Examples of Legal Aspects of Boundary Surveying as Apply for Crown Lands in NSW

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ABSTRACT

It is well recognised that surveyors are included among those professions with an ageing workforce and need to look towards systems to capture knowledge of peers before it is lost. The Department of Primary Industries (DPI) – Lands (Crown Lands) is also experiencing the loss of knowledge due to staff retirements and restructuring for both surveyors and allied staff. As I look to my own retirement, I have determined to prepare a reference document that is a collation of knowledge collected over many years by personal experience and from my peers who hold specialised knowledge in many areas of Crown Lands operations. The title of this paper is a deliberate play on words from Hallmann's well respected tome. For this or any conference, a paper of this nature would be almost certain to send even the most interested audience to sleep. As such and with constraints of time, a number of examples have been compiled to outline issues with some detail of knowledge sources, precedents and opinion. Land law includes opinions and advice that may be regarded as valid until tested in court. The examples provided include matters involving tidal and non-tidal waters, possession adverse to the Crown, closer settlement, land ownership and roads.

KEYWORDS: *Crown lands, land law, closer settlement, adverse possession, roads.*

1 INTRODUCTION

The role of Crown Lands surveyors includes the provision of professional survey advice and support services for Crown land and lands adjoining Crown land as well as project managing land management projects to achieve government priorities in the management of Crown land. The team provides expert support to all of the Department of Primary Industries – Lands / Land and Natural Resources business programs.

Over the years many different issues and requests for advice both by internal and external clients have required resolution. With the aid of available resources including written material particularly Hallmann (2007), Willis (1982), Registrar General's Directions (LPI, 2015a), the Office Practice Guidelines – Crown Lands Management (DPI-Lands, 2013) and publications dealing with water as a boundary (Lands, 1989) as well as experienced co-workers, surveyors and non-surveyors, solutions have been determined and advice provided. It should be noted that the Office Practice Guidelines have not been updated for many years and have moved from a hard-copy, loose-leaf resource available in Crown Lands offices to online form and have recently been severely restricted in access. While current policy and procedure may not be reflected in the guidelines, they do contain valuable historical concepts that are among the 'lost' or now unavailable knowledge resources.

This paper provides information and examples for some issues as a prelude to an anticipated more detailed information document or resource that will provide future surveyors with reference material that will go some way to filling the void in the knowledge database of past colleagues who are no longer available.

The examples that are presented in this paper include some matters that have been resolved from written material and the advice given is sound and unlikely to be challenged. Other examples include matters that have no precedents and the advice is based on learned opinion and may well be challenged sometime in the future. It is equally possible that some opinions may change – we all learn as we go ahead in life. A different set of eyes on a subject or a lapse in time can be rewarding in that there may be further advancements in our collective knowledge pool. The author encourages ongoing peer review and sharing of matters learned particularly in specialised areas.

2 CROWN LAND AND TENURES

2.1 Grants

European settlement following the colonisation of Australia brought with it many laws and statutes from England, among them the declaration that all of the land including the beds of all waters was Crown land. Grants of land were the means for alienation or transfer of land from the Crown to individuals. Initially grants were made to members of the militia and other persons in public office in recognition of service or of respected members of English society. Later grants were provided to the wider community, both in the colony and in England to encourage further settlement.

The Crown grants each form a record of the initial land dealing and provide details including the location and description of the land and applicable reservations and conditions. Land law (Butt, 2010) distinguishes between exceptions from the grant and reservations (see chapters 20.81.1 and 23.10.1). Under an exception, no part of the excepted land passes with the grant. As an example, the 30.48 m (100 foot) reservations of land above the Mean High Water Mark (MHWM) are exceptions. Reservations are placed over the granted lands with the Crown retaining a right to take back the specified land or property if and when required. It is not uncommon for reservations to have been wrongly used as exceptions. Titles deriving from the original grant show as a second schedule notification the continuation of reservations and conditions of the grant. Prior to any survey or dealing with land, it is essential that the grant is obtained and all details applicable to the land are understood.

In the not too distant past, unless it was possible to attend the Land and Property Information (LPI) office in Sydney, it was frequently an awkward and timely process to obtain copies of grants for lands to be surveyed or examined. In recent times, LPI has continued to make land and title records available online via the Spatial Information eXchange platform (SIX – see LPI, 2015b).

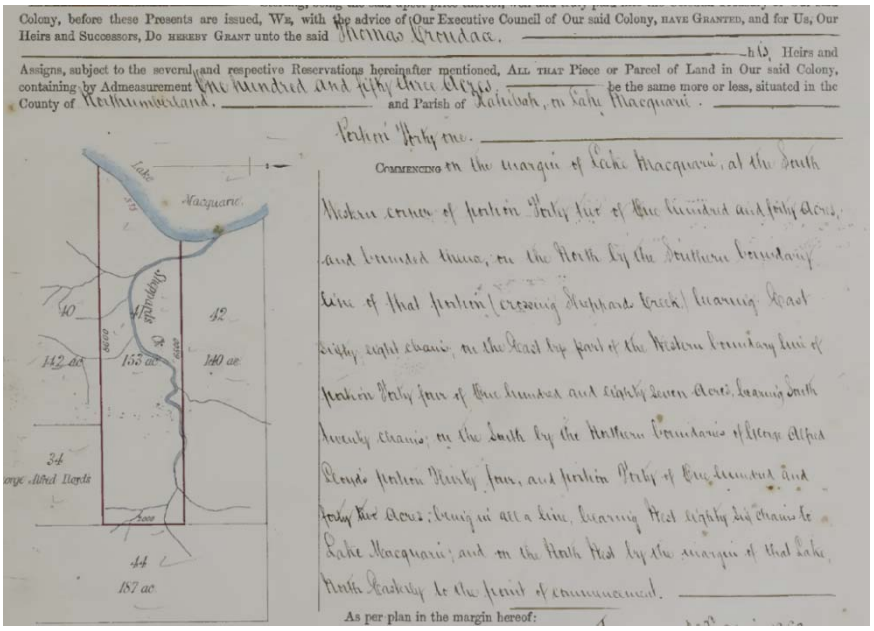
2.1.1 Sheppards Creek

Sheppards Creek flows into Lake Macquarie near Valentine about 20 km south of Newcastle. The original grants of land through which the creek flows were constructed with no mention of the creek, and the associated Crown plans similarly were devoid of defining the creek more

than by way of a line on the face of the plans. Crown Lands received a request for an authoritative determination of the ownership of and management responsibility for the bed of Sheppards Creek between the margin of Lake Macquarie and the bridge at Macquarie Drive (Figure 1).

