

Orchestrating a harmonious system

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ABSTRACT: the authors consider those changes to the Victorian Torrens system necessary or desirable to assist in bringing about an Australian harmonised (or even a uniform) system of land title registration.

KEYWORDS: Torrens – uniform – harmonised laws – real property – land title registration – electronic conveyancing – electronic register – complete – comprehensive – cost saving – volunteer – indefeasibility – adverse possession – boundary location errors – discrepancies – land parcel remnants – slivers – unity of parent and acquired land parcels – Mother Hubbard clause – compulsory participation in Torrens scheme – history of the divergent Australian systems – fundamental principle – overriding interests – off-register interests – execution of legal documents – identity fraud – witness

Orchestrating a harmonious system

Harmonisation of Australia's eight different land title registration systems may be the best way to achieve the original intention of a complete and comprehensive register.

By Malcolm Park, Jude Wallace and Ian Williamson

Among the projects being undertaken by the Victorian Land Registry is the harmonisation of differences of the registered land statutes between the various states and territories which together total eight different schemes.

In addition, the federal Parliament is considering harmonising an even wider range of statutes. Harmonisation in this context means removing inconsistencies. Absolute harmonisation would see a single nationwide law while a lesser degree of harmonisation would see compatibilities between different jurisdictions.

In the past there have been numerous calls for the introduction of a uniform registered land title scheme within Australia.¹ It may be that harmonising the different schemes can succeed where uniform law proposals have failed. Further, the success of harmonisation may encourage and facilitate the take up of further harmonised laws (or uniform laws).

Even without uniform laws, the benefits of the harmonised laws, such as cost savings associated with similar and simpler business models, are made available to all.

What is harmonisation?

Harmonising encompasses a degree of compatibility and commonality (or uniformity) of law across the state and territory borders. At one extreme “harmonisation” means a single national uniform law (with a single national consistent interpretation of that law) and at the other it means different but coherent laws throughout the land. For example, the statute of limitations for land ranges between 12 and 15 years. A uniform law requires standardisation while differing periods may be compatible with harmonisation; that is, harmonisation does not necessarily require a uniform limitation period across all jurisdictions.

Another example is the different ways that the indefeasible title of the volunteer is treated – we suggest that in this instance uniformity is desirable for harmonisation. Thus where two of the states have legislated to confer the protection of indefeasibility on the volunteer and two other states, pursuant to the interpretation by their courts, have also conferred this protection, the time may be opportune for those jurisdictions not recognising the protection to change their approach.

In general, harmonising seeks similarity without absolute uniformity.

It must be emphasised that the current Victorian and federal exercises are not necessarily a cobbling together of a system made up of “spare parts” representing the supposed best features of the various systems. A fresh design is not impermissible. Both substantive and procedural law must be considered. Uniformity of substantive law and consistency in its interpretation would be one extreme of harmonisation while a lesser degree of harmonisation may only require a similarity of procedural law throughout the different jurisdictions.

Why harmonisation?

The desirability of uniformity of law has increased with community mobility and the emergence of nationwide businesses unconstrained by jurisdictional borders.

With some exceptions, the financial institutions facilitating land transactions are no longer confined to their state of origin – they are national (and international) business entities. Their customer base includes individual clients whose property holdings extend beyond a single jurisdiction. The desirable uniformity or harmony is founded on perceived cost savings. In 2001 annual cost savings to NSW and Victoria of \$150 million were estimated with regard to the use of a common national e-conveyancing system being developed by Victoria. With regard to banking, the ANZ Bank's submission to the 2006 Federal Parliamentary House Standing Committee on Legal and Constitutional Affairs referred to an expenditure of \$50m by that bank in setting up separate facilities in New Zealand necessitated by the different legal requirements in that jurisdiction. Similarly, Davies et al (2001) have estimated the cost savings to be unlocked by introducing a uniform Australian-New Zealand Torrens system of land title registration.² The simplification of the different legal regimes would foster the growth of competition and the expansion of business to the benefit of all the jurisdictions.

Specific issues

The authors suggest the issues needing consideration are:

1. Land parcel boundary location problems

The current means of resolving boundary problems in Australia range from part parcel adverse possession, building improvement or encroachment statutes, refusal to countenance the problem to a combination of these.

There are three factors in the current Victorian regime that are disadvantageous to the orderly maintenance of the land register.

First: the uncertainty associated with adverse possession in Victoria where title is extinguished and acquired unbeknown to the major affected parties: the registrar, the

dispossessed registered proprietor (who has lost 'title') and the new unregistered titleholder who has acquired title through longstanding trespass.

Secondly: an added complication of Victorian part parcel adverse possession is the practice of creating a new parcel of land for that part parcel that has been acquired through adverse possession. Thus the adverse occupier's land holding now consists of two registered land title parcels: the original "parent" holding and the newly acquired boundary sliver. Where once there were two registered title land parcels there are now three.

An alternative to the creation of these new land parcels is the amending of the trespasser's "parent" register entry to include the additional sliver instead of creating a new land parcel, such as is done with acquired boundary slivers under the building encroachment statutes.

