

Boundary Determinations by Government – Have they been Successful?

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SUMMARY

In 1990 the New South Wales government introduced an amendment to the Real Property Act 1900 that would allow the Registrar General to make boundary determinations. Boundary determinations are required when there is a dispute between two adjoining owners who have surveys which are in conflict as to the location of the common boundary between their properties.

A boundary dispute can be very complex and usually there are other issues that can lead to a flashpoint in neighbourly relationships which can turn very antagonistic if not resolved. Resolution of this type of dispute by an arm of government was established to provide an alternative to lengthy and expensive Supreme Court litigation.

This legislation, with minor amendments, will have been in existence in NSW for 20 years in 2010. Has it achieved what it set out to do? Have there been lessons learnt? Would it be useful in other jurisdictions?

This purpose of the paper is to provide a commentary on the legislation and explain how the legislation works. The paper will also produce some statistics on the effectiveness or otherwise of the legislation.

One of the essential parts of the legislation is the appeal process whereby an owner who is dissatisfied with a boundary determination may appeal the decision to Land and Environment Court for a re-determination. The paper will also look at some of these appeals and provide a commentary on them.

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1. A SHORT HISTORY OF CADASTRAL SURVEYING IN NSW

Cadastral surveying, as we know it today, developed from the English system when many of the great estates were being split up into smaller holdings and a more accurate and reliable definition of land became essential to the rise of the industrial society. The English system at that time depended greatly on the description of the nature of the boundaries rather than an exact dimension.

Settlement in the colony of New South Wales commenced in 1788 and one of the first civil appointments was for the position of Surveyor-General. This appointment recognised the importance of an orderly distribution and settlement of land for the rapid expansion of the colony. However by 1827, 400,000 hectares of granted or promised land had not been surveyed. (Hallman 2007) Land surveyors over that initial period had concentrated on staking corners and blazing lines so as to indicate, as rapidly as possible, to the intended grantees the limits of the land they were to occupy. The preparation of plans from the field notes had not as yet been completed. Whether surveyors at that time made any special markings for retracement purposes is doubtful.

This is the heritage of cadastral surveying that has been passed on to later generations of land surveyors: large scale surveys of great tracts of land with minimal survey marking and limited plan preparation.

The government by 1837 recognised the need to regulate surveyors and the way in which surveys were conducted. A licensing system for government surveyors was introduced, tabulated references to marked corners began to appear on plans of survey and instructions for the guidance of licensed surveyors were published in 1848. The enactment of the Real Property Act in 1863 introduced a new form of land tenure that required a greater accuracy in defining boundaries. It was not until 1929 that the Surveyors Act was introduced followed by the Survey Practice Regulations in 1933.

As a consequence of the slow start to a legislative background for surveys, the cadastral framework, as we know it today, has evolved in a very piecemeal and disjointed fashion. There has been a tendency in rural areas for surveyors to work from the part to the whole with many surveys being made in isolation to others. In the urban areas, large developments were often designed on paper but were not marked on the ground. The problems caused by these factors have been compounded by the lack of any sustainable marking.

In conjunction with the government regulation there was also an increase in the accuracy of survey equipment. Instruments, such as the theodolite and the steel band, meant that it was possible for surveys to be made to a much higher standard of accuracy. This brought some

certainty to the surveying industry but with this came an expectation by land owners that cadastral surveys were reliable and retraceable.

Therefore, there are a number of the reasons why land surveyors in attempting to redefine boundaries cannot agree on the position of the boundaries. As Karl Hamer said in 1967 in a paper that is still relevant today: “Title boundary definition is recognized by surveyors, but unfortunately not by the general public, as being far from an exact science. Unlike some other branches of surveying, the problems encountered in the cadastral work do not as a rule fall within certain well defined limits nor are they governed by any well established formulae which, if correctly applied, will provide the required answers”. (Hamer, 1967)

2. BOUNDARY DISPUTES

The types of boundary disputes discussed in this paper occur when two adjoining land owners have in their possession surveys made by registered land surveyors which are in conflict with each other. At other times an individual owner will have two surveys that conflict with each other. In NSW, the surveys in question are usually called identification surveys. An identification survey is a property boundary survey which identifies where the title boundaries are located on the ground. They are generally made when a property is being transferred from one owner to another or when some form of development will be undertaken. No survey marks are placed however the location of any buildings or encroachments are shown on the sketch which accompanies the report. The survey could also be a “peg-out” survey where marks are placed in the ground.