Figure 1: Sheppards Creek, Valentine.

The issue of ownership of Sheppards Creek has been raised on a number of occasions previously by different sections within Lake Macquarie City Council (LMCC). Early responses provided had mostly stated that title records indicate that the creek was included in the lands granted to Thomas Croudace in June 1869 following sale of portions 41A and 42A in the Parish of Kahibah and County of Northumberland. An extract from the grant of Portion 41A is shown in Figure 2.


Colony, before these Presents are issued, We, with the advice of Our Executive Council of Our said Colony, have Granted, and for Us, Our Heirs and Successors, Do hereby Grant unto the said Thomas Croudace. —— his Heirs and Assigns, subject to the several and respective Reservations hereinafter mentioned, All that Piece or Parcel of Land in Our said Colony, containing by Admeasurement One hundred and fifty three Acres, —— be the same more or less, situated in the County of Northumberland, —— and Parish of Kahibah, on Lake Macquarie. ——

Portion Forty one. ——

Commencing on the margin of Lake Macquarie, at the South Western corner of portion Forty two of One hundred and forty Acres, and bounded thence, on the North by the Southern boundary line of that portion Crossing Sheppards Creek, bearing West eighty eight chains, on the East by part of the Western boundary line of portion Forty four of One hundred and eighty seven Acres, bearing South twenty chains, on the South by the Northern boundaries of Lots Allots Lloyds portion Forty four, and portion Forty of One hundred and forty two Acres; bearing all a line bearing East eighty six chains to Lake Macquarie, and on the South East by the margin of that Lake North Easterly to the point of commencement. ——

As per plan in the margin hereof: ——

Figure 2: Extract of part of grant.

Unfortunately, misunderstanding of officers not qualified in the matter of land ownership has created doubt for various management authorities, and that doubt persists even to the time of this latest request. The confusion stems from the fact that Sheppards Creek is a significantly tidal watercourse that is navigable for a distance and has been populated by berthing and mooring facilities for private vessels.

Figure 3 shows a timeline of significant land dealings for both portions 41A and 42A. Where the land affected by the dealings includes the physical creek (i.e. the creek is within or is adjacent to the land), the timeline is shaded by blue colour.

Por 42A N344~1501 (Circa 1864) CT V.105 F. 13		C290728 Transfer 18 Sept 1934 CT V.4717 F. 80 to 86	Residue CT V.5875 F.202	D736131 Resumption (LMCC) Notified Gaz. 14 March 1947 F.589 Ms4863~3070	DP225005 14 August 1963 (eastward of Macquarie Drive)		
					DP589761 19 Sept 1973	DP591142 9 March 1976 CT V.13524 F.201 (LMCC)	
		C223659	Resumption for Roads - 26 June 1934			(LMCC)	DP329688
Por 41A N344~1501 (Circa 1864) CT V.92 F. 247	A825321 Residue CT V.3597 F.182	C223659	Resumption for Roads - 26 June 1934			(LMCC)	DP329688
		C282214	Resumption for Roads - 12 March 1934			(LMCC)	DP185366
		C290728 Transfer 18 Sept 1934 CT V.4717 F. 80 to 86	Residue CT V.5875 F.202	D736131 Resumption (LMCC) Notified Gaz. 14 March 1947 F.589 Ms4863~3070	DP589761 19 Sept 1973	DP591142 9 March 1976 CT V.13524 F.201 (LMCC)	
						Lot 1 DP589761 CT V.13919 F.80 (HWC)	
					Lease from LMCC CT Vol.9732 F.104 DP509443 4 Nov 1963		
					Lease from LMCC CT Vol.10369 F.249 DP520055 30 May 1966		
			D685356 Transfer 5 June 1945 CT V.5780 F. 101 DP432796	D859349 Transfer CT V.5861 F.4 & 5 DP21581 27 Jan 1949			
				DP207645 25 July 1961 part CT Vol.8354 F.16			
				Residue of CT Vol.8354 F.16			
				DP30401 27 April 1959			
				DP103833 DP239936 15 July 1970 (eastward of Macquarie Drive)			
				DP21468			
				DP22718 13 Aug 1948 (eastward of Macquarie Drive)			
	A824006 Transfer 6 June 1922 CT V.3553 F.44						

Figure 3: Timeline for dealings.

Following the completion of a thorough investigation of the plan and title records of portions 41A and 42A and derivatives there from, it is apparent that Sheppards Creek was an apparently non-tidal waterway that was not excluded from the land granted to Thomas Croudace in 1869. Crown plan N344~1501 (Figure 4) was completed in the early 1860s.

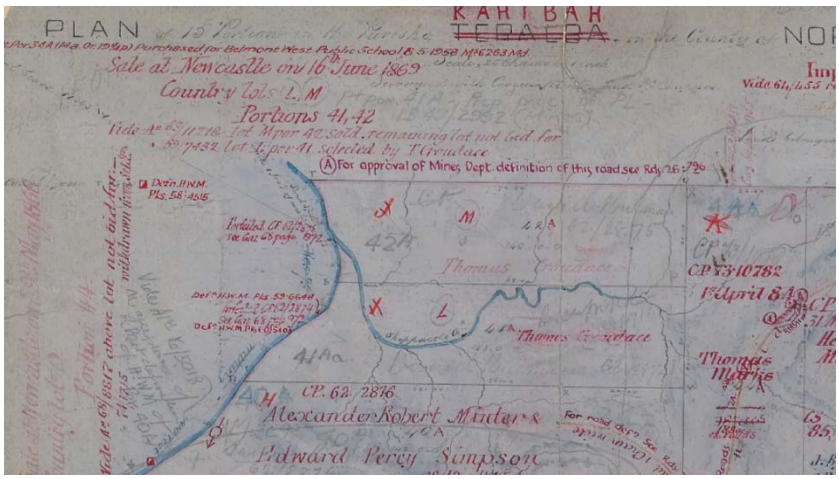


Figure 4: Part of Crown plan 344.

