Chapter 4

Land Identification, Boundaries and Encroachment

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SURVEY BOUNDARIES

SECTION 270 OF THE PROPERTY LAW ACT

4.1 Section 270 of the Property Law Act 1958 (Property Law Act) was introduced to deal with excesses in measurements in original Crown survey boundaries. The excesses resulted from the early practices of government surveyors of using a survey chain that was over the standard length or in some other way adding an extra amount to the boundaries of a lot when conducting the survey.1

4.2 The inaccuracies led to a problem where the area marked out on the ground as part of the Crown survey exceeded the total areas of the lots of the Crown subdivision as described in the title documents (‘an excess’). The predecessor provision to section 270 was enacted following a review of boundary problems by a Royal Commission in 1885.2

4.3 Section 270 provides that, where a Crown section has been subdivided by the Crown into allotments of equal area, the excess area is ‘deemed originally distributable’ equally among the lots. The provision has a retrospective operation insofar as the excess is deemed to have been distributed equally at the time of the Crown subdivision.

4.4 The section does not confer power on anyone to make a determination to distribute the excess and amend the boundaries. Section 273 of the Property Law Act provides that section 270 shall, where applicable, be acted on by the Registrar in an application to register a lot or to amend a folio as to boundaries, and in any investigation as to boundaries.

SECTION 102 OF THE TRANSFER OF LAND ACT

4.5 When a folio is created, the Registrar must record in it the description of the land.3 Sometimes an error in measurement in the original survey results in an excess or shortage in the dimensions of the land as recorded in the folio. Where this occurs, section 102(1) of the Transfer of Land Act 1958 (Transfer of Land Act) provides that the Registrar may create a new folio or ‘amend the recordings in the Register to accord with the dimensions marked on the ground or otherwise to adjust equitably the discrepancy’.

4.6 Section 102(2) empowers the Registrar to do the following:

- in appropriate cases make a distribution among the allotments or lots of any surplus area
- where the proprietor of an allotment or lot has been in possession of a surplus for 15 years, include in the folio so much of the surplus held in possession as is attributable to his allotment, or
- in any case, make such adjustments as the Registrar considers equitable and expedient.

4.7 Robinson notes that it is unclear what difference, if any, exists between the power to ‘adjust equitably the discrepancy’ in section 102(1) and to make an ‘adjustment that the Registrar considers equitable and expedient’ contained in section 102(2).4

4.8 In our Consultation Paper we asked two questions with regard to the operation of section 270. These were:

- whether section 270 should be extended to include shortages
- whether section 270 should be extended to include Crown subdivision into lots of unequal area.
SHORTAGES

CROWN SURVEY MEASUREMENTS

4.9 Three submissions that addressed the question of extending section 270 to shortages supported such an extension, and two raised objections to it.

4.10 The submissions from Mr Macnamara and the Law Institute of Victoria supported the extension of section 270 to deem shortages in Crown surveys to be proportionately distributed among all lots in the subdivision. The Association of Consulting Surveyors suggested that ‘the proportioning might be based on parcel frontages rather than on relative parcel areas’.6

4.11 Mr Hope and Dr Vout raised the following objections to the proposed extension of section 270 to shortages:7

- Where a shortage is distributed to a lot for which a title is already held by a lot owner, it might be viewed as a governmental acquisition of the shortfall.

- If the shortage reduces the lot size it might unfairly penalise the lot owners under planning law. For example, a reduction in lot size might make the lot smaller than the minimum required for some planning requirements, which could restrict the permitted uses.

4.12 Land Victoria indicated in its submission that there are few examples of shortages of measurement and that section 270 should not be extended to apply to them.8

4.13 The Association of Consulting Surveyors Victoria said shortages in Crown surveys do exist, although they are ‘relatively rare’.6 Shortages are usually discovered when a re-survey is undertaken for purposes of a subdivision or application for a planning permit. The lot owner generally accepts their proportionate share of the shortage as part of the cost of the subdivision or permit. For example, where a survey for a subdivision reveals a shortage, the plan of subdivision will be lodged incorporating an adjustment which represents the lot’s proportionate share of the shortage in the measurements of the section.10

4.14 Where shortages in Crown surveys exist, there is a need to deal with the matter by legislation. The preferable approach would be to amend section 102(2) of the Transfer of Land Act to expressly empower the Registrar to make a distribution among the lots concerned of any shortage of area in the measurement of a Crown section in the original Crown survey. In making the distribution and amending boundaries, the Registrar should be required to have regard to any guidelines published by the Minister. The provision for publication of guidelines is discussed below.11

PRIVATE SUBDIVISIONS

4.15 We found evidence that there is a problem with shortages in private subdivisions. The Association of Consulting Surveyors Victoria said that discrepancies exist in private subdivisions because ‘for almost 100 years it was possible for titles to be created by paper transfers with boundaries being created without a survey’.12 Even where surveys were conducted, limitations in surveying methods up until the 1960s meant that discrepancies could occur.13

4.16 Several submissions said that it would be useful to extend section 270 to discrepancies arising from measurements in boundaries other than Crown boundaries.14

4.17 Section 102(2) of the Transfer of Land Act expressly empowers the Registrar to distribute excesses in private subdivisions, but is silent as to shortages. We consider that the Registrar should be expressly empowered to distribute shortages in private subdivisions as well as in Crown survey measurements.
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COMPENSATION FOR DISTRIBUTION OF SHORTAGES

4.18 The conferral on the Registrar of a power to distribute shortages under section 102 of the Transfer of Land Act raises a question of whether compensation should be payable for the resulting loss or deprivation of property rights to an area of land, and who should be liable.

