ADVERSE POSSESSION AND TITLE-BY-REGISTRATION SYSTEMS IN AUSTRALIA AND ENGLAND

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[The doctrine of adverse possession has had a long history in English law and was inherited by the Australian legal system from England. Adverse possession arose in and was suited to a land law system based on possession and relativity of title. However, the introduction of title by registration in Australia and England has seriously challenged the retention and usefulness of this doctrine. This article explores the degree to which adverse possession remains part of the law of England and Australia. It is argued that while adverse possession has been statutorily constrained in the English title-by-registration system, it remains relevant for unregistered title. In Australia, there have been diverse approaches to adverse possession (both in relation to old or common law system land and title by registration). Accordingly, Australian land is law fractured and contradictory. The article distils the various approaches to adverse possession, particularly in relation to title by registration, and considers arguments for and against its retention. It is suggested that it may be appropriate to abolish this 'rough-and-ready' doctrine, which has the potential to undermine the otherwise indefeasible interest of registered proprietors. Instead, it is contended that there ought to be careful analysis of the kinds of cases where, in modern times, adverse possession has been used to address title claims. Specific provisions dealing with such situations could be implemented, taking into account modern approaches to the acquisition of land.]

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I INTRODUCTION

Adverse possession has had a long history in English land law. In the preface to his seminal work on the subject, Stephen Jourdan commented that the doctrine of adverse possession (hereinafter 'the doctrine') has been an 'immensely popular' vehicle for resolving land disputes in England.[1] He noted that Baroness Scotland had observed during the debates about the Land Registration Bill 2002 (UK) that each year the Land Registry had received approximately 20 000 applications for registration based on adverse possession and that about three quarters of the applications were decided in favour of the adverse possessors (over half of whom were squatters).[2] Jourdan also observed that adverse possession was an 'enormously profitable' exercise, particularly when large areas of valuable land were involved.[3] These simple, but significant, facts demonstrate that even in the early 21st century the traditional doctrine was playing a significant role in the resolution of property disputes in English law. However, adverse possession was not popular with all segments of the English population. Individ-

1 Stephen Jourdan, *Adverse Possession* (LexisNexis Butterworths, 2003) v.
2 Ibid.
3 Ibid.

ual landowners who were supplanted as owners of the land,[4] public authorities that lost land (or were in danger of losing land) due to poor record-keeping or insufficient supervision,[5] and law commissions faced with the implementation of a modern title-by-registration system did not consider adverse possession as either appropriate or profitable.[6] There were controversial and emotionally charged reports in the broadsheets[7] and popular or tabloid press[8] about squatters

4 See, eg, *J A Pye (Oxford) Ltd v South Gloucestershire District Council* [2001] EWCA Civ 450 (29 March 2001); *J A Pye (Oxford) Ltd v Graham* [2000] Ch 676; *J A Pye (Oxford) Ltd v Graham* [2001] Ch 804; *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHHR 43; *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 1083. The *Pye* litigation focused lawyers and academics on the continued existence of the doctrine of adverse possession and highlighted the significant impact of successful claims. The dispute developed into a litigious saga. In this case, Mr and Mrs Graham entered into a grazing agreement with J A Pye (Oxford) Ltd ('Pye') in relation to land which was adjacent to the Grahams' farm. After the grazing agreement expired, the Grahams requested a further grazing agreement from Pye, but Pye did not wish to enter into any further agreement. Nevertheless, the Grahams remained in possession of the land from 1984 until 1997, when Mr Graham registered a caution at the Land Registry, claiming that he was entitled to the property under the doctrine of adverse possession. Pye sought to have the caution removed and brought proceedings for possession of the land. At first instance, the court held that the Grahams could rely on the doctrine of adverse possession because they had had factual possession of the land for the requisite period. Therefore, Pye's interest in the land had been extinguished, and the Grahams could be registered as the new proprietors of the land: *J A Pye (Oxford) Ltd v Graham* [2000] Ch 676, 709–10 (Neuberger J). Pye successfully appealed to the Court of Appeal. The Court held that the Grahams continued to use the land by reference to the expired grazing agreement, which the Court interpreted as a licence agreement, and that the Grahams' intention in relation to land had not changed since they commenced using the land under the grazing agreement: *J A Pye (Oxford) Ltd v Graham* [2001] Ch 804, 819–20 (Mummery LJ, Keene LJ and Sir Martin Nourse agreeing). The House of Lords upheld the appeal of the Grahams from the decision of the Court of Appeal, finding that the Grahams displayed sufficient factual possession of the land for the requisite period and Pye had not undertaken sufficient acts to exclude them from the land: *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 442–4 (Lord Browne-Wilkinson, Lords Hope and Hutton agreeing). Dissatisfied with the decision of the House of Lords, Pye appealed to the European Court of Human Rights. Pye argued that the doctrine of adverse possession deprived Pye of its right to enjoy its interest in the land and that the doctrine therefore breached art 1 of the *Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954). Article 1 of the Protocol protects a person's 'peaceful enjoyment of his possessions'. It also provides that: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' The Protocol does not 'impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.' At first instance, the Chamber held by 4 votes to 3 that there had been a breach of the Protocol: *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHHR 43, 58–64 [53]–[76]. On the request of the United Kingdom government, the matter was referred to the Grand Chamber, which decided by 10 votes to 7 that there had been no breach of the Protocol. The Grand Chamber held that the law of adverse possession, which limited the period for recovery of land and determined ownership of land, had a legitimate aim in the general interest and was not without reasonable foundation. Pye was affected by laws pertaining to the 'control of use' of the land, rather than the deprivation of possessions: *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 1083, 1099–106 [58]–[85].

5 See, eg, *Ellis v London Borough of Lambeth* (2000) 32 HLR 596; *Lambeth London Borough Council v Archangel* (2001) 33 HLR 44; *Buckinghamshire County Council v Moran* [1990] 1 Ch 623 ('*Buckinghamshire*').

6 Law Commission (UK) and H M Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, Law Com No 254 (1998) 214–20 [10.27]–[10.42].

7 See, eg, Clare Dyer, 'Britain's Biggest Ever Land-Grab', *The Guardian* (London), 9 July 2002, 16, commenting on the success of the adverse possessors in *J A Pye (Oxford) Ltd v Graham*

adroitly relying on the principle of adverse possession to acquire property from the true owners. Adverse possession developed a 'bad name' as it (allegedly) facilitated property theft. The result was that some important litigation was brought before high level courts, which raised fundamental questions about both the abuse of human rights[9] and the recommendations by the Law Commission to restrain considerably and restrict access to the doctrine in regard to registered land.[10] As it is envisaged that most if not all the land in England will be subject to a title-by-registration system eventually,[11] the introduction of such a system is likely to have a profound effect upon the ongoing existence of the doctrine in England.

At the commencement of European settlement, Australia substantially inherited the system of land law that existed in England.[12] Like England, Australia also had an effective doctrine up until the implementation of title by registration, or the Torrens system, in the sense that the doctrine could be relied upon successfully by adverse possessors to acquire land.[13] However, unlike England, some states in Australia still retain a fully fledged doctrine, while in others it has been reintroduced within the Torrens system. Moreover, although there have been recent instances of the successful application of the doctrine in the courts,[14] unlike in England there has not been the same degree of adverse publicity in Australia (perhaps because there does not appear to have been the level of annual applications referred to in Jourdan's book). Nevertheless, it has been recognised that title by registration and adverse possession may not be compatible.[15]

[2003] 1 AC 419. See also Diane Smith, 'Squatters to Keep £1m House', *The Guardian* (online), 5 April 2004 <http://www.guardian.co.uk/society/2004/apr/05/housingpolicy.uknews>.

8 See the examples listed in Neil Cobb and Lorna Fox, 'Living Outside the System? The (Im)morality of Urban Squatting after the *Land Registration Act 2002*' (2002) 27 *Legal Studies* 236, 237 n 4.

9 *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 1083. See the discussion of these cases in above n 4.

10 Law Commission (UK) and H M Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Law Com No 271 (2001) pt XIV, cited in *J A Pye (Oxford) Ltd v Graham* [2000] Ch 676, 709–10 (Neuberger J).

11 Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 12 [2.9]; Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 192 [2.2.28].

12 See Janice Gray et al, *Property Law in New South Wales* (LexisNexis Butterworths, 2nd ed, 2007) ch 3.

13 See, eg, *R v West* (Unreported, Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 18 October 1832); *Blower v Larkin* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 5 November 1833); *R v Steele* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 18 October 1834); *Doe ex diem Antil v Hodges* (Unreported, Supreme Court of New South Wales, Forbes CJ, 23 March 1835); *Doe dem Hunt v Grimes* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 15 July 1835); *Holt v Hadley* (Unreported, Supreme Court of New South Wales, Dowling CJ, Burton and Stephen JJ, 31 July 1841). These cases can be accessed at <http://www.austlii.edu.au/au/cases/nsw/NSWSupC>.

14 See, eg, *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56 ('*Abbatangelo*'); *Bridges v Bridges* [2010] NSWSC 1287 (8 November 2010).

15 Lynden Griggs, 'Possessory Titles in a System of Title by Registration' (1999) 21 *Adelaide Law Review* 157; Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement under a Mistake' (2006) 33 *University of Western Australia Law Review* 31.

This article proceeds as follows. First, the article will briefly describe the legal context in which the traditional doctrine arose; the major elements of the traditional doctrine; and how it still applies to unregistered land in England and Australia. Second, the article will consider to what extent legislators of title-by-registration systems have been able or willing to accommodate the doctrine within their systems. A careful analysis of the legislation dealing with the doctrine in each of the Australian states and territories and England will be undertaken. It will be demonstrated that there have been changing attitudes on this issue and that there has been no one single or overarching approach to adverse possession. Third, the article will outline various responses to adverse possession which have been gleaned from the analysis of the Australian and English legislation, and in so doing consider whether the doctrine remains appropriate in a modern system of land law, taking into account philosophical arguments and the practical implications associated with its retention, modification and abolition.

In this article, 'documentary owner' or 'true owner' will refer to the owner of the land, and 'adverse possessor' will refer to the person able or intending to claim a right to land under the traditional doctrine or under a statutorily modified version. The word 'squatter' has been avoided as much as possible because of pejorative connotations.

II THE TRADITIONAL DOCTRINE OF ADVERSE POSSESSION

A *The Early Common Law Context*

In order to appreciate the significance of adverse possession in English land law, it is necessary to understand the context in which it arose. The doctrine was developed in a legal era when the idea of property and the philosophical basis of title were deeply rooted in the physical possession of the land. While it is true that physical possession was an influential factor in Roman law,[16] it became even more highly determinative in England (notwithstanding the introduction of complex notions of 'title' and 'estates').[17] Gray and Gray have perceptively pointed out:

> Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective, the identification of property in land is an earthily pragmatic affair … On this view property in land is more about fact than about right; it derives ultimately not from 'words upon parchment' but from the elemental primacy of sustained possession.[18]

[16] Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 107–15.

[17] The doctrines of estates and tenures will not be discussed in this article. For a discussion of these doctrines, see Gray and Gray, *Elements of Land Law*, above n 11, 62–8 [1.3.14]–[1.3.29]; A W B Simpson, *A History of the Land Law* (Clarendon Press, 2nd ed, 1986) 1–24.

[18] Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15, 18–19.

From a legal perspective, the emphasis on the empirical reality of behavioural fact[19] as a core element of land law had several consequences, which in turn became indispensable for the development of the doctrine because it not only depended upon these principles, but elucidated them.[20] 'Possession' underpinned the notion of 'seisin'.[21] A person could only claim seisin if he or she possessed the land or was in a position to possess the land.[22] The concept of possession legally defined (either in the form of seisin or more generally) was not transitory, equivocal or ephemeral. The possessory activities had to be consistent, transparent and open to the rest of the world.[23]

Possession was not simply a physical activity. The possessor was required to have a possessory intent, that is, a subjective intention to possess (but not necessarily own) the land. This intention could be objectively determined by reference to the possessor's actions.[24] It was a further requirement that possession be exclusive, so that to claim possession of the land meant that the claimant reserved the ability and the right to exclude all others from the land.[25]

Under the principle of seisin, the English common law did not subscribe to a notion of absolute ownership of property (which was more characteristic of the Roman law).[26] Even an entitlement to the land based on seisin was only relative. Therefore, in an action to recover the land, the question was whether the claimant possessed an earlier and legally better seisin than the defendant.[27] It has only been recently that the language of ownership has arisen in English land law.[28]

19 Ibid 15–20; Gray and Gray, *Elements of Land Law*, above n 11, 150 [2.1.1]; *Semayne's Case* (1604) 5 Co Rep 91a, 91b; 77 ER 194, 195.

20 Gray and Gray discuss the concept of possession in English law, and the broad features of the possession concept feature heavily in the criteria for adverse possession discussed below: Gray and Gray, *Elements of Land Law*, above n 11, 153–163 [2.1.6]–[2.1.22].

21 The principle of seisin dominated English law for many centuries. It made an important distinction between freehold interests and leasehold interests. A person was seised of an estate if he held the freehold estate, the land was of freehold tenure, and the person had possession of the land (or a party such as a lessee held the land from him). A leaseholder could not have seisin — such a person merely had possession of the land. For a helpful description of the doctrine, see Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 8th ed, 2012) 45–6 [3-018]–[3-021].

22 Ibid 151 [2.1.3]. F W Maitland also demonstrated that the early cases emphasised possession: see F W Maitland, 'The Seisin of Chattels' (1885) 1 *Law Quarterly Review* 324; F W Maitland, 'The Mystery of Seisin' (1886) 2 *Law Quarterly Review* 481; F W Maitland, 'The Beatitude of Seisin I' (1888) 4 *Law Quarterly Review* 24. Indeed, a wrongful possession could be accorded a degree of protection under the principle of seisin: Jourdan, above n 1, 20 [2-06]; *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 1015 [87] (Millett J); *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 276–7 (Latham CJ).

23 Gray and Gray, *Elements of Land Law*, above n 11, 156 [2.1.11].

24 Ibid 161–3 [2.1.18]–[2.1.21].

25 Although it has been suggested that exclusionary intent has been diluted in modern cases to require evidence only of self-interest: see ibid 162 [2.1.20].

26 Absolute ownership was probably not achievable in Roman law either: Nicholas, above n 16, 153–4.

27 Gray and Gray, *Elements of Land Law*, above n 11, 172 [2.1.38]–[2.1.40].

28 Ibid 56 [1.3.1], 136 [1.7.10], 183 [2.2.7].

The doctrine of adverse possession first developed in England. Accordingly, it is apposite to describe it briefly, as well as how it developed and presently operates in that jurisdiction, before turning to Australia.

B *The Traditional Doctrine of Adverse Possession and Unregistered Land*

1 *Adverse Possession and Prescriptive Acquisition of Title*

The historical antecedents to and the long evolution of the doctrine of adverse possession will not be discussed here.[29] What is important is that English law took a different path from the civil law in regard to possession and competing claims.

The Roman law did not develop a law of adverse possession based on limitation of actions, although eventually limitation periods restricting when legal actions could be brought were introduced.[30] The Roman law adopted the principle of acquisitive prescription of property (or *usucapio*), with short periods of possession required.[31]

While a doctrine of prescription did exist in English law, it was confined to the acquisition of easements and profits à prendre over another person's land. These fell well short of acquisition of title through seisin or possession, and the traditional approach to easements and profits à prendre has reflected this.[32]

2 *The Rationale for Adverse Possession*

A system of land law based on possession and relativity of title which eschews a concept of absolute ownership has a significant weakness. There is always a danger that a person exercising possession and control over the land may be subject to a claim based on prior events by an earlier possessor who the law deems to have the better title. In order to deal with this, English law took a pragmatic response. Claims to land were barred by a statutorily based concept of

[29] See generally Jourdan, above n 1, 18–24 [2-01]–[2-15].

[30] Nicholas, above n 16, 122.

[31] Usucapion of land performed a restorative or perfective function because it cured defects in the legal conveyance of the subject matter (or the *traditio* of a *res mancipi*) and remedied any defect in the title of the transferee. Usucapion of land took place after two years and after one year for movables. In order to rely on usucapion it was necessary for the claimant to demonstrate that he or she had acted in good faith: ibid 122–4. As the civil law developed, the doctrine of prescription was founded on broader factors, namely the fiction that the land had in fact been granted by the original owner to the squatter even where there was no documentary evidence: *Buckinghamshire* [1990] 1 Ch 623, 644 (Nourse LJ), quoted in Law Commission (UK) and H M Land Registry, *A Consultative Document*, above n 6, 202 [10.1]. Nevertheless, the Roman law-inspired perfection of title persists in the Scottish doctrine of acquisitive prescription, although it is arguably circumscribed by the introduction of a form of title by registration: see, eg, William M Gordon and Scott Wortley, *Scottish Land Law* (Thomson Reuters, 3rd ed, 2009) 354–66 [12-25]–[12-53].