It should be noted that there was also doubt as to the tidality of Lake Macquarie beyond the entrance channel at Swansea, even to the 1980s. A comprehensive study was undertaken by the then NSW Department of Public Works with the result that tidal variations do occur to the margins of the lake and upstream in most of the creeks and rivers that flow into the lake. The ownership of and responsibility for the bed of Sheppards Creek is therefore with the grantee or heirs and assigns thereafter. While the creek or part of the creek may now exhibit tidal variations, from a land boundary perspective it retains the original non-tidal status as determined by historical records. In 1947 much of the land including the northern part of portion 41A and all of portion 42A was resumed by LMCC for improvement and embellishment of the area. Gazette 14 March 1947 folio 589 and Crown Plan (CP) $Ms4863_{\sim 3070}$ refers. DP589716 is a 1973 survey of part of the land resumed by Council in March 1947 west of Macquarie Drive. Land including lot 2 in DP589716 was later surveyed as DP591142. For the part of the creek shown by DP591142 as separating the two parts of lot 200, Lake Macquarie City Council is considered to be the owner and responsible party as a consequence of the resumption.

It should also be noted that DP591142 incorrectly shows Sheppards Creek as a tidal waterway, this is clearly not the case despite the apparent approval of the plan by the Under Secretary of Lands. At the time of the investigation, Permissive Occupancy 12350 was held by Council over a part of Sheppards Creek for the purpose of a swimming pool. Action to terminate this account with effect from 2 April 2012 was recommended.

For the part of the creek that is in the southern section of portion 41A and not being part of the land resumed by Council in March 1947, CT Vol. 5780 Fol. 101 refers. Ownership is individually or severally held by owners of adjacent lands unless retained, reserved or otherwise transferred by a prior landholder:

- The land in CT Vol. 5861 Folios 4 & 5 was transferred as depicted by DP21581 with the individual parcels abutting the creek with title extending only to the creek. The title to the bed of the creek remains with the residue land.
- Part of the residue of the preceding title is CT Vol. 6287 Fol. 134 – this title clearly retained the bed of the creek. As such it is verified that the owners of lots within DP21581 where they abut Sheppards Creek do not own part of the bed of the creek.
- DPs 30401 and 207645 are subdivisions of part of the land in CT Vol. 6438 Fol. 177; these plans again show the lots abutting the creek as being limited by the bank of the creek.
- Transfers of parts of the title with no creek effect included the lands shown by DP21468 and DP22718.
- CT Vol. 8354 Fol. 16 includes the remaining land prior to DP207645 and part of the land east of the Macquarie Drive.

Ownership of this part of the bed of Sheppards Creek is recorded as being part of the residue of CT Vol. 8354 Fol. 16; as such this section of the bed of the creek is owned privately. This title is recorded as a cancelled title.

Figure 5 is a plan of the area showing the creek with part owned by LMCC and part privately owned. That part shown by vertical hatching (i.e. southern part) is privately owned. Where the proprietor of land is unknown and possibly lost in the processes of subdivision and transfer, it may be possible on the basis that there may be a public benefit, to recommence the title process through resumption by Council and creation of a new folio of the register under section 31A of the Real Property Act 1900. It was suggested that Council pursue its own legal

advice concerning the cancelled title and the ownership of the residue of that title.

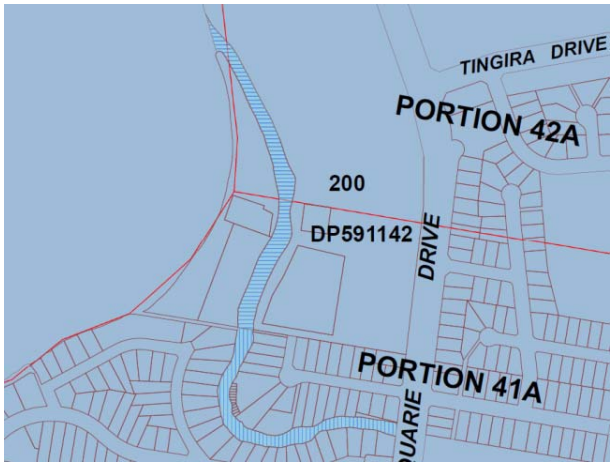


Figure 5: Ownership of Sheppards Creek.

2.1.2 Macleay River

The Macleay River is one of the big coastal rivers of New South Wales; it flows from the watershed beyond Kempsey to the coast near South West Rocks. It is a tidal river with the tidal limit established as being near Kempsey some 30 km from the sea (Figure 6a). Figure 6b shows Spencer Creek as a deviation to the main river channel.

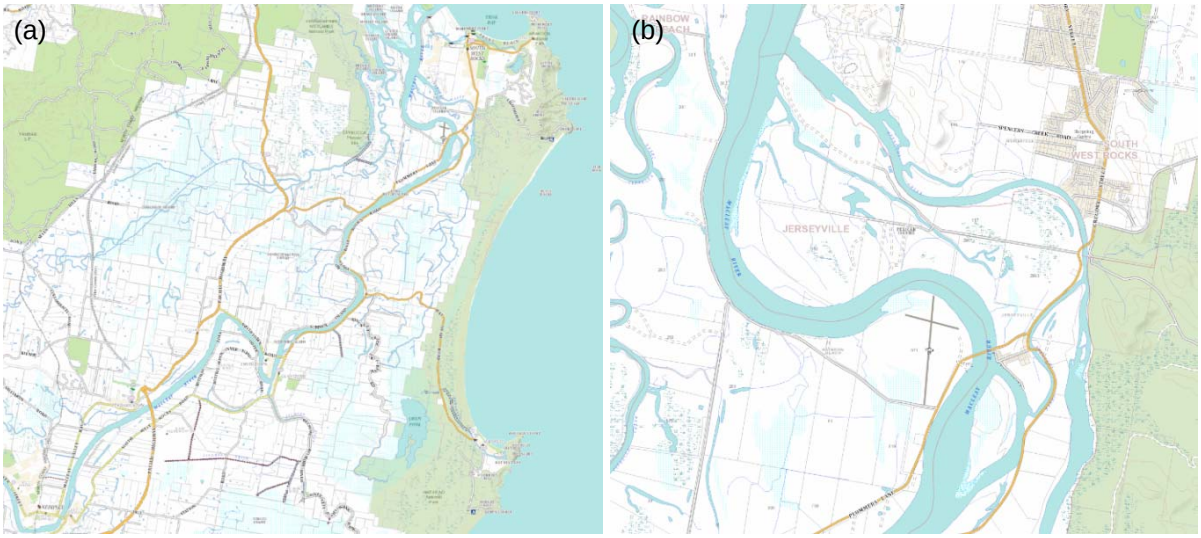


Figure 6: (a) Macleay River to Kempsey and (b) Macleay River and Spencers Creek.

