements made under a mistake of title, such as where the improver mistakenly believes that he or she is entitled under a will. In New Zealand, the mistaken improver provision has been held not to apply to encroachments, but only to cases in which a building is erected wholly on land not owned by the improver.⁶⁰ The Western Australian provision, although almost identical to the New Zealand provision, has been held to apply to boundary errors.⁶¹ The Queensland and Northern Territory provisions are

55. Dickinson above n 53, 38, 41-42, 52; JH Merryman 'Improving the Lot of the Trespassing Improver' (1959) 11 Stanford L Rev 456, 466-467. The origins of the statutes fit with Miceli & Sirman's hypothesis that a certain amount of mistaken improvement is efficient. They argue that ascertaining ownership of land before developing is not always efficient because the cost may outweigh the benefit. This might more often have been the case in the circumstances of a new settler community: TJ Miceli & CF Sirmans 'The Mistaken Improver Problem' (1999) 45 J Urban Economics 143, 146.

56. Property Law Act 1974 (Qld) Pt 11, Div 2; Encroachment of Buildings Act 1982 (NT) Pt III. For a summary of the provisions, see Bradbrook, MacCallum & Moore above n 3, para 15.36.

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

58. Property Law Act 1974 (Qld) s 196; Encroachment of Buildings Act 1982 (NT) s 13.

59. Property Law Act 1952 (NZ) s 129A(1); Property Law Act 1969 (WA) s 123(1).

60. Note that New Zealand has a separate provision for building encroachments: Property Law Act s 129. In *Blackburn v Gemmell* (1981) 1 NZCPR 389, 393, Hardie Boys J said that treating s 129A as intended to deal with encroachments would render s 129 (the building encroachment provision) redundant. See also *Webb v Barr* [2003] DCR 127. This restrictive approach to the interpretation of the statutes has been abandoned in Canada: see below n 65.

61. Western Australia has provisions closely modeled on New Zealand's Property Law Act ss 129 and 129A. In *Executive Seminars Pty Ltd v Peck* [2001] WASC 229, para 153, Hasluck J said that the Property Law Act 1969 (WA) s 123 (corresponding to New Zealand's s 129A) 'is available where the building was erected because of a mistake as to any boundary'. His Honour granted relief to the plaintiff under s 122, but said that the plaintiff was entitled to relief under s 123 also, and that the same discretionary considerations

in broader terms, but appear under headings which are deemed to be part of the Acts and which refer to ‘mistake of title’.⁶² While the question has not yet been decided, these two statutes might be read as applying only to improvements made under a mistake of title, the opposite of the New Zealand and Western Australian statutes which *exclude* mistakes of title.⁶³ There is no clear policy justification for excluding either mistakes of title or mistakes of identity from mistaken improver statutes.⁶⁴ The Canadian statutes are generally read as covering both types of mistake.⁶⁵

The Australasian statutes allow courts a wide range of discretionary dispositions. The court may, if it thinks fit, make an order vesting the piece of land wrongly built upon (‘the subject land’) in the person specified in the order, allow the improver to remove the improvements from the land, require payment of compensation, give the improver the right to possession of the subject land, and discharge or vary any lease, mortgage, easement or other encumbrance affecting the land.⁶⁶

All the Australasian, Canadian and US statutes impose a requirement of good faith.⁶⁷ The New Zealand and Western Australian statutes require that the building be erected under a ‘mistake’;⁶⁸ while Queensland and Northern Territory statutes require that a lasting improvement be made ‘in the genuine but mistaken belief’ that the land is the improver’s property or that of a person on whose behalf the improvement is

applied: paras 192-193. His Honour did not refer to *Blackburn v Gemmel*, but did refer to Australian authorities which said that the statutes should be given a beneficial interpretation: paras 154-156.

62. Encroachment of Buildings Act 1982 (NT) Pt III and Interpretation Act (NT) s 129(2)-(4); Property Law Act 1974 (Qld) Pt 11, Div 2 and Acts Interpretation Act 1954 (Qld) s 14(1).
63. In *Schiell v Morrison* [1930] 4 DLR 664 the Saskatchewan Court of Appeal held that the title to the province’s Improvements under a Mistake of Title Act did *not* confine relief under that Act to mistakes of title. The decision may be distinguished on the basis that Saskatchewan’s interpretation statute did not deem the title to the Act to be part of the Act.
64. Sutton says that the restrictive application of the Australian statutes is ‘artificial’, and calls for recognition of a broader principle of relief for all cases of mistaken improvements: RJ Sutton ‘What Should be Done for Mistaken Improvers?’ in P Finn (ed) *Essays on Restitution* (Sydney: Law Book Co, 1990) 241, 281.
65. The courts in Saskatchewan, Alberta, Ontario and Manitoba interpret their mistaken improver statutes as applying to both mistakes of identity and mistakes of title. Ontario and Manitoba courts originally restricted their mistaken improver statutes to mistakes of title because of the existence in those jurisdictions of statutes relating to unskillful survey (boundary encroachment laws), but this view has since been abandoned: *Schiell v Morrison* above n 63; *Mildenberger v Prpic* [1976] 67 DLR (3d) 65; *Worthington v Udovicic* (1979) 24 OR (2d) 646; *Re Robertson v Saunders* (1977) 75 DLR (3d) 507; Fridman, above n 54, 343-344.
66. Property Law Act 1969 (WA) s 123(2)-(5); Property Law Act 1952 (NZ) s 129A(2)-(4); Encroachment of Buildings Act 1982 (NT) s 14; Property Law Act 1974 (Qld) s 197(1).
67. Casad finds that good faith is the most ‘pervasive’ requirement of the US statutes, although there are different views as to what ‘good faith’ means: RC Casad ‘The Mistaken Improver: A Comparative Study’ (1968) 19 Hastings LJ 1039, 1050.
68. Property Law Act 1969 (WA) s 123(1); Property Law Act 1952 (NZ) s 129A(1).

intended to be made.⁶⁹ All the Canadian statutes require that the person who made the improvements have acted in the belief that the land was his or her own.⁷⁰ The Canadian courts have consistently held that the belief must be bona fide,⁷¹ although this seems to add nothing to the concept of mistake.⁷² Some authorities say that the belief must also be reasonable,⁷³ while others have sought to introduce aspects of reasonableness into an objective assessment of whether a bona fide belief existed.⁷⁴ It is clear that willful blindness and failure to make inquiries demanded by the circumstances will preclude the improver from relief.⁷⁵ If the belief is unreasonable in the circumstances, the court may not be satisfied that the alleged belief was actually held.⁷⁶ For example, the Supreme Court of Canada held that a lessee with an unexercised option to purchase could not have believed that the land was his own.⁷⁷

Relief under the statutes does not depend on any wrongful action or acquiescence in the improver's mistake on the part of the landowner.⁷⁸ Where there is such wrongful conduct, the improver may have an alternative cause of action in estoppel, contract or arising under a constructive trust. These claims can be brought against a registered owner in personam, arising from his or her own conduct and actions, notwithstanding the indefeasibility of registered title.⁷⁹ Mistaken improver statutes give a statutory remedy that is enforceable not only against the owner of the subject land at the time the improvements were made, but also against his or her successors in title.⁸⁰

The mistaken improver statutes are conceptually quite different to adverse possession. They offer an alternative approach that better accords with Miceli and

69. Property Law Act 1974 (Qld) s 196; Encroachment of Buildings Act 1982 (NT) s 13.

70. See the Canadian statutory provisions listed above n 53.

71. *Schiell v Morrison* above n 63; *Chandler v Gibson* (1901) 2 OLR 442; *Corbett v Corbett* (1906) 12 OLR 268.

72. PD Maddaugh & JD McCamus *The Law of Restitution* (Ontario: Law Book Inc, 1990) 294.

73. In support of the implied requirement of reasonableness, see *Smith v Gibson* (1875) 25 UCCP 248, 251-252; *Fletcher v Claggett* [1927] 2 WWR 362, 364; *Schiell v Morrison* above n 63; *Aumann v McKenzie* [1928] 3 WWR 23, para 24.; *Robertson v Saunders* above n 65, para 35. Hurlburt dismisses the requirement of reasonableness as 'a judicial gloss': WH Hurlburt 'Improvements Under Mistake of Ownership: Section 183 of the Land Titles Act' (1978) 16 Alberta L Rev 107, 111.