[32] Gray and Gray, *Elements of Land Law*, above n 11, 665–78 [5.2.55]–[5.2.81]. Generally, a claim for an easement or profit à prendre would fail if the court considered that it derogated from the servient owner's possession and control of the land: see *Re Ellenborough Park* [1956] 1 Ch 131; *Copeland v Greenhalf* [1952] 1 Ch 488; *Batchelor v Marlow* [2003] 1 WLR 764; *Clos Farming Estates Pty Ltd v Easton* (2001) 10 BPR ¶18 845. Recently, the House of Lords has developed a practical and flexible approach to the question of possession and control: *Moncrieff v Jamieson* [2007] 1 WLR 2620, 2642–3 [59]–[60] (Lord Scott), 2664 [143] (Lord Neuberger).

limitation. As early as 1623, the *Limitations Act 1623*[33] barred the right of the true owner to recover possession by setting a fixed (albeit arbitrary) time limit for recovery.[34] A person who had a long history of uncontested possession of the land was able to deal with it as an owner so that '[t]he door of justice … closed.'[35] The doctrine quietened title[36] when it could be said that the documentary owner had 'slept' on his or her rights.[37] The doctrine made sense in a pre-industrial society when land was held by a relatively small group of persons and documentary exchanges were not necessarily the normal way of dealing with land. In any event, documentary exchanges could be irregular in nature and the documentation could be lost and destroyed.[38]

English[39] (and Australian)[40] scholars have recognised the historical importance of possession in the English common law and its role as the foundation for the traditional doctrine. Therefore, they have generally considered and accepted the operation and effect of adverse possession through the dual medieval lenses of 'possession' and 'relativity of title'.[41] While the doctrine was subject to a number of different statutes of limitations[42] and the case law dealt with some important finer points,[43] the fundamental principle of adverse possession remained intact and was not seriously challenged. The doctrine would not be challenged until these two concepts were themselves re-evaluated and were ultimately diminished in importance in England and Australia. The trigger for this was title by registration.

3 *The Elements of Adverse Possession*

Through the implementation of statutes of limitations, a new method of acquisition of title to land was implemented. Although 'indirect', the 'inescapable'

33 21 Jac 1, c 16.

34 Jourdan, above n 1, 22–4 [2-13]–[2-15]; Gray and Gray, *Elements of Land Law*, above n 11, 1158 [9.1.1].

35 *Cholmondeley v Clinton* (1820) 2 Jac & W 1, 139; 37 ER 527, 577 (Eldon LC). See also *Manby v Bewicke* (1857) 3 K & J 342, 352; 69 ER 1140, 1144 (Page Wood V-C); *A'Court v Cross* (1825) 3 Bing 329, 332; 130 ER 540, 541 (Best CJ).

36 See *Cholmondeley v Clinton* (1820) 2 Jac & W 1, 139; 37 ER 527, 577 (Eldon LC); *Trustees of Harbour of Dundee v Dougall* (1852) 15 D(HL) 3.

37 *Cholmondeley v Clinton* (1820) 2 Jac & W 1, 140; 37 ER 527, 577 (Eldon LC).

38 For medieval conveyancing practices, see Simpson, above n 17, 119–43.

39 See, eg, Harpum, Bridge and Dixon, above n 21, 1456–7 [35-001]; Jourdan, above n 1, 51–4 [3-17]–[3-22]; Nigel P Gravells, *Land Law: Text and Materials* (Sweet & Maxwell, 4th ed, 2010) 87; E H Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, 17th ed, 2006) 114–16.

40 See, eg, Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) 895 [22.01]; Adrian J Bradbrook et al, *Australian Real Property Law* (Thomson Reuters, 5th ed, 2011) 50–4 [2.45]–[2.80], 128–34 [3.80]–[3.110].

41 While this has been a strong tendency, some commentators have sought explanations outside the prosaic: see, eg, Gray and Gray, *Elements of Land Law*, above n 11, 1161–66 [9.1.6]–[9.1.15]; Alison Clarke and Paul Kohler, *Property Law: Commentary and Materials* (Cambridge University Press, 2005) 413–27. However, even here it is arguable that the questions raised by the implementation of title by registration have influenced the materials.

42 Jourdan, above n 1, 18–42 [2-01]–[2-68].

43 For example, the meaning of 'factual possession' has led to a vast body of case law: see ibid 107–49 [7-01]–[7-102].

effect of the legislation was to 'toll' or bar the exercise of the prior rights of the true owner.[44] As Jourdan has stated:

> There are two aspects to an adverse possession claim. First, the extinction of the paper owner's title. Secondly, the acquisition of title by the squatter. The extinction of the paper owner's title is the consequence of statutory provisions. The acquisition of title to unregistered land by the squatter is not. It is the result of the common law rules which protect a person in exclusive possession of land.[45]

Butt neatly observed: 'The law governing possessory title is a mixture of common law and statute. Common law determines the required nature of possession. Statute determines the required duration of possession.'[46]

Therefore, it was by the implementation of a two-stage process that English law resolved the problem of property disputes and unstable landholdings.

(a) A Limitation Period in Relation to the Bringing of an Action to Recover Land

The first element of an adverse possession claim will be based on a statute of limitations because the concept of limitation of actions did not exist in the English common law.[47] Statutes of limitations set a preclusive period to the exercise of rights of action. In order for a limitation period to run, it is necessary that a right of action accrues in favour of the owner of the land and that the land is in possession of someone 'in whose favour the period of limitation can run.'[48] Therefore, 'limitation' means that after a period of time prescribed by the legislation is proved to have run, a right to recover possession of the land by the true owner comes permanently to an end.

In England, the law of adverse possession has been subject to a number of statutes of limitations which have prescribed different forms and standards.[49] Presently, the period of limitation is 12 years for the recovery of unregistered land.[50] Once the limitation period has commenced, no conveyance, lease or other assurance of the land will prevent the limitation period from continuing.[51] In order to stop the limitation period from running, it will be necessary for the true owner to take some form of action to recover the land, such as formal court proceedings.[52] However, if the action is unsuccessful, discontinued or abandoned, then the commencement of the action will have no effect on the running of the limitation period.[53] The date upon which the period may commence will

[44] Gray and Gray, *Elements of Land Law*, above n 11, 1158 [9.1.1].
[45] Jourdan, above n 1, 3–4 [1-03].
[46] Butt, above n 40, 896 [22.02].
[47] Harpum, Bridge and Dixon, above n 21, 1458–9 [35-003].
[48] *Limitation Act 1980* (UK) c 58, sch 1 para 8(1).
[49] For the history of the statutes of limitations and the doctrine, see Jourdan, above n 1, 18–44 [2-01]–[2-70]; Harpum, Bridge and Dixon, above n 21, 1458–9 [35-003].
[50] *Limitation Act 1980* (UK) c 58, s 15.
[51] Ibid s 15(4).
[52] Harpum, Bridge and Dixon, above n 21, 1460–1 [35-007].
[53] Jourdan, above n 1, 270–1 [15-16]. It appears that in Australia, the simple institution of proceedings will automatically prevent time from running: Butt, above n 40, 912 [22.34].

be postponed when there is evidence that the original owner was disabled[54] or was subject to fraud by the adverse possessor or his or her agent.[55]

Under the various statutes of limitations that operated in English law, the impact upon the original owner's title was dramatic. Prior to 1833, the only effect of the expiration of the period was that the owner's right to bring an action to recover the land was barred.[56] The *Real Property Limitation Act 1833*[57] radically changed this approach, and the *Limitation Act 1980* (UK) c 58 has retained the 19th century innovation that at the end of the limitation period, both the right of action to recover the land and the original owner's title are automatically extinguished.[58]

The *Limitation Act 1980* does not provide a parliamentary conveyance of the land. Instead, the original owner's title to the land is extinguished.[59] However, the Act operates within the context of relativity of title. The extinction of title under the Act will only protect the adverse possessor against actions by the original owner. The extinction of the original owner's title will not be absolute in all cases.[60] On taking possession recognised at common law, the adverse possessor will gain a legal estate in fee simple exercisable against the whole world except the true owner.[61] Upon the extinguishment of the true owner's title, the adverse possessor will acquire a better (legal) title in fee simple to the land than anyone else, so that although he or she may not acquire the title of the original owner, the adverse possessor remains in a strong position. However, the title to the land is subject to other valid legal and equitable rights that existed prior to the commencement of possession.[62] A true owner whose title has been extinguished is not entitled to any monetary compensation under the doctrine.[63]

In relation to actions that may be brought by the Crown to regain possession of Crown or public land, the original limitation period was 60 years.[64] However, this has been shortened to 30 years.[65]

[54] Harpum, Bridge and Dixon, above n 21, 1481–2 [35-044]–[35-047].

[55] Ibid 1435–6 [35-048]–[35-049].

[56] Therefore, it was still possible for the original owner of the land to peacefully reassert title to the land.

[57] 3 & 4 Will 4, c 27, s 34.

[58] *Limitation Act 1980* (UK) c 58, s 17. See also Jourdan, above n 1, 337–8 [20-14].

[59] Gray and Gray, *Elements of Land Law*, above n 11, 1161 [9.1.5].

[60] This will be particularly the case when a lessee's interest under a lease is extinguished by adverse possession. The landlord is able to claim the land after the expiration of the lease. For a discussion of the complexity of leases in this regard, see Jourdan, above n 1, 337 [20-12]–[20-13]; Harpum, Bridge and Dixon, above n 21, 1489–91 [35-059]–[35-062].

[61] Gray and Gray, *Elements of Land Law*, above n 11, 1159–60 n 7.

[62] Gray and Gray consider that public and private rights of way would be protected from the effect of adverse possession under the *Limitation Act 1980* (UK) c 58: ibid.

[63] *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 43, 62–63 [71]–[72].

[64] *Crown Suits Act 1769*, 9 Geo 3, c 16 ('*Nullum Tempus Act*').

[65] *Limitation Act 1980* (UK) c 58, sch 1 para 10. See also Harpum, Bridge and Dixon, above n 21, 1461 [35-010].

(b) Land Subject to Adverse Possession (and against Which the Limitation Period Can Run)

In order to acquire a right to rely on the relevant limitation statute, it was necessary for a claimant to demonstrate adverse possession over the land. Proving that there had been adverse possession that triggered the operation of the relevant statute of limitations was composed of two broad elements, which remain pivotal today.

(i) The Fact of Exclusive Possession

The person claiming entitlement had to be in exclusive possession of the land, dealing with the land as an occupying owner.[66] This would occur when the original owner had been dispossessed or had discontinued possession of the land (such as when the owner has abandoned the land) and the claimant had taken possession of it.[67] However, it was not necessary to demonstrate that the true owner had been driven off the land by the claimant or precisely how or why the owner was no longer in possession of the land.[68] What was essential was that the claimant was in possession of the land and that the possession was inconsistent with the rights of the true owner.[69] Unless the owner took significant action to repossess the land such as entry into the land and removing the possessor,[70] removing fences[71] or successful court action to remove the possessor,[72] time would begin to run in favour of the adverse possessor from the moment of possession unless the adverse possessor abandoned the land or acknowledged the title of the true owner.[73] Subject to the period of adverse possession remaining unbroken, successive possession by a series of adverse possessors could run against the true owner of the land.[74] The doctrine could also affect future interests and leaseholds, but this will not be discussed in this article.[75]

(ii) The Animus Possidendi

The claimant had to demonstrate that he or she had an *animus possidendi*, which meant that he or she had 'an intention for the time being to possess the

[66] *Powell v McFarlane* (1979) 38 P & CR 452, 470–2 (Slade J); Harpum, Bridge and Dixon, above n 21, 1465–6 [35-017]; Gray and Gray, *Elements of Land Law*, above n 11, 155 [2.1.9], 1180–5 [9.1.44]–[9.1.52]. It was also known as the *factum possessionis*: at 1179 [9.1.43].

[67] Harpum, Bridge and Dixon, above n 21, 1462–3 [35-015].

[68] Ibid; *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 434–5 [35]–[38] (Lord Browne-Wilkinson). Adverse possession does not have to be hostile or violent; possession does not have to be acquired by hostile or violent acts: Gray and Gray, *Elements of Land Law*, above n 11, 1183–4 [9.1.50].

[69] *Powell v McFarlane* (1979) 38 P & CR 452, 470–2 (Slade J); Harpum, Bridge and Dixon, above n 21, 1465–7 [35-017]; Gray and Gray, *Elements of Land Law*, above n 11, 153–4 [2.1.7], 155–6 [2.1.10], 1180 [9.1.46]. Trivial or equivocal acts would not be sufficient: at 160 [2.1.16].

[70] *Randall v Stevens* (1853) 2 El & Bl 641, 652; 118 ER 907, 911–12 (Lord Campbell CJ).

[71] *Worssam v Vandenbrande* (1868) 17 WR 53.

[72] *Markfield Investments Ltd v Evans* [2001] 1 WLR 1321.

[73] *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078; Gray and Gray, *Elements of Land Law*, above n 11, 1182–3 [9.1.49]; Harpum, Bridge and Dixon, above n 21, 1484–5 [35-051].

[74] Harpum, Bridge and Dixon, above n 21, 1470 [35-021]–[35-023].

[75] For a discussion of this, see ibid 1423–8 [35-024]–[35-034].

land to the exclusion of all other persons, including the owner with the paper title.'[76] The focus of the case law was on the mental intention and attitude of the claimant rather than the owner of the land.[77] It was not necessary to show that the claimant knew that the land belonged to another person and deliberately took action to dispossess the true owner, or that he or she acted in good faith.[78] The claimant did not have to prove that he or she believed that the land was his or hers, but simply that he or she intended to exclude other people from it.[79]

(c) Unregistered Land

The traditional doctrine (unaffected by the significant amendments made under the *Land Registration Act 2002* (UK) c 9) still operates in England in relation to unregistered title.[80] It is difficult to determine how much land remains unregistered and by whom it is owned because there is no public record of ownership.[81] Nevertheless, it is estimated that unregistered land (large landholdings owned by the Crown, local authorities and old establishments) comprises about 30 to 35 per cent of English land by area.[82] This means that the traditional doctrine is not yet a mere historical relic.[83]

C *Adverse Possession in Australia and Old System Land*

1 *The Reception of English Law*

As Australian colonies were treated as having been settled (rather than conquered), the colonies adopted or 'received' the English land law to the extent that it was relevant for Australian conditions.[84] In the early colonial period, Australia adopted (in relation to the settlers but not in regard to the native population)[85] the

[76] *Buckinghamshire* [1990] 1 Ch 623, 643 (Slade LJ). See also *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 435–6 (Lord Browne-Wilkinson); Gray and Gray, *Elements of Land Law*, above n 11, 160–1 [2.1.17]; ibid 1467–9 [35-019].

[77] See, eg, *Buckinghamshire* [1990] 1 Ch 623, 645 (Nourse LJ); Harpum, Bridge and Dixon, above n 21, 1467–9 [35-019].

[78] *Buckinghamshire* [1990] 1 Ch 623, 644 (Nourse LJ); Gray and Gray, *Elements of Land Law*, above n 11, 161 [2.1.18], 1185–6 [9.1.54].

[79] *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 436–7 [42]–[43] (Lord Browne-Wilkinson); *Buckinghamshire* [1990] 1 Ch 623, 643 (Slade LJ); Gray and Gray, *Elements of Land Law*, above n 11, 161 [2.1.18].

[80] Law Commission (UK) and H M Registry, *A Consultative Document*, above n 6, 208 [10.18]; Gray and Gray, *Elements of Land Law*, above n 11, 183–4 [2.2.8].

[81] Gray and Gray, *Elements of Land Law*, above n 11, 185 [2.2.11], especially at 185 n 1.

[82] Martin Dixon, *Modern Land Law* (Routledge, 7th ed, 2010) 429 n 6. Dixon states:

> Although there are less than 15 per cent of unregistered titles, this comprises somewhere between 30 to 35 per cent of land by area. In other words, unregistered titles comprise large parcels of land, often owned by the Crown, the Church, ancient institutions and local authorities.

[83] Jourdan, above n 1, ch 3.

[84] Alex C Castles, *An Australian Legal History* (Law Book, 1982) 9–13; Gray et al, above n 12, 70–2 [3.4]–[3.7]. Note the later *Australian Courts Act 1828*, 9 Geo IV, c 38 and *Lord v McLaren* (Unreported, Supreme Court of Van Diemen's Land, Pedder CJ and Montagu J, 22 May 1840), which canvasses different views as to the nature of the reception of English law. See also Butt, above n 40, 2 [1.03].