4.19 The general rule is that boundaries of registered land are not guaranteed, and that the Consolidated Fund is not liable for loss or deprivation caused by misdescription of boundaries. An exception should perhaps be made to the general rule where there is an amendment or adjustment under section 102 of the Transfer of Land Act to distribute a shortage of measurement resulting from inaccuracies in an original Crown survey.

4.20 The question of whether the Consolidated Fund should be made liable for losses resulting from the distribution of shortages in Crown surveys and private subdivisions should be considered as part of a review of the Transfer of Land Act. It raises questions as to the scope and purpose of the compensation provisions in sections 109–111 of the Transfer of Land Act.

DISTRIBUTION OF EXCESS ON SUBDIVISION INTO UNEQUAL LOTS

4.21 All of the submissions we received on the question of extending section 270 to enable proportionate distribution of excesses among lots of unequal area were in favour of the proposal.

4.22 On further examination, we have concluded that section 270 should not be extended to Crown subdivisions involving unequal lots. A retrospective deeming provision is not a suitable vehicle for making complex distributions and adjustments. The distribution of excesses among unequal lots in proportion to their respective area is more complex than equal distribution among equal lots. There may be more than one way in which the adjustments to boundaries required by the section could be made.

4.23 Where the lots are unequal, the distribution of an excess should require a decision by the Registrar and amendment of the boundaries. Any Crown subdivision of land for sale of the lots would require registration of the land, which would empower the Registrar to act under section 102.

EXTENDING SECTION 270 TO SINGLE CROWN ALLOTMENTS

4.24 Land Victoria proposed the extension of section 270 to cover excesses in a single Crown allotment, with the apportionment occurring along each of the lengths of an irregularly shaped boundary in proportion to the lengths.

4.25 A provision for the apportionment of excesses along boundary lengths in irregularly shaped lots is too complex to include in a retrospective deeming provision such as section 270. The deemed distribution would be operative in law before any decision as to how the boundary amendments are to be made. This would create uncertainty as to the effect of the provision when applied to the particular lots.

4.26 The Registrar already has the power under section 102(1) of the Transfer of Land Act to ‘adjust equitably the discrepancy’ in a single lot arising from an excess or shortage of measurement in the original survey. In the case of an irregularly shaped lot, it is open to the Registrar to follow the method of adjustment proposed in his submission if he considers it equitable to do so.

4.27 We make no recommendation for the amendment of section 270 in relation to irregularly shaped lots.
GUIDELINES FOR BOUNDARY ADJUSTMENTS

4.28 We have concluded that section 270 should not be further extended because it lacks administrative machinery for making determinations. We acknowledge that section 270 does have a normative function in establishing the principle of proportionate distribution of excesses. The surveyors who made submissions indicated that they would welcome the addition of other principles for boundary redefinition in the Property Law Act.

4.29 Most boundary discrepancies are discovered by consulting surveyors, who play an important role in advising the affected landowners. In our consultations with surveying organisations, we learned that there is a need for clear, authoritative and accessible principles to guide surveyors and the public in resolving boundary problems and redefining boundaries. We ascertained from Land Victoria that the Registrar does not make available to the public any guidelines or similar instructions issued for or used by his officers in exercising his powers under section 102.

4.30 We consider that guidelines for the redefinition of boundaries should be established under the Property Law Act, for both old system and registered land, and applied by the Registrar when acting under section 102 of the Transfer of Land Act. The guidelines should deal with discrepancies in boundaries arising from errors of measurement in an original survey or a subdivision. The guidelines should also deal with matters such as distribution of excess measurements among unequal lots and irregularly shaped lots.

4.31 The guidelines should be made by the Minister on the advice of the Surveyor-General and published in the Government Gazette. Advising the Minister on the content of the guidelines fits with the Surveyor-General’s statutory functions which include: advising the Minister and the community on surveying matters; responsibility for the correct positioning of Crown boundaries; resolving disputes over boundaries that affect the State cadastre; and performing any other functions conferred on the Surveyor-General under any Act.

RECOMMENDATIONS

13. The new Property Law Act should provide that the Minister must, after consultation with the Surveyor-General, publish in the Government Gazette guidelines for the re-establishment, redefinition and adjustment of land boundaries where errors in measurement have occurred in an original survey or in a subdivision.

14. A consequential amendment should be made to section 273 to provide that any guidelines that the Minister issues for the re-establishment, redefinition and adjustment of land boundaries under the new provisions shall:

(a) apply to land, whether under the operation of the general law or under the operation of the Transfer of Land Act 1958

(b) where applicable, be acted upon by the Registrar in exercising the Registrar’s powers and functions under section 102 of the Transfer of Land Act 1958.
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A BUILDING ENCORACHMENT RELIEF PROVISION

4.32 An encroachment arises when a building straddles the boundary between two lots which are owned and occupied by different persons. The ‘adjacent owner’ owns the lot over which an encroachment extends. The ‘encroaching owner’ owns the lot adjacent to the boundary beyond which an encroachment extends. In this context, ‘building’ means a substantial building of permanent character. The encroachment may also be by overhang of part of a building as well as by intrusion of footings of a building. The portion of the adjacent owner’s lot over which the encroachment extends is the ‘subject land’.

4.33 Building encroachments may arise through a failure to check the location of boundaries before construction. They may also occur through no fault on the part of the encroaching owner whose building extends across the boundary. The encroachment may be due to a deliberate or careless act of a previous owner or a builder, an honest mistake by the encroaching owner or a previous owner or a builder, or even a common mistake by both the affected landowners about where the boundary lies. Inaccuracies in Crown surveys and plans of subdivision, displacement or destruction of survey markers and other boundary discrepancies can also contribute to mistakes by landowners and builders.