74. *Gay v Wierzbicki* [1966] 2 OR 372, 375; *Worthington v Udovicic* (1979) 24 OR (2d) 646, para 30. Fridman above n 54, appears to agree with this interpretation. Maddaugh & McCamus say that the attempt to imply a requirement of reasonableness into the statutes has not prevailed: above n 72, 294-295.

75. *Maly v Ukrainian Catholic Episcopal Corp* (1976) 70 DLR (3d) 691, 692; *Olchowy v McKay* [1996] 1 WWR 36, para 44; *Jusza v Dobosz* [2004] 5 WWR 585.

76. *Welz v Bady* [1949] 1 DLR 281; *McGregor v McGregor* (1880) 27 Gr 470, 476; Fridman above n 54, 475.

77. *Montreuil v Ontario Asphalt Company* (1922) 63 SCR 401.

78. *Olchowy v McKay* [1996] 1 WWR 36, para 43.

79. *Frazer v Walker* [1967] 1 AC 569, 585.

80. *Blackburn v Gemmell* above n 60, Hardie Boys J 393, referring to ss 129 and 129A of the Property Law Act 1952 (NZ).

Sirmans' theory that the reliance interest of an adverse possessor should be protected only where the squatting was inadvertent (and therefore in good faith), and the squatter has made a non-salvageable investment in improvements.⁸¹ The statutes go a little further by dispensing with any requirement that the improver be in possession of the land.

A conditional veto rule

It is not necessary to prohibit adverse possession and leave all the relief work to the mistaken improver statutes. A less radical reform would allow an application for registration by a good faith adverse possessor, without requiring that he or she have made lasting improvements to the land. This could be achieved without doing violence to the common law doctrine of adverse possession, by using a conditional veto rule.⁸² The registered owner could be given a right to object to an application for registration by an adverse possessor, the objection being determinative *unless* the adverse possessor (or any predecessor in title) believed throughout the limitation period that the subject land belonged to him or her.

England's Land Registration Act 2002, Schedule 6, applies a similar rule upon a first application by an adverse possessor to be registered as owner of land adjacent to his or her own.⁸³ The adverse possessor's belief must be reasonably held.⁸⁴ Paragraph 5(2) and (3) of schedule 6 add two further conditions limiting the effectiveness of the registered owner's veto, applicable to all first applications. The veto is ineffective where the registered owner is estopped from dispossessing the claimant (para 5(2)), or where 'the circumstances are such that the applicant ought to be registered as the proprietor' (para 5(3)). The latter condition is intended to allow the application to succeed where the application has a right to registration arising other than by adverse possession, such as a right under a contract of sale. The net effect of the three conditions is to define the classes of good faith adverse possessors who may successfully apply for registration, while allowing the registered owner to veto all other claims.

Ideally, the conditional veto rule of adverse possession would operate alongside a mistaken improver statute. Otherwise the landowner would be entitled during the limitation period to eject the improver without compensation for the improvements.⁸⁵

81. See text accompanying above n 42.

82. The conditional veto is, in form, a procedural provision which leaves the underlying common law doctrine of adverse possession intact.

83. Sched 6, paras 1-5. The rule applies only where the exact line of the property boundary has not been fixed: para (5)(4)(b).

84. Land Registration Act 2002 (UK) sch 6, para 5(4)(c).

85. This is generally assumed to be the common law position, based on the principle that chattels annexed to land merge with the realty and lose their separate status as personality. Sutton notes that this view of the law is shared by the standard texts, although direct

5. BOUNDARY ENCROACHMENT

Disputes about the location or adjustment of boundaries may be dealt with under a rule of adverse possession in the same way as whole parcel claims, or under a special rule. There is a trend in Australasia, the UK and Canada to make separate provision for claims to disputed areas of land adjacent to boundaries. New South Wales allows adverse possession claims as to whole parcels only.⁸⁶ Queensland allows applications to register a title acquired by adverse possession but not as to parts of lots and encroachments.⁸⁷ Nova Scotia allows adverse possession as to part parcel claims only (not exceeding 20% of the area of the parcel),⁸⁸ Tasmania restricts adverse possession claims that result in the creation or continuation of 'sub-minimum lots',⁸⁹ and England adopts a special scheme for claims to land adjacent to land belonging to the applicant.⁹⁰ Statutes providing for broad discretionary relief in cases of building encroachments are found in New Zealand and in five Australian jurisdictions.⁹¹ All Australasian jurisdictions except the ACT allow for adjudication of boundary disputes and adjustment of boundaries either through part parcel adverse possession, boundary encroachment laws or both.⁹²

Boundary disputes can arise without any default on the part of the owners or their agents. For example, they may arise through an initial surveying error when the parcel was first registered, errors in re-surveys due to loss or displacement of survey pegs or markers, or the natural shifting of ground. In Australasia and in Canada, early surveying errors were common in registered plans and surveys. Although the Torrens system uses 'fixed' (ie, mathematically determined) boundaries, they are not 'guaranteed': in all the Torrens statutes, misdescription of boundaries is an express exception to the conclusiveness of the registered title.⁹³ Where there is disagreement as to the position of the parcel boundary, the measurements in the registered plan are not conclusive. The court will determine the boundaries having

authority is scant: Sutton above n 64, 242. The rule was applied, without citing direct authority, in *Brand v Chris Building Co Pty Ltd* [1957] VR 626, a case where a builder who erected a house on the wrong lot was denied compensation for the improvement.

86. Real Property Act 1900 (NSW) s 45D.

87. Land Title Act 1994 (Qld) s 98. However, title to parts of lots can still be acquired under the Limitation of Actions Act 1974: Park above n 2, 153-155.

88. Nova Scotia: Land Registration Act, SNS 2001, cl 6, s 75.

89. Land Titles Act 1980 (Tas) s 138Y.

90. Land Registration Act 2002 (UK) sch 6, paras (3)-(5).

91. Property Law Act 1952 (NZ) s 129; Encroachment of Buildings Act 1922 (NSW); Property Law Act 1974 (Qld) Pt 11, Div 1; Encroachment of Buildings Act 1982 (NT); Encroachments Act 1944 (SA); Property Law Act 1969 (WA) s 122.

92. Park & Williamson above n 50, 50. The authors argue that a rule allowing for adjustment of parcel boundaries is a practical necessity.

93. Real Property Act 1900 (NSW) s 129(2)(e); Land Title Act 1994 (Qld) s 185(1)(e), (g); Real Property Act 1886 (SA) s 69(c); Land Titles Act 1980 (Tas) s 40(3)(f); Transfer of Land Act 1958 (Vic) s 42(1)(b); Transfer of Land Act 1893 (WA) s 68(1); Land Transfer Act 1952 (NZ) s 62(c).

regard to the survey measurements on the ground.⁹⁴ Where the survey pegs and marks have been lost or displaced, long and unchallenged occupation will be taken as the best indication of the location of the true boundary.⁹⁵

Apart from cases of surveying errors, the boundaries of the land as occupied may change over time. Surveyed boundaries are invisible lines and occupiers are sometimes mistaken about where the true boundary lies. Occupiers commonly build improvements on land without having the land resurveyed. Boundary discrepancies are particularly likely to arise in new high-density housing developments where units are sold off the plan, as the buildings and footings then must be constructed exactly within the lot.⁹⁶

Options for a rule to resolve disputes over the location of boundaries

There are several ways that the law could respond to the encroachment problem. It could allow a claim of adverse possession to the area of land encroached upon ('the boundary strip'); it could refuse to allow any adjustment of rights or alteration of boundaries other than by agreement of the parties;⁹⁷ or it could provide a statutory scheme for discretionary adjustment of the rights and obligations of the parties. Each of these three options is discussed below.

