

GENERAL LAW LAND

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PART 1- HISTORY & BACKGROUND

1.1 What is General Law land?

In Victoria today, 'General Law land' is the term used to describe land alienated by the Crown between 1837 (the year of the first grants by the Governor of New South Wales of land in the District of Port Phillip) and 2 October 1862 which has not since been brought under the operation of the *Transfer of Land Act* (TLA). All land alienated since 2 October 1862 is under the TLA (Torrens title) system. General Law land is also commonly described as 'NUA' land, meaning 'Not under the Act', or 'Old law' land.

1.2 What constitutes a General Law title?

Title to land under the General law consists of a series of deeds or other documents which evidence dealings or transactions in the land since the issue of a grant from the Crown or the earliest date to which the title can be traced. Title is proven by producing the collection of documents and showing from their contents and proof of other relevant facts that the estate which was granted by the Crown and which has been held by successive owners eventually comes down to the person now appearing to be the owner. Thus, title must be traced from the Crown grant through every subsequent holder down to the present owner. Each owner could acquire only such title as his predecessor held. This is known as the theory of relative dependent title. Each document or dealing represents a link in a 'chain of title' and, as with every chain, it is only as strong as its weakest link.

A good illustration of the theory is the case of a forged deed. A is the true owner of land. X obtains A's chain of title and forges A's signature to a deed conveying the property to B, an innocent purchaser. B in turn conveys the property to C, who is equally innocent. The forged deed is a complete nullity and breaks the chain of title. Neither B nor C obtains good title to the land; rather, title remains with A. This is true irrespective of whether the forged deed and the conveyance from B to C have been registered.

1.3 Registration under the Property Law Act

Until 31 December 1998, deeds and other documents relating to estates and interests in General law land could be registered with the Registrar-General's Office (RGO) under Section 6 of the *Property Law Act* 1958. At the time of registration, a deed or document was allocated a registration number, commonly known as the 'book and page number', which was subsequently often used as a summary way of referring to the deed. The registered deed was returned to the lodging party. The RGO was provided with a second document, a 'Memorial', which was essentially a summary of the contents of the registered deed or document. Memorials were retained by the RGO and, literally, bound into numbered books corresponding to the allocated registration numbers.

Although registration under the *Property Law Act* 1958 was completely optional, it was typically undertaken; today, it is quite rare to find General Law deeds that have not been registered. Registration of deeds did not cure any defects in the documents constituting the chain of title.

The popularity of registration resulted from the priority accorded to a registered deed over a subsequently registered deed or over an unregistered deed. A properly executed bona fide deed, once registered had priority, from the date of registration, over any later registered deed or over an unregistered deed, even though the later registered deed or unregistered deed (as the case may be) was executed earlier in time than the first registered deed. Thus, registration was important in deciding priority between competing deeds, but gave no increased efficacy to an otherwise defective deed.

PART 2— THE CONVERSION PROCESS — Bringing land under the Act

2.1 Past Practice

From the commencement of the ‘Torrens’ system in Victoria in 1862, provision was made for its operation to be extended to all land previously alienated. This was done by providing for application to be made to the Registrar of Titles to bring previously alienated land under the operation of the *Real Property Act* 1862 and succeeding Acts. In their final form, these provisions were contained in Section 9 of the TLA.

Although the expectation was that all land would be brought under the operation of the Act (‘converted’) fairly quickly, this did not prove to be the case. In fact, by the mid 1980’s, after 120 years of operation of the ‘Torrens’ system, large areas of land remained under the General Law system. This was due mainly to a cumbersome application process that imposed onerous evidentiary requirements, coupled with ultra-conservative policies of administration and lack of staff in the Registrar’s office.

2.2 The 1986 Amendments

The TLA was substantially amended in 1986 to introduce accelerated conversion processes. However, the traditional form of application under Section 9 was retained and the General Law register remained open to registrations.

The significant new provisions were contained in Section 26D and 26E, which allowed for land to be ‘converted’ based upon a solicitor’s certificate as to title. The philosophy underlying the new provisions was that, in virtually every case where General law land was sold, the purchaser’s solicitor would conduct a thorough investigation of title in order to advise his/her client whether or not to proceed with a purchase. Having reached this conclusion, it was a fairly small additional step for the solicitor to certify as to good title and for the Registrar to rely on that certification without repeating the investigation already conducted by the solicitor.

The effect of the new provisions was to place responsibility for the thorough investigation of General Law titles onto the practicing legal profession, thus removing the ‘bottle-neck’ process of investigation of title under the earlier system and reducing Titles Office administration to a minimum.

Section 26D provided for conversion based on the deed description of the land, while Section 26E allowed for a conversion supported by a survey. The main difference between the two provisions was that a title issued from a deeds based conversion contained a warning relating to dimensions i.e. that any dimension or connecting distance shown is deeds based and not the result of investigation by the Registrar of Titles (see para 3.2 below).