4.34 Boundary discrepancies are relatively common in Victoria, although most are of small magnitude. The Surveyor-General has advised he would not be surprised if most re-establishment surveys in urban areas revealed discrepancies of up to 20 cm between boundaries as noted on title and the land as occupied.

4.35 Building encroachments are becoming more common due to higher coverage of sites by buildings. Where landowners build up to the boundary, encroachments are more likely to arise.

4.36 Building encroachments are of particular concern because a highly valuable building might encroach by a very small amount into a neighbouring property. In some cases the loss or detriment which would result from removal or alteration of the building would far exceed the value of any loss or detriment to the owner of the adjacent land from the continuation of the encroachment.

BUILDING ENCORACHMENTS UNDER THE CURRENT LAW

4.37 The owner of an encroaching building commits a trespass to land. On the application of the adjacent owner, a court may grant a mandatory injunction to require the removal of the encroachment. The court has a discretion to refuse an injunction and award damages instead, including damages for a continuing trespass. The court may award damages instead of injunction where the injury caused by the encroachment is small and is capable of being estimated in money and compensated by a small amount of money, and it would be oppressive in the circumstances to grant an injunction. Such an order has the effect of allowing the encroachment to continue, by denying the means of preventing it.

4.38 The discretion to grant an injunction or to award damages instead does not give the courts the full range of powers needed to resolve encroachment problems. Encroaching owners may obtain relief where the court withholds an injunction, but they cannot initiate the proceedings nor ask the court to grant them a property right in the subject land.
4.39 Encroachments should ideally be resolved by negotiation between the affected landowners, perhaps by alteration of a building, or by consensual adjustment of boundaries.31 In some cases, negotiating a price for allowing the encroachment to continue may be obstructed by strategic bargaining. The value of the building represents a sunk investment by the encroaching owner which inflates his or her valuation of the subject land. Knowing this, the adjacent owner may be tempted to conceal his or her own valuation, in order to extract a share of the encroaching owner’s higher valuation.32 Economists call this ‘rent-seeking behaviour’.33

4.40 When the New South Wales Parliament enacted Australia’s first building encroachment relief provision in 1922, the Minister who introduced the Bill explained that it was directed to controlling rent-seeking by adjacent owners, which he called ‘blackmail’.

Although encroachments may arise without wrong intent through human error, yet when they are discovered human avarice takes advantage of the opportunity, with the result that innocent men are blackmailed, in respect of an inch or two of land to an unconscionable extent.34

4.41 In our Consultation Paper we asked whether Victoria should have a discretionary relief provision for building encroachments.35 The majority of the submissions which addressed the question were in favour of such a provision, although some expressed reservations as to how the provision would interact with the law of adverse possession (discussed below).36 Mr Davies opposed the provision on the ground that it would reward those who encroach due to incompetence or lack of due diligence in building near a boundary without a survey.37 We discuss the control of this moral hazard problem below.38

BUILDING ENCROACHMENT LAWS IN OTHER JURISDICTIONS

4.42 Adopting a building encroachment provision would promote harmonisation of Victorian law with that of other Australian States and Territories. Five Australian jurisdictions and New Zealand have provisions dealing with encroachment by buildings, of which four are based on the Encroachment of Buildings Act 1922 (NSW).39 The New South Wales Act confers jurisdiction on the Land and Environment Court to grant or refuse such relief as it deems proper in the circumstances, including an order for the removal of the encroachment, the regularisation of the encroachment through an order for a transfer, lease or easement of the affected land portion, and payment of compensation.40 An application may be made by either the landowner whose land is encroached upon or the owner of the encroaching structure.41

4.43 The Act sets out a range of discretionary factors to be considered by the court in determining an application, including:42

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

4.44 In 1973, the Queensland Law Reform Commission reviewed the operation of its encroachment of buildings provision, which was based on the New South Wales provision and first enacted in 1955. The Commission reported that the provision ‘worked reasonably well, and few practical problems seem to have arisen in its application and enforcement’.43

4.45 The terminology used here is taken from the Encroachment of Buildings Act 1922 (NSW).


26 The Surveyor-General as quoted in email communication from the Executive Director of Land Victoria, 1 Sept 2010.

27 Surveying and Spatial Sciences Institute, Submission 11, 1–2.


30 O’Connor (2007), above n 25, 217.

31 The boundary could in some cases be amended by an unopposed application to the Registrar under section 99 of the Transfer of Land Act.


33 Rent seeking is behaviour that seeks to exploit an economic advantage, such as a monopoly situation, rather than earn income through productive activity and market transactions.

34 NSW Hansard, 13 September 1922 (Mr Ley), as cited in Googoorewon Pty Ltd v Amatek Ltd (1991) 25 NSWJR 330, 333–34 (Mahoney JA).


36 Dr Malcolm Park and Mr Peter Burns, Submission 4, 2–3; Dr Paul Vout, Submission 6, 7–10; Surveying and Spatial Sciences Institute, Submission 11, 2–3; Land Victoria, Submission 18, 4; Mr Peter Davies, Submission 19, 15–16.

37 Mr Peter Davies, Submission 19, 18–19.

38 See [4.63]–[4.69].


40 Encroachment of Buildings Act 1922 (NSW) s 3(9).


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45 Dr Malcolm Park and Mr Peter Burns, Submission 4, 2–3; Mr James Hope and Mr Peter Burns, Submission 6, 7–10; Surveying and Spatial Sciences Institute, Submission 11, 2–3; Land Victoria, Submission 18, 4; Mr Peter Davies, Submission 19, 15–16.