Option 1: A rule of adverse possession

It is possible for an encroacher to acquire title to a boundary strip, and thereby obtain an adjustment of the title boundaries, in Victoria, Western Australia, South Australia and Tasmania. Western Australia has a building encroachment law but does not exclude the acquisition of title to a boundary strip by adverse possession.⁹⁸ In South Australia, the encroaching owner can apply to be registered as the owner of the boundary strip on the basis of adverse possession, but the registered owner can defeat the application simply by lodging a caveat.⁹⁹ Accordingly, an application

94. *National Trustees, Executors and Agency Co of A'Asia Ltd v Hassett* [1907] VLR 404; *Leader v Beames* (2000) 1 Qd R 347; *Moore v Prentice* [1901] 20 NZLR 128; M Weir 'The Uncertainty of Certain Boundaries' (2001) 9 Aust Property LJ 27, 35-36; British Columbia LRC *Report on Limitations* Project No 6 (1974) Pt II – General, 50-51.

95. *National Trustees, Executors and Agency Co of A'Asia Ltd v Hassett* [1907] VLR 404, Cussen J 412; Weir *ibid*, 36.

96. LRC (Vic) *Review of the Fences Act 1968* Final Report (1998) para 5.44.

97. Bradbrook, MacCallum & Moore above n 3, para 17.32, suggest that the statutory provisions that prohibit adverse possession also impliedly exclude the acquisition of prescriptive rights.

98. Property Law Act 1969 (WA) s 122. In *Executive Seminars Pty Ltd v Peck* [2001] WASC 229 adverse possession was argued as an alternative ground for relief to s 122 but was not established on the facts.

99. Real Property Act 1886 (SA) s 80F.

relating to a boundary strip will rarely succeed.¹⁰⁰ With respect to Tasmania, Park summarises the position as follows:

Although not prohibited, the statutory provisions permitting part parcel adverse possession impose a practical prohibition upon applications founded upon adverse occupation of part only of a land parcel. Tasmania has postponed the enactment of encroachment legislation and has effectively repealed the previous provisions allowing adverse possession of part only of a land parcel while imposing stringent restrictions upon part parcel applications.¹⁰¹

Furthermore, the limitation period for adverse possession does not run against a registered owner who is paying council rates.¹⁰² So it is only in Victoria and Western Australia that an adverse possession application in relation to a boundary strip is likely to succeed. In Queensland, New South Wales and New Zealand, no application can be made to register title to a boundary strip on the basis of adverse possession.¹⁰³ The Northern Territory and ACT have no unregistered land, and their limitation statutes include no limitation period for actions to recover land.¹⁰⁴

Victoria is the only State that relies solely on adverse possession to resolve disputes over the location of boundaries. In 1998, a Victorian Parliamentary Committee completed an inquiry into the Fences Act 1968 (Vic).¹⁰⁵ Although the Committee's terms of reference did not extend to the operation of the rule of adverse possession in disputes over the placing of fences, it was moved to report on the matter having regard to the number and the vehemence of the submissions received, the high cost of litigating the claims in the courts, and 'public concern regarding a law that allows a person to claim part of his or her neighbour's land'.¹⁰⁶ The Committee said that disputes over the position of fences are a significant category of neighbour disputes.

Of these, possibly the most acrimonious and certainly the most conducive to protracted litigation are cases where one party wants a fence moved onto a boundary surveyed to accord with the certificate of title and the other argues that the boundary has moved because title has been acquired through adverse possession.¹⁰⁷

100. Park above n 2, 165.

101. *Ibid* 238.

102. Land Titles Act 1980 (Tas) s 138U. It is not clear what this restriction means in a case of boundary encroachment. Rates are payable in respect of a property identifier which relates to a parcel. Since boundaries are not guaranteed, they may have been altered by adverse possession, so that the parcel no longer includes the boundary strip.

103. Land Title Act 1994 (Qld) s 98 precludes applications to register 'encroachments'. The Real Property Act 1900 (NSW) Pt 6A allows applications with respect to whole parcels, which may include a boundary strip: see P Butt *Land Law* 5th ed (Sydney: Law Book, 2006) para 2230. The New Zealand provision excludes claims made because a fence or other boundary feature is not on the true boundary: Land Transfer Amendment Act 1963 s 21(e).

104. Land Title Act (NT) s 198; Land Titles Act 1925 (ACT) s 69. In both territories no unregistered land remains and there is no limitation period for actions to recover land.

105. LRC (Vic) above n 96.

106. *Ibid*, para 6.1.

107. *Ibid*, para 6.3.

The Committee observed that some landowners felt threatened by the law of adverse possession, and by the high costs of defending a claim.¹⁰⁸

Highly charged emotions may be generated 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 mutual mistake as to the location of a fence should become the basis for a claim to ownership of the land that forms part of one party’s title.¹⁰⁹

A factor contributing to the dissatisfaction with the adverse possession rule is its failure to protect the reasonable expectations of landowners where fences are located off-boundary by mutual agreement. Where the parties agree to construct a ‘give and take’ fence (a fence constructed on a convenient line which is partly on the land of one landowner and partly on the land of another), the arrangement is generally construed as giving rise to a tenancy at will.¹¹⁰ The limitation statutes provide that a tenancy at will is deemed to be determined at the end of one year after it commences, and the owner’s cause of action to recover the land accrues.¹¹¹ So the limitation period starts to run against the owner of the land on which the fence encroaches one year from when the fence is built. South Australia has overcome this anomalous rule by providing that where fences are built off the boundary line with the agreement of the adjoining owners or pursuant to an order of the court, neither of the adjoining landowners is deemed to be in adverse possession of any land of the other.¹¹² Victoria has a provision to similar effect, but it is applicable only where the properties are divided by a waterway.¹¹³ The Victorian Parliamentary Committee recommended that a similar provision be enacted in Victoria and that the agreements and orders should be recorded on title.¹¹⁴

Problems with the rule of adverse possession

The public dissatisfaction with adverse possession reported by the Victorian Parliamentary Committee is not surprising. Public disquiet about the adverse possession rule has been reported in other jurisdictions, often associated with publicity over high profile cases.¹¹⁵ The following aspects of the rule are unsatisfactory:

108. Ibid, para 6.5.

109. Ibid, para 6.4

110. *Landale v Menzies* (1909) 9 CLR 89; P Young ‘Some Thoughts on Fences’ (1994) 2 Aust Property LJ 1, 2.

111. See eg Limitation of Actions Act 1936 (SA) s 15; Limitation Act 1974 (Tas) s 15(1); Limitation of Actions Act 1958 (Vic) s 13; Limitation Act 1935 (WA) s 9 .

112. Fences Act 1975 (SA) s 17.

113. Fences Act 1968 (Vic) s 5.

114. LRC (Vic) above n 96, para 3.70, recommendations 30, 31. The recommendations have not been acted upon.

115. L Griggs ‘Possessory Titles in a System of Title by Registration’ (1999) 21 Adel L Rev 157, 157-158 referring to the public reaction to the decision in *Woodward v Hazell* [1994] ANZ

1. It draws no distinction between honest and dishonest encroachers. As explained above, the law has no policy interest in providing a coerced transfer to a bad faith acquirer.¹¹⁶
2. It ignores the circumstances in which the encroachment occurred and the conduct of the parties. These matters are relevant only to the availability of relief under other rules, such as estoppel by acquiescence, constructive trust or contract.
3. It allows an encroacher who has made no lasting improvements to acquire title, provided that there are sufficient acts of adverse possession and *animus possidendi*. In such cases there is no sunk investment and no economic justification for a non-market transfer.
4. It provides a fee simple estate in land when a lesser right (such as an easement or lease) might be enough to protect the encroacher's reliance interest.
5. It provides no compensation to the adjacent owner for the loss of title.¹¹⁷
6. Under the Victorian, Queensland and Western Australian statutes the adjacent owner is denied 'adequate procedural protection',¹¹⁸ as his or her title is extinguished by operation of the limitation statute, without notice, upon expiry of the limitation period.¹¹⁹ In Tasmania, the registered owner's title is not extinguished but deemed to be held on trust for the adverse possessor.¹²⁰ In *JA Pye (Oxford) v United Kingdom*,¹²¹ the European Court of Human Rights held, by a majority, that similar provisions of the repealed Land Registration Act 1925

ConvR 623. See also Park above n 2, 172; Park & Williamson above n 50, 52, referring to public concern in Tasmania, and in Western Australia following the decision in *Holdsworth v Holdsworth* [2001] WASC 25. The UK Law Commission noted 'growing public disquiet' about the ease with which squatters can acquire title: Law Commission for England & Wales and HM Land Registry *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, No 271 (2001) paras 2.70, 14.4.