The nature of the disputes can vary widely from a few millimetres to metres but usually involve some form of redevelopment. It has been found over the years that there is usually some other underlying cause that leads to the boundary dispute. Generally one neighbour is unhappy with the type of redevelopment that has been approved or the owners have had a disagreement over the type of fencing to be erected. It is interesting to note that as Sydney undergoes a redevelopment of the older areas of the city more of the applications for a determination come from these areas.

Whilst there are applications for a determination of a boundary, the majority of people living in NSW live in total harmony with their neighbours. Generally owners have little knowledge of the precise location of their boundaries or if they do they are not concerned about a small discrepancy here and there.

The issue that is most commonly raised is over the location of fencing. Some owners have a belief that the fence represents the boundary and are often distressed to discover that the fence may not be on the boundary. The legislation in NSW clearly states that it is not possible to claim via adverse possession, part of a Torrens Title. This may not be true for other states in Australia. There is often media coverage of some owner who has lost a strip of land because a fence was incorrectly placed.

However even with all the best intents of the system, boundary disputes do occur. The problem, prior to the introduction of the Part 14A legislation, has been for land owners who cannot resolve their differences over the location of a boundary, to find some method of resolution to their problem.

3. RESOLVING BOUNDARY DISPUTES PRIOR TO 1990

The time honoured method for resolving boundary disputes was for the parties to litigate the dispute in the Equity Division of the Supreme Court. This can be an expensive, complex and lengthy process and often the result is not what either party expected. The other disadvantage of this process is that it has the potential to increase the animosity between the parties. On the other hand the advantage of litigation is that it provided some finality to the dispute and that there is a transparent process with an impartial decision. There have been very few cases that have been heard in the Supreme Court that have been reported and it is difficult to provide any meaningful details of these cases.

A recent alternative to court action is to use one of the mediation services that are available. Again there are no reliable figures on how often this has been used and to what success there has been from the process. The author is also aware of the use of a Chamber Magistrate to provide an opinion and help disputing parties resolve an issue. The Local Land Boards have also been asked to intervene in fencing disputes especially in the rural areas of the state.

The most common method to resolve a dispute over the location of a boundary, prior to 1990, was to seek the help of a government agency. In most cases this agency was the office of the Registrar-General. Since 1904 the Registrar-General has employed a registered land surveyor to advise the Register-General on matters pertaining to boundary definition and cadastral surveying. It is interesting to note that one of the reasons for employing a registered land surveyor was that the surveying profession itself asked for it. In a letter published in “The Surveyor” (Vol 2 p. 227) from the Secretary of the Institution of Surveyors the view was expressed: “probably the only cure will be the institution of some method of ascertaining whether surveys for the RP Act and for transfer purposes are satisfactorily carried outIf surveyors were awake to their interests they will urge the (re-)employment of a small field staff for this purpose”.

The most obvious reason for using the office of the Registrar-General is that it is the organisation that has an almost complete record of previous surveys. In addition the Registrar-General has the responsibility to investigate every plan that is lodged for registration. The Registrar-General has maintained records in the form of plans and other related material for the Torrens Title system since 1863 and records of Old System deeds long before that time. It is the organisation considered by many to have a high level of skill and knowledge in the definition of boundaries. However there were also a number of difficulties in using the office of the Registrar-General for this process.

Firstly, any decision reached by the Registrar-General is not binding on either party. In most disputes there tends to be an aggressor and someone who considers they are being victimised.