The parish maps are one of the few records that show the tidal limits; the Crown Lands offices also hold an electronic file ‘Tidal limits of watercourses in NSW’. The tidal limits for NSW waters were recorded at varying times mostly since the early 1900s. Table 1 is an extract from the above resource showing for the Macleay River a description of the location of the tidal limit and the file reference for the determination. There are no apparent records for earlier determinations. Parish maps prior to the dates of the corresponding reports either did not show the tidal limits for tidal waters or they were subsequently added as a notification on the face of the then current edition of the map.

Table 1: Tidal limit of Macleay River.

Mangrove Creek	P: Ashby C: Clarence	Tidal to the northern boundary of portion 100	Pks.34-229
Macleay River	P: Yarravel & Kalateenee C: Dudley	Tidal influence extends to Belgrave Falls on southern boundary of portion 1 Parish of Yarravel and on northern boundary of portion 17 Parish of Kalateenee	Pks.34-229
Matenga Creek	P: Scope	Is tidal for about 500m from its junction with Bookram Creek	Pks.34-229

Figure 7 shows the location of the tidal limit at Belgrave Falls, about 5 km upstream from the town of Kempsey, as depicted on the map of the Parish of Yarravel, County of Dudley. This is the 9th edition, printed in 1975 and placed in use in 1978, showing the tidal limit as printed information. The 5th edition dated July 1920 shows the tidal limit as a hand-written notation on the face of the map.

Figure 7: Tidal limit at Belgrave Falls.

It is worth mentioning at this point that another publication exists that records recent tidal limits from 1996 to 2005 (MHL, 2006). This can be a source of confusion to people who do not realise the legality of the historic location of the tidal limits.

The following question has been asked: “How can we know and prove the tidality of a river or section of river prior to the reports being completed?” Why is this question important? It can be very difficult to prove the tidality of a river and if tidal where the limit of tidal influence is and was at prior times during the period of settlement. While in many cases it may not be possible to prove these attributes of waterways, it is necessary to collate as much information from all reference sources to be able to put a case to make a judgement call.

Firstly, the tidality of a river is important as the applicable rights that assign to lands abutting waterways differ and then those rights apply according to the tidal nature when the land was granted. Consequently, if a waterway changed its tidal regime at some time after the land was granted, the type of boundary and the applicable rights remain as at the time of the grant.

Secondly, while the English ‘land laws’ were passed into the legislative and statutory processes of the colony, in particular New South Wales, the construction of early grants and associated Crown plans may be less than conclusive with regard to the extent of lands with boundaries comprising waterways other than on the sea coast. It has been found that for many, if not all grants and plans prior to 1886, there was no distinguishing between tidal and non-tidal waters. It appears from a review of old surveying instructions and regulations that prior to the release of the 1886 surveying regulations there was no mention of High Water Mark

(HWM). The 1886 regulations were apparently the first instructions for surveyors to actually identify and measure the HWM and adopt it as a boundary.

Some grants do not show internal waters and the accompanying plans are similarly devoid of measured lines to enable these features to be excluded from the title. This remains so even if the waters are tidal and the grant is subsequent to the general reservations of the beds of rivers and creeks. Grants and the relevant Crown plan surveys abutting waterways prior to 1886 were devoid of any distinguishing characteristics for tidal waters; they appear exactly the same as those applying to lands abutting non-tidal waters.

An application was received for an easement for underground powerlines over part of the bed of the Macleay River and a small creek deviation of the main river channel. Both of these waters are at the present time tidal waters. As the beds of tidal waters are Crown land, easements across tidal waters must be acquired. Figure 8 shows the proposed easement in red colour where it crosses both waterways.

Figure 8: Proposed easements across Macleay River and Spencers Creek.

The case officer investigated the application and based on available records including current titles and recent survey plans that indicate the waters to be tidal, advised the applicant that the required easements were to be acquired. CP $608_{\sim 666}$ is a plan dated March 1869 that shows 22 portions as measured for sale by auction. Apart from notations later added to the plan, there is little to indicate the tidal status of the waterways. Figure 9 is an overlay of this plan and the proposed easement on recent aerial imagery.

The applicants sought legal advice and, based on the advice received, claimed that the Crown did not own the beds of the waters as the grants and original Crown surveys for the abutting lands show the waters to be non-tidal. It is the author's opinion that the legal advice was made without appreciating the lack of survey instructions, directions and regulations regarding tidal waters prior to 1886. The Macleay River would certainly have been tidal for a considerable distance past the site of the required easements since at least European settlement. On this premise it is considered that the applicable original grants were in error and the waters were tidal at the time of alienation and titles to the lands abutting excluded any presumptive ownership of the bed of the river or creek. If this opinion was to be challenged in the courts, it would require the services of well-briefed legal team to challenge the concept that the grant is infallible and indefeasible. It is noteworthy that quite a number of recent plans and titles in the area of investigation are recorded as showing the river as tidal and abutting a tidal river.