[85] This recognition was to come much later in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 207–14 (Toohey J).

broad premise that possession was a strong indicator of an underlying title.[86] Flowing on from this, the Australian colonies implemented and considered the traditional doctrine.[87] Prior to the creation of title by registration, Australia also adopted common law or old system land title in which land was dealt with by individual owners through the transfer of paper titles (rather than through a centralised system of titles).[88] Therefore, the general framework of the doctrine briefly outlined above[89] was assumed by the High Court of Australia not only to be part of the Australian law, but also compatible with the system of land title.[90] This is still reflected in the present Australian law on the doctrine and on unregistered title (to the extent to which it is still applicable in individual states, as distinct from the territories). Recent English authorities[91] dealing with the traditional doctrine (before the implementation of the amendments under the *Land Registration Act 2002* (UK) c 9) are persuasive though not binding on Australian courts.[92] Eminent Australian authors on real property law refer to both English and Australian case law in regard to the traditional doctrine interchangeably.[93]

Therefore, in relation to unregistered land in Australia, it is necessary for a claimant to demonstrate the two important elements outlined above.[94]

86 Ibid.

87 See, eg, *R v West* (Unreported, Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 18 October 1832); *Blower v Larkin* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 5 November 1833); *R v Steele* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 18 October 1834); *Doe ex diem Antil v Hodges* (Unreported, Supreme Court of New South Wales, Forbes CJ, 23 March 1835); *Doe dem Hunt v Grimes* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 15 July 1835); *Holt v Hadley* (Unreported, Supreme Court of New South Wales, Dowling CJ, Burton and Stephen JJ, 31 July 1841). Like England, Australia did not adopt title by prescription, but it was possible to acquire easements and profits à prendre by prescription: see *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283.

88 Although there were the various registration of deeds statutes (such as the *Registration of Deeds Act 1897* (NSW) presently re-enacted in the *Conveyancing Act 1919* (NSW) pt 23 div 1), these statutes implemented neither a fully-fledged centralised system nor title by registration. They simply provided a system of recording instruments relating to land. Moreover, it was possible to acquire the estate in fee simple without registration. Registration was not compulsory, but it was a prudent course of action: see Butt, above n 40, 723–4 [19.88]–[19.89].

89 See above Part II(B)(3).

90 *Wheeler v Baldwin* (1934) 52 CLR 609; *Allen v Roughley* (1955) 94 CLR 98.

91 See, eg, *Powell v McFarlane* (1979) 38 P & CR 452; *Buckinghamshire* [1990] 1 Ch 623; *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

92 *Parker v The Queen* (1963) 111 CLR 610; *Cook v Cook* (1986) 162 CLR 376.

93 Butt, above n 40, 901–12 [22.13]–[22.35]; Bradbrook et al, above n 40, ch 3, especially the discussion at 133–4 [3.110]; Gray et al, above n 12, 202–22 [5.40]–[5.81].

94 See above Part II(B)(3).

2 *Statutes of Limitations and the Duration of Possession*

(a) The Australian States

Statutes of limitations apply in the Australian states and territories.[95] There is no one common statute dealing with the limitation of actions in relation to land.[96] Some states have transcribed significant chunks of English statutes,[97] while others have made an effort to modernise the law (but certainly not to abandon it)[98] because the expression in some of the older statutes can be confusing.[99] However, despite the different jurisdictions and various sources, overall the Australian states (but not territories) have relied on and have been heavily influenced by various English statutes of limitations.

(b) The Australian Territories

Both the Northern Territory ('NT') and the Australian Capital Territory ('ACT') have statutes of limitations.[100] However, adverse possession is not part of their land law.

Section 5 of the *Limitation Act 1985* (ACT) expressly prohibits limitation of actions in relation to land, stating that:

> Nothing in this Act applies —
>
> (a) to a cause of action to recover land or an estate or interest in land or to enforce an equitable estate or interest in land …[101]

The NT has no provisions in respect to land which limit actions to recover land generally. However, this is subject to specific treatment of Crown land, noted below.[102] Another way of stating this is that as no general limitation period is set down, the NT effectively does not permit a claim based on adverse possession.[103]

[95] See *Limitation Act 1969* (NSW); *Limitation of Actions Act 1974* (Qld); *Limitations of Actions Act 1936* (SA); *Limitation of Actions Act 1958* (Vic); *Limitations Act 1935* (WA); *Limitation Act 2005* (WA). The *Limitations Act 1935* (WA) is applicable to causes of action that accrued on or before 15 November 2005. The *Limitation Act 2005* (WA) is applicable to causes of action that accrued after 15 November 2005.

[96] For an overview, see Bradbrook et al, above n 40, 117 [3.05], 123–6 [3.40]–[3.55].

[97] The South Australian legislation, *Limitations of Actions Act 1936* (SA), is most closely aligned to old imperial sources and bears a striking resemblance to the English statute, the *Real Property Act 1833*, 3 & 4 Geo 4, c 27. Victoria's *Limitation of Actions Act 1958* (Vic) is substantially based on the later *Limitations Act 1939*, 2 & 3 Geo 6, c 21. Queensland's *Limitation of Actions Act 1974* (and in a broad sense the *Limitation Act 1974* (Tas)) drew on the *Limitation Act 1939*, 2 & 3 Geo 6, c 21, the *Limitation of Actions Act 1958* (Vic) and the *Law Reform (Limitations of Actions Act) 1954*, 2 & 3 Eliz 2, c 36, which dealt with the limitations of actions against public authorities.

[98] See, eg, New South Wales Law Reform Commission, *The First Report on the Limitation of Actions*, Report No 3 (1967) 7 [6]; Law Reform Commission of Western Australia, *Limitation and Notice of Actions — Report*, Project No 36 Part II (1997) 356 [14.1]–[14.2].

[99] Law Reform Commission of Western Australia, above n 98, 356 [14.1]–[14.2]. For a helpful overview of the legislation, see Bradbrook et al, above n 40, 123 [3.40].

[100] *Limitation Act 1981* (NT); *Limitation Act 1985* (ACT).

[101] See also *Land Titles Act 1925* (ACT) s 69. However, the ACT legislation does have provisions that pertain to rights of action arising out of mortgages: *Limitation Act 1985* (ACT) s 24.

[102] See below in Part II(C)(2)(c).

[103] There are provisions dealing with the limitation of actions in regard to mortgages: *Limitation Act 1981* (NT) pt II div 3.

An explanation for the approaches in both territories may be that there is no longer any old system title existing in either jurisdiction.[104] Another separate but related point is that both territories may have taken the view that doctrines associated with old land title systems have little role to play in the modern law.[105] The prohibition of the doctrine also has important ramifications for registered title because it suggests that title by registration ought not to be subject to a doctrine based on possession rather than registration. This is considered further below in Part IV(F).

(c) Statutes of Limitations and Unregistered Land

Leaving aside the developments in the ACT and the NT, residents in the states of Australia may bring a claim based on adverse possession.

Although the sources for the limitations legislation in Australia are, strictly speaking, different, there can be no doubt that the broad effect is the same. Once time begins to run and if the true owner is a private person or corporation, the true owner of the land has a period of time in which to take repossession. In New South Wales ('NSW'),[106] Queensland,[107] Tasmania[108] and Western Australia,[109] the limitation period for the recovery of land is 12 years. In South Australia[110] and Victoria,[111] which in particular have legislation reflecting earlier limitations statutes, the period is 15 years. However, in all jurisdictions that still recognise adverse possession, the claimant may have to prove periods of longer adverse possession where the documentary owner establishes that he or she was under a disability[112] or there has been fraudulent concealment.[113]

Different limitation periods apply for the Crown. The original period in English law for the recovery of Crown land was 60 years.[114] This has been shortened to 30 years.[115] The 60 year period has been retained by South Australia apparently as a result of its reliance on imperial statutes.[116] However, akin to the English approach, the limitation period has been shortened to 30 years in NSW[117] and Tasmania.[118] It should be noted though that the provisions of the

104 O'Connor, above n 15, 47.
105 The Northern Territory legislation is silent as to whether it permits prescriptive easements or prescriptive profits à prendre.
106 *Limitation Act 1969* (NSW) s 27(2).
107 *Limitations of Actions Act 1974* (Qld) s 13.
108 *Limitation Act 1974* (Tas) s 10(2).
109 *Limitation Act 2005* (WA) s 19; *Limitation Act 1935* (WA) s 4. See also *Duarte v Denby* [2007] WASC 94 (26 April 2007).
110 *Limitation of Actions Act 1936* (SA) s 4.
111 *Limitation of Actions Act 1958* (Vic) s 8.
112 Bradbrook et al, above n 40, 156–7 [3.280].
113 Ibid 157–8 [3.285].
114 See above n 64 and accompanying text.
115 *Limitation Act 1980* (UK) c 58, sch 1 para 10. See also Harpum, Bridge and Dixon, above n 21, 1461 [35-010]. An example of the early reception of this law into Australia is *R v Steele* (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 18 October 1834).
116 See *South Australian Co v City of Port Adelaide* [1914] SALR 161, which relied on the *Nullum Tempus Act*. See Bradbrook et al, above n 40, 124 [3.45].
117 *Limitation Act 1969* (NSW) ss 27(1), (4).

Limitation Act 1969 (NSW) must then be read with the provisions of the *Crown Lands Act 1989* (NSW), which provide that title to Crown land cannot be claimed on the basis of adverse possession in a number of circumstances, although the legislation is not all-encompassing.[119] The statutes of the Northern Territory,[120] Queensland,[121] Victoria[122] and Western Australia[123] expressly state that there can be no adverse possession claim brought against the Crown. It has been suggested that the reason for the abolition of the right is that the Crown cannot be expected to monitor all Crown land for illegal occupiers. To allow adverse possession claims against the Crown could result in future generations being deprived access to important land.[124] This reasoning makes sense in light of the size of Australia and it is probably no accident that the two largest states (in terms of land mass), Queensland and Western Australia, have implemented these provisions.

Upon the expiration of the limitation period, not only is the true owner's right to bring an action barred, but the title of the documentary owner is extinguished.[125]

3 *Common Law Possession*

(a) General Principles

In the Australian states where the doctrine of adverse possession applies, the requirements are that there is a factual possession by the adverse possessor and that the adverse possessor have *animus possidendi*. In relation to the former, Australian courts have required that the adverse possessor demonstrate that there has been factual and exclusive possession,[126] although that possession need not be adverse in the sense of being confrontational or violent.[127] In relation to the

118 *Limitation Act 1974* (Tas) s 10(1).

119 For a helpful discussion of this area of the law, see Butt, above n 40, 897 [22.04].

120 *Limitation Act 1981* (NT) s 6; *Step v Crown Land Manager (NT)* (2011) 251 FLR 443, 451 (Southwood J).

121 *Limitation of Actions Act 1974* (Qld) s 6(4).

122 *Limitation of Actions Act 1958* (Vic) ss 7, 32. However, note in relation to local councils *Abbatangelo v Whittlesea City Council* [2007] VSC 529 (13 December 2007) and *Abbatangelo* (2009) 259 ALR 56.

123 *Limitation Act 2005* (WA) ss 19(2), 76. In *Water Corporation v Hughes* [2009] WASC 152 (5 June 2009), Martin CJ held that a water authority under the *Water Authority Act 1984* (WA) was an agent of the Crown and therefore entitled to enjoy the immunities afforded to the Crown: at [24]–[33].

124 B J Edgeworth et al, *Sackville & Neave: Australian Property Law* (LexisNexis Butterworths, 8th ed, 2008) 168 [2.88]. For a helpful overview of adverse possession in regard to Crown land, see Bradbrook et al, above n 40, 124–6 [3.45]–[3.50].

125 *Limitation Act 1969* (NSW) s 65(1); *Limitation of Actions Act 1974* (Qld) s 24(1); *Limitation of Actions Act 1936* (SA) s 28; *Limitation Act 1974* (Tas) s 21; *Limitations of Actions Act 1958* (Vic) s 16; *Limitation Act 2005* (WA) s 75.

126 See, eg, *Abbatangelo* (2009) 259 ALR 56, 55–79 [77]–[93] (Ashley and Redlich JJA and Kyrou AJA).

127 See *Harnett v Green [No 2]* (1883) 4 NSWLR 292; *Riley v Penttila* [1974] VR 547; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *Quach v Marrickville Municipal Council [No 2]* (1990) 22 NSWLR 55; *Guggenheimer v Registrar of Titles* [2002] VSC 124 (22 April 2002); *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215 (20 June 2005). See also Butt, above n 40, 903 [22.17].

latter, Australian courts have conformed to the traditional English approach to *animus possidendi*,[128] which requires evidence that the adverse possessor had an intention to exclusively control the land,[129] but not necessarily to own it.[130] Where the original owner has granted possession to the possessor, this will not amount to adverse possession.[131] There may be some slight differences of approach between England and Australia in regard to the nature of possession, but these are generally minor.[132] There are some very recent cases where adverse possession of unregistered land has been successfully claimed by an adverse possessor.[133]

(b) The Special Case of Tasmania

The exceptional situation in Tasmania ought to be noted at this stage. Although the doctrine was received into Tasmania,[134] that State has taken the step of not relying solely on the common law, but instead outlining in statute form the necessary criteria for possession to which the common law is subject. The relevant statutory provisions apply to both unregistered and registered land. Section 138T of the *Land Titles Act 1980* (Tas) states that a person 'who has been in possession of land owned by another person may acquire title to that land in accordance with … Division [5] but not otherwise.' Accordingly, it has been held that although the law of adverse possession still depends upon the common law and the *Limitation Act 1974* (Tas), both are subject to the provisions contained in div 5 of the *Land Titles Act 1980* (Tas).[135] Section 138V of the *Land Titles Act 1980* (Tas) is worth quoting in full. It states:

128 As stated in the judgment of Slade J in *Powell v McFarlane* (1979) 38 P & CR 452, 471–2.

129 See, eg, *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *Bayport Industries Pty Ltd v Watson* [2002] VSC 206 (12 June 2002); *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215 (20 June 2005); *Abbatangelo* (2009) 259 ALR 56. It is not necessary that there is a specific intention to exclude the true owner: see *Petkov v Lucerne Nominees Pty Ltd* (1992) 7 WAR 163. The kinds of activities that will indicate an intention to exclusively control the land include fencing the land and cultivating or grazing animals on the land: *Abbatangelo* (2009) 259 ALR 56, 83 [111] (Ashley and Redlich JJA and Kyrou AJA). Residing on the land will also evince such an intention. Further, the payment of rates can be an important indicator of adverse possession, particularly when it is linked to other factors such as fencing or cultivation: see *Bank of Victoria v Forbes* (1877) 13 VLR 760; Butt, above n 40, 906 [22.21]; Bradbrook et al, above n 40, 139–41 [3.155]–[3.165].

130 *Abbatangelo* (2009) 259 ALR 56, 77 [82] (Ashley and Redlich JJA and Kyrou AJA).

131 *Richardson v Greentree* (Unreported, Supreme Court of New South Wales, Einstein J, 1 December 1997). In this case, Einstein J referred to English authority including *Hughes v Griffin* [1969] 1 WLR 23. See also the comments of Tamberlin AJ in *Bridges v Bridges* [2010] NSWSC 1287 (8 November 2010) [34].

132 In relation to the possibly different requirements concerning the exercise of force, see Butt, above n 40, 903 [22.17].

133 See *Abbatangelo* (2009) 259 ALR 56; *Bridges v Bridges* [2010] NSWSC 1287 (8 November 2010).

134 Cf *Lord v McLaren* (Unreported, Supreme Court of Van Diemen's Land, Pedder CJ and Montagu J, 22 May 1840).

135 In *Quarmby v Keating* (2008) 18 Tas R 284, 309–10 [59], Evans J (Crawford J agreeing) stated:

> In the absence of the *Land Titles Act*, the law governing the acquisition of a possessory title to land would be governed by a combination of the relevant provisions of the *Limitation Act* and the common law, the latter determining the nature of the requisite possession, and the former specifying the period of possession following which the owner's title would be extinguished. What then is the impact of the currently applicable provisions of the *Land Titles Act* on the law

> In determining an application for title based on possession, the Recorder must consider all the circumstances of the claim, the conduct of the parties and in particular —
>
> (a) whether, during the relevant period, the applicant enjoyed possession of the land as of right; and
>
> (b) whether there is any reason to suppose that during the relevant period that enjoyment was by force or secretly or that that enjoyment was by virtue of a written or oral agreement made before or during that period unless the applicant can show that any such agreement terminated before that period; and
>
> (c) the nature and period of the possession; and
>
> (d) the improvements on the land and in particular —
>
> (i) when they were made; and
>
> (ii) by whom they were made; and
>
> (e) whether or not the land has been enclosed by the applicant; and
>
> (f) whether during the relevant period the applicant acknowledged ownership, paid rent or made any other payment in respect of the land —
>
> and the applicant must produce evidence from at least one other person in support of the application.

