

*FIG Congress 2010 Facing the challenges, building the capacity
International Conference*

**PART-PARCEL ADVERSE POSSESSION AS A MEANS
TO RESOLVING PROBLEM SURVEY AREAS**

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Overview

- Background and introduction to adverse possession
- Alternative mechanisms to part-parcel adverse possession
- Pertinent issues to boundary repair mechanisms
- Discussion of cases and case study
- Recommendations
- Conclusion (20 slides)

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Background

- ✦ A man's home is his castle (*old english proverb*)
 - ❖ A man's home is his wife's castle (*Alexander Chase*)
 - ❖ A man's home may seem to be his castle on the outside; inside is more often his nursery (*Clare Boothe Luce*)
- ✦ Adverse Possession is a doctrine of land law where a person either occupying or possessing land may acquire ownership or title to the occupied land without payment of compensation

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'Strip' part-parcel boundary repair



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Alternative mechanisms to part- parcel adverse possession

- ✦ Statutory encroachment legislation
- ✦ Confused boundary legislation
- ✦ Regulatory authority application for determination of a boundary
- ✦ Do nothing
- ✦ Superman approach



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Alternative mechanisms to part- parcel adverse possession

- ✦ Statutory encroachment legislation
 - ❖ Unintentional encroachment (not negligent), encroaching owner pays compensation to gain title/interest in land.
 - ❖ Encroachment can be structure or fence, hedge etc. May expressly not permit relief with regard to fencing etc. If no part-parcel adverse possession possible, fence needs to be an encroachment.
 - ❖ Limitation period not required for an application for relief
 - ❖ Encroachment legislation requires a court determination.
 - ❖ Alberta – has encroachment agreements, allowing neighbours to execute an agreement to permit encroachment of improvements on an adjoining parcel of land, security of interest similar to that of an easement.

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Alternative mechanisms to part-parcel adverse possession

✚ Confused boundary legislation

- ❑ Area of significant boundary discrepancy (usually affecting multiple lots), may be declared confused/uncertain/problem boundary area.
- ❑ Legislation for boundary determination by regulatory body, e.g. South Australia 1993 within *Survey Act 1992/Real Property Act 1886*: 'for when occupation of land does not accord to substantial extent with boundaries of land as shown in plans in Lands Office'.
- ❑ Regulatory body fixes boundaries: equitably by consideration of evidence, type/length of occupation, history, common law principles. Boundaries affected altered to extent necessary to effect the plan.
- ❑ Costs borne by the state, no provision exists for resolving lot(s) outside a declared area, alternative by empowering an arbitrator .

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Alternative mechanisms to part-parcel adverse possession

✚ Regulatory authority application for boundary determination

- ❑ For a lot where there may be an uncertain boundary, statutory provisions allow application to an arbitrator for determination of a boundary, e.g. Ontario an application under the *Boundaries Act 1990* to the Director of Titles:
 - independent authority to resolve the dispute
 - Director can dispose of an application in a manner considered to be equitable and determine boundaries as deemed appropriate
 - Appeal can be made to the court regarding Director's decision
- ❑ Costs of decision borne by the state
- ❑ Provides expeditious cost-effective mechanism to resolve boundary disputes.

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Alternative mechanisms to part-parcel adverse possession

- ⊕ Do nothing:
 - ❖ No specific method to deal with boundary repair issues, e.g. the Australian Capital Territory
 - ❖ Boundary disputes left to be dealt with by the court.
 - ❖ Onus on cadastral surveyor to survey/adjudicate on boundary determination. Level of investigation by surveyor normally less than presented at court; due to time, cost and other investigative constraints.
- ⊕ Superman approach:
 - ❖ Physically shift structural elements, fences and occupation etc. back on original surveyed legal boundaries.
 - ❖ Require satisfaction of local government set-back requirements with building application.

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Pertinent issues to boundary repair mechanisms

- ⊕ Displacement offset
 - ❖ Land value?
 - ❖ Shape of lot?
 - ❖ Variations from Victoria (Aus.) ~ 50mm for standard urban lot to Nova Scotia 20% of area
 - ❖ South Australia 0.4m worthy of investigation
- ⊕ Appropriate %? 5 to 10% range, consider land use/value?

