28 June, 2010

The Victorian Law Reform Commission
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Dear Commissioners,

Review of *Property Law* Act 1958
Consultation Paper (April 2010)

As outlined in our other letter to the Commission, we are currently formulating a proposal for modifying the *Transfer of Land* Act with regard to boundary law for the Victorian cadastre. We expect to send this other letter in the near future and this present letter, our response to the Consultation Paper, has taken precedence because of the imminent closing date for responses.

Because we are not wholly in agreement we have separated out our responses. We here note that we have confined ourselves to Chapter 12 of the Consultation Paper: "Land Identification, Boundaries and Encroachments". We also note that the Consultation Paper fails to distinguish between Crown boundaries and sub-divisional boundaries (for example, see ¶¶ 12.4, 12.39 and 12.43 at pp 78, 80 and 81 of the Consultation Paper). A further reference to the importance of the distinction between Crown and sub-divisional boundaries is at pp 13-4 of Jahn & Knight, *Review of the Law & Procedure relating to Boundary Adjustment* (2000).

Because of our belief that the distinction between Crown and sub-divisional boundaries is a primary cause of the problems currently besetting the Victorian title system we here briefly outline our understanding of those events leading to the current position where Crown boundaries and sub-divisional boundaries are treated differently. The law relating to Crown boundaries (*Property Law* Act § 270) has caused virtually no public disharmony although the discontinuities between title and physical boundaries (occupation) have created both hiatuses and encroachments

that pepper Victoria's title system where our reference to the Victorian title system encompasses both the "General Law" land title and Registered Land Title systems.

Events leading to the current position:

The current problem in Victorian boundary law had its genesis in the Royal Commission of 1885 where the commissioners and the Minister (in the second reading speech during the debate on the subsequent legislation) all declared that the only solution to the problems created by sub-standard surveys was to adopt the boundaries as fenced where the original survey marks had been obliterated. Despite the acceptance of the solution, the actual problem still exists today because the ensuing legislation did not treat all boundaries equally with the result that private landholders elected to save money by not availing themselves of the solution provided by that ensuing legislation. That is, despite the 1885 recommendations being to include all boundaries, the ensuing legislation (currently § 270 of the *Property Law* Act) was confined to Crown boundaries only and did not encompass sub-divisional boundaries.

Response to 2010 VLRC Consultation Paper by Peter Burns, one-time Manager, Registrar-General's office.

I am in the process of preparing a joint submission to the Parliament regarding a proposal to modify the boundary law of the Victorian cadastre. In view of our proposal and the recommendations of the Jahn & Knight report, *Review of the Law & Procedure relating to Boundary Adjustment* (14 April, 2000) commissioned by the then Director of the Land Registry in response to Recommendation #69(2) of the Victorian Parliamentary Law Reform Committee's *Review of the Fences Act* (1999), I am indifferent to the proposals within chapter 12 of the VLRC's Consultation Paper.

A summary of my opinion would be that I express no opinion with regard to mistaken improvements; I do not oppose the proposals for building encroachments save that I am of the view that such relief should only be available where adverse occupation is of less duration than the limitation period OR the adverse occupier is unable to establish the necessary 15 year adverse possession. Otherwise, I see no necessity for building encroachment. I offer no opinion on the transition between current part parcel adverse possession and the introduction of building encroachment because

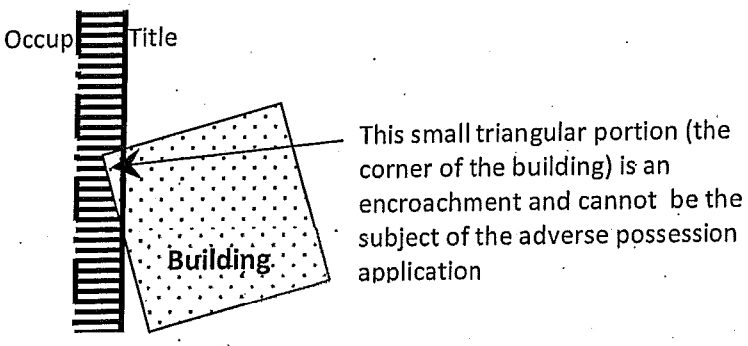
they should continue to co-exist: the one for occupation less than 15 years (or where the occupier is unable to establish the necessary period of occupation) and the other for occupation of 15 plus years. This would appear to be in accord with sub-para 1 of paragraph 12.45. With regard to sub-paras 2, 3, & 4 of para 12.45, I am of the view that such proposals would create more problems than solutions. Another factor behind my disapproval of transitional provisions is my lack of confidence that such provisions can be implemented without improper destruction of accrued rights. I offer, as an example, the transitional provisions of the *Limitations of Actions (Adverse Possession)* Act 2004 prohibiting adverse possession of local government land where these transitional provisions improperly affected accrued property rights.

Response to 2010 VLRC Consultation Paper by Dr MM Park.

¶ 12.4, p 76: Agree - with the additional comment that the proposed amended § 270 also be extended to sub-divisional boundaries.

¶ 12.44, sub-para 1, p 81: Content to allow reform to permit encroachment to apply during initial 15 year period (or where 15 year period cannot be established). After passage of 15 years the current part parcel Adverse Possession provisions to continue to apply.

¶ 12.44, sub-para 2, p 81: This is unworkable. In the example given the adverse occupier could apply for title over "enclosed land" but would necessarily have to apply for an encroachment within that enclosed land. That is the adverse possession application would include all that land between the title boundary and the misplaced fence (shown as ▬ · ▬) ***save*** the corner of the building which would be the subject of an encroachment application. ***ALL*** the land ***should*** be the subject of the part parcel adverse possession application.



¶ 12.44, sub-paras 3 & 4, p 81: Disagree with both sub-paragraphs.

¶ 12.46, p 81:	Typo error: § 99 of the *TLA* & § 271 of the *PLA*.
Question 32, p 86:	Yes, the proposed amended § 270 also be extended to sub-divisional boundaries.
Question 33, p 86:	Yes to both. However this solution relieves surveyors, builders and clients (the landholders) of responsibility for due care.
Question 34, p 86:	No opinion. However, I am confident that if such determinations are to be heard by a lower court then they will be heard eventually by the higher courts (on appeal).
Question 35, p 86:	Yes. But see my comments above in regard to ¶ 12.44.
Question 36, p 86:	Yes. But see my comments above in regard to ¶ 12.44, sub-paragraph 1.
Question 37, p 86:	None – the limitation period and the encroachment proposals can co-exist - see my comments above in regard to ¶ 12.44, sub-paragraph 1.
Question 38, p 86:	No opinion. However, I am confident that if such determinations are to be heard by a lower court then they will eventually be heard by the higher courts (on appeal).

Yours truly,

Peter M Burns

Malcolm Park