Thirdly: another complexity is the direct consequence of creating a new parcel of land out of the boundary land sliver acquired through part parcel adverse possession. This is the presumption that a vendor (or transferor) only intends to transfer to the purchaser (or transferee) the parent parcel of which the vendor is the registered proprietor.

Victorian registry practice is to not recognise the "unity" of the adverse occupier's two parcels making up the occupier's total land holding. As a result, unless the occupier, as transferor, explicitly transfers the whole land holding (both parcels), the transferee will only be registered as proprietor of the original (or "parent") parcel of the occupier without the accompanying parcel of the acquired boundary strip.³ In Victoria, the presumption is that the transferor only intended to transfer the original parcel unless the transfer instrument includes a "Mother Hubbard" clause expressly including the additional boundary sliver in the transfer. As a consequence, the Victorian cadastre is replete with thin slivers of land where the registered proprietor is a past vendor who has transferred their land holding to a transferee with neither vendor nor purchaser realising that not all of the vendor's holding has been transferred to the purchaser.

2. The volunteer under the various systems

Victoria currently confers immediate indefeasibility on the bona fide purchaser for value pursuant to the interpretation of the Victorian Torrens statute by Justice Adam in 1958.⁴ The majority of the other jurisdictions afford the same protection to the volunteer as to the purchaser (either by express legislation or judicial decision). The Victorian and Tasmanian law reform bodies have recommended that their respective states enlarge the protection of indefeasibility to include the volunteer, but these recommendations have not been followed through.

3. The elimination of the certificate of title issued to the registered proprietor (and the misuse of those certificates leading to informal unrecorded transactions including unregistered mortgages)

In days past when the register was paper-based, the register entry was described as the title certificate, with the document issued to the proprietor being described as the “duplicate” title certificate. With the current electronic registers, the register entry is digital data and where there is a paper document issued to the proprietor, it is described as the title certificate. Queensland no longer issues certificates to proprietors on the basis that such certificates facilitate fraud by permitting the fraudster with custody of a certificate to falsely represent themselves as authorised to enter into transactions involving the registered land parcel.

4. The need to introduce in Victoria identity checks sufficient to prevent a Victorian clerk falsely asserting they had witnessed a proprietor executing a mortgage document, thus permitting a fraudster to defraud the proprietor

In Queensland, witnesses must satisfy themselves as to the identity of persons executing documents in their presence.⁵ The importance of a strict identity check of the proposed transferor is heightened with the adoption of the electronic register and the availability of electronic conveyancing over the internet without face-to-face encounters.

5. The need to expand the group of persons entitled to make application to the registrar

This suggestion is a direct consequence of a submission to the 1998 Victorian Parliamentary Law Reform Committee describing the difficulties faced by the dispossessed proprietor of a part parcel.⁶ Thus, any person able to demonstrate to the registrar an interest in making an application should be permitted to do so.

6. A requirement that applications be processed in order to get on title

Victoria, Western Australia and Queensland recognise legal title not recorded in the register, allowing title to pass (extinguishing the title of the registered proprietor and conferring title on the trespasser) on the expiry of time alone. This creates an uncertain state of affairs.

7. Compulsory participation in the scheme

Compulsion assists the maintenance of the register and its integrity.⁷ This carries with it the consequence that all private interests are to be shown on title – if it is not shown on title it does not exist. All private rights or restrictions over a particular land parcel to the benefit of an individual legal person must be shown on the register and failure to register such a right or restriction may lead to the loss of that right or restriction. However, there will be many “off register” or “below register” rights or restrictions imposed by statute over all land holdings that are not shown on the register. In these cases the register records key private rights and restrictions, such as ownership, mortgages and easements etc., which together with the spatial cadastre provide an infrastructure on which all other “below register” interests can be referenced.

The origin and later divergence of the *Torrens* systems

The “Torrens” system of registration of land title was initially introduced in South Australia in 1858. The *Real Property Acts* of 1858 were subsequently replaced by the *Real Property Act* 1860. This Act was then replaced by the *Real Property Act* 1861. This 1861 statute formed the basis on which most of the other Australian and New Zealand jurisdictions founded their registered title statutes (Victoria in 1862 and Tasmania in

1862 with New Zealand in 1870 and New South Wales in 1862, being based on the 1862 Victorian statute). The last of the adopting jurisdictions, Western Australia, based its 1874 statute on the later Victorian 1866 scheme. That the NSW (1862) scheme was based on Victoria (1862) meant that NSW omitted to include the overriding interests of the adverse possessor which were first introduced in the later Victorian 1866 statute. The Queensland Torrens statute of 1861 was based on the earlier 1860 South Australian scheme.

Thus, until recently, Queensland had the Mark II South Australian model, South Australia, Tasmania, New Zealand and NSW the Mark III model, and Victoria and WA the Mark IV model. The Northern Territory and ACT statutes were based on those of their parent states of South Australia and NSW respectively. Added complications arose when Queensland adopted a further 1877 Act that together with the 1861 Act made up the Torrens system in that state until the 1994 Act. There exists further divergence in that Tasmania adopted a new scheme in 1980 as did the Northern Territory in 2000-1.

