Doctrine of Accretion

The Doctrine of Accretion is relevant with respect to land abutting lakes, rivers and streams, as well as the shoreline of a sea. Where the boundary of land with a shoreline is defined by reference to the “mean high water mark” (HWM), or a specified distance from the HWM, the HWM may be subject to change over a period of time by way of “accretion”.

In February 2014, newspaper reports drew our attention to this then little known doctrine. Lindsay Fox invoked the doctrine to add 2400 square metres of Portsea beach to the title to his property. The 45metre extension of the title boundary across the beach to the “mean high water mark” was said to improve the value of the land by $5.4 million, for an outlay of a $447.80 application fee.¹

If you have a beach front property you might like to consider this doctrine, although the then planning Minister Matthew Guy and Environment Minister Ryan Smith were said to be furious at the decision, and were considering reform to ensure other landowners with similar titles cannot claim public beach space.²

The Age reported that this was not the first time the Fox family had applied to move the property line. “In 1998, an application was rejected based on legal advice provided by the then Solicitor-General in a report that has never been made public. The opinion reportedly cautioned that the high-water mark issue was murky enough that a flood of similar claims would ensue if the government tested the matter in court and lost.”

What does it mean?

¹ The Age, 16 February 2014
² Ibid
Accrete means “grow together or into one”; and accretion, “growth by organic enlargement”. ³

The law was stated in US v Robertson Terminal ⁴ to be:

“Accretion refers to the increase of land (adjoining a body of water) by the gradual deposit, by water, of solid material whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water

According to the Property Law website⁵ the doctrine of accretion is the process whereby the boundary of land bounded by tidal waters is liable to change as a result of natural forces, which may result in a gradual increase or decrease of the land in question. The doctrine operates to adjust the legal boundary of the land so affected. And it works in reverse. Where soil is taken away from the land of an owner by effects such as rising sea levels, the legal boundary of the land may be adjusted to reflect that occurrence.

The Victorian State Government⁶ has described the doctrine as “the process where the boundary between land and water alters so slowly that the change is not readily noticeable”. The Guidance Note, states:

In early days of settlement in Victoria, Crown land was usually sold to the edges of lakes, rivers or streams and also to the shoreline of a sea unless there was a particular need for a reservation along the frontage. This Doctrine explains, in general terms, the effect that alterations in boundaries between land and water can have on land ownership of both freehold and Crown land. Gradual accretions of the land from water becomes the property of the abutting owner and conversely, land encroached upon by water is lost to the abutting owner. The important factor is that the alteration must be ‘gradual and imperceptible’ so that the change ‘cannot be seen actually going on, though a visible increase or decrease is observable every year’ – common law. The Doctrine may also apply despite the fact that the gradual and imperceptible change was caused by artificial means, such as the construction of a jetty.

Accretion can be aluvion, where sand and soil is washed up to make an addition to existing land; or dereliction, where land is left dry by lake or sea shrinkage, or a river changing its bed Diluvion on the other hand is the opposite of accretion. It is the loss of land by encroachment of water. Land may also be lost by erosion.

An earlier paper issued in 1993 ⁷ states, after noting that in the early days of settlement, Crown land was sold to the shoreline of the sea:

“Although significant parts of the frontages to Bass Strait, Port Phillip Bay and so on were sold, most frontages, both marine and inland were reserved over the years for public

³ The Australian Concise Oxford Dictionary
⁵ www.propertylawuk.net
⁶ DSE, Principles of Re-establishment; Guidance Note 6
⁷ DCE guideline No: 02-20-0734-1 – The Doctrine of Accretion; available at www.dtpli.vic.gov.au
purposes and other purposes. Of more recent times, the marine frontages in many parishes have been permanently reserved for the protection of the coastline”.

“Many of the Orders in Council that reserved Crown land along the coast described the boundary between land and water .. that clearly indicated that the boundary was in fact between land and sea. In most cases the sea boundary is high-water mark”.9

“In the event of an accretion of land to a reserve along the coast ... the boundary of the reserve will extend out to sea... (or) where the sea invades reserved Crown land, .. the area of the reserve is reduced”.10

**The Land Act 1958**

Section 385 states:

*Crown property in bed and banks of certain watercourses*

(1) If –
   (a) Land is bounded in whole or in part by a watercourse 11; and
   (b) The land was alienated by the Crown before, or is so alienated on or after, the commencement of section 327 of the Water Act 1989

the bed and banks of the watercourse remain, and must be taken always to have remained, the property of the Crown despite the alienation of the land and despite the fact that the same person owned or owns, or holds or obtains a consolidated certificate of title for, the land adjacent to both banks.

(2) ...........

(3) ...........

No similar legislation is applicable to shorelines or foreshores of seas or lakes.