116. See text accompanying above n 41. In a formal legal sense adverse possession is an original rather than a derivative acquisition of title, but economists look to the substance, and see a coerced transfer.
117. *JA Pye (Oxford) Ltd* [2002] 3 All ER 865 Bingham LJ 867, 886 (Hope L, 886); *JA Pye (Oxford) Ltd v United Kingdom* [2005] ECHR 44302/02, para 73-74. For an argument that compensation should be payable for the acquisition of title, see Merrill above n 41.
118. *JA Pye* [2005] *ibid*, para 73; *JA Pye (Oxford)* [2002] *ibid*, Bingham L 867.
119. Transfer of Land Act 1958 (Vic) s 60; Limitation of Actions Act 1958 (Vic) ss 8, 18; Land Titles Act 1994 (Qld) Pt 6, Div 5, s 185(1)(d); Limitation of Actions Act 1974 (Qld) s 24(1) Transfer of Land Act 1893 (WA) s 222; Limitation Act 1935 (WA) ss 4, 30. One difference from the 1925 English Act is that under the Australian provisions, the squatter is required to give formal notice to the registered owner of his application to be registered. However, registration is not necessary to perfect the squatter's title, and the registered owner's title, once extinguished without notice under the limitation statute, cannot be revived.
120. Land Titles Act 1980 (Tas) s 138W.
121. Above n 117. The decision of the ECHR is under appeal.

(UK)¹²² violated article 1 of Protocol 1 of the European Charter of Human Rights.¹²³

The conditional veto rule of adverse possession rule for boundary disputes used in the Land Registration Act 2002 (UK) overcomes objections 1 and 6 in the list above. Under Schedule 6 of the Act, a person may apply to be registered as the owner of land if he or she has been in adverse possession for 10 years. The registered owner must be notified of the application and may object. If the boundary has not been fixed, and the applicant (or any predecessor in title) has been in adverse possession for the preceding 10 years in the reasonable belief that the land belonged to him or her, and there is nothing giving rise to an equity by estoppel or other entitlement, the application for registration will succeed despite the registered owner's objection.¹²⁴ In this way, the Act confines the acquisition of title by adverse possession to encroachers who act under a reasonable and honest mistake. The procedural protection given to the registered owner was impliedly approved by the European Court of Human Rights.¹²⁵ This scheme is still open to objections 2-5 above.

A benefit often claimed for an adverse possession rule is that it facilitates conveyancing by quieting titles and simplifying title search.¹²⁶ The Law Reform Commission of British Columbia noted that 'prospective purchasers are usually interested in acquiring land on the basis of its actual physical boundaries'.¹²⁷ A rule of adverse possession allows purchasers in many cases to rely on the occupational boundaries and dispense with a check survey.¹²⁸ Park and Williamson observe that in New South Wales, where adverse possession does not bar the registered owner's

122. Section 75 of the repealed English Act was similar to the Victorian and Western Australian provisions in that the registered proprietor was deprived of his or her title automatically and without notice upon expiry of the limitation period. The title was not extinguished but deemed to be held on trust for the adverse possessor: s 75(1). The ECHR found that the provisions of the Limitation Act 1980 and the Land Registration Act 1925 deprived the applicants of their beneficial interest in the land: *JA Pye v UK* *ibid*, paras 55, 56.

123. The article provides: 'Every natural of legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.' Australia and New Zealand are not parties to the convention, but are subject to the UN Declaration on Human Rights, art 17(2) of which provides: 'No one shall be arbitrarily deprived of their property'.

124. Land Registration Act 2002 (UK) ss 96, 97; sched 6, paras (1)-(7).

125. *JA Pye* [2005] above n 117, paras 73-74. The court identified the following procedural protections in the 2002 Act as important: the squatter is required to give formal notice to the registered owner of his application to be registered, and special reasons must be shown for the application to succeed in the face of an objection by the registered owner.

126. This justification has a long history in the US, but was largely overlooked in the UK until Dockray pointed it out: M Dockray 'Why Do We Need Adverse Possession?' [1985] *Conveyancer & Property Lawyer* 272, 277-280.

127. British Columbia LRC above n 94, 52.

128. LRC (Vic) *The Torrens Register Book* Report No 12 (1987) para 12; Park above n 2, 13.

right to recover a boundary strip from an encroacher, check surveys are normally required in conveyancing transactions, but not in Victoria, which uses an adverse possession rule.¹²⁹ Provided that fences and other buildings have been in place for the duration of the limitation period, purchasers in Victoria can generally assume that any claims from adjoining landowners to remove encroachments are barred.¹³⁰

The Tasmanian Law Reform Commissioner proposed that greater use of check surveys by purchasers should be encouraged, to avoid boundary errors arising later.¹³¹ There is a danger that encouraging purchasers to undertake check surveys will increase the incidence of disputes over boundaries, by revealing encroachments that might otherwise have gone unnoticed. Purchasers' requisitions on title following survey may prompt vendors to take action to recover the boundary strip in order to 'make title'. Simpson's account of the failure of the Land Registry Act 1862 (UK), due in part to its requirement that all boundaries be fixed on first registration, is a salutary reminder of the mischief that can result from stirring up controversies over the location of boundaries. Simpson quotes the following observations from the Report of the Royal Commission that inquired into the failure of the Act:

If there is any border land over which the precise boundary line is obscure, it is usually something of a very trifling value, and the purchaser is content to take the property as his vendor had it, and to let all questions of boundary lie dormant. But the Act of 1862 prevents a transfer on these terms. People who are content with an undefined boundary are compelled to have it defined ... and a dispute is thus forced upon neighbours who only desire to remain at peace.¹³²

It is more useful, and less productive of unnecessary disputes, to require or encourage landowners to do a check survey before building improvements near the boundary, rather than at the time of purchase. The requirement to survey before building can be imposed through building and planning laws. Provisions in fencing legislation for determining the correct boundary line before building fences can also reduce the incidence of boundary errors.¹³³

129. Park & Williamson above n 50, 51. The Tasmanian Law Reform Commissioner noted that check surveys were not routinely done in conveyancing transactions in the State. At the time, Tasmania had an adverse possession rule similar to Victoria's: LRC (Tas) above n 9, para 9.7. In *Gladwell v Steen* (2000) 77 SASR 310, [20], Debelle J said that purchasers in South Australia do not ordinarily survey before purchase. In that State, registered owners have an absolute veto of adverse possession applications.

130. Of course an adverse possession rule that bars an action against the purchaser might also bar the purchaser from recovering a boundary strip encroached upon by a neighbour. In theory, a check survey would be needed to see if the land offered for sale is being encroached upon, but purchasers are less worried by this risk.

131. LRC (Tas) above n 9, para 9.7; recommendation 9.

132. SR Simpson *Land Law and Registration* (Cambridge: CUP, 1976) 134, quoting from the *Land Transfer Commission Report* (1870) xxi, para 45.

133. Eg *Dividing Fences Act 1961* (WA) s 12, which provides a procedure for having the dividing boundary line defined by a surveyor.

Option 2: No adjustment of boundaries by adverse possession

Apart from Western Australia and Victoria, all Australasian jurisdictions either prohibit adverse possession claims to boundary strips, or impose significant restrictions on them. In Canada, only Alberta and Nova Scotia allow such claims. Nova Scotia allows them only if the land claimed does not exceed 20 per cent of the area of the parcel.¹³⁴ Most of the jurisdictions that prohibit adverse possession to boundary strips provide statutory schemes for discretionary adjustment of rights, either in the form of mistaken improver statutes or boundary encroachment laws. In Australia and New Zealand, only the ACT makes no provision for adjustment of boundaries or adjustment of rights in encroachment cases.