46 Mr Peter Davies, Submission 19, 18–19.

47 See [4.63]–[4.69].


49 Encroachment of Buildings Act 1922 (NSW) s 3(9).


51 Rent seeking is behaviour that seeks to exploit an economic advantage, such as a monopoly situation, rather than earn income through productive activity and market transactions.


53 Dr Malcolm Park and Mr Peter Burns, Submission 4, 2–3; Mr James Hope and Mr Peter Burns, Submission 6, 7–10; Surveying and Spatial Sciences Institute, Submission 11, 2–3; Land Victoria, Submission 18, 4; Mr Peter Davies, Submission 19, 15–16.

54 Mr Peter Davies, Submission 19, 18–19.
ADJUSTMENT OF BOUNDARIES

4.45 The submission from Land Victoria, while expressing no view on the substantive policy proposals, suggested a modification of the form of an order for transfer of the subject land. Land Victoria said that ‘rather than creating a folio that is to be transferred and then may or may not be the subject of a plan of consolidation, a simpler mechanism is for an order to provide for the adjustment of boundaries’. Land Victoria added that this approach would better protect the interests of mortgagees. We have adopted this suggestion in the framing of our recommendation.

4.46 Any boundary adjustments under the provision will need to be incorporated into the State’s cadastral mapbase. Our recommendations include provision, similar to that made in other States, for the court to order the Registrar to amend the recordings in the register of the dimensions of the affected lots.

ADVERSE POSSESSION AND BOUNDARY ENCROACHMENT

PART PARCEL ADVERSE POSSESSION

4.47 Disputes about encroaching buildings and the location of dividing fences are currently regulated by the law of trespass and the law of adverse possession. An adjacent owner is entitled to require a neighbour to remove an encroaching fence, wall or other structure erected without the landowner’s permission, and may sue in trespass for damages or an injunction.

4.48 The right to sue arises when the encroachment or trespass commences but expires if legal proceedings are not commenced before the limitation period expires. The limitation period for an action to recover land is 15 years although it may extend to 30 years if the landowner is under a legal disability. Once the right to sue arises, the running of the limitation period is unaffected by changes in ownership of either property.

4.49 So long as the trespass continues, the encroaching neighbour may be deemed to be in adverse possession of the portion of land on which the encroachment extends. Building on part of a neighbour’s land is strong evidence of adverse possession, but all relevant circumstances must be evaluated.

4.50 Once the limitation period expires, the adjacent owner’s title to the portion of land under encroachment is automatically extinguished by section 18 of the Limitation of Actions Act 1958 (Limitation of Actions Act). The adverse possessor can subsequently apply to the Registrar for an order vesting title to the land portion in the applicant, and can have the portion consolidated with his or her adjacent land. The rule that allows portions of land to be acquired in this way is ‘part parcel adverse possession’.

INTERACTION WITH BUILDING ENCROACHMENT PROVISIONS

4.51 A building encroachment relief provision may be used with or without a rule of part parcel adverse possession. Most jurisdictions do not allow part parcel adverse possession at all, or allow it subject to what is effectively a right of veto by the adjacent owner, or do not allow claims to areas of land which are below the minimum lot size for planning standards. In those jurisdictions, the building encroachment provision may be the only means by which the encroaching owner can have the boundary adjusted to accord with actual occupation without the consent of the adjacent owner.

4.52 The overall result in those jurisdictions is that a court may order an adjustment of the property rights only where the subject land has been built upon by a building that straddles the boundary. Where the land has been merely fenced or enclosed with and used as part of a neighbour’s land for any period of time, the neighbour does not acquire title to it.
4.53 Western Australia is the only Australian jurisdiction which has a building encroachment relief provision and also permits acquisition of title by adverse possession without restriction as to area. There has been little judicial consideration of the relationship between the provisions. If the encroaching owner is found to be in adverse possession, it appears that the encroachment relief jurisdiction can be exercised only in the period from the commencement of the encroachment until the expiry of the limitation period. Once the limitation period expires, the adjacent owner’s title to the subject land is extinguished by operation of law, leaving the encroaching owner with a possessory title. The building is no longer an encroachment, and the relief provision ceases to apply.

4.54 Although our terms of reference require us to consider the desirability of harmonising Victorian property law with the law of other Australian jurisdictions, there is no national consensus on part parcel adverse possession. In its submission, the Property Law Reform Alliance noted that a national approach to property law is needed in order to streamline property transactions and reduce confusion. The Property Law Reform Alliance proposed a draft Uniform Torrens Title Act be adopted, which includes provision for the acquisition of title by adverse possession. It seems that this model would permit adjustment of boundaries on the basis of adverse possession.

4.55 Because of these different approaches to adverse possession, particularly in jurisdictions with building encroachment provisions, we outlined four options in our Consultation Paper for reconciling the doctrine of adverse possession with a building encroachment provision.

4.56 The majority of submissions favoured the option of retaining the rule of part parcel adverse possession and leaving the Limitation of Actions Act unamended. This would have the effect of allowing the relief provision to operate only during the period (usually 15 years) between the commencement of the encroachment and the expiry of the limitation period. This was the preferred option for the Law Institute of Victoria, each of the surveying organisations and some individual surveyors.

4.57 It is not necessary for the purposes of this review to make any recommendation about part parcel adverse possession. A building encroachment relief provision can operate with or without part parcel adverse possession, and has useful work to do in both cases. It has a more limited scope of application if part parcel adverse possession is retained, since relief can no longer be granted after the limitation period has run and the adjacent owner’s title to the subject land has been extinguished.