2.3 The 1998 Amendments

Although significantly streamlining the conversion process, the amendments made in 1986 did not, regrettably, achieve their aim of eliminating General law land within a comparatively short time. This was not due to any fundamental defect in the conversion schemes, but rather, the fact that the General Law registration system continued to run in tandem with the conversion schemes, thus offering a continuing alternative to conversion.

This situation was finally dealt with by amendments to the TLA effected by the *Transfer of Land (Single Register) Act 1998*, which came into operation on 1 January 1999. By that Act, the registration provisions of the *Property Law Act 1958* were repealed, bringing an end to the General Law register and making conversion practically compulsory, at least on transaction. At the same time, an opportunity was taken to ‘fine tune’ the conversion provisions, to provide means for Provisional Folios where conversion is not based on a solicitor’s certificate and to introduce the concept of an Identified Folio. Section 26D and 26E became Sections 14 and 15 respectively.

2.4 Conversion methods — post 1998

2.4.1 Section 14

The most common conversion method is an application under Section 14. The section requires an application to convert, supported by a solicitor’s certificate, the chain of title and a search of title. The title that issues, unless it contains a whole Crown allotment, will be subject to a survey warning.

2.4.2 Section 15

This method is used where the application is supported by a survey of the land. Its most common application is in cases where title is claimed by possession, although it is also used in cases of freehold title where, for some reason, the applicant requires a survey- accurate title. The lodging requirements are an application to convert, supported by a solicitor’s certificate, the survey, a search of title and, if applicable, chain of title. It is possible for the Registrar to waive the requirement for a survey if the land applied for satisfies the survey exemption guidelines. If supported by a survey, the title issued is an Ordinary folio, but if survey has been waived, the title that issues, unless it contains a whole Crown allotment, will be subject to a survey warning. NB: this is the only survey- based conversion method.

2.4.3 Section 22

This is one of two provisions authorising conversion without a solicitor’s certificate. The section provides for conversion based on the lodgement of a Specified Dealing. A ‘Specified Dealing’ is defined to include a Transfer, conveyance, mortgage or a conveyance of possessory rights. The lodging requirements include the Specified Dealing, the chain of title and a search of title. As no examination of title is made, either by a solicitor or by the Registrar, a Provisional Folio is issued, containing Part IV and Part V warnings (see Part 3 below).

2.4.4 Section 23

This is the other provision authorising conversion without a solicitor’s certificate. The section provides for conversion based on application to convert, supported by the chain of title and a search of title. Again, as no examination of title is made, either by a solicitor or by the Registrar, a Provisional Folio is issued, containing Part IV and Part V warnings (see below).

2.4.5 Section 26F

This provision allows for the lodging of a Notice of Interest (somewhat like a Section 89 caveat) by a person claiming an interest in General law land. If one does not already exist, an Identified Folio is created upon which the Notice of Interest is recorded.

2.5 Searching a General Law title — Why and how?

Searching the registration records of the RGO is an essential part of the investigation of General Law title. The purpose of conducting a search is to identify all the registered transactions relating to a parcel of land. The search record can then be compared to the chain of title produced by the person appearing to be the owner. By this process, it should be possible to determine whether the chain of title evidences a good title.

The process of searching a General Law title is cumbersome and time consuming. Beginning with the Crown grant or a recognised start¹, each subsequent transaction with the land is identified and an extract of relevant details made. As dealings in General law land were usually indexed under the name of the seller or mortgagor, identifying transactions involves a process of repeatedly moving between the names index and the Memorials register in order to build up a history of transactions in the land. Subdivisions or conveyances as to part only of the land further complicate this process.

All being well, the search process should lead to identifying a person as the last one to whom the land was conveyed, the 'last registered owner' (LRO). However, as the Memorial register has been closed to further registrations since 1 January 1999, it is possible that there have been transactions in the land since that date which have not be registered. The LRO is not necessarily the person now entitled to deal with the land.

¹ start - a recognised start is a point in the chain of title that has been accepted by the Registrar of Titles in a previous application to bring land under the operation of the TLA. For example, a whole Crown allotment was transacted as a single parcel until 1920. In that year, it was subdivided into two parcels (parcel 1 and parcel 2), each then transacted separately. Parcel 1 was brought under the TLA in 1960. Parcel 2 is now going to be brought under the TLA. A searcher does not need to search the chain of title for parcel 2 any earlier than 1920, as the chain of title prior to 1920 (that part of the chain common to both parcels) has already been accepted by the Registrar.

PART 3 - WARNINGS

The traditional (Section 9) method of conversion provided for a restriction or limitation to be placed on a title by way of Registrar's Minute. The 1986 amendments to the *Transfer of Land Act* introduced the concept of warnings on title, although the concept of a Registrar's Minute continued. By the 1998 amendments to the Act, the notion of a Registrar's Minute was repealed and an additional form of warning added to the two introduced in 1986. The warnings are contained in Schedule 5 of the Act. The following is a brief explanation of the various warnings and their use.