Since boundaries on registered plans of survey are not conclusive, most jurisdictions provide a procedure for fixing the position of boundaries on application by a landowner,¹³⁵ by the Registrar with the agreement of all interested parties,¹³⁶ or for the specific purpose of locating the construction of a dividing fence.¹³⁷

Where the problem is that the boundaries of the land as occupied have deviated from the location of the boundaries as originally surveyed, some jurisdictions allow no adjustment other than by agreement between the parties. The Law Reform Commission of British Columbia argued that recognition of long-standing occupational boundaries is more in accordance with the reliance interest of both landowners:

We also believe that some sort of relief should ... be available where a boundary fence has been improperly located. In these situations, an inflexible rule favouring the 'paper' boundaries may lead to injustice. When a survey brings to light the fact that a boundary fence has been misplaced, that may represent a windfall to owner X and a corresponding loss for owner Y. If the apparent physical boundary was relied upon at the time each purchased his property, this would be most unfair.¹³⁸

A stronger case for allowing adjustment of boundaries can be made where an encroaching owner (E) has made lasting improvements upon adjacent land under a mistake as to the location of boundaries. In the absence of an agreement or circumstances giving rise to an estoppel, the other owner (A) may apply for a

134. Land Registration Act, SNS 2001, cl 6, s 75(1).

135. Eg Real Property Act 1900 (NSW) Pt 14A; Property Law Act 1974 (Qld) s 191; Transfer of Land Act 1958 (Vic) s 102. South Australia has a co-ordinated cadastre and imposes restrictions on the correction of boundaries: Real Property Act 1886 (SA) s 51E(4).

136. Eg Real Property Act 1886 (SA) s 223J.

137. Eg Dividing Fences Act 1991 (NSW) s 18; Dividing Fences Act 1953 (Qld) s 13; Fences Act 1968 (Vic) s 5(1); Dividing Fences Act 1961 (WA) s 12.

138. British Columbia LRC above n 94, 52.

mandatory injunction for the removal of the improvements.¹³⁹ Removal of the improvement may be very costly or impractical. For example, in *Droga v Proprietor of Strata Plan 51722*,¹⁴⁰ 30 horizontal concrete beams supporting a multi-storey building were embedded in the wall of a building on adjoining land, and were essential to the stability of the building on the encroaching owner's land.¹⁴¹

There are also cases of cascading encroachments, where the boundaries of all lots in a subdivision are displaced. For example, each house on a subdivision may encroach by half a metre onto the adjacent land. The errors may be 'irreversible, or reversible only at a prohibitive cost.'¹⁴² Park and Williamson observe that '[t]his pragmatic argument is the one least advanced in support of part parcel adverse possession but may well be the only tenable rationale'.¹⁴³

If the law does not relieve the encroaching owner, E, from the consequences of his or her error, E will have to negotiate with the adjacent landowner, A, to buy the boundary strip or some lesser right over it such as an easement.¹⁴⁴ Economic theory indicates that in this scenario, there are significant obstacles to private bargaining. The market for the boundary strip is a bilateral monopoly in which there is only one seller and one buyer. E's valuation is inflated by the sunk expenditure that E has made in constructing the improvements. E's enhanced valuation amounts to what economists call a 'quasi-rent', which A may seek to extract by demanding a price higher than A's own valuation.¹⁴⁵ A's power to extract the quasi-rent derives from A's legal right to demand the removal of the encroachment. Merrill suggests that in an extreme case, A 'may be able to extract not only the value of the land but the full

139. The grant of a mandatory injunction to remove the encroachment is at the discretion of the court, which may award damages instead: *Jaggard v Sawyer* [1995] 2 All E.R. 189; *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. In *Harrow London BC v Donohue* [1993] NPC 49, it was held that that a landowner who had been totally dispossessed of his land by an encroachment was entitled to a mandatory injunction as of right, but this was disapproved in *Feakins v Dept Environment Food and Rural Affairs* [2005] EWCA 1513, Parker LJ paras 203-204.

140. (1996) 93 LGERA 120, Stein J.

141. In this case, the court accepted that an easement of support was not enough, and ordered a transfer of part of the subject land under s 3(1) of the Encroachment of Buildings Act 1922 (NSW).

142. Miceli & Sirmans above n 55, 145.

143. Park & Williamson above n 50, 51; Park above n 2, 54, citing the example of a Brisbane subdivision in which all parcels in a subdivision were horizontally displaced. A South Australian example is given by GA Jessup 'The House that Torrens Built' (1945) 18 ALJ 302, 303.

144. Where there has been long and continuous use of the boundary strip by the encroaching owner that does not amount to an ouster of the adjoining owner, a prescriptive easement may have already arisen under the doctrine of lost modern grant or, in some jurisdictions, by statutory prescription. See generally, Bradbrook, MacCallum & Moore above n 3, paras 17.32-17.33.

145. Miceli & Sirmans above n 42, 163; Merrill above n 41, 1131; A Bell & G Parchomovsky 'Pliability Rules' (2002) 101 Michigan L Rev 1, 58, n 199.

value of the addition as well'.¹⁴⁶ This kind of behaviour by A, which economists call 'rent-seeking', is of concern to policy-makers, particularly where the mistaken improvement results from errors in survey that are not E's fault.¹⁴⁷

Miceli and Sirmans argue that the law should seek to advance two policy interests in dealing with boundary errors. First, it should promote voluntary or market transfers, which are most likely to result in land being put to its most valuable economic use.¹⁴⁸ Thus, the law must discourage E from encroaching on A's land prior to making sunk investments, as this is inconsistent with market exchange. Secondly, the law must limit the costs of boundary errors once they occur. It must discourage rent-seeking by A, which tends to magnify the cost of E's error.

The rule that prohibits boundary adjustment other than by agreement is most effective in providing an incentive to E to avoid encroachment, but does nothing to limit the cost of *bona fide* errors once they occur.

Option 3: Building encroachment laws

Building encroachment laws provide the court with the power to grant relief in cases where part of a building on one piece of land has encroached over the boundary on to the adjoining piece of land. The laws exist in New Zealand, in three Canadian provinces and in five Australian jurisdictions.¹⁴⁹ The earliest Canadian encroachment law was an Ontario statute of 1818, which was introduced to provide relief from the consequences of mistake of identity of boundaries arising from unskillful surveys.¹⁵⁰

Although only Manitoba, British Columbia and Nova Scotia have laws dealing specifically with building encroachments, relief is available in six Canadian provinces to encroachers who make lasting improvers to adjacent land under a mistake about the location of boundaries. Ontario repealed its 'statute or unskillful survey' in 1911, and since then uses its mistaken improver provision for 'mistakes of identity' (as to

146. Merrill above n 41. For an example of rent-seeking in a boundary encroachment case, see *Re Melden Homes (No 2) Pty Ltd's Land* [1976] Qd R 79, 82.

147. See eg *Hardie v Cuthbert* (1998) 65 LGRA 5, Young J 6-7, referring to the purpose of the Encroachment of Buildings Act 1922 (NSW). See further below n 178 and accompanying text.

148. Miceli & Sirmans above n 42, 61-64, 170.

149. New Zealand: Property Law Act 1952, s 129; British Columbia: Property Law Act, RSBC 1996, c 377, s 36; Manitoba: Law of Property Act, CCSM, c L90, s 28 (modeled on an Ontario provision that was repealed in 1911); Nova Scotia: Land Registration Act, S.N.S. 2001, cl 6, s 76(3); Australia: Encroachment of Buildings Act 1922 (NSW); Property Law Act 1974 (Qld) Pt 11, Div 1; Encroachment of Buildings Act 1982 (NT); Encroachments Act 1944 (SA); Property Law Act 1969 (WA) s 122..