The legislation appears to depart from the common law in four significant respects. First, the legislation does not actually refer to the *animus possidendi* or possessory intent (although this could be implied by the requirement that the applicant possessed the land 'as of right').

Second, the applicant must produce evidence from at least one other person in support of the application. Whether such a requirement would be easy to fulfil is still to be seen, although it is likely that corroborating evidence of the nature and extent of the adverse possession would be necessary.

Third, for the purposes of an application to acquire title to any land by possession, any period during which council rates have been or are paid by or on behalf of the true owner is to be disregarded.[136] The requirement will not apply if the relevant council has certified in writing that it is unclear who has paid, or is paying, the relevant council rates.[137] This unusual qualification stemmed from a controversial decision of the Tasmanian Supreme Court in *Woodward v Wesley Hazell Pty Ltd*[138] in which an adverse possessor who satisfied the common law

> as to obtaining a possessory title? Two important provisions are s 138H which provides that the application of Pt IXB extends to land that is not registered land, and s 138T, which provides that a possessory title to land may be acquired in accordance with Div 5 'but not otherwise'. Consistent with these provisions, the body of law as to obtaining a possessory title, comprised by the relevant provisions of the *Limitation Act* and the common law, now apply to the acquisition of a possessory title subject to the precondition that the body of law is not paramount to Div 5, but subject to it. Put another way, except where otherwise provided, the *Limitation Act* and the common law must yield to the provisions contained in Div 5.

See also Bradbrook et al, above n 40, 173–4 [3.395].

[136] *Land Titles Act 1980* (Tas) s 138U(1).

[137] Ibid s 138U(2).

[138] (Unreported, Supreme Court of Tasmania, Underwood J, 17 March 1994).

requirements was successful, notwithstanding the fact that the true owner had paid council rates throughout the period of adverse possession.[139]

Fourth, the Recorder may consider whether the applicant had made improvements in respect to the land — an issue that was not directly relevant in the traditional doctrine, other than that it may have supported the contention that the applicant had demonstrated the fact of possession and the *animus possidendi*.

III LAND REGISTRATION SYSTEMS AND ADVERSE POSSESSION

A *Land Registration: An Overview*

1 *Early History*

Adverse possession was able to exist in English land law because its operation elucidated the twin medieval concepts of possession and relativity of title. However, this began to change in the 19th century.

In Australia, the change was immediate and dramatic. The conditions in Australia were different from those in England. First, the reality was that Australia did not have a feudal history of land ownership,[140] so that although feudal concepts such as the doctrine of tenure and the doctrine of estates were received into Australian law, they had less relevance and meaning than in England (which itself had outgrown its feudal past).[141] Second, and more importantly, old system title was no longer considered satisfactory for land title and land transfer in Australia.[142] The problem was that under old system title the transferee of the land acquired a dependent title.[143] The transferee needed to be satisfied that he or she had a 'good root of title'.[144] Therefore, it was necessary to ensure that the person from whom a person acquired title (and from whom in turn, he or she had acquired title) had a title that could stand up against any other claimant.[145] Moreover, in the absence of documentary evidence (or indeed, even in the face of documentary evidence) the underlying philosophical basis for ultimately determining title remained possession and relativity of title. This system was inherently unstable.

The Australian colonies were rapidly expanding. Settlers demanded certainty of title and the reliability of transactions pertaining to title. Therefore, the

[139] See *Quarmby v Keating* [2007] TASSC 65 (23 August 2007) [40] (Tennent J); *Quarmby v Keating* (2008) 18 Tas R 284, 289–90 [9] (Slicer J). See also Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land*, Report No 73 (1995) 20 [5.3.2]–[5.3.3]. Under the traditional doctrine, the payment of rates by the true owner only marginally assisted him or her to defend a claim based on adverse possession: see *Shaw v Garbutt* (1996) 7 BPR ¶14 816.

[140] Edgeworth et al, above n 124, 198–9 [3.4]–[3.6].

[141] See *Tenures Abolition Act 1660*, 12 Car 2, c 24.

[142] For example, according to Castles, the system of old system title practised in South Australia was fraught with considerable difficulties: Castles, above n 84, 458. See also Douglas Pike, 'Introduction of the *Real Property Act* in South Australia' (1960) 1 *Adelaide Law Review* 169.

[143] Butt, above n 40, 744–5 [20.03].

[144] Ibid 698–9 [19.06].

[145] Ibid 700 [19.10].

Australian colonies embraced Robert Torrens' vision for a system of land title by registration (rather than simply a register that publicly notified pre-existing title, but which substantially perpetuated the weaknesses of old system title).[146]

In England, consideration of title by registration commenced in the 19th century, particularly with the work of the Real Property Commissioners,[147] but progress was slow and early legislative attempts to implement land registration schemes failed.[148] It was only in the 20th century that the *Land Registration Act 1925*[149] placed title by registration on a surer footing in England.[150]

2 *Basic Characteristics of Title by Registration*

Although title-by-registration systems will differ, there are a number of important 'classic' features that set them apart from earlier systems of title:

- Title is determined by who is registered as the title holder or owner of the land in a centrally and bureaucratically administered system.[151]
- The title of the person who is registered as the title holder of the land is not dependent on the title of his or her predecessors. Theoretically, a new grant is issued each time by the Crown.[152]
- A registered proprietor of the legal fee simple acquires absolute and indefeasible title, in the sense that he or she is regarded as the owner of the land. Although both England and the Australian states and territories adhere to the doctrine of tenures — and therefore the highest form of tenure is the legal estate in fee simple — a person registered as the proprietor of the legal fee simple in a title-by-registration system will be regarded as the owner of the land.[153] Therefore, he or she, generally speaking, cannot be displaced as the registered proprietor by another person relying on the principle of relativity. There may be, for example, some limited legislative exemptions in the form of exceptions to indefeasibility or overriding interests.[154] However, the aim of this system is that honestly registered proprietors have safe and secure titles.

[146] The first jurisdiction to adopt this system was South Australia in 1858 and the other colonies followed suit, so that by 1875 all the colonies of Australia had adopted title-by-registration for all land that would be subsequently granted by the Crown. As the previous discussion has indicated, however, there remain small pockets of land that are still governed by old system title and are yet to be converted: see Edgeworth et al, above n 124, 461–2 [5.15]–[5.16].

[147] W S Holdsworth, *Historical Introduction to the Land Law* (Oxford University Press, 1927) 318; Simpson, above n 17, 280–3.

[148] Holdsworth, above n 147, 312, 318.

[149] 15 & 16 Geo 5, c 21.

[150] See Gray and Gray, *Elements of Land Law*, above n 11, 188 [2.2.17].

[151] Ibid 203 [2.2.55].

[152] *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ); *Gibbs v Messer* [1891] AC 248, 254 (Lord Watson); Harpum, Bridge and Dixon, above n 21, 146–7 [7-001].

[153] Gray and Gray, *Elements of Land Law*, above n 11, 183 [2.2.7]. Gray and Gray suggest that the titles maintained in the Land Registry in England 'are beginning to evince a more "absolute" quality than they have ever previously enjoyed, thereby demonstrating, in effect, an inexorable drift towards the hitherto alien continental concept of *dominium*.'

[154] In the Australian context, see Edgeworth et al, above n 124, 512–55 [5.74]–[5.122]. In the English context, see Gray and Gray, *Elements of Land Law*, above n 11, 195 [2.2.35].

- Transfers will be uni-titular in the sense that it is not possible for one party (or one set of parties in the co-ownership) to acquire the legal estate in fee simple without registration. The party who is registered as the proprietor of the legal estate must be divested of that legal estate before another person can acquire it.[155]
- The register 'mirrors' all other interests (such as mortgages, leases or easements) that burden the land.[156]
- Upon registration of title, the title is generally guaranteed by the state. Therefore, if the registrar makes an error or omission, or acts wrongfully, a party is able to make a claim against the state for compensation (under an assurance fund).[157]

As Australia introduced title by registration before England, the operation of adverse possession in the Australian states will be considered first.

B *Adverse Possession and the Torrens System in Australia*

In the light of some of the 'classic' features of an ideal title-by-registration system, it would be expected that adverse possession would have little role to play in Australian land law. The traditional doctrine was based on possession (rather than registration), relative title (rather than absolute and indefeasible title) and non-compensation (rather than an assurance scheme). Historically, it is unlikely that Robert Torrens subscribed to a doctrine of adverse possession working within his title-by-registration system. Unfortunately, he did not deal directly with the doctrine in his writings.[158]

Nevertheless, the Australian states and territories have adopted the doctrine in their title-by-registration systems, although they have not displayed a uniform or even a broadly similar approach to it. Therefore, it is necessary to review the diversity in Australia, broadly sketching out the most salient, unusual and innovative features of the various statutory schemes.

1 *Victoria and Western Australia*

The Torrens statutes in Victoria and Western Australia expressly permit a claim for adverse possession as an exception to indefeasibility of title. The Victorian and Western Australian legislation both provide that the registered proprietor is subject to any rights subsisting under any adverse possession of the land.[159]

155 See A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 136–41.

156 Gray and Gray, *Elements of Land Law*, above n 11, 188–9 [2.2.19]; Harpum, Bridge and Dixon, above n 21, 146 [7-001].

157 For the Australian context, see Edgeworth et al, above n 124, 555–65 [5.125]–[5.136]; Bradbrook et al, above n 40, 265–76 [4.420]–[4.485]. For the English context, see Gray and Gray, *Elements of Land Law*, above n 11, 208–10 [2.2.69]–[2.2.72].

158 See generally Sir Robert Torrens, *An Essay on the Transfer of Land by Registration: Under the Duplicate Method Operative in British Colonies* (Cassell, Pettèr, Galpin, 1882).

159 *Transfer of Land Act 1958* (Vic) s 42(2)(b); *Transfer of Land Act 1893* (WA) s 68(1A).

The traditional doctrine has been pleaded, sometimes successfully, even in recent times.[160] Moreover, the doctrine has been accepted by the courts with little or no comment about its compatibility with Torrens title. The perverse effect of the traditional doctrine is that there are no procedural safeguards for the registered proprietors. Once the limitation period has run the interest of the adverse possessor will extinguish the title of the registered proprietor, and the adverse possessor will be entitled to be registered as the proprietor, subject to conformity with administrative specifications.[161]

Both jurisdictions have developed similar formal procedures for dealing with the registration of the adverse possessor who may make an application to be registered as the new proprietor.[162] If the Registrar of Titles (or Commissioner in the case of Western Australia) accepts the application, then a process of notification is implemented, including a notice on the land and a notice in a newspaper.[163] A person who considers that he or she has an interest in the land may lodge a caveat preventing the registration of the applicant as the new proprietor. Such caveats will be considered in accordance with the provisions dealing with caveats generally.[164] However, unlike the procedure in South Australia, which will be discussed below,[165] a lodgement of a caveat or document against registration does not automatically bring the application to an end. If the applicant satisfies the criteria for adverse possession, then he or she will eventually be registered. If no caveat is lodged, the Registrar (or Commissioner) will proceed to register the applicant as the new proprietor.[166]

An important issue is the nature of the interest acquired by the adverse possessor prior to registration. Under the traditional doctrine, the adverse possessor acquired an estate in fee simple, which was good title against the world, except the true owner, until the expiration of the limitation period. If the adverse possessor still acquires a legal estate in fee simple (which is an inchoate possessory right until the expiration of the limitation period) then he or she would have a right that would be exercisable against the world and would continue to run against successive registered proprietors of the land. Therefore, as has been

[160] See, eg, *Malter v Procopets* [2000] VSCA 11 (3 February 2000); *Traykof v Shanco Holdings Pty Ltd* [2001] VSCA 56 (3 May 2001); *Manier v Yarra City Council* [2001] VCAT 2262 (15 October 2001) [47] (Horsfall DP); *Guggenheimer v Registrar of Titles* [2002] VSC 124 (22 April 2002); *Body Corporate No 435612 v Kaufer* [2003] VSC 250 (11 June 2003) [17] (Cummins J); *Kierford Ridge Pty Ltd v Ward* [2005] VSC 215 (20 June 2005); *Sunny Corporation Pty Ltd v Elkayess Nominees Pty Ltd* [2006] VSC 314 (28 August 2006); *Johnson v Morrison* [2009] VSC 72 (3 March 2009); *Re Franklin* [2009] VSC 496 (4 November 2009); *Rise Home Loans Pty Ltd v Chambers* [2009] VCC 31 (3 February 2009), revd *Rise Home Loans Pty Ltd v Dickinson* [2010] VSC 29 (18 February 2010); *Lord v Maguire* [2009] VCC 765 (29 June 2009); *Alford v Evans* [2010] VCC 475 (13 May 2010); *Blake v Maguire* [2010] VCC 1265 (16 September 2010); *Executive Seminars Pty Ltd v Peck* [2001] WASC 229 (29 August 2001).

[161] Bradbrook et al, above n 40, 172 [3.390]; O'Connor, above n 15, 49.

[162] *Transfer of Land Act 1958* (Vic) s 60; *Transfer of Land Act 1893* (WA) s 222(1).

[163] *Transfer of Land Act 1958* (Vic) s 60; *Transfer of Land Act 1893* (WA) s 223.

[164] *Transfer of Land Act 1958* (Vic) s 61; *Transfer of Land Act 1893* (WA) s 223A. Note also that in some circumstances the Registrar may lodge a caveat preventing the transfer from taking place: see *Guggenheimer v Registrar of Titles* [2002] VSC 124 (22 April 2002).

[165] See below Part III(B)(5).

[166] *Transfer of Land Act 1958* (Vic) s 62; *Transfer of Land Act 1893* (WA) s 223(2).

pointed out,[167] so long as the adverse possessor has ultimate possession for the required period of limitation, the fact that the registered proprietor sells the land to a new registered proprietor (during the effluxion of the limitation period) does not matter.[168] The new registered proprietor will take title subject to the inchoate right and, upon the running of the required time, the adverse possessor will be entitled to be registered as the new proprietor.

Another interpretation could be that only a possessory right arises after the effluxion of time, so that a newly registered proprietor would not be subject to an earlier inchoate right. However, this is not borne out by the language of the provisions in Victoria or Western Australia.

2 *New South Wales*

Consistent with the rationale of title by registration that title can only be acquired by registration and not by possession, it was initially not possible to acquire a possessory title against the registered proprietor of Torrens title land in NSW.[169] Nevertheless, it was (and remains) possible to acquire possessory title against the entire world except the registered proprietor.[170] In 1979 the Torrens title legislation was amended and pt 6A was introduced into the *Real Property Act 1900* (NSW) to allow claims for adverse possession against registered proprietors. In some respects pt 6A preserves the conclusiveness of the register, because the extent to which possessory title may be obtained and how it will be retained is more tightly controlled than in Victoria and Western Australia. Notwithstanding the importance of the statutory requirements in pt 6A, it is necessary for applicants to comply with the fundamental common law principles.[171] There have been a number of recent applications for possessory title or applications raising aspects of the law of possessory title in NSW,[172] some of which have been successful.[173]

Section 45D(1) of the *Real Property Act 1900* (NSW) permits a person who has acquired possession of Torrens title land in circumstances in which the title of the registered proprietor would have been extinguished under the statute of limitations to make an application to the Registrar-General to be recorded as the

[167] Bradbrook et al, above n 40, 172 [3.390]. See also Edgeworth et al, above n 124, 548 [5.115].

[168] *Alford v Evans* [2010] VCC 475 (13 May 2010); *Blake v Maguire* [2010] VCC 1265 (16 September 2010).

[169] *Real Property Act 1900* (NSW) s 45, as repealed by *Real Property (Possessory Titles) Amendment Act 1979* (NSW) sch 1 item 8.

[170] *Spark v Whale Three Minute Car Wash (Cremorne Junction) Pty Ltd* (1970) 92 WN (NSW) 1087, 1104 (Slattery J); *Newington v Windeyer* (1985) 3 NSWLR 555, 563–4 (McHugh JA).

[171] See, eg, *Newington v Windeyer* (1985) 3 NSWLR 555; *Americana Leadership College v Coll* [2003] NSWSC 295 (15 April 2003); *Bourke v Hooper* [2007] NSWSC 1516 (7 December 2007).

[172] See, eg, *Re North Sydney Council Matter No 3838/96* [1997] NSWSC 409 (17 September 1997); *Americana Leadership College v Coll* [2003] NSWSC 295 (15 April 2003); *Bourke v Hooper* [2007] NSWSC 1516 (7 December 2007); *Weber v Ankin* (2008) 13 BPR ¶25 231. In *Byron Council v Vaughan* (Unreported, Land and Environment Court of New South Wales, Lloyd J, 14 July 1998), there were submissions based on possessory title. However, these were unsuccessful because the Court determined that the matter related to the encroachment of buildings, a matter separately treated in the law of NSW: at [23]–[28].

