



# Property Law Review June, 2010

**SUBMISSION BY  
ASSOCIATION OF CONSULTING  
SURVEYORS VICTORIA**



## **1. BACKGROUND**

The Association of Consulting Surveyors Victoria currently has a membership of 114 firms and represents the interests of the vast majority of Licensed Surveyors providing boundary surveying services to the public (including individual property owners, builders, investors and major developers) and to government entities (including Councils, Water Authorities, VicRoads and Land Victoria).

As such our members have a direct and critical role in relation to the implementation of Part VII (Sections 267-271) of the Property Law Act and a strong 'hands-on' knowledge of the implications of adverse possession and "Mistaken improver and building encroachment" incidences and implications throughout Victoria.

## **2. COMMENTARY ON PART VII OF THE PROPERTY LAW ACT**

The provisions of this part of the Property Law Act principally deal with boundaries defined in Crown Surveys.

The vast majority of titles in Victoria have for a very considerable time been created by private subdivisions (under the Subdivision Act 1988 and preceding legislation) and are not related to Crown boundaries and the application of these provisions is therefore limited in extent. It is the Association's belief that the Royal Commission of 1885 may well have limited the application of such provisions to Crown boundaries due to the relative immaturity of the Torrens Title System (implemented in October 1862) and the relatively smaller extent of private subdivisions at the time. It is also noted that for almost 100 years it was possible for titles to be created by paper transfers with boundaries being created without survey.

The Association believes that it is appropriate to consider the broadening of these sections to cover boundaries created by private subdivisions.

It is also noted that since implementation of the Property Law Act advancement of surveying techniques and most particularly the technological advances in electronic and satellite measurements over the past 30 years and the audit program operated by the Surveyors Registration Board of Victoria have practically eliminated the likelihood of significant inaccuracies in current surveys. However the principles contained in these sections and in other land and surveying related legislation are essential for dealing with titles of reasonable age.

### 3. CONSIDERATION OF PROPOSALS AND QUESTIONS SET OUT IN THE CONSULTATION PAPER IN RELATION TO CHAPTER 12

- 3.1 **Q.32.** *Should Section 270 be extended to enable the distribution of shortages, as well as excess of measurements, in proportion to the respective areas of the allotment?*

View: The Association supports the proposal to extend the provisions to enable the distribution of shortages, *though shortages in Crown Allotments are relatively rare occurrences for historical reasons, and that such proportioning might be based on parcel frontages rather than on relative parcel areas.* The Association also believes that consideration should be given to extension of this provision to cover boundaries other than Crown boundaries. We believe that this question requires a broad review by relevant stakeholders.

#### 3.2 **Questions 33-38**

- Q.33.** *Should Victoria adopt a mistaken improver relief provision? If so, should it encompass mistakes as to identity as well as mistakes to title?*
- Q.34.** *If Victoria adopts a mistaken improver provision, which court, courts or tribunal should have jurisdiction?*
- Q.35.** *Should Victoria have discretionary relief provision for building encroachments?*
- Q.36.** *Should the limitation period for recovery of land continue to apply in relation to portions of land adjacent to a property boundary?*
- Q.37.** *If the limitation provisions are amended, what provision should be made for persons in adverse possession of portions of land at the time the amendments come into force?*
- Q.38.** *If Victoria adopts a building encroachment provision, which court or courts or tribunal should have jurisdiction?*

View: For reasons set out below it is the Association's view that the questions related to Mistaken Improver Relief Provisions can only be properly considered after detailed examination of the current application of the rule of adverse possession. We note that in Section 12.44 of the Consultation paper it is indicated that the Commission proposes "that the wider application of the rule of adverse possession should be examined as part of the review of the Transfer of Land Act in the second stage of the property law reference". Accordingly the Association suggests that Mistaken Improvers Relief Provisions consideration should be deferred until that time.

The Association believes that the provisions relating to adverse possession under Sections 60 and 99 of the Transfer of Land Act 1958 (and previous similar provisions under preceding Acts) have so greatly influenced land dealings in Victoria for considerably more than 100 years that careful examination of the implications of removal of such provisions is required.

As noted in Section 12.28 of the Consultation paper "Once the limitation period expires, the landowner's title to the portion of land affected by the encroachment is automatically extinguished". We believe that this legal position has become so well established that it has strongly influenced professional advice from both Licensed Surveyors and Solicitors in relation to building and occupation encroachments and that it has obtained a general community acceptance in Victoria.

We note that relatively recent amendments to the Limitations of Actions Act have removed the rights to claim adverse possession against Railway, Municipal and Water Authority lands with a transitional period involved. However the Association believes that there is an intrinsic difference between these situations and general land dealings, where in most instances the adjoining properties are properties are *occupied and therefore absentee landlord provisions are not required.*

Considering that the current reliability of boundary definition (as noted in Section 2 of this submission) is high and current building construction methodologies and practices generally require survey definition of boundaries prior to construction, the Association believes it would be appropriate to consider removal of some adverse provisions in relation to newly issued titles.