150. *Mohl v Senft* (1956) 19 WWR 481, paras 40-42. In Canada, the statutes are still generically known as 'statutes relating to unskillful survey', although their application is not confined to encroachments resulting from surveying errors.

the location of the parcel or its boundaries) as well as for mistakes of title.¹⁵¹ The same applies in Saskatchewan¹⁵² and Alberta.¹⁵³

The use of a mistaken improver provision to adjudicate cases of building encroachment has caused difficulties in Canada. The Canadian statutes provide for two independent forms of relief.¹⁵⁴ Where the improvements have enhanced the value of the adjacent land the improver is entitled to a lien. Or the court may order that the improver ‘retain’ the land and pay compensation to the owner.¹⁵⁵ The latter remedy may be granted whether the value of the land has been enhanced or not. Since building encroachments across a boundary commonly do not enhance the value of the adjacent land,¹⁵⁶ the only form of discretionary relief the court can give to an encroacher may be to allow him or her to retain the land on paying compensation to the owner. In *Gay v Wierbicki*, the Ontario Court of Appeal described this remedy as ‘a species of private expropriation’, and set out the following guiding principles:¹⁵⁷

The discretion of the Court to allow the honestly mistaken person to retain the land on paying compensation is not one that is to be lightly exercised. I would hold that the claimant must show that the balance of convenience is decidedly in his favour before he is permitted to retain another’s land, or, that the equities preponderate in his favour within the framework of the statute.

Although this ‘limiting principle’ was formulated for Ontario’s mistaken improver provision, the British Columbia Court of Appeal unanimously approved its application to the Property Law Act, RSBC 1996, c 377, s 36, a pure encroachment statute.¹⁵⁸ As

151. The history of the Ontario statute is set out in *Worthington v Udovicic* (1979) 24 OR (2d) 646.

152. *Schiell v Morrison* above n 63, the court deciding that the scope of the statute was not to be read down by reference to the title of the Act which referred to ‘mistake of title’.

153. *Maly v Ukrainian Catholic Episcopal Corp* (1976) 70 DLR (3d) 691; *Mildenberger v Prpic* [1976] 67 DLR (3d) 65; *Jusza v Dobosz* [2004] 5 WWR 557.

154. With the exception of Nova Scotia, the Canadian provisions are expressed in a single provision like this one from Manitoba: ‘Where a person makes lasting improvements on land under the belief that the land is his own, he is or his assigns are entitled to a lien upon the land to the extent of the amount by which the value of the land is enhanced by the improvements, or is or are entitled, or may be required, to retain the land if the Court of Queen’s Bench is of opinion or requires that that should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land if retained, as the court may direct.’

155. This is the generally accepted interpretation of the statutes: Fridman above n 54, 342; *Gay v Wierzbicki* [1967] 63 DLR (2d) 88, rejecting the alternative interpretation that the second form of relief was ancillary to the first and depended on value enhancement. The term ‘retain’ is used in the statutes, but where the remedy is granted the court orders a conveyance of the land encroached upon. See eg the order in *Gay v Wierzbicki* para 15.

156. A house erected entirely on the wrong lot will usually enhance the value of the lot on which it is built, but building encroachments are usually made for the benefit of the encroacher’s land and are a detriment to the adjacent land because they restrict the owner’s use of his or her land.

157. [1967] 63 DLR (2d) 88, paras 8, 11 (Laskin JA, McLennan and Wells JJA concurring).

158. *Taylor v Hoskin* (2006) 265 DLR (4th) 132, para 36.

Dickinson points out, ‘thorny remedial issues have caused judges and legislators to quail in the face of conscience and deny relief to mistaken improvers’.¹⁵⁹ If building encroachment is seen as a subset of mistaken improver cases, any principle or presumption against granting relief is likely to extend to both categories. While a court-ordered transfer might be said in each case to be ‘private expropriation’, building encroachments commonly affect a very small area of land, the value of which may be considerably less than the value of the building or the cost of its removal. Removal of some encroachments may be wasteful, and disproportionate to the inconvenience caused to the owner of the land encroached upon.

Building encroachment laws in Australia and New Zealand

New Zealand, the Northern Territory, New South Wales, South Australia, Queensland and Western Australia have building encroachment laws allowing for discretionary adjustment of rights by a court.¹⁶⁰ The Northern Territory, South Australian and Queensland statutes are modeled on the Encroachment of Buildings Act 1922 (NSW), while Western Australia follows the New Zealand statute which is in different terms to the other Australian Acts. Victoria and Tasmania have no encroachment provision,¹⁶¹ although both States have provisions empowering the Registrar or Recorder to amend the certificate of title or folio of the register where the land description is erroneous, or imperfect, or differs from the boundaries, area or position of the land actually and bona fide occupied by the registered owner.¹⁶² The scope of the powers is presently unclear.¹⁶³ Courts have generally cautioned Registrars to exercise their powers of correction conservatively where the correction involves a substantive determination of legal rights.¹⁶⁴ A former Registrar of South

159. Dickinson above n 53, 75.

160. Property Law Act 1952 (NZ) s 129; Encroachment of Buildings Act 1982 (NT); Encroachment of Buildings Act 1922 (NSW); Property Law Act 1974 (Qld), Pt 11 Divn 1; Encroachments Act 1944 (SA); Property Law Act 1969 (WA) s 122.

161. The Victorian Parliamentary LRC recommended that it be given terms of reference to conduct an enquiry into the law relating to the encroachment of buildings in Victoria and the right to support from adjoining land: LRC (Vic) *Review of the Fences Act 1968* Final Report (1998) 125-126, Recommendation 65. The recommendation has not been acted upon.

162. Land Titles Act 1980 (Tas) s 142; Transfer of Land Act 1958 (Vic) ss 99-101. Other Torrens statutes have similar provisions. In 1995 the Tasmanian LRC recommended that the Recorder’s power to rectify boundaries be amended to include a list of relevant factors: LRC (Tas) above n 9, para 9.3 and recommendation 4. This has not been implemented.

163. The provisions have yet to be judicially considered. Robinson says that the Victorian provision is subject to the rights of an adverse possessor and can only be invoked where there has been no transfer for value. An application may be granted only where the applicant’s right is undisputed, or has been found by a court, or is ‘demonstrably plain’ so that the Registrar is not required to make a judicial determination of rights: *Duthie v Land Registrar at Wellington* (1912) 31 NZLR 245, Sim J 250, referring to a similar provision in a New Zealand statute: S Robinson *Transfer of Land in Victoria* (Sydney: Law Book, 1979) 393-395.

164. D Grinlinton ‘The Registrar’s Powers of Correction’ in D Grinlinton (ed) *Torrens into the 21st Century* (Wellington: LexisNexis, 2003) 217, 226-228.

Australia observed that Registrars usually only exercise their powers to adjust boundaries by agreement or after any applicable limitation period has expired.¹⁶⁵

All the statutes empower courts to provide relief in disputes between landowners relating to an encroachment by a 'building'. The statutes on the New South Wales model define 'building' in expansive terms to mean a substantial building of a permanent character, including a wall.¹⁶⁶ 'Encroachment' is not defined, but includes the intrusion of any part of a building in or upon the soil, including walls and footings.¹⁶⁷ In Australia, New Zealand and Canada, courts have held that for purposes of the statutes, an 'encroachment' means a building that is partly on one piece of land and partly on another; it does not apply to improvements made entirely within one parcel of land.¹⁶⁸ Accordingly the statutes provide no relief where a building is erected wholly on the wrong lot.

Either the 'encroaching owner', E, or the owner whose land is encroached upon ('the adjacent owner'), A, may apply to the court for relief in respect of an encroachment.¹⁶⁹ Under the statutes that follow the New South Wales model, the court may, if it thinks just, order the removal of the encroachment, the transfer of an estate or interest in the subject land and the payment of compensation.¹⁷⁰ The New Zealand and Western Australian statutes empower the court to vest in the encroaching owner or any other person any estate or interest in any part of the adjoining land, create an easement in favour of the encroaching owner or any other person any estate or interest in any part of the adjoining land, or give the encroaching owner or any other person the right to possession of any part of the adjoining land, on such terms (including as to payment of compensation) as the court thinks fit.¹⁷¹

The New Zealand and Western Australian statutes do not provide statutory criteria for the exercise of the discretion, but the other four statutes do. In deciding whether

165. GA Jessup 'The House that Torrens Built' (1945) 18 ALJ 302, 303, noting that the power was generally exercised in Victoria only if occupation for the full limitation period was shown. Similar powers in the New South Wales and South Australian Acts were usually exercised by agreement of the parties, there being no limitation period at that time.

166. Encroachment of Buildings Act 1922 (NSW) s 2; Encroachment of Buildings Act 1982 (NT) s 3; Property Law Act 1974 (Qld) s 182; Encroachments Act 1944 (SA) s 2. The Western Australian and New Zealand statutes do not define 'building'.