[173] See, eg, *Shaw v Garbutt* (1996) 7 BPR ¶14 816.

new registered proprietor.[174] Generally, an application can only be made in regard to whole parcels of land.[175] However, there are specific exceptions to this rule.[176]

Assuming that an application can be made in regard to the land,[177] the Registrar-General may grant the possessory application if he or she is satisfied that the requirements under s 45D have been satisfied and the entire limitation period has run against the current registered proprietor. Unlike the position for old system title land (or probably the situation in Victoria and Western Australia), it is not possible for an applicant to rely on periods of adverse possession that occurred before the true owner was registered. Each time a new registered proprietor is registered without fraud and for value, the limitation period recommences.[178] However, it is not clear whether the use of the word 'may' means that the Registrar-General retains an overall discretion whether or not to register the applicant or whether the Registrar-General is compelled to grant the application when the requirements have been met.[179]

When the Registrar-General intends to grant a possessory application and gives notice of that intention, he or she is required to specify a period (being not less than one month after the date of the notice) before the expiration of which the application will not be granted.[180] Such a specified period allows a party affected by the possessory application to lodge a caveat against the granting of the application, and the standard provisions in relation to caveats apply.[181] While the caveat will initially prevent registration of the adverse possessor's claim, it will not do so finally: the caveat may lapse. A court may determine that the

[174] As to the applications in regard to qualified title, see *Real Property Act 1900* (NSW) s 45D(1)(c); *Real Property Act 1900* (NSW) s 45C(2); *South Maitland Railways Pty Ltd v Satellite Centres Australia Pty Ltd* (2009) 14 BPR ¶26 823.

[175] That is, land that basically meets town planning standards: *Real Property Act 1900* (NSW) s 45B(1). Note also *Re North Sydney Council Matter No 3838/96* [1997] NSWSC 409 (17 September 1997); *Refina Pty Ltd v Binnie* [2009] NSWCA 914 (3 September 2009); *Refina Pty Ltd v Binnie* [2010] NSWCA 192 (11 August 2010).

[176] Such as land beyond occupational boundaries and residue lots or service lanes, subject to the rights of local councils. Where there is possession up to the occupational boundary, but the land as registered includes land beyond the occupational boundary, then the application for the whole parcel of land includes the land beyond the occupational boundary: *Real Property Act 1900* (NSW) s 45D(2). As to residue lots, see Butt, above n 40, 914 [22.38]; *Weber v Ankin* (2008) 13 BPR ¶25 231.

[177] See the comments in above Part II(C)(2) in relation to Crown land in NSW. See also *Townsend v Waverley Council* (2001) 120 LGERA 224.

[178] *Real Property Act 1900* (NSW) s 45D(4). Under s 45E(1), the Registrar-General 'may grant a possessory application' if the Registrar-General is satisfied that the application complies with and is authorised by the requirements for title by possession in s 45D of the same legislation.

[179] There are two views evident in the case law. One is that the Registrar-General retains discretionary power: see *Shaw v Garbutt* (1996) 7 BPR ¶14 816. The other is that in this kind of context the power must be exercised in favour of the applicant: see *W H Soul Pattinson & Co Ltd v Department of Health and Family Services* (1997) 74 FCR 339.

[180] *Real Property Act 1900* (NSW) s 45E(2). This provision does not specifically state to whom the notice must be sent. However, under s 12(1)(h1), the Registrar-General has the general power to give notice by advertisement or personal service if intending to exercise or perform any of the powers, duties or functions conferred by statute.

[181] Ibid pt 7A.

applicant has fulfilled the criteria and order the Registrar-General to register the applicant as the new proprietor.[182]

Unlike the Victorian and Western Australian legislation, the NSW statute clarifies that until registration, the applicant does not acquire title to the land and the adverse possession does not extinguish the interest of the registered proprietor.[183] Indeed, it remains unsettled whether prior to registration the adverse possessor acquires any title in the land. Some authority suggests that the adverse possessor acquires an inchoate possessory title which has a status similar to that of other unregistered interest holders,[184] while other authority relying on pt 6A has held that the legislation precludes the adverse possessor having any inchoate right.[185] A possible way of resolving this issue is to ask whether the adverse possession is (like in Victoria, Western Australia and Tasmania) an exception to indefeasibility. It is not expressly stated to be so, and the provisions in pt 6A lean against any inchoate or possessory claim operating as an exception to indefeasibility (because upon a new registration, time runs afresh and a possessory claim does not extinguish the proprietor's title). Therefore, it is unlikely that the adverse possessor acquires any interest in the land, and it is more likely that the possessor holds only a statutorily regulated possessory claim against the current registered proprietor after the expiration of the limitation period.

3 *Queensland*

Initially, the Torrens legislation did not provide for adverse possession. There was some subsequent case law that permitted the doctrine to operate,[186] but other case law overruled it.[187]

In 1952 the legislation was changed[188] so that (consistent with such states as Victoria and Western Australia) an adverse possessor acquires an interest that constitutes an exception to the indefeasibility of the registered proprietor. Upon application,[189] the applicant can be registered if the Registrar is satisfied that the interest of the registered proprietor has been extinguished.[190] The Registrar is required to advertise the application,[191] and a person who is a registered proprietor or who believes that he or she has an interest in the land may initially lodge a

[182] *Bartlett v Ryan* [2000] NSWSC 807 (16 August 2000) [11] (Hamilton J).

[183] *Real Property Act 1900* (NSW) s 45C. See also ibid; *Refina Pty Ltd v Binnie* [2010] NSWCA 192 (11 August 2010) [19]–[22] (Allsop P).

[184] See, eg, *Newington v Windeyer* (1985) 3 NSWLR 555, 563–4 (McHugh JA).

[185] See, eg, *Refina Pty Ltd v Binnie* [2009] NSWCA 914 (3 September 2009) [37]–[43] (Brereton J). See also *Refina Pty Ltd v Binnie* [2010] NSWCA 192 (11 August 2010) [19]–[22] (Allsop P).

[186] *Verri v Holmes* [1934] QWN 9; *Miscambles Pty Ltd v Rae* [1935] QWN 38.

[187] *Miscamble v Phillips* [1936] St R Qd 136. This case was discussed in Queensland Law Reform Commission, *On a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland*, Working Paper No 32 (1988) 59–62.

[188] *Real Property Acts Amendment Act 1952* (Qld).

[189] *Land Title Act 1994* (Qld) s 99. Under the legislation, the reference to the 'registrar' is a reference to the 'registrar of titles': s 206.

[190] This provision was originally enacted in ibid s 170(1)(d). However, it is now stated at s 185(1)(d). For a discussion of the change to the legislation, see Queensland Law Reform Commission, above n 187, 62.

[191] *Land Title Act 1994* (Qld) s 103.

caveat to protect his or her interest.[192] The legislation also generally prohibits applications in respect to various lots, including a part of a lot and a lot that may be later created by subdivision.[193]

However, the Queensland legislation has its own particular features. First, unlike in NSW, the legislation makes it clear that the Registrar has the power to refuse applications that do not provide the necessary documentary support.[194] Second, the legislation specifically states that the death of a person who could make an application to be registered as owner will not prevent such an application being made by the person's legal personal representative.[195] Third, if the Registrar is satisfied that the caveator has an interest in the land that has not been extinguished under the *Limitation of Actions Act 1974* (Qld), then the Registrar can refuse to register the applicant as owner, instead registering the applicant as having a lesser interest.[196] Fourth, if the caveator does not agree to the registration of the applicant for a lesser interest, the caveator may start proceedings in the Supreme Court to recover the land.[197] Fifth, the Registrar may register the applicant as an owner of part of the land, subject to the prohibition mentioned above[198] and to certain administrative requirements.[199] Finally, the language of the legislation indicates that the *Limitation of Actions Act 1974* (Qld) does operate within the title-by-registration system. The title of the registered proprietor can be extinguished by the Act,[200] whereas in NSW such an effect is specifically prohibited.[201] Therefore, it has been pointed out that in Queensland the 'adverse occupier is not required to apply for registration in order to enjoy the overriding protection of the exception'.[202] Unlike the Victorian and Western Australian legislation, however, the Queensland statute does not preserve or recognise inchoate possessory rights, but only those rights which have run for the

192 Ibid s 104.

193 Ibid ss 98(1)(a)–(b). Other lots that are excluded from an application include a lot that is owned by the State government or a local council (s 98(1)(c)) and a lot where possession arises out of an encroachment (s 98(1)(d)). See also *Sherrard v Registrar of Titles* [2004] 1 Qd R 558.

194 *Land Title Act 1994* (Qld) s 102.

195 Ibid s 101. See also *Re Johnson* [2000] 2 Qd R 502.

196 *Land Title Act 1994* (Qld) s 107(1). It is not clear whether the use of the word 'and' means that the Registrar can refuse to register, or whether the refusal to register requires the Registrar to automatically register a lesser interest. It is submitted that the former interpretation is to be preferred; otherwise, adverse possessors who did not comply with the requirements of the *Limitation of Actions Act 1974* (Qld) would always obtain a lesser, but still burdening, interest in the land. What kind of interest would comply with the provision is not stated.

197 *Land Title Act 1994* (Qld) s 107(2). The proceeding must be started within one month of receiving written notice of the Registrar's intention: s 107(3). If the caveator does not start proceedings within one month, the Registrar may register the applicant as the holder of a lesser interest in the land: s 107(4).

198 Ibid s 107(1).

199 Ibid s 108A.

200 'Adverse possessor' in the *Land Title Act 1994* (Qld) is defined as 'a person (a) against whom the time for bringing an action to recover the lot has expired under the *Limitation of Actions Act 1974*; and (b) who, apart from this Act, is entitled to remain in possession of the lot': sch 2 (definition of 'adverse possessor').

201 *Real Property Act 1900* (NSW) s 45C, which overrides the *Limitation Act 1969* (NSW).

202 M M Park and I P Williamson, 'An Englishman Looks at the Torrens System: Another Look 50 Years On' (2003) 77 *Australian Law Journal* 117, 123.

required limitation period and entitle the adverse possessor to make an immediate application for registration.[203]

4 *Tasmania*

In Tasmania, the doctrine of adverse possession applies to Torrens title land and a registered proprietor's indefeasible title is statutorily 'subject to section 117 [of the *Land Titles Act 1980* (Tas)], so far as regards rights acquired, or in the course of being acquired, under a statute of limitations'.[204] Section 117 (which basically provided that the general law of adverse possession applied to Torrens title land) was repealed and replaced by pt IXB, which, inter alia, deals with the question of 'possessory title' claims. It has been assumed that, notwithstanding the current legislative inaccuracy, otherwise indefeasible titles will be subject to the provisions contained in pt IXB and to inchoate possessory interests.[205]

Part of the Tasmanian response to adverse possession has already been highlighted.[206] It will be recalled that the current legislation deals with how the nature of the possession must be proved. Leaving aside this issue, the legislation has some broad similarities to that of other states. An adverse possessor may make an application to be registered;[207] there will be notice provisions publicising that an application has been made;[208] and a registered proprietor may lodge a caveat to prevent registration.[209]

However, the Tasmanian position is so different to that in the other states that it warrants description. Tasmania has taken significant steps to control adverse possession within a title-by-registration system. First, the legislation states that it applies to both unregistered and registered land (so presumably the Recorder can make a decision about applications in regard to unregistered land, although some of the mechanical aspects of title by registration would not apply).[210] Second, the period of adverse possession will be disregarded when the registered proprietor has paid council rates.[211] Third, like in NSW, the estate of the registered proprietor in regards to Torrens title land is not extinguished by the statute of limitations.[212] However, in those cases where the estate would have been extinguished if the land had not been Torrens title land, the registered proprietor of land is taken to hold the land on trust for the adverse possessor.[213] The adverse posses-

[203] Under the *Land Title Act 1994* (Qld) s 185(1)(d), the interest of the registered proprietor is subject to 'the interest of a person who, on application, would be entitled to be registered as owner of the lot because the person is an adverse possessor'. See also Bradbrook et al, above n 40, 174–6 [3.400]; Edgeworth et al, above n 124, 548 [5.115].

[204] *Land Titles Act 1980* (Tas) s 40(3)(h); Edgeworth et al, above n 124, 548 [5.115].

[205] *Quarmby v Keating* (2008) 18 Tas R 284, 307 (Evans J).

[206] See above Part II(C)(3)(b).

[207] *Land Titles Act 1980* (Tas) ss 138T, 138W(4).

[208] Ibid s 138W(8).

[209] Ibid s 138Z(1).

[210] Ibid s 138H.

[211] Ibid s 138U. The provision operates retrospectively: *Natural Forests Pty Ltd v Turner* (2004) 13 Tas R 44; *Quarmby v Keating* [2007] TASSC 65 (23 August 2007).

[212] *Land Titles Act 1980* (Tas) s 138W(2).

[213] Ibid s 138W(2).

sor can then make an application for registration.[214] Unlike the position in NSW, the right of a person to apply for registration is not affected by subsequent registrations or transmissions.[215] This is consistent with the point that the indefeasible title of the registered proprietor is subject to an inchoate possessory claim. However, a fully-fledged possessory claim will not extinguish the title of the registered proprietor. It is an unusual blending of the approaches taken in Victoria, Western Australia and NSW. Fourth, the Recorder may simply reject an application wholly or in part, or make requisitions as he or she sees fit.[216] However, despite the breadth of the (apparent) discretionary power to reject an application, it may be that such a rejection would be qualified by a requirement that the Recorder act in good faith based on the terms of the legislation. Fifth, the Recorder may make a vesting order subject to the condition that the title vested is to be a qualified title.[217] Under the Tasmanian legislation, qualified title is subject to a caution[218] which will lapse after 20 years.[219]

In addition, unlike that of the other states the Tasmanian legislation has specifically dealt with the problem of unregistered purchasers of land. The Recorder may make an order vesting land in an applicant if the Recorder is satisfied that the applicant:

> (a) is in possession of registered land and no claim to recover the land has been made by the registered proprietor of that land or his or her heirs, personal representatives or assigns; and
>
> (b) is entitled in equity and good conscience to be registered as proprietor of an estate in fee simple in the land in consequence of a sale of the land; and
>
> (c) is unable to obtain a transfer of the land from the registered proprietor of the land because the registered proprietor is dead or residing out of Tasmania or cannot be found or for any reason it is impracticable to obtain his or her signature within a reasonable time.[220]

At least 15 years must have elapsed since the date of the sale upon which the applicant relies.[221] If a caveat is subsequently lodged against the application, the Recorder may: grant or refuse the application; conduct an enquiry as to whether the application ought to be granted; or refer the matter to the Supreme Court for determination.[222]

The Recorder may also take action to rectify the legal description of land boundaries when: the description of the land in a folio of the Register differs

214 Ibid s 138W(4).
215 Ibid s 138W(6).
216 Ibid s 138W(11).
217 Ibid s 138X(5).
218 Ibid s 21(2).
219 Ibid s 25.
220 Ibid s 138D(1).
221 Ibid s 138D(2).
222 Ibid s 138E(4).

from the actual land;[223] and the Recorder is of the view that the amendment can be dealt with outside the legislative scheme for adverse possession.[224]

5 *South Australia*

South Australia reintroduced adverse possession into its Torrens statute in 1945,[225] but has taken unusual steps to control adverse possession within its title-by-registration system. It is not possible to acquire title by adverse possession except in accordance with the *Real Property Act 1886* (SA),[226] but unlike in Tasmania the scheme is still totally dependent upon the meaning of possessory title under the traditional doctrine.

Under s 69(f) of the *Real Property Act 1886* (SA), a registered proprietor's certificate of (otherwise) indefeasible title will be void

> as against the title of any person adversely in actual occupation of, and rightfully entitled to, such land, or any part thereof at the time when such land was so brought under the provisions of the said Acts, and continuing in such occupation at the time of any subsequent certificate being issued in respect of the said land.