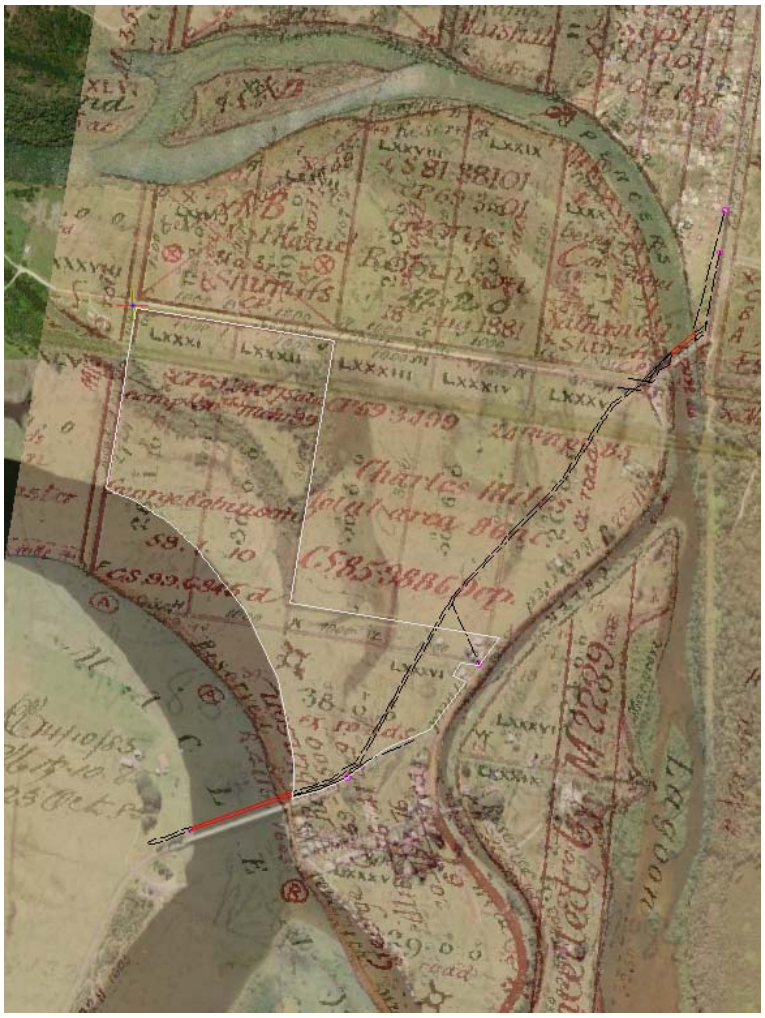


Figure 9: CP608, overlaid on aerial imagery.

2.2 Reservation by Exclusion of Land

Grants are issued with conditions and reservations. In the early 1800s our forefathers recognised the importance of maintaining access to waters ‘as a public need’. Consequently, some early grants, and later all grants where the land adjoined tidal waters, excluded from the grant by reservation to the Crown all of the land above and along the Mean High Water Mark (MHWM) boundary to a width of 30.48 metres or 100 feet. There have been errors in so much as these reservations have been included in grants where the adjoining waters were non-tidal and thereby invalidating the reservation.

The position of these reservations is defined as at the date of the grant. That means that the landward boundary remains fixed at a distance of 30.48 m landward of the MHWM at the date of the grant. The MHWM boundary of the reservations is subject to accretion and/or erosion where the doctrine of ‘accretion’ is satisfied in that the processes of change are natural, gradual and imperceptible. Consequently, subsequent to the grant the reservation may alter in width as the MHWM boundary ambulates.

The quality of surveys at the time of old grants is frequently poor or possibly more often not even on public record. The practice that has been encouraged is to adopt as a pseudo ‘grant’ survey, the first available survey that is often the survey accompanying a primary application.

2.2.1 Hunter River at Raymond Terrace

Some years ago a landowner had made a purchase of a rural parcel of land with a frontage to the Williams River, a tidal river near the confluence of the Hunter River. Figure 10 shows the property partly surrounded by water boundaries.

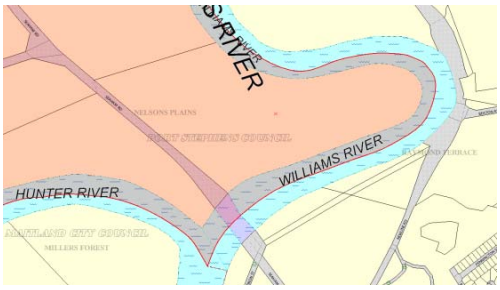


Figure 10: Lot 1 DP136263.

This landowner had engaged the services of a solicitor to negotiate the many hurdles that may be revealed during the conveyancing process. Prior to the purchase, a Crown Lands account search was obtained. Unfortunately, this search is only for advice of any Crown authorisations or tenures that are applicable to the land and does not include advice as to titular matters. The land was purchased and the owner then proceeded to develop the land, until it was revealed that the development would include part of the land excluded from the grant by way of reservation to the Crown.

The solicitor was subsequently found to have been unaware of the 30.48 m wide reservation of land along the MHWM boundary. The solicitor had relied upon old conveyances that did not include the reservation and did not recognise the importance of the second schedule notification of the latest title in that it includes conditions and reservations of the Crown grant. Figure 11 is part of the grant showing the description of the land bound by the Williams and Hunter Rivers. The second part shows the reservation of all land within 100 feet of the HWM on the sea coast or on any creek, harbour and inlet.