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Discussion of cases/case studies - by agreement

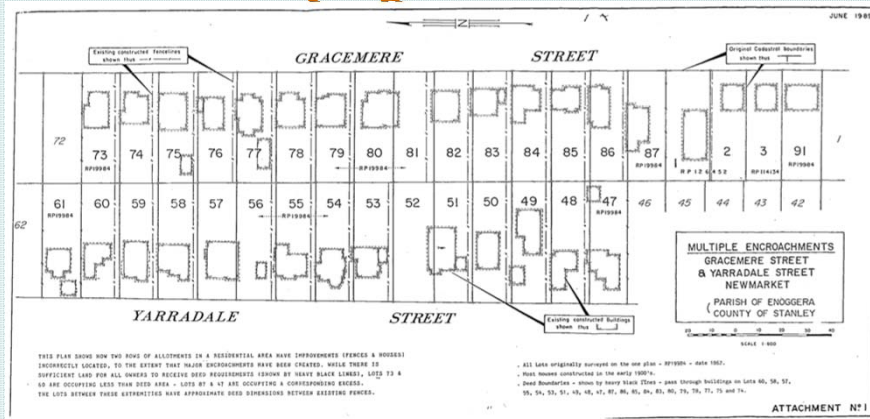
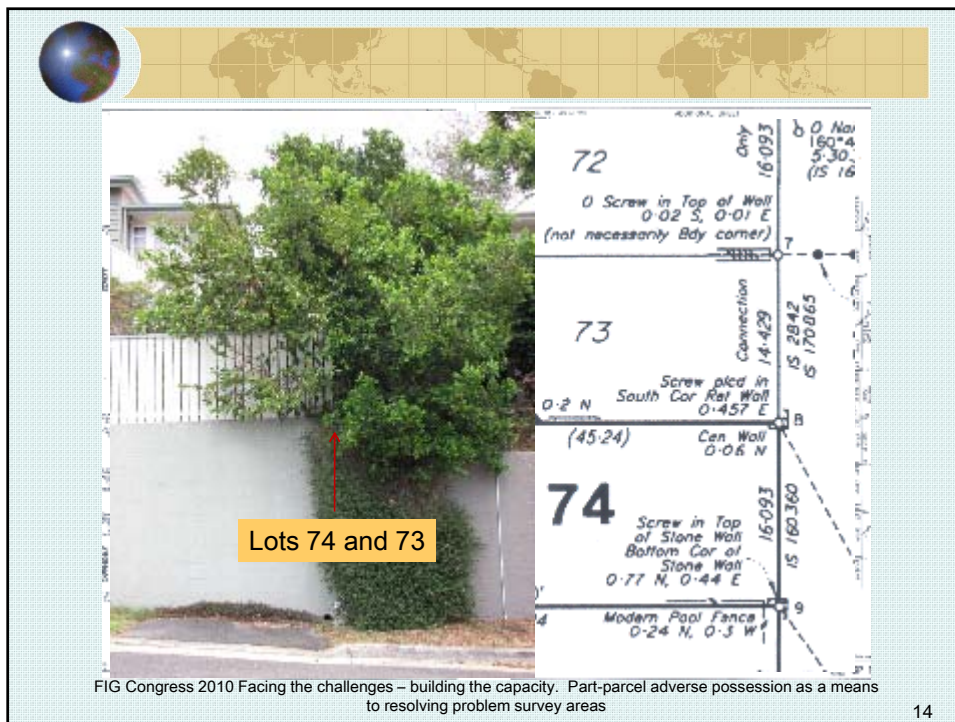
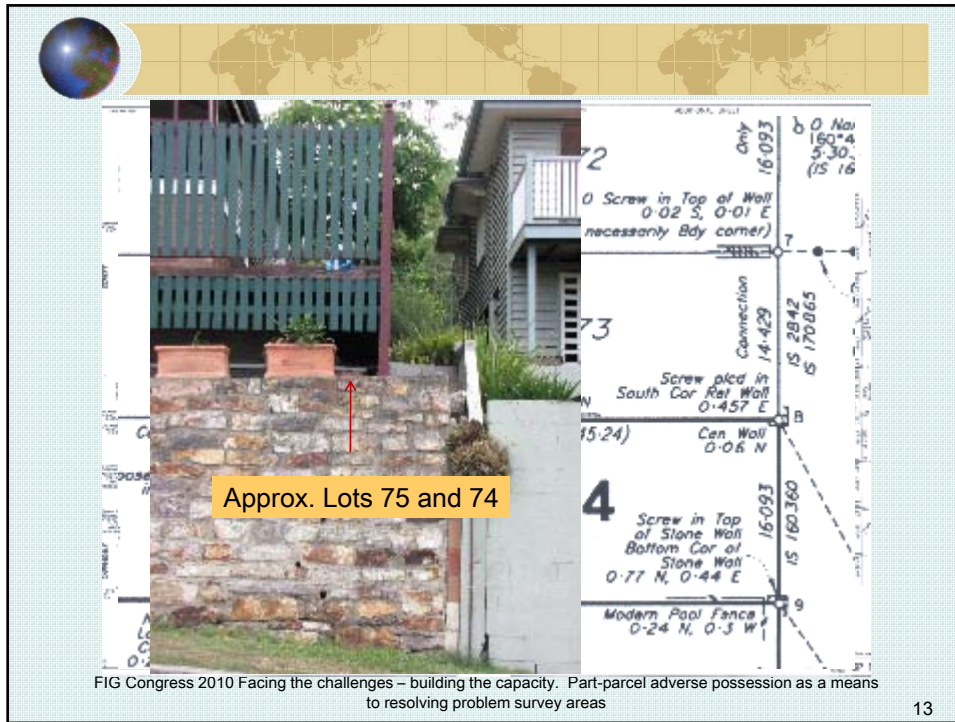