4.58 In order to ensure that part parcel adverse possession continues to operate in conjunction with the building encroachment relief provision, the new Property Law Act should specify that nothing in the Division relating to the building encroachment relief provision affects the operation of Part 1, Division 3 of the Limitation of Actions Act. The effect on the operation of the building encroachment provision would be the same as for Western Australia, as discussed above at paragraph 4.53.

4.59 The relief provision will not apply where a dividing fence or wall positioned off the boundary encloses a portion of a lot with an adjacent lot and no building extends from the adjacent land onto or upon the portion. In such cases there is no ‘encroachment’. Property rights to the portion of land will continue to be governed by the law of trespass and part parcel adverse possession.

4.60 It is apparent from the submissions received that there are a number of reform issues relating to part parcel adverse possession that are beyond the scope of the present review, but which need to be examined. We outline the issues in Chapter 8.
WHO SHOULD BE ENTITLED TO APPLY FOR RELIEF?

4.61 Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.

4.62 The types of relief that are available under the building encroachment provision should be sufficiently broad, to accommodate the different circumstances in which encroachments can arise.

DISCOURAGING DELIBERATE AND NEGLIGENT ENCROACHMENT

4.63 The law relating to building encroachment should promote two objects: to discourage deliberate or careless encroachment; and to control rent-seeking and minimise losses by limiting the power of adjacent owners to require the removal of a building.59

4.64 The relief provisions in other jurisdictions all contain provisions designed to discourage deliberate and negligent (or grossly negligent) encroachment.

4.65 The Western Australian provisions are the most stringent. The encroaching owner is precluded from relief unless he or she proves that the encroachment was not intentional and did not arise from gross negligence, or that he or she did not build the encroachment.60

4.66 The New South Wales, Northern Territory, Queensland and South Australia statutes adopt a different approach. The encroaching owner is not precluded from obtaining relief if he or she fails to prove that the encroachment was not intentional and did not arise from gross negligence, but must pay three times the unimproved capital value of the subject land if the court makes an order for compensation for the transfer of an interest in the land to the encroaching owner.61

4.67 The mandatory requirement to award three times the unimproved value can cause injustice in some cases.62 For example, situations could arise where the previous adjacent landowner had permitted or even encouraged the construction of the encroachment. An equity might have arisen against that owner by equitable estoppel,63 which is not enforceable against a subsequent registered owner of the adjacent land.64 In this example, the encroachment was intentional, but it may be unjust in the circumstances to require payment of compensation at three times the value.

4.68 In Gladwell v Steen,65 Justice Debelle observed that, while the South Australian provision required the court to order a minimum compensation of three times the unimproved capital value of the land as a penalty for not taking due care in erecting the encroachment:

\[
\text{it would be unfair to impose that kind of penalty upon an innocent successor in title who has purchased the land unaware of the encroachment.}
\]

4.69 We consider that it should be left to the discretion of the court to judge in each case whether it is just and equitable in the circumstances that the encroaching owner should pay compensation at a higher rate, not exceeding three times the unimproved capital value.
JURISDICTION

4.70 In our Consultation Paper, we asked which court, courts or tribunal should be given jurisdiction over any new building encroachment provision. The Chief Judge of the County Court, while expressing no view on whether such a provision should be enacted, supported a shared jurisdiction in which the power is vested in the Supreme, County and Magistrates’ Courts. The Deputy Chief Magistrate pointed out in his submission that the Magistrates’ Court currently deals with applications relating to the position of dividing fences in applications under section 7(1)(c) of the Fences Act 1968.

4.71 The view of the Law Institute of Victoria is that the relief provision should be vested in ‘a costs jurisdiction with appropriate expertise’. The Institute proposes the establishment of a Land and Environment Court, as in New South Wales, and that jurisdiction under the relief provisions should be exercised by it.

4.72 The question of whether a new court should be established lies outside the Commission’s current terms of reference and we list it in Chapter 8 as a matter that requires further consideration.

4.73 The courts already deal with building encroachment cases coming before them as actions for trespass to land or nuisance, or claims based on equitable estoppel. Since encroachment issues may involve related proceedings, we are persuaded that the jurisdiction under the relief provision should be exercised by courts rather than VCAT. The courts have broader jurisdiction to determine any related proceedings.

4.74 The Supreme and County Courts have jurisdiction under the Property Law Act, except for Part IV, unlimited as to the value of the claim. We recommend that the Magistrates’ Court be given shared jurisdiction with the Supreme and County Courts under the relief provision. A model of concurrent jurisdiction of the Supreme, County and Magistrates’ Court is consistent with Attorney-General’s Justice Statement 1, which advocates the resolution of matters at the lowest level in order to reduce costs and improve access to justice. It would also be consistent with recent amendments giving the Magistrates’ Court jurisdiction to hear and determine matters arising under the Transfer of Land Act.

4.75 We considered three options as to the extent of the Magistrates’ Court’s jurisdiction:

- Jurisdiction limited as to the value of the subject land or the value of the relief (for example, compensation) sought. The limit could be $100,000, which is currently the limit for the court’s jurisdiction in causes of action for debt, damages and liquidated demands or in claims for equitable relief, or it could be a higher figure. In a proceeding involving property, the Court can admit into evidence a certificate of a valuer for the purpose of determining whether the amount claimed or the value of the relief sought is within the jurisdictional limit.

- Jurisdiction limited as to the size of the area of the subject land.

- Jurisdiction without a limit. Where an Act other than the Magistrates’ Court Act 1989 (Magistrates’ Court Act) vests jurisdiction in the Court to hear and determine a cause of action, the $100,000 jurisdictional limit does not apply unless special provision is made.

A monetary jurisdictional limit is difficult to apply where it requires an assessment to be made of the value of a portion of a lot, and the value of the portion is a fact in issue in the proceedings. A jurisdictional limit as to the area of the subject land is simpler and cheaper to apply, since it does not require expert evidence. However, the area of the land may have little relationship to its value or to the complexity of the proceeding.