167. See provisions *ibid*.

168. *Amatek Ltd v Googorewon Pty Ltd v Amatek Ltd* (1993) 176 CLR 471, 477; *Blackburn v Gemmell* above n 60; *Webb v Barr* [2003] DCR 127; *Manita Investments Ltd v TTD Management Services Ltd* (1997) 15 RPR (3d) 88; *Re Robertson v Saunders* (1977) 75 DLR (3d) 507.

169. Encroachment of Buildings Act 1922 (NSW) s 3(1); Encroachment of Buildings Act 1982 (NT) s 5(1); Property Law Act 1974 (Qld) s 184(1); Encroachments Act 1944 (SA) s 4(1); Property Law Act 1969 (WA) s 122(1); Property Law Act 1952 (NZ) s 129(1).

170. Encroachment of Buildings Act 1922 (NSW) s 3(2); Encroachment of Buildings Act 1982 (NT) s 6(1); Property Law Act 1974 (Qld) s 185(1); Encroachments Act 1944 (SA) s 4(2)).

171. Property Law Act 1969 (WA) s 122(2)-(4); Property Law Act 1952 (NZ) s 129(2)-(4).

to make such an order, the court is empowered to consider a number of factors including the situation and value of the land, the nature and extent of the encroachment, the character and purpose of the encroaching building, the loss or damage that has been incurred by the landowner, the loss or damage that 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.¹⁷² The statutory factors are not exhaustive, and the court may consider any other relevant factors, including how long the encroachment has existed,¹⁷³ whether the adjoining owner was aware of and consented to the encroachment, the conduct of the parties in dealing with the encroachment,¹⁷⁴ and whether the adjoining owner has taken reasonable steps to mitigate his or her loss.¹⁷⁵

The statutes give little guidance as to how these criteria are to be weighed and applied and the remedy selected. The courts have had difficulty in discerning a guiding purpose beyond the provision of a wide discretion to resolve encroachment disputes.¹⁷⁶ In *Hardie v Cuthbert*, Young J identified the mischief which the Encroachment of Buildings Act 1922 (NSW) was intended to remedy:

The Encroachment of Buildings Act 1922 (NSW) was passed in New South Wales as remedial legislation to overcome a problem where innocent and in some cases not so innocent people were being held to blackmail by neighbours as a result of faulty surveys that were carried out earlier this century and by other surveying or building errors which were not their fault.¹⁷⁷

The purpose of limiting rent-seeking by adjacent owners is not apparent from the legislative scheme itself, but is based upon the Minister's Second Reading Speech. The Minister said the measure was necessary to prevent 'blackmail' by adjacent

172. Encroachment of Buildings Act 1922 (NSW) s 3(3); Encroachment of Buildings Act 1982 (NT) s 6(2); Property Law Act 1974 (Qld) s 185(2); Encroachments Act 1944 (SA) s 4(3).

173. *Hardie v Cuthbert* (1988) 65 LGRA 5 (NSWSC).

174. *Butland v Cole* (1995) 87 LGERA 122 (NSWLEC).

175. *Farrow Mortgage Services Pty Ltd (In Liq) v Boscaini Investments Pty Ltd* [1997] ANZ Conv R 349 (SCSA, Debelle J); *Re Melden Homes No 2 Pty Ltd's Land* (1976) Qd R 79, 83 (Dunn J).

176. *Clarke v Wilkie* (1977) 17 SASR 134. at 139 (Wells J): 'The policy of the Act is to facilitate the resolution of disputes when an encroachment has occurred': *Gladwell v Steen* (2000) 77 SASR 310 (SASC, Debelle J), In *Googoorewon Pty Ltd v Amatek Ltd* (1993) 176 CLR 471; (1993) 112 ALR 1 the High Court of Australia said that purpose of the Act was to be ascertained from its language. 'The twin purposes of the Act are to facilitate the determination of existing boundaries (and to permit the adjustment of boundaries when, but only when, buildings encroach on adjoining land.': 112 ALR 1 at 5. The Canadian statutes have been said 'to have been enacted to provide a basis, on equitable grounds, for resolving disputes over encroachments': *Ferguson v Lepine* (1982) 141 DLR 3d, 187 at 188 (BCCA). These formulations of the purpose of the statutes provide little guidance to the courts in weighing the relevant considerations and selecting a remedy.

177. (1988) 65 LGRA 5, 6. The decision was reversed on appeal without comment on this statement: (1989) 17 NSWLR 321 (NSWCA).

owners seeking to make a profit from small encroachments arising from human error.¹⁷⁸

Australian courts have given the statutes a beneficial construction and, unlike the Canadian courts,¹⁷⁹ adopt no ‘limiting principle’ or presumption against granting relief. On the contrary, it has often been said that the statutes are remedial and should be given a ‘fair, large and liberal’ interpretation.¹⁸⁰ New Zealand courts have taken a more restrictive approach, indicating that they will be circumspect in exercising their power to grant an interest in land to an encroaching owner, because to do so derogates from the indefeasibility of Torrens titles.¹⁸¹ It appears that no Australian court has yet considered this view. Of course, indefeasibility does not extend to boundaries. And if it is true that purchasers generally buy in reliance on the occupational boundaries as inspected rather than the surveyed boundaries as shown on the deposited plan of survey,¹⁸² a remedy that allows the occupational boundaries to prevail tends to protect rather than defeat their expectations.

Presented with a list of statutory criteria to be weighed without any presumptions or guiding principles,¹⁸³ courts adopt a ‘broad equitable approach ... weigh[ing] the equities between the parties in determining the balance of convenience’.¹⁸⁴ They consider, first, how the encroachment occurred, to determine if the encroaching owner, E, is at fault. Under the New Zealand and Western Australian statutes, E can get no relief unless he or she proves that the encroachment was not intentional and

178. NSW *Hansard*, 13 September 1922, Mr Ley, cited in *Googoorewon Pty Ltd v Amatek Ltd* (1991) 25 NSWLR 330, Mahoney JA 333-334. The decision was reversed on appeal, without comment on this remark: above n 168. Actual examples of ‘blackmail’ cited in the NSW Parliamentary Debates are summarised in Park & Williamson above n 50, 53.

179. See above n 157 and accompanying text.

180. *Clarke v Wilkie* (1977) 17 SASR 134, Wells J 139; *Hardie v Cuthbert* (1988) 65 LGRA 5, Young J 6; *Boed Pty Ltd v Seymour* (1989) 15 NSWLR 715, Bryson J 719; *Bunney v South Australia* (2000) 77 SASR 319, Debelle J 327; *Amatek Ltd v Googoorewon Pty Ltd* above n 168, 477; *Re Melden Homes (No 2) Pty Ltd's Land* [1976] Qd R 79, 81; *Executive Seminars Pty Ltd v Peck* [2001] WASC 229, paras 154-156.

181. *Blackburn v Gemmell* above n 60, Hardie Boys J 393, referring to ss 129 and 129A of the Property Law Act 1952 (NZ); *Webb v Barr* [2003] DCR 127. The difference in approach may account for the divergence of authority in New Zealand and Western Australia on whether the mistaken improver provisions (Property Law Act 1969 (WA) s 123; Property Law Act 1952(NZ) s 129A) apply to encroachment cases: see above n 61.

182. See above n 127 and accompanying text.

183. A guiding principle that might be used here is the ‘oppression test’ used by the courts to determine whether to exercise their discretion to refuse an injunction. The courts ask whether it would be oppressive to the defendant in all the circumstances to grant a mandatory injunction to remove an encroachment: *Jaggard v Sawyer* [1995] 1 WLR 269, Bingham MR 283, Millett LJ 288.