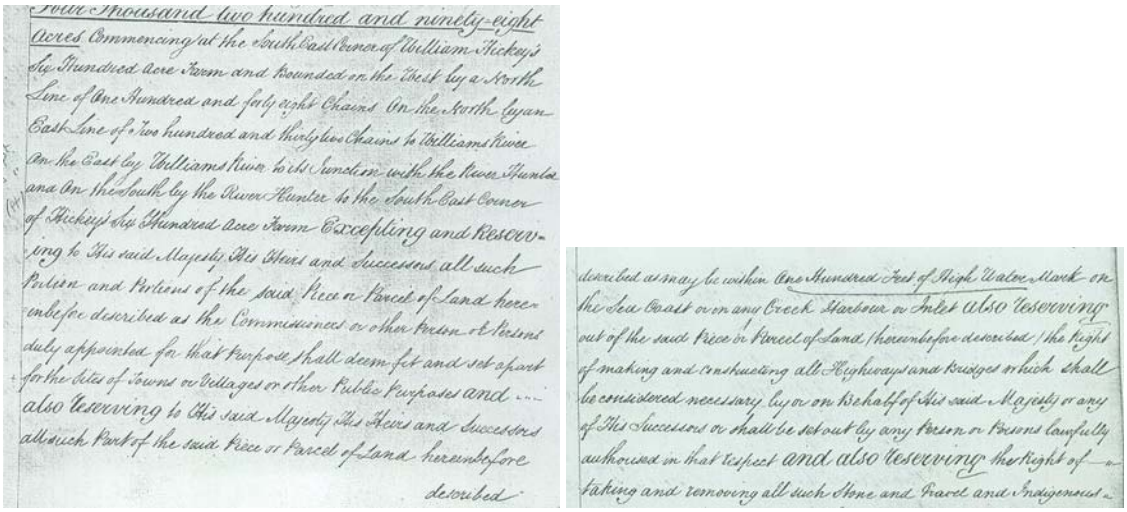
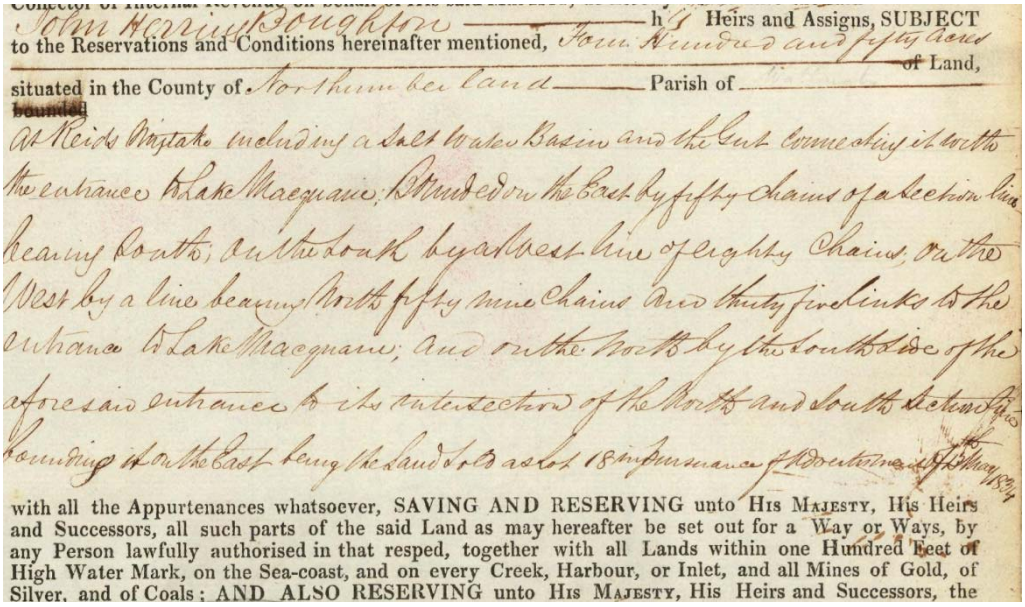


Figure 11: Extract from Crown grant.

2.2.2 Black Neds Bay, Swansea

The original grant of land to John Herring Broughton was for 2000 acres, being portion 45 in

the Parish of Wallarah and County of Northumberland, excluded land within 30.48 m of the MHWM of Black Neds Bay even though the grant included the waters of Black Neds Bay. Figure 12 is an extract of the grant showing the description of the land including a salt water basin and the gut connecting it with the entrance to Lake Macquarie. Without a diagram it is very difficult to interpret the extent of the grant. The grant continues with the reservations including the land within 100 feet of the HWM.



John Henry Boughton ——— h[illegible] Heirs and Assigns, SUBJECT to the Reservations and Conditions hereinafter mentioned, Four Hundred and fifty Acres of Land, situated in the County of Northumberland ——— Parish of ——— bounded as Reids Mistake including a Salt Water Basin and the Gut connecting it with the entrance to Lake Macquarie; Bounded on the East by fifty Chains of a Section line bearing South; on the South by a Base line of eighty Chains; on the West by a line bearing North fifty nine Chains and thirty five Links to the entrance to Lake Macquarie; and on the North by the South side of the aforesaid entrance to its intersection of the North and South Boundary Lines bounding it on the East being the Land sold as Lot 18 in pursuance of Proclamation of 15th May 1834

with all the Appurtenances whatsoever, SAVING AND RESERVING unto His Majesty, His Heirs and Successors, all such parts of the said Land as may hereafter be set out for a Way or Ways, by any Person lawfully authorised in that respect, together with all Lands within one Hundred Feet of High Water Mark, on the Sea-coast, and on every Creek, Harbour, or Inlet, and all Mines of Gold, of Silver, and of Coals; AND ALSO RESERVING unto His Majesty, His Heirs and Successors, the

Figure 12: Extract from Crown grant.

Figure 13a is provided to assist with the location of the grant, particularly in relation to CP H96~663, i.e. the plan of portion 45 (Figure 13b).

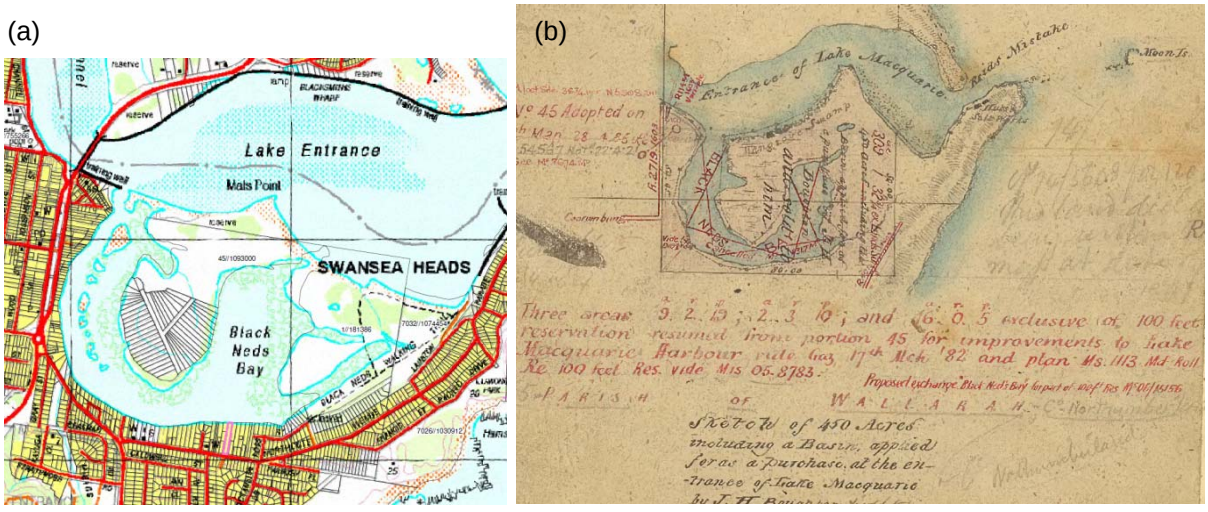


Figure 13: (a) Map of Black Neds Bay and (b) part of Crown plan H96.