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Discussion of cases – Shadbolt

- Question: What price a pool with a view?
Answer: \$85,000 + court costs, legal fees, no pool, 6 court proceedings & 8 years stress

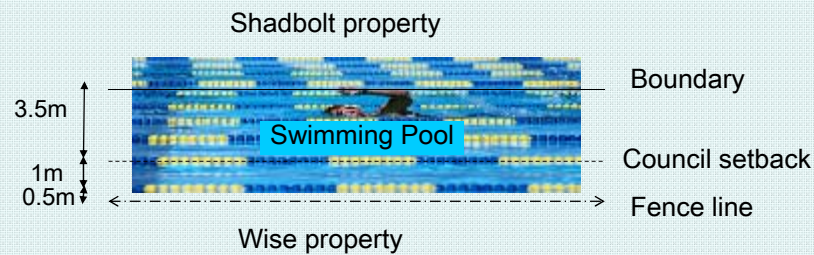


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Recommendations

- Six primary considerations that impact on the resolution to a particular problem and the choices by and of the state in resolving such issues:
 - Compensation – question of whether compensation is payable to the displaced legal land owner. Compensation applies in statutory encroachment legislation but does not apply in adverse possession with the single exception of Sweden (BIICL 2006);
 - Occupation – nature, strength and evidence of occupation for a successful part-parcel boundary re-definition or registration of another interest (e.g. easement);
 - Systematic block shift issue – question of whether the issue is part of a wider problem with the boundaries in a particular locality;
 - Time – length of occupation sufficient to satisfy the limitation period for an adverse possession application;
 - Intentional encroachment – deliberate encroachment may possibly lead to removal of the encroachment or adverse to legal owner and adverse possession application;
 - Cost – both the public and private cost with resolving an issue by a particular course of action and the effect on the efficient operation of a land market.

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Recommendations

- ✦ Unfortunately, in boundary disputes acquiescence often exists only in so far as the owners are ignorant of the occupational discrepancies to the original title dimensions.
- ✦ Statutory encroachment legislation – best to solve disputes between neighbours where there is inadvertent occupation within a relatively recent time frame and only for significant structures which specifically precludes relief for occupation by fencing etc.
- ✦ Part-parcel adverse possession not ideal solution for multiple lots where a 'block' shift is required. Takes time to resolve an individual application, is simple solution to boundary repair issues where occupation disagrees with the mathematical solution of a boundary line. Best applied within a range of allowable limits, say minimum allowable margin of error of 0.3 metre up to a maximum of say 10% of the area for standard size residential lots.

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Recommendations

- ✦ By agreement – easiest/most efficient method to resolve multiple lots where a block shift of the boundaries may be required due to occupational discrepancies is by way of re-survey of all lots (if agreement is at all possible!). However, given the difficulties seen in the case study the application of confused/problem/uncertain boundary legislation may best resolve issues involving multiple lots, but costs are borne by the state.
- ✦ Regulatory authority application for determination of a boundary best suited to determining a disputed boundary line between neighbouring properties and is a viable alternative to the application of part-parcel adverse possession. The author recommends that the applicant(s) bear the cost of resolution of the application regardless of whether the applicant is advantaged or not.

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Conclusion

- ✦ "You can't fit a square peg in a round hole", the reality is that a 'one size fits all' approach - does not fit.
- ✦ Adopt statutory encroachment relief legislation combined with either part-parcel adverse possession or use regulatory authority legislative power to adjudicate and determine a boundary line - will cover many instances of part-parcel boundary issues and disputes.
- ✦ To provide a mechanism to deal with wider problem areas of uncertain boundaries then could apply confused boundary legislation.
- ✦ If no means to resolve part-parcel boundary disputes, greater expectation/responsibility placed upon the surveyor to fix boundaries by common law principles - which may include increased investigation into occupation and possessory titles as a matter of course.

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Federal Court Judge: *And on what Law are you basing this argument?*

Darryl Kerrigan: *The Law of Bloody Common Sense!*
(The Castle, 1997)

Thank you for your attention

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