60 Property Law Act 1969 (WA) s 12(2).

61 Encroachment of Buildings Act 1922 (NSW) s 4(1); Encroachment of Buildings Act 1932 (NT) s 7(1); Property Law Act 1974 (Qld) s 186(1); Encroachments Act 1944 (SA) s 5(1).


63 For an example of an argument that an equitable estoppel had arisen in regard to an encroachment, see McNulty & Aron v Cluster 3 Pty Ltd (Supreme Court, NSW 28 May 1997 1194/97) [355] NSW 17.

64 A personal equity against the owner of land can be an exception to the indefeasibility provisions of section 42(1) of the Transfer of Land Act. However, the equity will not be enforceable against a subsequent innocent purchaser of the land. See eg, Butt (2009), above n 52, [20 107]. See also the comments by Bryson j in Board Pty Ltd v Seymour and Others (1989) 15 NSWLR 715, 718–719.

65 (2000) 77 SASR 310 [21].


67 Judge Michael Roumenes, County Court of Victoria, Submission 3.

68 Deputy Chief Magistrate Peter Lauritsen, Magistrates’ Court of Victoria, Submission 13.

69 Law Institute of Victoria, Submission 13, 15.

70 Law Institute of Victoria, Submission 13, 14–15.

71 Property Law Act 1958 (Vic) s 3; County Court Act 1958 (Vic). The monetary limit on the Court’s jurisdiction was abolished by the Courts Legislation (Jurisdiction) Act 2006 (Vic) (Repealed) s 3(1).

72 Hansard, Assembly, 2 Sept 2009, 2983 (The Hon Mr Batchelor, MLA).

73 See definition of ‘court’ inserted into s 4(1) of the Transfer of Land Act 1958 (Vic) by s 3 of the Land Law Legislation Amendment Act (Vic) 2009, which commenced 1 May 2010. See discussion in Chapter 8: [8.54].

74 Magistrates’ Court Act 1989 (Vic) s 100(3).

75 A jurisdictional limit of 30 square metres was suggested by the Law Institute of Victoria, Submission 13, 15.

76 Magistrates’ Court Act 1989 (Vic) s 100(1)(a).
4.77 We consider that it would be preferable to vest jurisdiction in the Magistrates’ Court as a statutory cause of action under section 100(1)(d) of the Magistrates’ Court Act, unlimited as to jurisdiction. Concurrent jurisdiction would allow applicants to choose the court which they consider most appropriate to hear the application. A designated judicial officer has the power to transfer a proceeding to a higher court which has the appropriate skill, experience and authority to hear it having regard to its gravity, difficulty and importance, where a transfer is just and convenient.77

RECOMMENDATIONS

15. The new Property Law Act should include provisions empowering the Supreme Court, the County Court and the Magistrates’ Court to grant discretionary relief in respect to an encroachment by a building.

16. The new building encroachment provisions should describe a building encroachment in the following terms:

(a) An encroachment arises when a building straddles a boundary line and is partly on a lot owned by one party (the ‘encroaching owner’) and partly on an adjacent lot owned by another party (the ‘adjacent owner’).

(b) A building means a substantial building of permanent character.

(c) The encroachment may be by overhang of any part of a building as well as by intrusion of any part of a building in the soil.

(d) The portion of the lot over which the encroachment extends is the ‘subject land’.

17. The building encroachment provisions in the new Property Law Act should provide the following procedure for relief:

(a) Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.

(b) An owner means a person who holds an estate in freehold in possession and includes a mortgagee in possession.

(c) The applicant should be required to give notice of the application to a mortgagee, lessee or any other person who has an estate or interest in the subject land, or any other person to whom the court directs that notice should be given.

(d) On an application for relief the court should have power to make one or more of the following orders:

(i) the payment of compensation by the encroaching owner to the adjacent owner

(ii) that the subject land be included in the title to the encroaching owner’s lot by amendment of a boundary

(iii) that the adjacent owner lease the subject land to the encroaching owner

(iv) that the adjacent owner grant to the encroaching owner any easement right or privilege in relation to the subject land specified in the order

(v) that the encroaching owner remove the encroachment.
RECOMMENDATIONS

18. In exercising its discretion under the building encroachment provisions the court should have power to grant or refuse such relief as it thinks just and equitable and to consider:
   (a) the situation and value of the subject land
   (b) the nature and extent of the encroachment
   (c) the character of the encroaching building and the purposes for which it may be used
   (d) the loss and damage which has been or will be incurred by the adjacent owner
   (e) the loss and damage which would be incurred by the encroaching owner if he or she is required to remove the encroachment
   (f) the circumstances in which the encroachment was made.

19. Where, in an application for building encroachment relief, the court makes an order that the subject land is to be included in the title to the encroaching owner's lot, it should have power to direct the Registrar to make all entries on the folio of the register relating to any lot necessary to give effect to the order.

20. In determining the compensation to be paid under the building relief provisions to the adjacent owner in respect of any lease or grant to the encroaching owner or any amendment of a boundary line, the court should have power to determine an amount up to but not exceeding three times the unimproved value of the subject land.

21. In determining whether the compensation for building encroachment should exceed the value of the subject land, the court should have regard to:
   (a) the value, whether improved or unimproved, of the subject land to the adjacent owner
   (b) the loss or damage which has been incurred by the adjacent owner by reason of the encroachment
   (c) the loss or damage which will be incurred by the adjacent owner through the orders which the court proposes to make in favour of the encroaching owner
   (d) the circumstances in which the encroachment was made.