It has been pointed out that the section does not strictly relate to the doctrine.[227] The phrase 'adversely in actual occupation of, and rightfully entitled to' does not mean the doctrine of adverse possession.[228] The provision is concerned with the situation where a person was in actual possession of the land when the land was brought into the title-by-registration system but the certificate of title or subsequently issued certificates of title have not reflected this.[229] Leaving aside this provision, adverse possession is not specifically stated to be an exception to indefeasibility. In the light of the strict control of adverse possession under the Act, it is unlikely that any inchoate interest arises to act as a de facto exception.[230]

Part 7A of the *Real Property Act 1886* (SA) covers possessory title. Like in the other states, a person claiming title by adverse possession may bring an application to be registered as the proprietor of the land.[231] Notice provisions apply[232] and a party who claims that he or she has an interest in the land may lodge a caveat.[233] Nevertheless, the application and caveat processes take markedly different approaches to the status of the registered proprietor. In the other states, it is open to the registrar (or equivalent) to refuse an application because, for example, there has not been compliance with the required criteria, the appropri-

223 Ibid s 142(1)(a).
224 Ibid s 142(2).
225 See Park and Williamson, above n 202, 123.
226 *Real Property Act 1886* (SA) ss 80A–80I, 251.
227 Bradbrook et al, above n 40, 174–6 [3.400].
228 Ibid.
229 Ibid.
230 Edgeworth et al, above n 124, 548 [5.115].
231 *Real Property Act 1886* (SA) s 80A.
232 Ibid s 80E.
233 Ibid ss 80F(1)–(2).

ate supporting documentation has not been tendered, or the application of the adverse possessor has failed in court. The South Australian legislation takes a radical step and favours the registered proprietor. In this respect, the South Australian legislature transcribed a provision recommended by the Queensland Law Reform Commission in a working paper[234] into the South Australian *Real Property Act 1886* (SA).[235] That Act affords a registered proprietor the opportunity to lodge a caveat to halt the registration process, but then it effectively gives the registered proprietor a veto on registration. Section 80F(3) directs:

> If the Registrar-General is satisfied that the caveator is the registered proprietor of the land to which the application relates, or has an estate or interest in that land derived under or through the registered proprietor, he shall refuse the application.

Therefore, the legislation adheres to a doctrine that may assist the smooth running of the system when the land has been abandoned by the registered proprietor or registration does not reflect the true possessor of the land.[236] Ultimately, however, the legislation's key concern is to protect the rights of registered proprietors by allowing them to veto an application. It is only when there are no caveats lodged or the Registrar-General is satisfied that the caveator is unable to show that he or she is the registered proprietor (or has an estate or interest in the land derived from the registered proprietor) that the Registrar-General would be in a position to register the applicant (after the caveator has been given notice to commence proceedings in the Supreme Court).[237] As the registered proprietor has a broad power of veto, the adverse possessor's initial application for registration is untrammelled by statutory restrictions (like those in NSW, Queensland or Tasmania) about the precise nature of the possession required, or the kind of land or disputes that may or may not be subject to the application.

Nevertheless, it is arguable that the legislative scheme in pt 7A is defective because it appears to contradict the effect of the limitations statute. Section 28 of the *Limitations of Actions Act 1936* (SA) states that at the determination of the period of limitation, the right and title of the owner of the land will be extinguished. Yet it is implicit in pt 7A that until registration, an applicant is not the registered proprietor and the application may be vetoed by the registered proprietor. It is likely that the answer lies in the fact that the *Real Property Act 1886* (SA) entirely regulates the operation and effect of adverse possession,[238] so that even though the *Limitations of Actions Act 1936* (SA) would appear to extinguish title, it cannot do so in the light of pt 7A.

[234] Queensland Law Reform Commission, above n 187, 258 (sch 4 s 7(4)).
[235] However, the *Land Title Act 1994* (Qld) does not contain a similar provision.
[236] This appears to have been the intention of the Queensland recommendations: see Queensland Law Reform Commission, above n 187, 63.
[237] *Real Property Act 1886* (SA) ss 80F(4)–(7).
[238] Ibid s 251.

The positions of Queensland and South Australia are discussed under the one heading by eminent commentators,[239] suggesting that the positions taken in the respective statutes strike a good balance between the interests of the registered proprietor and the adverse possessor. Although both permit an adverse possessor to make an application for registration and the true owner to take steps to lodge a caveat prohibiting registration, the lodging of a caveat under the Queensland legislation may not bring the application to a close. For example, if the registered proprietor lodges a caveat, but the Registrar is satisfied that the registered proprietor's interest has been extinguished under the *Limitation of Actions Act 1974* (Qld), the Registrar must provide a notice to the registered proprietor requiring him or her to start proceedings to recover the land in the Supreme Court within six months after the notice is given.[240] In contrast, in South Australia, the Registrar-General may not register the adverse possessor when a caveat against prohibition has been lodged by the registered proprietor.[241] It is submitted that the South Australian legislation unequivocally gives the registered proprietor the right to bring the application to an end, whereas the ultimate recourse for the registered proprietor in Queensland is legal proceedings.

6 *Australian Capital Territory and the Northern Territory*

As previously discussed,[242] the doctrine of adverse possession has been statutorily removed from the law of both territories. The title-by-registration legislation of both territories state that title may not be acquired from a registered proprietor by virtue of adverse possession.[243]

C *England*

The path to title by registration was a slower one in England than in Australia. Under the 19th century legislation, it was initially not possible for adverse possessors to acquire possessory title,[244] but at the end of the century it was permitted.[245]

The intention of the drafters of the *Land Registration Act 1925*[246] was that adverse possession would equally apply to unregistered and registered land. However, it was acknowledged that this was difficult because title by registration was dependent not upon possession, but upon registration. A party who remained registered retained the legal estate to the land.[247] It has been suggested that the

[239] Bradbrook et al, above n 40, 174–6 [3.400], quoting Douglas J Whalan, *The Torrens System in Australia* (Law Book, 1982) 328; Park and Williamson, above n 202, 123.

[240] *Land Title Act 1994* (Qld) s 105(1).

[241] *Real Property Act 1886* (SA) s 80F(3).

[242] See above Part II(C)(2)(b).

[243] *Land Titles Act 1925* (ACT) s 69; *Land Title Act 2000* (NT) s 198.

[244] *Land Transfer Act 1875*, 38 & 39 Vict, c 87, s 21.

[245] *Land Transfer Act 1897*, 60 & 61 Vict, c 65, s 12; Law Commission (UK) and H M Land Registry, *A Consultative Document*, above n 6, 209–10 [10.20].

[246] 15 & 16 Geo 5, c 21.

[247] Law Commission (UK) and H M Land Registry, *A Consultative Document*, above n 6, 205–6 [10.11], 208 [10.18].

appropriate solution would have been to protect the adverse possessor's legal estate as an overriding interest, binding all persons who subsequently acquired an interest in the land.[248] Instead, simply stated, the legislation provided that the registered proprietor's title would not be extinguished, but that (like the current position in Tasmania) the registered proprietor would hold the land on trust for the adverse possessor. The Law Commission later considered this approach unnecessary and confusing.[249]

In the late 20th century, the Law Commission proposed a new system of title by registration. The Commission considered that the doctrine of adverse possession was fundamentally antithetical to title by registration.[250] If there were to be any principle of adverse possession in operation, then it would have to be severely clawed back to ensure that the certainty and reliability of the register was not undermined.[251] Thus, one of the components of the new system was a fresh way of dealing with the question of adverse possession, influenced by the *Land Title Act 1994* (Qld)[252] (although in some respects the final result was closer to the Queensland Law Reform Commission's recommendations, which were adopted in South Australia).[253] The basic recommendations of the Law Commission were enshrined in the *Land Registration Act 2002* (UK) c 9.

The scheme is heavily weighted in favour of the registered proprietor. Unlike the 1925 legislation, possession of the land in accordance with the traditional doctrine does not (and for as long as it continues, will not) affect the title of the registered proprietor of the land.[254] It does not extinguish the interest of the registered proprietor, nor does it terminate the right of the registered proprietor to bring an action to recover the land.[255] Therefore, from an Australian perspective, this probably would not constitute an exception to indefeasibility. However, after 10 years the adverse possessor may apply to the Registrar to be registered as the new proprietor.[256] If the Registrar considers that there is an arguable case for registration (because the nature of the applicant's possession is such that it complies with the common law principles), then the Registrar will send a notice

[248] Ibid 214 [10.27]. In this sense, an overriding interest would function as an exception to indefeasibility, similarly to adverse possession in Victoria, Western Australia and Tasmania.

[249] Ibid 214–19 [10.28]–[10.39].

[250] Ibid 208 [10.18].

[251] Ibid 209 [10.19].

[252] Ibid 208 [10.17], 221 [10.44]. It was pointed out that under the Queensland legislation it was not clear what happens if the registered proprietor objects to the squatters' application for registration, other than that no registration takes place: at 222 n 149. However, the issue of what happens after the caveat is lodged is dealt with under s 105 of the *Land Title Act 1994* (Qld). It will depend upon whether the Registrar is satisfied that the interest of the registered proprietor has been extinguished or whether the caveat is withdrawn or lapses.

[253] The recommendations were contained in Queensland Law Reform Commission, above n 187, 256–9 (sch 4).

[254] Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5].

[255] *Land Registration Act 2002* (UK) c 9, s 96. See also ibid.

[256] *Land Registration Act 2002* (UK) c 9, sch 6 para 1. See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5], 316–19 [14.19]–[14.23].

to the registered proprietor and other affected parties (as specified in the legislation) about the application.[257]

The legislation permits the registered proprietor to respond in three specified ways.[258] First, the registered proprietor may decide to not oppose the application,[259] although this is unlikely to occur often.[260] Second, the registered proprietor may object to the application (without lodging a counternotice), meaning that the registration cannot take place until there is a resolution of specific matters (such as the factual basis for possession).[261] Therefore, in such a case there may need to be an adjudication of the objection or a negotiated settlement. It is not likely that registered proprietors will make this response often, as they risk the prospect of losing the land as they have not lodged a counternotice.[262] Third, the registered proprietor may serve a counternotice (with or without an objection to the basis of the application).[263] The effect of the counternotice is that Registrar must deal with the application. Notwithstanding the length of the period of possession, the applicant cannot obtain registration, unless the adverse possessor is able to fit within one of the exceptions discussed below.[264] Therefore, the registered proprietor can in effect veto the registration of the adverse possessor and the Registrar must comply with this. However, the veto is not foolproof. The scheme gives the registered proprietor a further two years in which to take action and acquire possession of the land.[265] In the unlikely event that the registered proprietor does not take action to recover the land, then it is open to the adverse possessor to make a further application to be registered, and on this occasion he or she will be successful.[266] The registration replaces the common law freehold, which the adverse possessor initially acquired on possession, and operates effectively as a statutory conveyance of the registered estate.[267]

The overall scheme is subject to three situations in which an adverse possessor may have an opportunity to become the registered proprietor despite a counternotice being issued.[268] The adverse possessor must prove that he or she has been

[257] *Land Registration Act 2002* (UK) c 9, sch 6 para 2. See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5], 322–4 [14.32]–[14.33].

[258] *Land Registration Act 2002* (UK) c 9, sch 6 paras 3–4.

[259] Ibid sch 6 para 4. See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5], 322 [14.32]–[14.33].

[260] Gray and Gray, *Elements of Land Law*, above n 11, 1171–2 [9.1.23]–[9.1.25].

[261] *Land Registration Act 2002* (UK) c 9, sch 6 para 3(1). See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5], 322 [14.32].

[262] Gray and Gray, *Elements of Land Law*, above n 11, 1172 [9.1.25]; Dixon, above n 82, 445 [11.4.2].

[263] *Land Registration Act 2002* (UK) c 9, sch 6 para 3(1) & 3(2).

[264] Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5], 322 [14.32] 324 [14.35].

[265] *Land Registration Act 2002* (UK) c 9, sch 6 para 6. See also Gray and Gray, *Elements of Land Law*, above n 11, 1172 [9.1.26].

[266] *Land Registration Act 2002* (UK) c 9, sch 6 paras 6(1) and 7. See also Gray and Gray, *Elements of Land Law*, above n 11, 1172 [9.1.26].

[267] Gray and Gray, *Elements of Land Law*, above n 11, 1174 [9.1.32].

[268] *Land Registration Act 2002* (UK) c 9, sch 6 paras 5(2)–(4).

in adverse possession in the traditional sense for 10 years and that one of the three exceptions apply.[269] It has been pointed out that it is likely that the three exceptions will become contentious, because it is through these exceptions that adverse possessors are most likely to be successful.[270]

The first exception is where it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and the circumstances are such that the applicant ought to be registered as the proprietor.[271] This exception will be dependent upon the nature and extent of the law of estoppel at the time that the application was made. Commentators have observed that in view of the fluidity of estoppel in English law, it is by no means clear that an adverse possessor would succeed.[272] Moreover, the minimum equity requirement may mean that an applicant will be awarded monetary compensation rather than registration as a remedy. After all, the legislation specifies that the applicant ought (rather than must) be registered.[273]

The second exception is where the applicant is for some other reason already entitled to be registered as the proprietor of the estate.[274] The Law Commission envisaged that this would occur, for example, when the applicant was already entitled to the land under a will or intestacy, or the applicant was the purchaser of the land who had moved onto the land but the legal estate was not transferred to him or her.[275]

The third exception is where a neighbour has made a reasonable mistake in relation to the boundary to the land.[276] The legislation permits an owner who in fact has occupied land that did not belong to him or her, and mistakenly and reasonably believed for at least 10 years that the exact boundary of that land had been fixed, to be registered as the proprietor of that portion of land.[277] It is an interesting provision which requires that the adverse possessor has acted reasonably, a requirement which was absent in the common law.

[269] Ibid sch 6 paras 1 and 5. See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 308 [14.5], 325 [14.36]; Gray and Gray, *Elements of Land Law*, above n 11, 1172–3 [9.1.27].

[270] Dixon, above n 82, 446 [11.4.3]. However, the adverse possessor will take the land subject to any encumbrances (such as charges) because the chargee will not have had an opportunity to object to the registration: at 449 [11.4.4].

[271] *Land Registration Act 2002* (UK) c 9, sch 6 para 5(2). See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 326–8 [14.39]–[14.42]; Gray and Gray, *Elements of Land Law*, above n 11, 1173 [9.1.28].

[272] See, eg, Dixon, above n 82, 447 [11.4.3.1].

[273] Gray and Gray, *Elements of Land Law*, above n 11, 1173 [9.1.28]; ibid.

[274] *Land Registration Act 2002* (UK) c 9, sch 6 para 5(3). See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 328 [14.43]; Gray and Gray, *Elements of Land Law*, above n 11, 1173 [9.1.29].

[275] Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 328 [14.43].

[276] *Land Registration Act 2002* (UK) c 9, sch 6 para 5(4). See also Law Commission (UK) and H M Land Registry, *A Conveyancing Revolution*, above n 10, 328–32 [14.44]–[14.52].

[277] It has been pointed out that this is one of the few examples where ignorance or mistake as to law forms a basis for a claim for adverse possession: Gray and Gray, *Elements of Land Law*, above n 11, 1174 [9.1.30].

The *Land Registration Act 2002* (UK) c 9 strongly protects the interests of the registered proprietor and gives him or her ample opportunity to take action to repossess the land. Although adverse possession has been used to address boundary disputes in the past (and may still be used, depending upon the approach taken by adverse possessors),[278] the first two exceptions are effectively otiose. They repeat what would have been the position before the passing of the Act. The robust principle of estoppel has operated effectively outside the confines of property law legislation;[279] and the second exception ensures that where a possessor has a legitimate source of entitlement outside the legislation, the protection of the registered proprietor will not undermine that entitlement.

Generally, this statutory scheme of adverse possession has been accepted by commentators as a means of adjusting property law concepts to fit title by registration. As land law is no longer governed by possession and relativity of title, registration as an indicator of ownership or dominion has come clearly to the fore.[280]

However, there has been some dissent, arguing that the system may have the converse effect of discouraging adverse possessors from coming forward to seek registration.[281] This will be dealt with below.[282]

IV Distilling Modern Responses to Adverse Possession

A comparison and contrast of the Australian and English jurisdictions demonstrates that it has not been easy to integrate the traditional doctrine of adverse possession into title-by-registration systems.

In this article, six approaches will be canvassed. The first approach (complete preservation of the traditional doctrine) and the sixth approach (abolition) are at opposite ends of the continuum. The second, third, fourth and fifth approaches represent various degrees and kinds of statutory amendment of the doctrine. Each of these approaches will be considered in turn, including (where apposite) some of the arguments for and against their adoption.

A *Preservation of the Traditional Doctrine of Adverse Possession*

Title by registration was, strictly speaking, a new method of conveyancing and dealing with property rather than a new form of property law. Robert Torrens did not challenge such fundamental tenets of English law as the doctrine of tenures or the doctrine of estates. Therefore, it has been contended that the changes

[278] See, eg, *Norton v London & North Western Railway Co* (1879) 13 Ch D 268; *Marshall v Taylor* [1895] 1 Ch 641; *Neilson v Poole* (1969) 20 P & CR 909; *London Borough of Hounslow v Minchinton* (1979) 74 P & CR 221. For a helpful discussion of boundary disputes, see Jourdan, above n 1, ch 33.

[279] Harpum, Bridge and Dixon, above n 21, ch 16.