**Coastal Protection Act 1979 (NSW)**

Section 55N of this New South Wales Act is entitled Modification of doctrine of erosion and accretion. It applies to land within the coastal zone, or which adjoins the tidal waters of Sydney Harbour or Botany Bay, a boundary of which is defined by reference to a mean high water mark (the water boundary).

The effect of the section is to prevent an increase in the area of land to the landward side of the water boundary if (a decision is to be made by a Court or the relevant Minister)

( a) a perceived trend by way of accretion is not likely to be indefinitely sustained by natural means, or

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8 At 1.1.2
9 At 3.3.1
10 At 3.1.4
11 See s. 384 for definitions
(c) as a consequence of making such a determination, public access to a beach, headland or waterway will, or is likely to be, restricted or denied.

The Registrar-General is denied power to make a determination concerning a water boundary that would increase the area of land to the landward side of the water boundary. Similar legislation in Victoria would have prevented the Portsea application from succeeding.

**Principles and Problems of Shoreline Law**

A comprehensive paper published in December 2012 was motivated by the Australian Federal Government climate change adaptation initiatives. The term “shoreline” was adopted to encapsulate those elements of the doctrine of accretion which deal with boundaries formed by tidal waters, especially the sea. It provides an overview of the context in which shoreline law operates. Factors influencing the development of shoreline law include global climate change (rising sea levels, increased storminess and greater coastal erosion directly affecting the interface between land and water); and the complex, multi-layered legal and policy framework governing land titles and coastal management, administered by Local, State and Commonwealth Governments.

The author identifies nine key principles of property law relevant to lands bounded by tidal waters.

1. The legal boundary between tidal waters and adjacent land (high water mark – HWM)
2. Where land is bounded by water, the legal boundary of the land changes to reflect changes in the position of the waters’ edge, but only if certain conditions are met
3. To be recognised in law, changes in a water boundary must be ‘gradual’ and ‘natural’
4. New land formed gradually by accretion belongs to the adjoining landowner
5. The doctrine of accretion includes gradual change brought about by erosion, and by the advance or retreat of waters (diluvion or dereliction)
6. Land below the HWM belongs to the Crown and is held in trust for public purposes
7. Land ‘lost’ to the sea, below HWM, by gradual erosion or diluvion, ceases to be real property and reverts to the Crown
8. Ambulatory boundaries supplant and rescind surveyed boundaries
9. No compensation is payable for either gradual loss or gain of land.

With respect to Principle 2, the author observes that under the doctrine, where the boundary of land extends due to the gradual build up of sediment, the adjoining owner gains that land. Conversely where the boundary contracts due to erosion, the area gradually reduces and the owner loses that area of land.

**Addressing Principle 4**, the author referred to an Irish decision of 1911 wherein it was said

> If by gradual and imperceptible accretions in the ordinary course of the operation of nature land is added on by slow degrees to the shore .. notwithstanding that after a certain period you may see that a body of land, however considerable, has accrued to the shore, yet if the

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13 Par 2.
14 Attorney General (Ireland) v McCarthy (1911) 2 IR 260 at 293
steps by which that land is formed are steps gradual and in the ordinary course of nature, and happening from time to time, but you cannot perceive the change from step to step (if one may use that figure), then that land so gradually and imperceptibly accrued does belong to the owner of the shore, and is given to him by the law as his property.

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HINDSIGHT

Prophetically, in the 1993 paper at [5]1, it is said:

Sometimes CNR (the then Department of Conservation and Natural Resources) becomes aware of an accretion or is consulted when one occurs, either by the land owner or later by the Registrar or the Surveyor General. Unfortunately this does not happen consistently and, there have been cases where Crown land has been included in title with adjoining freehold without the knowledge of CNR. Even when CNR is aware that an application is to be made to include a Crown land accretion title, there is little that can be done to prevent this happening. If CNR opposes the loss of Crown land, the best course may be to negotiate with the land owner, who may be prepared to forgo part of the claim. The alternative is to legally challenge the application on the grounds that the doctrine is not relevant for some reason or another.

I am not aware that any action has been taken to avoid future claims of a similar nature. The potential remains for those who can successfully establish that the Doctrine of Accretion applies to land abutting Port Phillip Bay (or other shorelines) to do so.

Terra Publica 15 has posited the complication of boundaries between Crown Land and freehold land, where different interests and policies pertain in each case. Furthermore, issues involving Crown

15 Vol 14 No 2 February-March 2014, The Public Land Consultancy
land, Planning and Legal matters are the bailiwick of three different Ministers (although I understand that Land will now sit in the Planning portfolio within the Department of Environment, Land, Water and Planning).

**LASSI PLAN**

The below plan shows the adjusted boundaries of the Portsea land and was copied from a LASSI search.  

![LASSI Plan](image)

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