It is not always easy to get the aggressor to accept a decision if it goes against their wishes. Without an agreement between the adjoining owners as to the result of the determination, nothing is binding. This issue was one of the main driving forces behind the introduction of the legislation in 1990. That is, to put something in place that would make a determination become the legal position of the boundary.

Secondly there is the cost involved in determining a boundary. Prior to 1990 there was no provision for the Registrar-General to charge a fee for the service of resolving a boundary dispute. This either led to an abuse of the system where a number of, what may be called frivolous, requests were made for the Registrar-General to assist in the location of a boundary when there was really no dispute from a surveying perspective or the costs of the search and field work were so high as to make the whole process prohibitive from a cost recovery.

Finally, as there was no formality to the process there was always the problem of litigation against the Registrar-General. As there was no transparency in the system and no procedural safeguards, this possibility was always present.

An initial effort by the Registrar-General in 1988 to overcome some of the problems mentioned was to consider the option of forming a Boundary Disputes Tribunal. This tribunal was to provide an inexpensive and simple alternative to expensive litigation to resolve boundary disputes. However it was found that without some legislative backing it was difficult to make any decision of the tribunal binding on the parties and the whole process was considered to be very cumbersome.

Eventually, it was decided that the best solution was for the Registrar-General to be given the power to make binding decisions on boundary determinations. This power was consistent with the Registrar-General's ability to make decisions on property matters that already existed under the Real Property Act.

4. LEGISLATION

The legislation for the resolution of boundary disputes comes under the broader Real Property Act 1900. The relevant provisions come under Part 14A. These provisions were introduced in 1990 to provide a simple and inexpensive alternative to the court system for determining boundary disputes.

Under Part 14A, an application may be made to the Registrar-General for the determination of the position of the common boundary of adjoining lands. The application can be made only by or on behalf of: an owner of land on either side of the boundary; a purchaser under a contract for sale of land on one side of the boundary who has paid the purchase price in full or obtained the owner's consent; a public or local authority or the Head of a Government Department.

Part 14A originally did not apply to Old System title land; land comprised in a limited folio of the Register or land the subject of a primary application. The amendments made by the *Real*

Property and Conveyancing Legislation Amendment Act 1999 permit the Registrar-General now to determine the position of a boundary between adjoining parcels, whether or not each parcel is under the Real Property Act.

An application must be accompanied by such evidence as the Registrar-General may require. Usually this consists of an identification survey or peg out survey, which shows a discrepancy with an earlier survey or plan or is at variance with the occupation of the land. This effectively means that the owner making the application must have at least gone to the expense of having a survey made by a registered land surveyor at some time.

Before determining an application, the Registrar-General must consult with a registered surveyor and give notice to the adjoining owner, inviting the owner to make written submissions on the application. If the Registrar-General decides that a survey or other investigation should be carried out to assist in the determination the Registrar-General may require the applicant to fund these requirements.

The Registrar-General has a staff of four registered land surveyors whose responsibility it is to assist with the registration of plans, carry out audits of surveys in the field and to make surveys for boundary determinations as they are required.

Unless the Registrar-General is satisfied that there is a doubt about the position of the boundary concerned, the Registrar-General must refuse the application and inform the applicant accordingly.

If, while considering an application in respect of a boundary, the Registrar-General becomes aware that there is doubt as to the position of another boundary of that or other land, the Registrar-General may determine the position of that other boundary. However, before making the determination, he must consult with the Surveyor-General and consider any written submissions made in reply to a notice served on the adjoining owner.

The Registrar-General must determine the position of a boundary on the basis of all the evidence available but, if that evidence is inconclusive, may determine it on the basis of what appears to him to be just and reasonable in the circumstances.

The notice of a determination in the form of a sketch and a short report is given to the applicant and the adjoining owner. An owner who is dissatisfied with a determination may, within 28 days after receiving notice, appeal to the Land and Environment Court. A public or local authority or Head of a Government Department also has a right to appeal against a determination.