22. It should be provided that nothing in the building encroachment relief provisions affects the operation of Part 1, Division 3 of the Limitation of Actions Act 1958.
Chapter 4

Land Identification, Boundaries and Encroachment

A MISTaken IMPROVER RELIEF PROVISION

4.78 When movable objects (chattels) are attached to land or to buildings with the intention that they will be a permanent improvement, they can become a ‘fixture’.78 Fixtures are legally part of the land, and belong to the owner of the land. This common law rule is known as the fixtures rule.

4.79 The rule can cause injustice when a person attaches chattels to the land of another person under a mistake about the ownership or identity of the land. An example is where a contractor installs an air conditioning system in the wrong unit of a multi-owned unit development, or a water tank on the wrong lot. The air conditioning unit or the water tank is brought onto land as a chattel, but may become a fixture when it is attached to land as a permanent improvement.79 If so, the contractor, on realising the mistake, is not entitled to recover the items from the land without the landowner’s consent. The landowner is not liable to pay for the items or the improvement.80

4.80 In the leading Victorian case, Brand v Chris Building Society,81 the plaintiff was granted an injunction to stop a builder from demolishing a new home which the builder had erected on the plaintiff’s land under an honest mistake as to the identity of the lot. The plaintiff had not contributed to the builder’s mistake. The Supreme Court held that it has no jurisdiction to refuse the injunction on the basis that the plaintiff would be unjustly enriched by retaining the improvement on his land.82

4.81 Although there have been some developments in the law since Brand v Chris Building Society was decided, it is very unlikely that a mistaken improver who makes unsolicited improvements to someone else’s land would succeed in a claim for compensation on the basis of unjust enrichment.83

MISTaken IMPROVER RELIEF PROVISIONS IN OTHER JURISDICTIONS

4.82 Mistaken improver relief provisions have a long history in North America, where they are found in 42 US states and six Canadian provinces.84 They were originally enacted to encourage settlement and development of land at a time when land records were deficient.85 Their purpose is to relieve against the unjust enrichment of a landowner who benefits from another’s mistaken expenditure.

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

4.84 In 1973, the Queensland Law Reform Commission examined the mistaken improver problem and the Victorian decision in Brand v Chris Building Society.86 It concluded that a relief provision was not merely desirable but necessary.87

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

- that the whole or part of land on which the improvement stands be vested in the applicant
- that the improvement be removed
- that compensation be paid to any person
- that a person have or give possession of the land or improvement or part thereof for a specified period and on specified terms and conditions.
4.86 The Northern Territory adopted a provision based on the Queensland model in 1982.\textsuperscript{86} Western Australia enacted relief provisions, but the relief is limited to mistakes of identity.\textsuperscript{87} The Western Australian provision applies where a building has been erected by a landowner because of a mistake as to the identity of a lot.

4.87 The Queensland, Northern Territory and New Zealand provisions are broader and include mistakes as to title as well as mistaken identity.\textsuperscript{90} An example of a mistake of title occurred in a Queensland case in which a company which had purchased land constructed a home on the land in the belief that it had acquired a beneficial interest from an intermediate vendor.\textsuperscript{91} The company lost its interest in the land when the vendor under the head contract defaulted.

4.88 Another example of a mistake of title would be where a person improves land in the belief that they have inherited it, only to find that someone else has a better right under a later will.

**PROPOSED MISTAKEN IMPROVER RELIEF PROVISION FOR VICTORIA**

4.89 We proposed in the Consultation Paper that a mistaken improver relief provision be included in the new Act.

4.90 Most of the submissions that commented on the proposal were in favour of the introduction of such a provision and said that it should extend to mistakes as to title and mistakes as to identity.\textsuperscript{92}

4.91 In their submission, Mr Hope and Dr Vout raised the following objections to a mistaken relief provision:\textsuperscript{93}

- The cases involve a dispute between two innocent parties, with the landowner more ‘innocent’ than the improver.
- An order for compensation could create financial hardship for a landowner who has committed no wrong.
- Technological development in the areas of property registration and identification is a more suitable solution.

4.92 They observe that an order for payment of compensation to an improver may cause financial harm to a landowner whose land has been improved. For example, an improvement which substantially increases the value of land might result in the landowner needing to sell the improved land to pay the compensation award.

4.93 The submission further suggests that if the court is empowered to make a compensation order against a landowner who retains the improvement, the quantum of the compensation should be subject to a discount, because of the landowner’s lack of fault, and also to reflect any loss of amenity or opportunity that the landowner might suffer.

4.94 The proposed provision is not intended to disadvantage innocent landowners. It would limit the operation of the fixtures rule to enable mistaken improvers to mitigate their losses and to prevent landowners from being unjustly enriched. Causation, fault, hardship and cost are matters that the court should be able to take into account in determining whether to grant or refuse relief and in shaping the orders.

4.95 We propose that, as in other jurisdictions which have such a provision, the court should have a broad discretion and powers to make an order that is just and equitable in each case. In some cases, it may be just and equitable to allow the mistaken improver to remove the materials from the land and make good any damage. In other cases, justice may require the payment of compensation to the improver by a landowner who wishes to retain the improvement.
4.96 The assessment of the amount of compensation should be left to the court. A rule requiring a compensation discount would be arbitrary, as there is no sound criterion for determining what the general rate of discount should be.

4.97 As noted in the Consultation Paper, the Queensland model provides a good example of the kinds of relief that a court should be able to grant.

4.98 Finally, with regard to the observation that technological development in the areas of property registration and identification is a more suitable solution than legislative reform, we agree that mistakes are better avoided than remedied. Although technological developments in surveying have improved methods of land identification, mistakes will still occur where works are undertaken without a survey or title search, such as the installation of equipment in existing buildings.