Figure 14 is a notification added to the Crown plan that is very explicit in relation to the land 3 feet wide below the HWM. The notation refers also to CP Ms1317Md~3070 and indicates that some land has been surrendered to the Crown in accordance with Ms1317. The cadastral integrity for some properties abutting Black Neds Bay has been questioned due to the uncertainty of the ownership status and title of a strip of land 3 feet wide below the MHWM that may have been excised from the Crown estate.

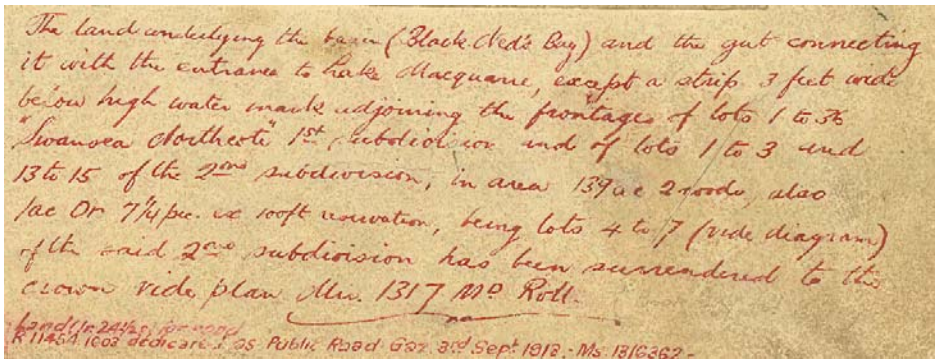


Figure 14: Notation on Crown plan H96.

The investigations found:

- Ms1317 represents an investigation and MHWM redefinition survey and is considered to form the basis for survey definitions and extent of titles for the area.
- A strip of land 3 feet wide as shown on Ms1317 affects some properties.
- Crown ownership of the bed of Black Neds Bay, excepting a strip 3 feet wide below the MHWM by Ms1317.
- A right existed for certain adjoining landowners to reclaim beyond the MHWM to a line 3 feet easterly of the MHWM as defined by Ms1317.

The following outcomes resulted from deliberations between Crown Lands and LPI:

1. Those properties where the right to reclaim has been exercised with longstanding effect are to be considered for title purposes, to be bound by right line(s) being the easterly limit of the 3-foot strip as shown by Ms1317 or occupied part thereof.
2. Those properties where the right to reclaim was not put into effect or was effected in relatively recent time are to be considered for title purposes to be bound by the MHWM as shown by Ms1317.
3. The right to reclaim has expired due to the passage of time.
4. Where the right to reclaim has expired including any part of the 3-foot strip not utilised for reclamation, the land being part of the bed of Black Neds Bay is Crown land.

The Australian Joint Stock Bank sought to develop parts of the grant and negotiated to exchange the 30.48 m reservation with the bed of Black Neds Bay. Following the land exchange of the tidal waters of Black Neds Bay for the 100-foot reserve (gazette 19 January 1910), titles were issued over the land containing the 100-foot reserve so that properties fronting Bowman Street could be extended to the bay. Those titles were issued to the MHW and dimensions mentioned in titles correspond to those found on Ms1317. The outcome was that the 30.48 m reservation was added to the alienated land and the bed of Back Neds Bay (excluding a 3-foot strip of land below MHWM fronting part of Black Neds Bay) was returned to the Crown. Prior to the survey for Ms1317 conveyances between the Australian Joint Stock Bank and the adjacent land owners included grants to those owners of a right to reclaim out to the eastern limit of the 3-foot strip. After considerable investigation and consideration together with senior survey, legal and title staff of LPI, it was determined that the strip of land was a right to claim land that was occupied at that time. Where the land was not occupied, the Crown owned the bed of the bay to the MHWM.

Figure 15 is part of Ms1317 and shows the survey for the 3-foot strip along the north-western part of Black Neds Bay. Diagram A as shown in the plan provides much needed clarification of the survey detail. As evident, this plan is in a very poor state of repair and the standard

monochrome image view is less than adequate. The plan heading as shown in Figure 16 also provides details of the actions proposed and completed with respect to affected lands.