[280] See, eg, Gray and Gray, *Elements of Land Law*, above n 11, 1169–70 [9.1.20]; Dixon, above n 82, 444 [11.4].

[281] Alison Clarke, 'Use, Time and Entitlement' (2004) 57 *Current Legal Problems* 239; Cobb and Fox, above n 8.

[282] See below Part IV(A).

envisioned by Robert Torrens did not automatically undermine traditional property norms such as adverse possession.[283] Unfortunately, Robert Torrens did not specifically address the role of adverse possession in his new title-by-registration scheme. Therefore, when the scheme was implemented in Australia it was possibly safer for legislatures to retain adverse possession as an exception to indefeasibility. This approach was accompanied by the retention or virtual copying of English statutes of limitations (which were in fact originally created to cover unregistered land). In England, the doctrine of adverse possession was more difficult to dislodge (probably because of the slower introduction of title by registration and the significant amount of unregistered land), so the *Land Registration Act 1925*[284] reinstated it and modified it to deal with land law's ongoing dependence on possession as a legal concept. In short, retaining the doctrine was arguably part of the overlap or transition from a possession-based land title system to a registration-focused system.

Two jurisdictions, Victoria and Western Australia, have retained the traditional doctrine as an exception to indefeasibility. It may be that they will be the last two Australian jurisdictions to abandon traditional adverse possession in a registration-based (and increasingly electronically focused) environment. There are strong indications that adverse possession will be reviewed in the near future by the Law Reform Commission of Western Australia.[285] In Victoria, the Law Reform Commission has already favoured the introduction of legislative provisions that would deal with two areas where adverse possession has been commonly useful: encroachments[286] and boundary disputes.[287] It has also recommended a review of part parcel adverse possession issues.[288]

The traditional doctrine has had its advantages. It has operated in a broad fashion, in a 'rough-and-ready' way as a net or 'catch-all' for a wide array of property disputes. In the 19th and 20th centuries, as the legal concept of possession came under pressure, so too did adverse possession. If the doctrine could not be defended by its interconnection to a fundamental principle of land law, then the question became on what rationale could it still be preserved?

There have been three broad lines of reasoning which attempted to widen the justification for adverse possession beyond its compatibility with possession and relativity of title. The first was based on practical and policy advantages. For

[283] Consider D J Whalan, 'Title by Adverse Possession and the *Land Transfer Act*' [1963] *New Zealand Law Journal* 524, 525–6. Cf the quotations of Torrens in Butt, above n 40, 744–5 [20.03].

[284] 15 & 16 Geo 5, c 21.

[285] The Law Reform Commission of Western Australia recommended that a detailed review of the doctrine of adverse possession ought to be undertaken, particularly in regard to title by registration, noting that such a review was outside its terms of reference: Law Reform Commission of Western Australia, above n 98, 368 [14.31]. The Commission also noted that there remained areas of old system title in Western Australia for which a doctrine of adverse possession was apposite, and that the current *Limitations Act 1935* (WA) was applicable to this form of land title: at 365 [14.25]–[14.26].

[286] Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010) 11–12 (recommendations 15–22).

[287] Ibid 12–13 (recommendations 23–31).

[288] Ibid 118–21 [8.35]–[8.60].

example, in his well-known article, Dockray contended that it was necessary to protect possessors from stale claims after they had invested effort and money in land. Moreover, adverse possession had the positive effects of discouraging putative plaintiffs from 'sleeping' on their rights,[289] encouraging 'the use, maintenance and improvement of natural resources',[290] and facilitating 'the investigation of title to unregistered land'.[291] Recently, other English authors have suggested that adverse possession also allowed poor adverse possessors to use and acquire title to property that was otherwise lying vacant and forgotten by local authorities.[292]

It may be true that adverse possession can be considered from this viewpoint. Certainly, the practical effect of adverse possession has gone beyond the standard rationale of quietening titles in ways which did not disturb the underlying legal framework. However, these unintended or indirect effects — if accepted as beneficial — are insufficient reason for retaining the doctrine even in a modified form. If a government wishes its citizens to productively use their land, the debate about how this will be achieved is much wider and more complex (particularly in light of environmental concerns)[293] than simply deciding to retain adverse possession, which in any event allows an owner to take action to remove adverse possessors. The plight of the poorer members of society and the homeless ought not to be resolved by recourse to a doctrine in which some landowners bear a disproportionate burden because they do not occupy the land or neglect to take action to remove the adverse possessor. Sometimes the true owner is a public authority, and therefore (if the adverse possessor is successful) the broader community (rather than a private landowner) ultimately loses the amenity which the land may have brought. This demands a more complex response than reliance upon adverse possession.

A second line of reasoning is that, notwithstanding its medieval origins, the doctrine can be justified by modern legal traditions. Here it is apposite to observe that commentators from the United States have suggested wider philosophical justifications than possession. For example, Radin has argued that adverse possession can be explained by, and is an example of, the pragmatism of utilitarianism, which tries to achieve the greater good in a 'giant balance' between welfare gain and loss.[294] Alternatively, she has suggested that adverse possession can be explained by a principle of personhood where 'title follows the will, or investment of personhood.'[295] The argument based on personhood is

[289] Martin Dockray, 'Why Do We Need Adverse Possession?' [1985] *Conveyancer and Property Lawyer* 272, 274. See also David Kenneth Irving, 'Should the Law Recognise the Acquisition of Title by Adverse Possession?' (1994) 2 *Australian Property Law Journal* 112, 114.

[290] Dockray, above n 289, 276. See also Irving, above n 289, 115.

[291] Dockray, above n 289, 277. See also Gray and Gray, above n 11, 1163 [9.1.8].

[292] See, eg, Cobb and Fox, above n 8, 256–8. See also Gray and Gray, above n 11, 1164 [9.1.10]–[9.1.11].

[293] See John G Sprankling, 'An Environmental Critique of Adverse Possession' (1994) 79 *Cornell Law Review* 816.

[294] Margaret Jane Radin, 'Time, Possession, and Alienation' (1986) 64 *Washington University Law Quarterly* 739, 744.

[295] Ibid 745.

allied to, but not the same as, the empirical fact of possession, which was raised at the beginning of this article. Ownership is achieved 'by placing one's will into an object'.[296] As the will into the object is withdrawn, the ownership of the object wanes. Therefore, the theory attempts to explain the acquisition of property rights by the adverse possessor and the loss of title by the true owner.

The doctrine was not originally developed in light of the philosophy of utilitarianism. Nevertheless, the doctrine has a practical focus and effect. The quietening of title as well as some of the other incidental functions of the doctrine (such as those raised by Dockray)[297] could be seen as promoting 'the greater good'. However, even if adverse possession is explicable by viewing it through the lens of utilitarianism, it is questionable whether it can or ought to be expected to deal with highly complex welfare issues such as housing for the homeless or the productivity of land.

The theory of personhood may describe and explain the attachment that an individual adverse possessor may have to the land, but the potential for fluidity of ownership (depending upon what will be sufficient to express 'the will' into an object) would cause even greater uncertainty than the traditional doctrine. There could be equally strong 'wills' vying for ownership, as the true owner may also have invested heavily economically and psychologically in the land. Moreover, the traditional doctrine did not require that an adverse possessor 'invest' in the land. If a person did make improvements such as constructing new fencing, this may have provided evidence of occupation and the *animus possidendi*, but it was not required.

A third line of reasoning is that the doctrine of adverse possession may enhance the operation of a title-by-registration system and may be compatible with it. While it is theoretically possible for all titles to emanate from the registration process, in the jurisdictions considered here there remain unregistered or 'off-the-title' interests, which to some degree are given legal recognition.[298] Therefore, an interest that arises by virtue of adverse possession ought to be given some legal recognition. Moreover, the acquisition of title by adverse possession, even within title by registration, can be resolved by the application of the relativity of title principle. An adverse possessor acquires a legal estate which is good against the whole world, except the registered proprietor.[299]

Recognition of some unregistered interests has been necessary to ensure fairness in what could otherwise be a hard-edged system of land title. However, care needs to be taken when comparing unregistered interests with the inchoate or possessory interests acquired by an adverse possessor. The interest of an adverse possessor (which arises from the omission of the registered proprietor to take

[296] Ibid 748.

[297] Dockray, above n 289, 274–6.

[298] In Australia, these are referred to as equitable interests or rights in personam: Edgeworth et al, above n 124, 573 [5.145]; Butt, above n 40, 818–19 [20.102]; *Barry v Heider* (1914) 19 CLR 197; *Frazer v Walker* [1967] 1 AC 569. In England, they are referred to as overriding interests: Gray and Gray, *Elements of Land Law*, above n 11, 195 [2.2.35], 198 [2.2.42].

[299] Clarke, above n 281, 260–2.

action) differs from other unregistered interests, which may have been actively created by the registered owner. Moreover, unregistered interests may burden land, but they do not have the dramatic effect of extinguishing title. For example, an unregistered easement or profit à prendre may burden the land, affect the registered proprietor's use of the land and in some cases constitute exceptions to indefeasibility in the Australian context.[300] However, the registered proprietor's ownership of the fee simple is not extinguished.

Reliance on the relativity of title principle is also probably unhelpful, because it was one of the perceived weaknesses of common law title, which proponents of title by registration have attempted to discard. Reintroducing the concept of relativity of title based on possession in a system set up to create certainty and reliability runs counter to a fundamental tenet of title by registration. An honest person could not be assured that he or she had acquired title clear of any earlier subsisting claims to ownership.

Nevertheless, the doctrine has been serviceable when there is no other common law or statutory right or action available in regard to matters involving unregistered purchasers, boundary disputes, encroachments or adverse possessors who have been active improvers of the land for a period of time. The absence of the doctrine was keenly felt in NSW (and Queensland),[301] and it is for this reason that it was reintroduced in a statutorily modified form.[302] However, as will be discussed below,[303] the question remains whether it is necessary to have a broad doctrine of adverse possession to deal with these situations and effectively leave the door open for the interests of otherwise inactive registered proprietors to be endangered.

B *Preservation of Adverse Possession with Relatively Minor Statutory Amendments*

The second, third and fourth approaches involve amending the doctrine in various degrees to make it accessible (or non-accessible) to adverse possessors. These approaches reflect changes that have been made in the jurisdictions discussed. Although it could be considered artificial to draw the divisions between legislative modifications, it is important to highlight that these modifications have been wideranging.

It is submitted that examples of minor statutory amendments are those that singularly or in combination with others modify the nature of possession (for example, by stating that it can only be over a whole block of land), change the

300 See Bradbrook et al, above n 40, 843 [17.255].

301 *Turner v Myerson* (1918) 18 SR (NSW) 133, 136 (Harvey J); Theodore B F Ruoff, *An Englishman Looks at the Torrens System* (Law Book, 1957) 56–7; Rosemary Osborne, 'Adverse Possession and the *Real Property Act*' (1975) 1 *University of New South Wales Law Journal* 175. For an overview of the introduced legislation, see Park and Williamson, above n 202, 122–3.

302 See, eg, the comments of the Minister for Lands in regard to the Real Property (Possessory Titles) Amendment Bill 1979 (NSW), which incorporated pt 6A into the *Real Property Act 1900* (NSW): New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 February 1979, 2601–5 (William Crabtree).

303 See below Part V.

period of possession (for example, from 12 years to 10 years) or bring the legal recognition of adverse possession to a halt for a limited period (for example, because the registered proprietor has paid council rates for a period of time within the period of possession). Some of the modifications may be reactive, responding to adverse publicity in particular cases.[304]

Under this approach, an otherwise indefeasible title would be subject to claims for adverse possession. The registered proprietor of the land may be entitled to lodge a caveat to prevent the registration of the adverse possessor, but taking into account the amendments to the doctrine by statute, the adverse possessor acquires an interest in the land and the statute of limitations eventually extinguishes the interest of the registered proprietor. Registration is a mere formality. The point is that the framework is essentially intact: possession is determined by common law principles and title is extinguished by virtue of a period of limitation. The advantage of this approach is the broad operation of the doctrine to catch most (if not all) circumstances where there is some kind of possession by a person who is not the true owner or where there is some uncertainty about title. The disadvantages are those associated with the traditional doctrine within title by registration generally and the necessity for careful scrutiny of legislative modifications.

C *Preservation of Adverse Possession with Moderate Statutory Amendments*

The third approach to adverse possession is similar to the preceding two approaches in that it relies on the common law and the relevant statute of limitations, subject to moderate statutory amendment. The broad framework is the same, but what distinguishes it from the preceding two versions is that it changes in some fundamental respect the operation of the doctrine, generally weighing it more in favour of the registered proprietor. The approach taken in the legislation in NSW is an example. Under the traditional doctrine, the expiration of the limitation period extinguishes the true owner's title. In contrast, the NSW legislation expressly states that the interest of the registered proprietor is not extinguished by the expiration of the limitation period, so the adverse possessor must obtain registration.[305] However, the amendments do not prevent the adverse possessor from obtaining registration, provided that the statutorily modified criteria are met (in contrast to the approach outlined below in Part IV(E)). Another example would be where the administrator or the court has the discretion to award a lesser interest to the adverse possessor, so that the registered proprietor's title is not extinguished, but subject to an interest or encumbrance over the land. However, the potential breadth of the statutorily modified doctrine may still be disadvantageous to registered proprietors who are unable to prevent the legal consequences of proven adverse possession.

[304] In relation to Tasmania, see Griggs, above n 15, 159–60. In relation to England, see Cobb and Fox, above n 8, 238–9.

[305] *Real Property Act 1900* (NSW) s 45C.

D *Preservation of Adverse Possession in Statutory Form*

Whereas the preceding three approaches depend upon the operation of the common law and allow the applicable limitations statute to take its course, another approach is to reformulate adverse possession in a statutory framework and subject it to a number of fundamental changes. For example, in Tasmania the application is not for common law possessory title, but rather is for title based on possession that is adjudicated and determined by reference to pt IXB div 5 of the *Land Titles Act 1980* (Tas).[306] The Recorder is required to take into account a number of matters in making a determination, including some which were historically not prescribed.[307] Although the indefeasible title is subject to inchoate possessory interests, the *Limitation Act 1974* (Tas) does not extinguish the registered proprietor's title in the land. Instead, the registered proprietor holds the land subject to a trust in favour of the applicant.[308]

Adverse possession is managed in a way that takes into account some modern concerns, but the statutory scheme does not necessarily favour the registered proprietor. Although the registered proprietor may lodge a caveat to prevent the initial registration of the applicant, in most instances such caveats are dealt with under the standard provisions for caveats and may not ultimately protect the registered proprietor.

E *Preservation of Adverse Possession with Statutory Amendments Favouring Registered Proprietors*

Although the preceding approaches have differed significantly, they have still preserved the right of the adverse possessor who complies with the (modified) criteria to become the registered proprietor. However, the fifth approach to adverse possession shifts the weighting significantly in favour of the registered proprietor. As a precondition of such an approach, adverse possession for whatever prescribed period of limitation would not extinguish the registered proprietor's interest, and the adverse possessor would not acquire any interest in the land prior to registration.

It is submitted that there are possibly three methods in which this can be achieved, each of which in some way makes the goal of registration very inaccessible to an applicant. One method would be to extend the period of possession necessary before a claim could be made, although this has not occurred in the jurisdictions under consideration. Additionally, the period could stop running (or end altogether) when a new proprietor is registered (as in NSW)[309] or a new adverse possessor occupies the land so that it would not be possible for aggregate periods to comply with the limitation period.

South Australia and England have employed versions of a second method to severely curtail the doctrine's operation through a registered proprietor's 'veto'.

[306] *Land Titles Act 1980* (Tas) s 138T.
[307] Ibid s 138V; *Quarmby v Keating* (2008) 18 Tas R 284, 292 [13] (Slicer J).
[308] *Land Titles Act 1980* (Tas) s 138W(2).
[309] *Real Property Act 1900* (NSW) s 45D(4).