An appeal is dealt with by that Court in its Class 3 jurisdiction. Such jurisdiction may be exercised by a Judge or a Commissioner or both. Costs are at the discretion of the Court and are not ordinarily awarded in proceedings in Class 3. It is only on a question of law that an appeal lies from a decision of a Commissioner to the Land and Environment Court or from a decision of that Court to the Supreme Court.

Where an alteration is required to be made to a plan as a result of a determination under Part 14A, the change must be shown on the appropriate plans, either by amendment of an existing plan or by registration of a new plan. (Hallmann 2007)

5. BOUNDARY DETERMINATIONS

Since the introduction of the legislation in 1990 there have been 360 boundary determinations lodged with the Registrar-General in accordance with the legislation. The following table contains information about the number of determinations lodged each year. The table also indicates that the majority of the determinations were from the Sydney area with only 13% of the determinations outside Sydney. Only 5 of those determinations outside Sydney were in rural locations.

| Year | No. Lodged | Outside Sydney | Appeals |
|------|------------|----------------|---------------------------|
| 2009 | 11 | 4 | |
| 2008 | 12 | 2 | |
| 2007 | 7 | 1 | |
| 2006 | 13 | 2 | |
| 2005 | 20 | 3 | |
| 2004 | 19 | 2 | |
| 2003 | 11 | 0 | |
| 2002 | 19 | 3 | 1 Appeal to Supreme Court |
| 2001 | 29 | 6 | 1 Withdrawn |
| 2000 | 31 | 8 | 1 Court action |
| 1999 | 13 | 1 | |
| 1998 | 19 | 4 | |
| 1997 | 17 | 2 | |
| 1996 | 18 | 1 | 1 Court action |
| 1995 | 21 | 1 | |
| 1994 | 22 | 3 | |
| 1993 | 25 | 2 | |
| 1992 | 20 | 3 | 1 Mediation |
| 1991 | 20 | 2 | 1 Court action |
| 1990 | 11 | 0 | |

Occasionally the request for a determination is rejected on the grounds that there is insufficient information to indicate that there is a survey problem with the definition of the boundary. The main reason for a low rejection rate is that generally the boundary dispute is discussed with the office of the Registrar-General before the application for determination is lodged. This means that those that do not satisfy the requirements are persuaded not to lodge their application.

6. COURT ACTION

Of the 360 applications lodged over the last 20 years only five aggrieved owners have appealed to the Land and Environment Court to have their determination reassessed. One case has been successfully resolved by mediation.

Registrar-General v Tuckfield

The first matter to come before the Land and Environment Court under the boundary determination provisions was the case of the *Registrar-General v Tuckfield & ors* (1991). This matter involved a dispute over the common boundary between lots A and B in DP 372397, a plan of survey dated 12 January 1951 and bearing evidence of council's subdivision approval. This plan showed the common boundary as being a fenced straight line. On an application by the registered proprietors of lot B, the Registrar-General had determined the boundary to be as shown in DP 372397. The applicants were dissatisfied with the Registrar-General's determination and requested the matter be referred to the Court. In the proceedings it was contended, on behalf of the proprietors of lot B that the fence shown in DP 372397 (and subsequently replaced) was not a straight line in 1951 and extended further into lot A at that time. These lines of fencing, it was submitted, formed the true boundary between lots A and B.

Counsel for the proprietors of lot B raised two further arguments in their support, drew attention to their long term possession of part of lot A up to what they believed was the common boundary, and cited *Turner v. Myerson* (1917) and *Turner v. Hubner* (1923) as authorities suggesting that continued occupation is a factor in determining boundaries in cases of doubt. It was also submitted that the Court should exercise the discretion given to the Registrar-General under the "just and reasonable" clause to determine a boundary in cases where the evidence is inconclusive.