184. *Taylor v Hoskin* (unreported) BCCA 39, 31 Jan 2006, para 53 (Levine JA, Rowles & Donald JJA concurring), referring to the British Columbia encroachment statute. Cf *Gladwell v Steen* (2000) 77 SASR 310, Debelle J 317: ‘[T]he [South Australian] Act vests in the court power to balance the respective interests of the parties to determine whether compensation should be paid and, if so, to decide what is reasonable and fair compensation.’

did not arise from gross negligence, or that the building was not erected by E.¹⁸⁵ Under the other statutes, E is not precluded from relief if he or she fails to satisfy the court that the encroachment was not intentional and did not arise from negligence,¹⁸⁶ but must pay three times the unimproved capital value of the boundary strip if the court makes an order for compensation for the transfer, lease or grant of the land to E.¹⁸⁷ It is unfortunate that this provision is expressed in terms which extend not only to the intention or negligence of E personally, but also to that of a predecessor in title or independent contractor such as a surveyor.¹⁸⁸ The conduct giving rise to the encroachment is always a very important discretionary consideration in the grant of relief.¹⁸⁹ In cases where fault is not decisive, the courts weigh all the relevant factors, seeking ‘to find a balance between the loss and damage to either party if the other party is to succeed’.¹⁹⁰

The statutes conform to Miceli and Sirman’s theory that the law should promote two objects: to encourage E to check the location of boundaries before investing in improvements, and to discourage A’s rent-seeking by limiting A’s power to require the removal of the improvement. All the statutes provide disincentives to the negligent (or grossly negligent) as well as the intentional encroacher. By requiring more than a mere honest mistake as to boundaries, the statutes set a higher standard of subjective good faith than is generally required under the mistaken improver statutes. The building encroachment statutes are not restitutionary and do not require value-enhancing improvement of the boundary strip. Their purpose is to limit rent-seeking (or ‘blackmail’) by A against E and E’s successors in title. They are applied in a cost-minimising manner which is directed to finding the cheapest and fairest outcome in the circumstances of each case.

185. Property Law Act 1969 (WA) s 122(2); Property Law Act 1952 (NZ) s 129(2).

186. *Droga v Proprietor of Strata Plan 51722* (1996) 93 LGERA 120. The encroaching owner bears the onus of proving the encroachment was not intentional and did not arise from negligence. In *Gladwell v Steen* above n 184, 315-317, Debelle J noted that the onus might be very difficult to discharge where the encroachment was caused by a predecessor in title.

187. Encroachment of Buildings Act 1922 (NSW) s 4(1); Encroachment of Buildings 1982 Act (NT) s 7(1); Property Law Act 1974 (Qd) s 186(1); Encroachments Act 1944 (SA) s 5(1). The penalty is arbitrary and inconsistent with the object of preventing rent-seeking. In *Gladwell v Steen* above n 184, 315-317, Debelle J discusses the various options that courts have to avoid the necessity to impose the penalty upon an innocent encroaching owner who has purchased without knowledge of the encroachment. One option is to award no compensation, since compensation is not mandatory on the creation or transfer of an interest: *Carlin v Mladenovic* (2002) 84 SASR 155, paras 162-163; *Melden Homes (No 2) Pty Ltd’s Land* [1976] Qd R 79, 81; *Morris v Thomas* (1991) 73 LGRA 164, 169; *Butland v Cole* (1995) 87 LGERA 122; *Bunney v South Australia* above n 180, Debelle J 327-328.

188. *Healam v Hunter* [1992] ANZ ConvR 592, Waddam CJ 594-595; *Gladwell v Steen* above n 184, Debelle J 316.

189. *Morris v Thomas* (1991) 73 LGRA 164, Bignold J 168; *Austin v Scotts Head Lifestyle Homes Ltd* [2002] NSWLEC 241, para 52; *Shadbolt v Wise* (2003) 126 LGERA 59, para 16.

190. *Mark Dawkins v ARM Holdings Pty Ltd* [1994] NSWLEC 54, cited with approval in *Attard v Canal (No 1)* [2005] NSWLEC 222, para 58.

CONCLUSION

Although the Australian and New Zealand statutory provisions are very diverse, and have been much amended, some general trends are apparent. First, most jurisdictions now accept a need to exempt a wide class of public lands from the operation of the limitation statutes to prevent them passing into private hands by adverse possession. Secondly, most jurisdictions have experienced problems with missing registered owners or informal conveyancing, and have recognised the necessity for a rule of adverse possession, at least for whole parcel claims, in order to update the register and restore the marketability of the affected land. Thirdly, a number of the jurisdictions limit or exclude adverse possession as a means of resolving disputes between adjacent landowners relating to encroachments, and a majority have special building encroachment laws giving the courts a broad discretion to adjust the property rights of the parties.

No consensus has yet emerged as to which rule of adverse possession is best for whole parcel claims. Victoria, Tasmania and Western Australia allow adverse possession to override the registered title as an exception to indefeasibility, whether adverse possession has continued for the full limitation period or not.¹⁹¹ Queensland allows the rights of an adverse possessor to override the registered title where the rights are mature and the person would, on application, be entitled to be registered as owner.¹⁹² These provisions are inconsistent with registration principles insofar as the registered owner's title may be extinguished without alteration of the register.¹⁹³ Where this occurs, the accuracy of the register is compromised, and that of any other land information systems that rely upon property information extracted from the title register.¹⁹⁴ A further objection to the provisions is that they provide inadequate procedural protection to the registered owner, whose title can be extinguished without any prior notice, right to object or adjudicative process.

If the adverse possession rule is applied to registered land, there should be a privative provision disapplying the limitation statute, as in New South Wales,¹⁹⁵ so that title cannot be extinguished automatically by the expiry of a limitation period. Any extinguishment of registered title should be effected under the Torrens statute, and only upon alteration of the register following a determinative process. An accrued right to apply for registration on the basis of adverse possession should not be an overriding interest enforceable against a purchaser. These are the minimum standards necessary to ensure that recognition of adverse possession accords with registration principles, natural justice and human rights.

191. Land Title Act 1994 (Qld) s 185(1)(d); Land Titles Act 1980 (Tas) s 40(3)(h); Transfer of Land Act 1958 (Vic) s 42(2)(b).

192. Land Title Act 1994 (Qld) s 185(1)(d).

193. For a similar opinion, see Park above n 2, 180-82; Park & Williamson above n 50, 54.

194. LRC (Vic) above n 96, paras 6.35-6.37.

195. Real Property Act 1900 (NSW) s 45C.

The rule which best meets these standards is the veto rule. South Australia and New Zealand give the registered owner a right to object, effectively an absolute or unconditional right of veto, where an adverse possessor applies to be registered as owner of the land. England borrowed the veto rule from Australia and modified it by attaching conditions and a time limit on the power of veto.¹⁹⁶ The time limit ensures that registered owners who fail to heed the warning and recover the land will ultimately lose their titles, while the conditions ensure that the registered owner's veto is ineffective against a squatter who has a legal or equitable claim in addition to possessory title. England has shown that a veto rule can be used to filter adverse possession claims in various ways. The rule could be adapted to screen out bad faith adverse possessors. This could be achieved by providing that the registered owner's objection is determinative *unless* the adverse possessor (or any predecessor in title) believed (or 'reasonably believed') throughout the limitation period that the subject land belonged to him or her.

Any rule based on adverse possession leaves the possessor liable to ejection during the limitation period. English common law, unlike the civil law jurisdictions, does not provide a restitutionary remedy to a person who makes value-enhancing improvements to the land of another under a mistake. Almost all US States, and most Canadian jurisdictions, now provide a remedy under mistaken improver statutes. New Zealand and three Australian jurisdictions have a mistaken improver statute, but they are inconsistent and unduly restrictive as to the type of mistake.

Building encroachments require special provision. The area of land involved is typically small, while the costs of removing an encroaching building may be prohibitively high. The non-salvageable investment made by an encroaching owner who builds across the property boundary renders him or her vulnerable to rent-seeking by the adjacent owner during the limitation period, or at any time if there is no applicable limitation period. Mistaken improver statutes are not ideal for resolving these cases, as their object is restitutionary and the remedial issues are quite different for whole parcels and boundary strips. Building encroachment laws are best suited to the purpose. They give courts a wide discretion to provide relief to the encroaching neighbour on just terms, while also discouraging deliberate or negligent encroachment. Australian and New Zealand courts have long experience in administering the statutes, and have demonstrated their capacity to resolve disputes in an equitable and cost minimising way.

196. Land Registration Act 2002 (UK) sch 6, paras (1)-(6).