There is some irony in the adoption by Victoria and NSW of the 1861 South Australian scheme in that initially these colonies had proposed their own schemes but then elected to adopt the 1861 South Australian scheme in order to achieve uniformity.⁸ New Zealand originally passed its own 1860 Act which was abandoned in 1870 for one derived from the 1861 South Australian model.

The current South Australian scheme is that of 1886 which was a consolidation (with minor amendments) of the 1861 scheme. Thus, the Northern Territory inherited the 1886 statute until 2000 when it passed its own scheme. Similarly, the current ACT scheme was inherited from the NSW *Real Property Act* 1900 but has since diverged from that statute.

The fundamental principle of land title registration

The ideal espoused by the originators of land title registration was that of a complete and comprehensive central public register, administered by a centralised public authority and available for public inspection so that community confidence could repose in the register

and its integrity.⁹ The purpose of the register is that to investigate and ascertain the legal rights or obligations associated with any particular land parcel or lot, one need only inspect the register. Such an investigator “need not and indeed, must not concern themselves”¹⁰ with interests not disclosed on the register. An alternative formulation is that provided in an authoritative and detailed comparative study of international land title registration schemes: “title is not affected by anything not shown on the register. It is not only unnecessary but also impossible to establish a right in the land by other means”.¹¹

Unfortunately, these absolute statements regarding the integrity of the various title registries are not justified. The register is less than perfect and “overriding” interests exist which are not disclosed on the supposedly conclusive register but which still bind the proprietor or owner of the land¹² and may also bind those wishing to deal with that proprietor. Examples of these interests include unpaid municipal rates, charges and taxes, public rights of way, easements and the rights of a tenant in occupation. How are people able to ascertain such interests that are not recorded? Why does a registered title system, designed to be complete in itself, permit such off-register interests?

Somewhere during the past 150 years the fundamental principle of a complete and comprehensive register, the ideal espoused by the originators of land title registration, was lost. Why? Certainly the Parliaments responsible for passing the various land title registration statutes have participated by enacting express provisions providing for exceptions to the fundamental principle.¹³ In addition, the courts, when interpreting these statutes, have held that they contain implied exceptions to the fundamental principle of a comprehensive and conclusive register.¹⁴

Some commentators have noted with regret that the courts have mistakenly imported traditional general land law principles into the title registration statutes.¹⁵ Another has complained that the unwarranted importation of these principles has created uncertainty and complexity in a system designed to provide predictability and simplicity and which is still capable of doing so if only the courts would give a fair reading to the words of the

statutes and not insist on subjecting the statutes to general law principles.¹⁶ These very issues are among those sought to be addressed by harmonising.

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¹ For example, K Davies et al, "The efficiency and effectiveness of land administration systems in Australia and New Zealand", 42nd Australian Surveyors Congress, Brisbane, 25–28 September 2001.

² K Davies et al, note 1 above.

³ *Kirk v Sutherland* [1949] VLR 33; *Koadlow and Another v Bolland and Others* [1997] 1 VR 633.

⁴ *King v Smail* [1958] VR 273.

⁵ Cf *Russo v Bendigo Bank Ltd* [1999] VSCA 108; 3 VR 376: www.austlii.edu.au/au/cases/vic/VSCA/1999/108.html (accessed 20 March 2009).

⁶ Victoria, Parliament of Victoria Law Reform Committee, *Review of the Fences Act 1968 Report*, 1998, para 6.64.

⁷ MM Park, "Compulsory maintenance of the Land Register: an exception to the fundamental principle of a conclusive register underpinning the Land Registration Act 2002", unpublished paper, 2004: <http://eprints.infodiv.unimelb.edu.au/archive/00004055> (accessed 20 March 2009).

⁸ JE Hogg, *The Australian Torrens System*, 1905, William Clowes, pp45-6.

⁹ P Butt, "Conveyancing and property: indefeasibility of title and 'volunteers'" (2002) 76 *ALJ* 219.

¹⁰ Theodore BF Ruoff, "An Englishman looks at the Torrens system: Part II – Simplicity and the curtain principle" (1952) 26 *ALJ* 162.

¹¹ S Rowton Simpson, *Land Law and Registration*, 1976, Cambridge University Press, p176.

¹² RE Megarry and HWR Wade, *The Law of Real Property* (4th edn), 1975, Stevens, p.cxv.

¹³ Transfer of Land Act 1958 (Vic) s42, Transfer of Land Act 1893 (WA) s68, Land Registration Act 1925 (UK) s70.

¹⁴ "... the fact of registration and registration alone that confers title. This is entirely in accordance with the fundamental principle of a conclusive register which underpins the Bill": Law Commission and Her Majesty's Land Registry, *Land Registration for the Twenty-first Century: A conveyancing revolution*, 2001, p4, ¶1.10: www.lawcom.gov.uk/docs/lc271.pdf (accessed 20 March 2009).

¹⁵ For example, M Neave, "Land law", in AR Blackshield et al (eds), *The Oxford Companion to the High Court of Australia*, 2001, Oxford University Press, p415.

¹⁶ S Robinson, *Transfer of Land in Victoria*, 1979, Law Book Co, preface and *passim*.