These arguments were rejected by the Court, and the Registrar-General's earlier decision was confirmed. The Court noted that, while differing views were expressed on the importance of the boundary fence as a monument of the survey, it was clear the monuments of the boundary line, sufficient for the proceedings, were those marked in the street and lane at either end of the straight line boundary, the boundary fence as shown in the plan, the offset indicated from the cottage on lot A to that boundary fence and the offsets shown from the garages at the rear of lots A and B to that boundary fence. Taking these factors into account, the Court decided the recollections of the previous owners of lot A as to the position of the fencing in 1951 could not be relied upon. The Court also held that, on a proper analysis of the deposited plan, the long term possession by the proprietors of lot B was not an issue for consideration and the evidence concerning the boundary was not inconclusive so as to invoke the "just and reasonable" clause of the Real Property Act. Since the Registrar-General was successful in upholding the primary decision and as the owners of lot A had briefed counsel to protect their interests, the Court ordered that their costs should be paid by the proprietors of lot B. (Hallmann 2007)

Registrar-General v Rigby

In *Registrar-General v. Rigby* (1996) it was held that as the Registrar-General's role is to assist the court, costs would not be awarded against the Registrar-General unless it could be shown that the Registrar-General was "acting through lack of *bona fides*, lack of diligence, or some other cogent reason which would render the court's discretion on costs liable to miscarry if it did not order him to pay the costs". (Hallmann 2007)

Registrar-General v Sutherland

In *Registrar-General v. Sutherland & Ors* (2000) an order was sought against the Registrar-General for costs incurred in earlier proceedings disputing a boundary determination made in respect of land at Cottage Point. The determination fixed a boundary as redefined from the mathematical position based on marks found from an original Portion and subsequent plans. The position of the easements required as a result of this determination and which form part of the determination was shown on a sketch.

The Sutherlands did not accept the determination and argued that the Registrar-General had no power to require the creation of the easements, which were to permit minor encroachments by a building and stairs to remain. The Registrar-General, nevertheless, maintained that the creation of easements was an essential component of the just and reasonable determination. The other parties involved in the determination took no objection to the Registrar-General's determination and supported the creation of easements.

Pursuant to Part 14A of the Real Property Act the Sutherlands, being dissatisfied with the determination, requested that the Registrar-General refer the matter to the Land and Environment Court. The claim by the Sutherlands against their neighbour for relief under the *Encroachment of Buildings Act 1922* was also listed for hearing. Following an acknowledgment by the Registrar-General that it was not possible to compel the creation of the easements, the Sutherlands and the adjoining owners entered into negotiations which resulted in an agreement between the parties as to the position of the boundary and the payment of compensation to the Sutherlands. The boundaries and easements proposed in the Registrar-General's determination were accepted by all the parties.

In their action for indemnity costs, the Sutherlands asserted that the proceedings were necessary only because the Registrar-General maintained that the boundary could not be determined without the creation of easements. They submitted that if the Registrar-General had acknowledged that there was no power to compel the granting of easements, the proceedings would have been settled at an earlier date and the costs of the proceedings would have been avoided. They also said they were concerned that the creation of easements would prejudice their claim for compensation in respect of the encroachments upon their land.

In the result, Justice Cowdroy found that the Registrar-General was not acting unreasonably in refusing to accede to the Sutherlands' demand that the boundary should be determined without easements. In the Registrar-General's opinion, which the Court accepted, the

determination was just and reasonable and was the only practical solution to resolve the inconclusive boundaries. In making his determination the Registrar-General was fulfilling his statutory duty. Cowdroy J went on to point out that the parties resolved their disputes due to the assistance of the Registrar-General and it was apparent that the proceedings became the vehicle by which all issues between the parties were resolved including the adoption of the Registrar-General's determination. Accordingly, his Honour refused to make an order for costs against the Registrar-General. (Hallmann 2007)

Westfield v Registrar-General

In *Westfield & Anor v. The Registrar-General* (2002) the applicants appealed against the Registrar-General's determination of the common boundary. In order to relocate the common boundary it was necessary to examine the title history of both parcels and to find any survey marks on the ground that would enable the disputed boundary to be re-established in its original position. In this process, the Registrar-General's surveyors fixed the position of a street from iron pins which were found and shown in registered plans. A lane (at rear of the properties) was defined by using marks and occupations accepted in other registered plans. In the absence of the original corner marks for Nos 35 and 37, the Registrar-General's surveyors fixed the disputed boundary by re-establishing the southern boundary of the land in a primary application to the south, and by then adopting the certificate of title dimensions of the two properties.

