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**SURVEYING & SPATIAL SCIENCES INSTITUTE**

Victorian Regional Committee

30th June, 2010

Property Law Act Review
Victorian Law Reform Commission
P.O.Box 4637 GPO
Melbourne, Victoria, 3001

By Email law.reform@lawreform.vic.gov.au

Dear Sir/Madam,

Re: Property Law Act Review

Thank you for the opportunity to make a submission on this review.

The Surveying & Spatial Sciences Institute (SSSI) is a national professional body which was recently created from the formal merger of the Spatial Sciences Institute and all the state divisions (excepting Victoria) of the Institution of Surveyors Australia. This is the final process of a government supported Spatial Action Agenda which involved the amalgamation of the national professional bodies representing Land Surveyors, Cartographers, Photogrammetry, Remote Sensing and GIS Professionals. The developments in technology have blurred the boundaries between these disciplines and significant economies of scale have evolved with the formation of this body. Our members are individuals from the private sector, government and academia. The Land Surveying Commission nationally is supportive of developing a common approach to cadastral surveying and definition of boundaries.

Our interest in this part of the review is predominantly around Land Identification, Boundaries and Encroachment

Section 272 A little more or a little less

We understand that the purpose of section 272 of the *Property Law Act 1958* is to restrict any proceedings over inconsequential matters. The current margin of error does not mean that a land parcel needs only to be marked to these defined limits as is inferred in the review that there is an allowed latitude in measurements, but it implies that there are inherent practical discrepancies between the dimensions of a land parcel as occupied and the dimensions provided in a title and that no action for trespass can be undertaken within these limits.

The current minimum margin of error of 50 millimetres and a one in 500 deviation of a length exceeding 40.30 metres, sits well within the confines of a typical dividing fence. As adverse possession issues have also been raised in this review it is worth creating an awareness of Clause 54.04 VPP's (the Rescode provisions) where buildings constructed within 150mm of a boundary are accepted as "practically" on the boundary for town planning purposes. This is

done for a number of reasons, so as overspill from wall footings does not encroach or as a safety margin if the title boundary has not been determined prior to construction. With the recent encouragement of the construction of building structures on boundaries as good land use, the legacy of this will be to create a further number of small strips which under the Statute of Limitations Act fifteen years later, can provide common law possessory rights to the adjoining owner of a small strip of land which is unviable to register, causing further inconsistencies to the State Cadastre .

This Review may provide an opportunity to consider and adopt a greater margin of error for which no legal action of trespass can be taken; for example 150 mm.

We are also aware of a case where a possessor made application to acquire a 1 metre + wide strip enclosed across the rear of his property. This was a straight forward adverse possession case, however in what could be considered a less than professional initiative, the application included the location of the side fencing which abutted a number of adjoining properties in the application. The side fencing was only in the magnitude of 50-80mm outside title in some sections, but the application included these properties which on their own would be small and imperceptible and not provide any cost benefit to an adverse possessor, but instead introduced unnecessary angst to unsuspecting adjoining proprietors and created "unnecessary" slivers of land. The recent Land Legislation Act has since provided the Registrar with the discretion to require consolidation of these slivers into a larger parent parcel.

Adverse Possession and Mistaken Improver Provisions

Although it is handled under the Transfer of Land Act, this review has introduced discussions surrounding the issues of adverse possession.

Adverse Possession is an important concept to land surveyors as well as lawyers. In particular; part parcel adverse possession is of interest to the cadastral surveyor because although it can repair the land description, it is on many occasions connected with a land dispute and it tends to introduce emotional and irrational behaviour.

The reality is that occupation seldom accords with title dimensions and it is essential to have a mechanism to deal with boundary repair issues. Adverse possession does in fact provide a solution to the problem and part parcel boundary adjustment should be allowed to continue but with the introduction of alternative provisions for encroachment relief.

Cases which may give rise to an adverse possession claim are:-

- Boundary Encroachment.
- Disused adjoining land parcels such as rear lanes, reserves.
- Boundary fencing not on the true title boundary.
- Improvements constructed on other land through incorrect lot or boundary definition.
- Improvements deliberately set back from a boundary for reasons of construction, practicalities and the land then used by the adjoining owner.
- Boundary uncertainty resulting from survey errors.
- Lack of knowledge of informal agreements in siting structures between previous owners who have since moved on.

Surveys in the 1800's were limited in accuracy due to the technical limitations of equipment and computing power. However with the modernisation of instruments, the Victorian Cadastre is now very accurate, based on surveys carried out by Licensed Surveyors. A major part of the State Governments *e-plan* project is implementation of a survey accurate cadastre.

The Surveyors Registration Board of Victoria (SRBV) carries out random audits of licensed surveyors to ensure the integrity of the cadastre is maintained. Areas of boundary uncertainty are more likely where old titles exist or in the case of new boundaries, where marks have not

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been properly taken into account. A prudent purchaser on purchasing a property will engage a licensed surveyor to confirm the relationship between occupational and legal boundaries.

The proposal to introduce *mistaken improvers encroachment provisions* in the form of some sort of statutory encroachment relief provisions which takes away the passage of time, is worthy of consideration. Any part parcel solutions should require a plan of survey to update and maintain the integrity of the cadastre. There would also need to be a transitional mechanism for protection of those rights of adverse possession which are in the course of maturing.

Alberta Canada, allows neighbours to execute an encroachment agreement and consideration could also be given to a specifically expressed intrusion easement in the case of encroachments by buildings, swimming pools, eaves, gutters etc or a negotiated sale of the land containing an encroachment.

Recent policy has seen a move towards centralised and harmonious property laws throughout Australia. Whilst there are many perceived benefits to be gained from this concept, one of the significant obstacles is the different approach to Adverse Possession in each State. The jurisdictions of Queensland, New South Wales, South Australia and Western Australia and the Northern Territory already have provisions in some form for statutory encroachment. Any implementation of changes should also consider those states with a similar approach to Victoria.

Thank you for the opportunity to respond this review and we welcome any further participation as the process develops.

Yours sincerely

Lindsay Perry
Land Surveying Commission Representative
Victorian Region