4.99 We have concluded that the new Act should include a mistaken improver provision that is broad enough to encompass both mistakes as to the identity of the land and mistakes as to the title to the land. ‘Improvement’ would be defined for the purposes of the provision as a fixture. This will limit the application of the Act to instances where the operation of the doctrine of fixtures has created the underlying problem.

LIMITATION PERIOD

4.100 Usually where a person has a right to bring an action in court, the right must be exercised within a limited time. If a mistaken improver relief provision is introduced, a limitation period should be set for it.

4.101 The effect of the mistaken improver provision is to relieve against the operation of the fixtures rule, allowing the improver to recover chattels which have become attached to someone else’s land. Apart from the effect of the fixtures rule, the improver would have an action in detinue against the landowner. An action in detinue arises where a person has lawfully acquired possession of goods but has wrongfully refused the plaintiff’s lawful request to return them.94

4.102 Sometimes it is unclear whether the chattel has become a fixture or not, since there is no single test and much depends on the facts of each case.95 In doubtful cases it is likely that an application for relief under the provision will be brought in conjunction with an action in detinue, so that the court can grant relief whether the chattel is found to have become a fixture or not.

4.103 Since the limitation period for an action in detinue is six years, it would be consistent to provide the same limitation period for an application under the relief provision.96

JURISDICTION

4.104 In our Consultation Paper we asked: if a mistaken improver provision is introduced, which court or courts or VCAT should have jurisdiction? The views of the Law Institute of Victoria on this question were the same as for the building encroachment relief provision as discussed above.

4.105 Cases of mistaken improvement already come before the courts under other types of action. For example, a contractor may sue in detinue for return of chattels used to make an improvement, or a landowner may sue in trespass for damages or in conversion for the return of objects removed from the land. There could also be related proceedings in contract or negligence against third parties, or a claim by a third party who holds a personal property security in chattels that were used to make the improvement.97
4.106 Since there may be multiple claims involving different areas of law, we recommend that the mistaken improver relief provision should be exercised by courts rather than VCAT. The courts have broader jurisdiction to determine any related proceedings in tort, contract and equity, and under the Personal Property Securities Act 2009 (Cth). The new relief provision will complement the existing jurisdiction of the courts, by giving them power to make an order that is just and equitable in the circumstances even if the mistaken improvement is a fixture.

4.107 In relation to the Magistrates’ Court, we refer to our comments at paragraph 4.74 in relation to the building encroachment relief provision. We recommend that the three courts should have concurrent jurisdiction under the relief provision.

**RECOMMENDATIONS**

23. The new Property Law Act should empower the Supreme Court, the County Court and the Magistrates’ Court to grant discretionary relief where a person has made a lasting improvement upon land owned by another in the genuine but mistaken belief that the land is:

(a) the person’s property, or

(b) the property of a person on whose behalf the improvement was made or was intended to be made.

24. An improvement for the purpose of mistaken improver relief should be defined as a fixture on land.

25. An application for mistaken improver relief should be able to be made by:

(a) a person by whom or on behalf of whom the improvement was made (the ‘mistaken improver’)

(b) a person who has an estate or interest in the land or part of it on which the improvement or part of it has been made

(c) a person upon whose land the improvement was intended to be made, or the person’s successor in title, mortgagee or lessee, or

(d) a person claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract or other instrument relating to the subject land on which the improvement was intended to be made.

26. The applicant for mistaken improver relief should be required to give notice of the application to any person who has an interest in the subject land or who is likely to be affected by an order that the court may make.

27. In exercising its discretion under the mistaken improver relief provision, the court should have power to grant or refuse relief as it sees fit and be able to consider:

(a) the situation and value of the subject land, and the nature and extent of the improvement

(b) the character of the improvement and the purposes to which it may be used

(c) the loss and damage which would likely be incurred by the mistaken improver if he or she were required to remove the improvement

(d) the circumstances in which the improvement was made.

94 John F Goulding Pty Ltd v Victorian Railway Cmrs [1932] VLR 408.
96 See Limitation of Actions Act 1958 (Vic) ss 5(1a).
97 The Chattel Securities Act 1987 (Vic) s 6(1) modifies the operation of the fixtures rule. The provision is retained pending a review of the interaction of the Personal Property Securities Act 2009 (Cth) and the fixtures rule.
28. On an application for mistaken improver relief the court should have power to make such order as is just and equitable, and should be able to make one or more of the following orders:

(a) that a specified person is vested with the whole or any part of the land on which the improvement or any part of the improvement has been made, either with or without any surrounding or adjacent or other land

(b) that a specified person shall or may remove the improvement or any part of it from the land or any part of it

(c) that a specified person pay compensation to any other person in respect of any land or part of it, any improvement or part of it, or any loss or damage caused or likely to be caused by the improvement or any order that the court proposed to make

(d) that any person specified in the order have or give possession of the land or part of it or the improvement or part of it for the period and on the terms that the court specifies.

29. The court should have power under the mistaken improver relief provisions to make orders as follows:

(a) upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise

(b) declaring any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other encumbrance, or varying, to such an extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land

(c) ordering any person to produce to any person specified in the order any title deed or other instrument or document relating to any land

(d) directing a survey to be made of any land and a plan of survey to be prepared.

30. The Transfer of Land Act 1958 should be amended to provide that, where a vesting order is made on an application for mistaken improver relief and is lodged at the office of the Registrar, the Registrar is required to make all entries on the folios of the affected lots necessary to give effect to the order.

31. The limitation period for bringing actions for relief under the mistaken improver provision should be the same as for an action in detinue.