In their appeal, the applicants contended that the determination did not define the common boundary of the properties, because there was an "excess" (i.e. a sliver of land) between the two properties. The applicants submitted that the court should determine the boundary between the two properties upon the basis of what appears to be "just and reasonable" within the meaning of Part 14A of the Real Property Act. The Registrar-General submitted that there was an "excess" but it was not between the properties, rather it was to the north. The Registrar-General further argued that as the evidence available was conclusive, "just and reasonable" did not apply.

In his judgment, Bignold J stated:

"I am of the clear opinion that having regard to the clear purpose of the statutory regime operating under the Real Property Act, Part 14A and to the particular functions conferred upon the Registrar-General, having regard to his and his Office's special expertise in matters pertaining to land title, that I should, in exercising the jurisdiction 'to determine the position of the boundary' accord due respect and deference to the determination made by the Registrar-General, especially in the light of the fact that in making that determination, the Respondent was well aware of, and considered, the views of the applicants' surveyor.

However, the Court's approach of according due deference to the Respondent's determination does not mean that the Court is, in any way abdicating or neglecting its statutory function 'to determine the position of the boundary' upon the basis of the evidence adduced before it (which included that of three officers of the Registrar-

General's Office) in litigation where the Respondent has actively participated in defending or justifying his determination, according to his entitlement under the Real Property Act.”

Having considered the evidence of both parties, his Honour found that the Registrar-General's determination was accurate and reliable in all respects.

The decision of Bignold J was later affirmed by the New South Wales Court of Appeal: see *Westfield v. Registrar-General* (2003). (Hallmann 2007)

7. CONCLUSION

The NSW Government introduced legislation in 1990 to assist the owners of properties to resolve boundary disputes. This power was given to the Registrar-General because of the existing powers in relation to property ownership already contained in the Real Property Act. In addition, the whole concept of a state guarantee on Torrens Title could be considered to be in jeopardy if there was significant doubt about the boundaries and no means of resolution of that doubt.

As indicated previously there have only been four significant appeals to the Land and Environment Court and in each of these appeals the court has vindicated the approach taken by the Registrar-General to resolve the dispute. From this point of view the approach taken by the NSW Government to resolve boundary disputes has been most satisfactory.

However at times there are parties to disputes who are not totally satisfied by the process. On occasions the resolution of the survey part of a dispute does not resolve the long term disagreements that have occurred. This happens at times when a new development is happening next to an older dwelling and the confirmation of the location of the boundary as a fixed position only adds to the anguish.

It also happens on occasions that an owner has two surveys of their property that differ. This is sufficient doubt for the Registrar-General to be able to make a determination. However the problem can be that the adjoining owner has been totally oblivious of any problem with their boundary and it is not until they receive advice that a determination is about to be made that they realise that there may be a problem. This may be one occasion when it is better to live with the problem and owners need to consider their situation carefully before making an application for the determination of a boundary.

Finally, the introduction of the legislation into NSW to resolve boundary disputes has helped make the Torrens Title system the robust system it is today. Overall the legislation has been very successful and has achieved what it set out to do.

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BIOGRAPHICAL NOTES

Grahame Wallis has worked for the Registrar-General as a registered land surveyor for 35 years holding various positions within that organization.

He is currently the manager of Cadastral Integrity and is a Deputy Registrar-General because of the need to advise the Registrar-General on boundary determinations.

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