The adverse possessor is not permitted to make a claim after the requisite limitation period without the registered proprietor being afforded an opportunity not only to caveat the application, but to veto it. In South Australia, the veto is effectively final.[310] In England, it is a 'wake-up call' that the registered proprietor needs to take action to reclaim the land; otherwise the adverse possessor will become the registered proprietor.[311]

The final method of curtailment is to specify strictly those situations in which a broad claim of adverse possession is likely to be successful. In England, this has been a device that has been used to narrow the doctrine's effective operation and to identify those special situations where it ought to apply freed from the veto mechanism. As discussed above, two of the three situations are otiose, leaving only the third, dealing with boundary disputes.[312]

The virtual emasculation of adverse possession under the English scheme has been criticised. It has been argued that it leaves the system open to the paradox that there will be no fair mechanism to deal with the mismatch between possession and registration. For example, where there have been a series of dealings that are unregistered and lost, it may be virtually impossible to follow the paper trail and it may be more appropriate to rely on the traditional doctrine.[313] Moreover, it has been argued that the restrictive nature of adverse possession in England may deter adverse possessors, particularly squatters, from coming forward, because they would be aware that it is likely that the registered proprietor would issue a counternotice and immediately take action to have them removed.[314] Therefore, the mismatch between registration and possession would be perpetuated, not resolved.[315]

While these arguments have merit, the question again arises whether it is appropriate to have a broad doctrine of adverse possession to deal with these problems. In relation to the issue of dealings that are unregistered, a special exception, such as that which exists in the English scheme, may provide sufficient redress.[316] Moreover, the kind of tailored, specific legislative provisions (such as those existing in the Tasmanian legislation) would also be constructive because they require an investigation of a wide variety of factors.[317]

In relation to adverse possessors who are otherwise homeless, as explained above[318] their circumstances need to be dealt with from a wide variety of policy angles.

[310] See above Part III(B)(5); *Real Property Act 1886* (SA) s 80F(3).

[311] See above Part III(C); *Land Registration Act 2002* (UK) c 9, sch 6 para 6.

[312] See above Part III(C); *Land Registration Act 2002* (UK) c 9, sch 6 para 5.

[313] Clarke, above n 281, 258–60.

[314] Cobb and Fox, above n 8, 256–60.

[315] Ibid.

[316] *Land Registration Act 2002* (UK) c 9, sch 6 para 5(3). It will be recalled that the second exception applies where the applicant is for some other reason already entitled to be registered as a proprietor of the estate: see text accompanying above n 274.

[317] *Land Titles Act 1980* (Tas) s 138D.

[318] See above Part IV(A).

F *Abolition of the Doctrine of Adverse Possession*

A final approach is to abolish the doctrine of adverse possession altogether. The advantage of abolishing the traditional doctrine (as well as any statutory modifications) is that it confirms that acquisition of title ought to be through registration. Registered proprietors are secure in the knowledge that whoever enters the land and has occupation will not be in a position to make a claim for registration. Registered proprietors are also spared the inconvenience and expense associated with defending adverse possession claims (which may be highly technical in nature), and the administrator is not burdened by the adjudication of the merits of the claim and overseeing various statutorily prescribed tasks. The absence of some form of adverse possession means that potential proprietors are encouraged to register their interest in land, so as to avoid lengthy periods of non-registration or loss of documents.

The abolition of the doctrine of adverse possession may also have an unusual consequence for adverse possessors who do not publicise their occupation. While they cannot acquire possession of the land, the onus is fully on the registered proprietor to take action to recover the property, but there is not the same degree of legal pressure for them to do so as in schemes where some form of adverse possession is retained. This means that some adverse possessors (including the otherwise homeless) may be left to occupy the property for a longer period of time than they would have if the doctrine had been retained. However, consistent with the arguments above, the abolition of the doctrine ought not to be justified as a way of supporting the poor or the homeless.

In some jurisdictions, the abolition of the doctrine would also create a consistent legislative approach. For example, Queensland, Victoria and Western Australia have abolished adverse possession claims for Crown land,[319] but retain some form of adverse possession for privately owned registered land.[320] It is arguable that if the Crown does not wish to assume the burdens and the consequences created by the doctrine, it is not appropriate for individual citizens owning Torrens title land to bear them (particularly when adverse possessors set about from the beginning to use the doctrine to acquire the land from a true owner).

Leaving aside concerns about the integrity of the register, the abolition of the doctrine would also mean that it would be unnecessary to contend with some of its inherent flaws. The traditional doctrine has several shortcomings that do not fit easily with modern approaches to the acquisition of land. For example, unlike schemes for the acquisition of land by government authorities[321] or the imposi-

[319] *Limitation of Actions Act 1974* (Qld) s 6(4); *Limitation of Actions Act 1958* (Vic) ss 7, 32; *Limitation Act 2005* (WA) ss 19(2), 72.

[320] *Land Title Act 1994* (Qld) s 99; *Transfer of Land Act 1958* (Vic) s 42(2)(b); *Transfer of Land Act 1893* (WA) s 68(1A).

[321] See, eg, *Australian Constitution* s 51(xxxi), which states that the Commonwealth can only acquire property compulsorily on just terms. See also Edgeworth et al, above n 124, 355 [4.92]. In relation to England and the common law, see Gray and Gray, *Elements of Land Law*, above n 11, 100–1 [1.5.34]–[1.5.36].

tion of proprietary interests over land,[322] there is no requirement that the adverse possessor compensate the true owner for the loss of land.[323]

Another example is that the subjective intent of the adverse possessor is not considered (or is not supposed to be considered) by the court.[324] There are no adverse possessors in good faith or bad faith. The court considers the reality of the empirical fact of possession, rather than whether the adverse possessor acted innocently or deliberately occupied the land in the hope of acquiring title. In contrast to the traditional doctrine, there have been legislative efforts to introduce considerations of reasonableness and good conscience on the part of the adverse possessor. The English legislation specifically requires that an adverse possessor in a boundary dispute 'reasonably believed that the land to which the application relates belonged to him',[325] and the Tasmanian legislation requires that an unregistered purchaser 'is entitled in equity and good conscience to be registered'.[326]

Moreover, the existence of the doctrine in some form may undesirably encourage persons to take occupation of land and improve it in the hope that after the expiration of the limitation period they will be able to make an application for registration as the new proprietor. This happened in the Victorian case *Roy v Lagona*,[327] in which the adverse possessor was unsuccessful because he was unable to prove a reasonable continuity of possession for the 15 year limitation period. Accordingly, he sought, inter alia, restitution of the costs that had been incurred for the improvements, but was unsuccessful because he was not a mistaken improver.[328]

It is probably too early to determine whether the abolition of adverse possession is a viable possibility, particularly in view of its reintroduction in states like NSW and Queensland. Admittedly, other jurisdictions have not reintroduced the doctrine.[329] However, it ought to be noted that neither the ACT nor the NT appear to have comprehensively dealt with matters that have been traditionally subject to adverse possession claims. For example, the ACT has not implemented

[322] In Australia, when easements are imposed by courts there must be monetary compensation: see, eg, *Conveyancing Act 1919* (NSW) s 88K.

[323] This was one of the contentious issues underlying the famous *Pye* litigation: see above n 4.

[324] It has been argued that although the doctrine in the United States eschews consideration of whether the adverse possessor acted in good or bad faith, courts do take this into consideration, although their reasoning may not disclose this: R H Helmholz, 'Adverse Possession and Subjective Intent' (1983) 61 *Washington University Law Quarterly* 331; R H Helmholz, 'More on Subjective Intent: A Response to Professor Cunningham' (1986) 64 *Washington University Law Quarterly* 65. Cf Roger A Cunningham, 'Adverse Possession and Subjective Intent: A Reply to Professor Helmholz' (1986) 64 *Washington University Law Quarterly* 1.

[325] *Land Registration Act 2002* (UK) c 9, sch 6 para 5(4)(c).

[326] *Land Titles Act 1980* (Tas) s 138D(1)(b).

[327] [2010] VSC 250 (10 June 2010).

[328] Ibid [294]–[314], [338]–[349] (Hansen J).

[329] For example, Alberta in Canada has abolished adverse possession outright: Law Commission (UK) and H M Land Registry, *A Consultative Document*, above n 6, 208 n 45.

legislation to deal with encroachments,[330] whereas the NT has done so by passing specific legislation[331] similar to that in NSW.[332]

V CONCLUSION AND COMMENT

The underlying rationale and justification for the structure and content of English and Australian land law has changed. Whereas the earlier law was based on the classical concepts of possession and relativity of title, the modern system of land law confers title upon registration and eschews relativity of title. Given the general public's expectation of certainty of and security in the registration process and the difficulties and costs associated with even a minimalist version of adverse possession, it may be time to consider whether adverse possession is necessary at all.

At present, the Australian approach to adverse possession is fractured, incomplete and contradictory. Even within states, anomalies remain. For example, in NSW a person can acquire title by adverse possession (statutorily modified), but is unable to acquire a prescriptive easement over Torrens title land,[333] whereas in South Australia it will be difficult for an adverse possessor to acquire Torrens title land, but it is still open to him or her to acquire a prescriptive easement.[334] Such a state of affairs does not augur well for the implementation of a clear, fair, cost-effective and uniform system of land law.[335] The paradox of the slow start of title by registration in England is that the concept may have been more carefully and coherently applied in England than in Australia, in the sense that there have been decisive efforts to rationalise adverse possession and see it within a broader context. But even here, a looming anomaly remains: the different treatment of registered and unregistered land. Although a consistency or purity of principle would suggest that unregistered land ought to be treated differently, a theme of ownership or dominium may ultimately prevail.

It is submitted that there is potentially another approach to adverse possession. It may be better to deal with the problems raised by land disputes directly, rather than relying on a broad and 'rough-and-ready' doctrine from the past. Although the breadth of the traditional doctrine of adverse possession was once a positive advantage, it has increasingly become a distinctive shortcoming. The problem with the traditional doctrine is that not only does it not sit well within title-by-registration systems, but it does not fit well into modern approaches to the acquisition of land. The second, third, fourth and fifth approaches discussed above demonstrate an increasing intolerance to aspects of the traditional doctrine. Some legislatures have snipped away small parts, while others have cut

330 O'Connor, above n 15, 52.
331 *Encroachment of Buildings Act 1982* (NT).
332 *Encroachment of Buildings Act 1922* (NSW).
333 *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286.
334 *Golding v Tanner* (1991) 56 SASR 482.
335 As to the desirability of a uniform land law in Australia, see Bradbrook et al, above n 40, 18–19 [1.140]; Marcia Neave, 'Towards a Uniform Torrens System: Principles and Pragmatism' (1993) 1 *Australian Property Law Journal* 114; Susan MacCallum, 'Uniformity of Torrens Legislation' (1993) 1 *Australian Property Law Journal* 135.

away huge chunks (so that what is left bears little resemblance to the original doctrine). In particular, the English legislation is a good example of the legislature paring down the doctrine to highlight those situations that the legislature considers worthy of special protection.[336]

It is submitted that a systematic approach to land disputes that have been previously subject to adverse possession claims ought to be implemented. Three matters are central to this approach.

1 Adverse possession (either in a traditional or in a modified form) would no longer be part of title by registration. However, some of the situations that adverse possession has redressed would still be covered by specific provisions in a title-by-registration system.

2 Whatever the claim, mere possession of itself would not be the sole or principal determinant of rights. It would be one of a number of factors to be considered.

3 Acquisition of title to the whole of the property (by possession) would not be possible in a title-by-registration system (subject to some tightly controlled exceptions).

In order to redress the over-reliance on adverse possession and the fact of possession as a 'default' position by legislatures and litigators, several matters could be considered.

First, it would be necessary to identify those recurrent situations where some form of adverse possession has been claimed, and the number and kind of applications for adverse possession that have been made. It is likely that they are of a limited nature. This has been suggested by commentators in the United States reviewing the law of adverse possession in that country.[337] Modern Australian and English cases involving adverse possession claims suggest that (leaving aside technical issues as to what will stop limitation periods running) they mainly deal with boundary disputes,[338] activities involving fencing,[339] encroachments or building on other people's property,[340] and persons using or occupying another person's property or part of the property as their own[341] for a long period of time.[342] It would also be appropriate to consider the extent to

[336] See O'Connor, above n 15, 49.

[337] See, eg, Richard A Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667, 692–3, who points out that adverse possession is mainly utilised in the United States to deal with boundary disputes and conveyancing errors. See also Thomas J Miceli and C F Sirmans, 'An Economic Theory of Adverse Possession' (1995) 15 *International Review of Law and Economics* 161, 170.

[338] See, eg, *Neilson v Poole* (1969) 20 P & CR 909; *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894; *Refina Pty Ltd v Binnie* [2009] NSWCA 914 (3 September 2009); *Refina Pty Ltd v Binnie* [2010] NSWCA 192 (11 August 2010).

[339] See, eg, *Powell v McFarlane* (1979) 38 P & CR 452; *Williams v Usherwood* (1983) 45 P & CR 235; *Boosey v Davis* (1987) 55 P & CR 83; *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex* [1975] 1 QB 94; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464.

[340] See, eg, *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464.

[341] *Quach v Marrickville Municipal Council* (1990) 22 NSWLR 55.

[342] See, eg, *Ellis v London Borough of Lambeth* (1999) 32 HLR 596; *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464; *J A Pye (Oxford) Ltd v Graham* [2000] Ch 676; *J A Pye (Oxford) Ltd v*

which delayed registration, off-the-register transfers where the owner is nowhere to be found,[343] conveyancing errors[344] and entitlements outside the doctrine (such as under a will or a contract) have had a role to play. There may be other such situations, and only a careful reference to case law and a systematic review prioritising the regularity of adverse possession applications to administrators could determine this.

Second, it would be necessary to determine whether such claims have already been dealt with under other doctrines or legislation, so as to avoid unnecessary duplication. For example, in Australia, some states have already separately dealt with matters such as boundary disputes or encroachments, thereby alleviating reliance on a form of the adverse possession doctrine.[345] It appears that in regard to some areas traditionally or potentially dealt with under the adverse possession doctrine, the Victorian Law Reform Commission has already recommended discrete pieces of legislation that cover disputes without the need to rely on a 'rough-and-ready' concept of long-term possession.[346] The point is that such reforms and the nature of the particular version of adverse possession still in operation need to be linked and reviewed.

Third, where specific matters have not been dealt with legislatively, or where the current law is deemed unsatisfactory, it would be necessary to consider whether some kind of specific statutory right of action would be appropriate, and the criteria for that particular situation. A period of possession may be a relevant criterion (though not the principal one), but other considerations may also be important, such as the subjective knowledge and intent of the claimant; whether the claimant had undertaken improvements (and the quality of the improvements); the amount of land affected; whether either or both parties could be compensated for loss; and the conduct and knowledge of the true owner.

Fourth, having determined where the legal gaps are, it would be necessary to consider in what circumstances a claimant would be entitled to seek proprietorship over a whole parcel of land. A claim based solely on possession would not be possible. However, a claim may be appropriate where, in addition to or alternatively to possession, a person relied on pre-existing entitlements such as payment of the purchase price for the land or inheritance. In any event, claims for whole parcels of land would have to be strictly controlled and ought to be permitted only in those cases where the new registration would principally correct the title, rather than transfer title to an adverse possessor. In those rare cases where the true (but unregistered) owner or his or her beneficiaries (under a will or through intestacy) can no longer be found, it may be more appropriate for the land to revert to the Crown — a process that has existed in property law for

Graham [2001] Ch 804; *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; *Abbatangelo* (2009) 259 ALR 56; *Bridges v Bridges* [2010] NSWSC 1287 (8 November 2010).

343 Law Commission (UK) and H M Land Registry, *A Consultative Document*, above n 6, 205 [10.7]; Whalan, above n 283, 525.

344 *McGuinness v Registrar-General* (1998) 44 NSWLR 61.

345 Consider O'Connor, above n 15, 54–60.

346 Such as encroachments and mistaken improvements: Victorian Law Reform Commission, above n 286, 11–13 (recommendations 15–31).

centuries.[347] In this way, there would be the potential to augment the land owned by the community, rather than reward a lucky or conniving adverse possessor.

Finally, just as mere possession may no longer be the principal driver for a successful action, so too acquisition of title ought not to be automatically guaranteed. There is no reason why more flexible remedies ought not to be available to deal with claims. A person who genuinely makes improvements on land that he or she has occupied ought not to be entitled to the land, but he or she ought to be entitled to compensation for the improvements, assuming that they are of an acceptable standard. Conversely, if an administrator or court decided that the specific matter could be best dealt with by a party acquiring the portion of land in dispute, then an amount of compensation ought to be ordered to redress the loss suffered by the true owner. It is submitted that it would not be appropriate to allow a claim based on possession of the whole parcel of land in which the true owner was compensated for the market value of the land. Such a claim would amount to a forced sale of the land when the registered proprietor did not wish to sell the whole lot.

[347] Indeed, under the doctrine of tenures, land may revert to the Crown under the principle of escheat. The freehold reverts to the Crown 'where there is no one entitled to the freehold estate by law': *Re Mercer and Moore* (1880) 14 Ch D 287, 295 (Jessel MR). Land reverts to the Crown in other circumstances, for example under the doctrine of *bona vacantia* in intestacy situations: see, eg, Ken Mackie, *Principles of Australian Succession Law* (LexisNexis Butterworths, 2007) 215 [9.14]; Roger Kerridge, *Parry and Kerridge: The Law of Succession* (Sweet & Maxwell, 12th ed, 2009) 21 [2-40].