3.1 Warning as to Title — Part III

A warning under Part III reads:

Warning as to Title

This folio is subject to the qualification(s) numbers in the legal practitioner's certificate relating to the land No.

This warning would appear where a solicitor's certificate as to title contains a qualification that the Registrar considers should be carried forward to a Torrens title. The qualification would be of such a nature as to constitute a defect in title. In practice, the Registrar has been able to deal with most applications without resort to this form of warning. In fact, only one title with a Part III warning has been created in the 17 year history of the accelerated conversion schemes. A Part III warning ceases to affect the folio after 15 years.

3.2 Warning as to Dimensions — Part IV

A warning under Part IV reads:

Warning as to Dimensions

Any dimension and connecting distance shown is based on the description of the land as contained in the General Law Title and is not based on survey information which has been investigated by the Registrar of Titles.

Usually referred to as a ‘survey warning’, this is by far the most common form of warning appearing on a title created from a conversion. It will appear on any title issued that is not based on survey, unless the land is a whole Crown parcel. As the wording suggests, the purpose of the warning is to alert any person interested that the diagram of the land on the Title Plan is merely a representation of the dimensions and position of the land as described in the General law documents and should not be treated as the actual dimensions or position of the land on the ground.

3.3 Warning as to Subsisting Interests — Part V

A warning under Part V reads:

Warning as to Subsisting Interests

This title is based on General Law documents which have not been investigated by the Registrar of Titles. Subsisting interests under the General Law may affect this title.

This warning appears when a conversion is not based on a solicitor’s certificate i.e. from a lodgement under either Section 22 or 23. As the General Law title has not been examined by either the Registrar or by a certifying legal practitioner, the warning is to alert any person interested that the ownership of the land as disclosed in the folio needs to be investigated and verified by examination of the General Law title. A Part V warning ceases to affect the folio after 15 years, unless the folio was based on adverse possession, in which case the notice and advertising requirements of Section 26Q must first be satisfied. Folios with this warning that derive from possessory-based applications usually have a Queen’s Caveat (Registrar’s Caveat) recorded to alert interested persons and Land Registry staff to the need to satisfy the notice and advertising requirements of Section 26Q before the warning can be removed.

PART 4 - REMOVAL OF A SURVEY WARNING

Unlike the other types of warnings, a survey warning does not expire after 15 years. It will affect a title indefinitely, but may be removed as the result of a survey-based application. A survey warning may be removed in two different circumstances:

4.1 Removal as part of a survey-based dealing

A survey warning will be removed without application if, during the examination of a survey-based dealing (e.g. a subdivision), it is evident that the title with the warning in fact accords with the survey or the discrepancies are minor and adjoining parcels are not affected². Powers contained in Section 106(e) of the Act justify the removal of the warning in these circumstances. The survey dimensions will subsequently be adopted for the parcel.

4.2 Removal by application under Section 26P

The provisions of this section combine elements of Sections 15, 60 and 99 of the Act. This flexibility enables one application to achieve a number of objectives. A Section 26P application may be used to do any or all of the following:

4.2.1 remove a survey warning from a title; and

4.2.2 amend title boundaries to accord with occupation; and

4.2.3 claim General law land by adverse possession and have it included in the title; and

4.2.4 claim TLA land by adverse possession and have it included in the title.

The evidentiary requirements for this section will vary depending on what is sought to be achieved. Where General Law land is claimed by possession, a solicitor's certificate will generally be required, as for a Section 15 possessory application. If TLA land is claimed by possession, evidence comparable with that usually provided in support of a Section 60 application may be required. Where no additional land is claimed by possession, but the application merely seeks the amendment of title boundaries to accord with occupation, evidence similar to that required for a Section 99 application may be appropriate.

Where TLA land is claimed by possession, notice of the application will generally be given to the owner of the affected title, who then has the opportunity to object to the application via the caveat process contained in Section 26R of the Act. However, where the TLA land claimed by possession is itself contained in a title with a survey warning, notice of the application would not generally be given, nor would notice be given where General Law land is claimed by possession. An affected TLA title will be amended to remove land claimed by possession, but, where the TLA land claimed by possession is itself contained in a title with a survey warning, it is treated as not affected².

² not affected — if land claimed by possession is TLA land contained in a title with a survey warning, the diagram of that land on the title is only a representation of the land as described in the General Law deeds. The actual dimensions and position of that land will not be known until a survey-based dealing or a Section 26P application is made in respect of that land. Until either occurs, it is not considered appropriate to amend the Title Plan in any way to attempt to reflect the consequence of surveys of adjoining land. For similar reasons, General Law land claimed by possession is also considered to be 'not affected'.