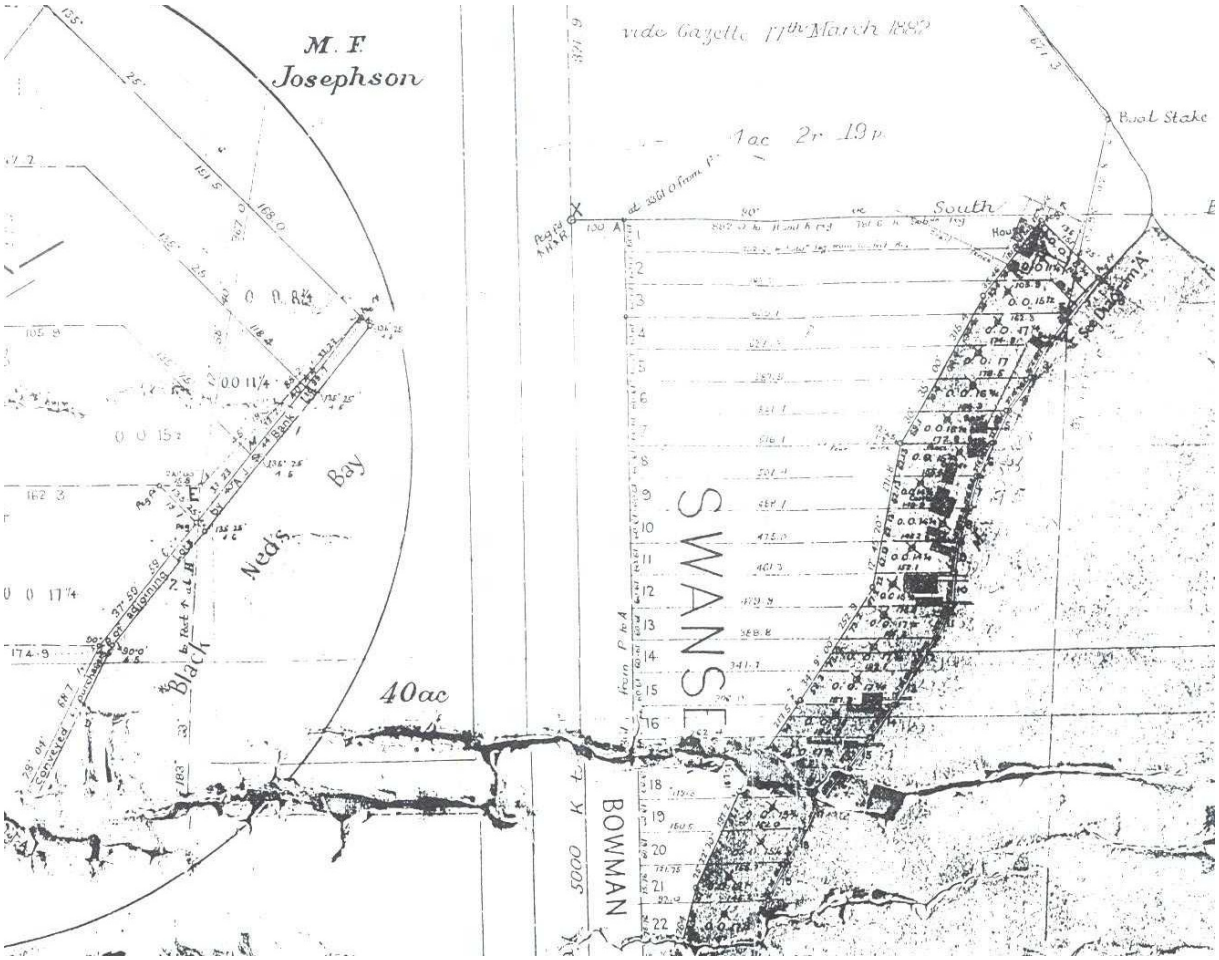


Figure 15: Part of Crown plan Ms1317.

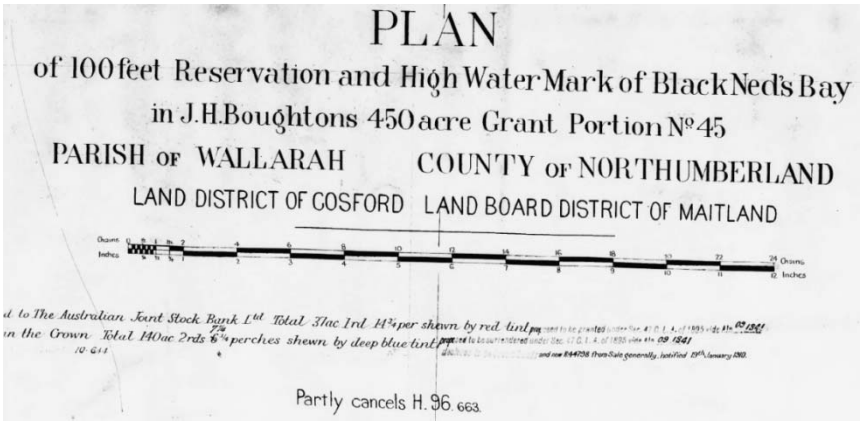

PLAN
of 100 feet Reservation and High Water Mark of Black Ned's Bay
in J.H. Boughtons 450 acre Grant Portion Nº 45
PARISH OF WALLARAH COUNTY OF NORTHUMBERLAND
LAND DISTRICT OF COSFORD LAND BOARD DISTRICT OF MAITLAND
Partly cancels H. 96 663.

Figure 16: Plan Heading of Ms1317.

The land underlying Black Ned's Bay except a strip '3 feet' wide below the MHWM adjoining lots 1 to 36 in Northcote's First Subdivision and some lots of the second subdivision were surrendered to the Crown vide plan Ms1317. This plan of survey was completed in 1908, showing the 100-foot reservation and the HWM of Black Ned's Bay in portion 45.

Despite the land in the original grant being old system title, the exchanged land comprising the 100-foot reservation and 3-foot strip are Torrens title by virtue of the survey of 1908. Based on the information available, the author is of the opinion that the position of the MHWM as shown by CP Ms1317 MdR supersedes that indicated by DP977409. This plan is thought to be a sale or proposed subdivision plan that preceded Ms1317.

Due to the physical changes such as seawalls that are now constructed along the foreshore of the bay and a lack of photographic or other information depicting the processes of change, the boundary is considered to be in the position as shown by Ms1317 Md. This assertion may be complicated by the fact that the 3-foot strip below the MHWM was also conveyed to the adjoining land owner(s) where the right to purchase was satisfied. Legal opinion at LPI is that the requirement to satisfy the right was the construction of seawalls on this land within a defined period of time. Where the right was not satisfied, the land reverted to Crown ownership as part of the bed of Black Neds Bay. The 'seaward' position of the strip would have been fixed at the date of 'transfer' just as the landward strip of a reserve is fixed at the date of grant of land including such reservation.

Are the lands that include the 3-foot strip bound by a right line boundary in a position 3 feet below the MHWM? As a consequence of the right applying to the construction of a structure, the author believes this is the case and as such the land is not affected by accretion or erosion. This boundary by virtue of how it is defined is a right line boundary, thus the ambulatory MHWM cannot move beyond it.

2.3 Adverse Possession Against Crown

At a first look, section 170 of the Crown Lands Act 1989 (NSW Legislation, 2015) appears to preclude adverse possession against the Crown:

Section 170: Limitation on acquisition of title by possession against the Crown

(1) Title to any land of the Crown which has been:

(a) set out as a road under an Act or in connection with the alienation of land of the Crown,

(b) left between Crown grants for use as a road or driftway,

(c) dedicated under the Crown Lands Acts or any other Act for a public purpose, or

(d) reserved in a Crown grant or recorded in a folio of the Register as being reserved to the Crown, may not, on the basis of adverse possession, be asserted or established against the Crown or any persons holding the land in trust for a public purpose.

(2) Title to any land of the Crown reserved under the Crown Lands Acts or any other Act for a public purpose (not being land referred to in subsection (1)) may not, on the basis of adverse possession, be asserted or established against the Crown or any persons holding the land in trust for that public purpose.

(3) Title to any other Crown land may not, on the basis of adverse possession, be asserted or established against the Crown.

(4) This section does not affect the operation of section 46B of the Real Property Act 1900.

(5) This section does not affect the title to any land:

(a) which has, in any proceedings to which the Crown has been a party, been held not to be land of the Crown:

(i) before the date of assent to the Crown Lands (Amendment) Act 1931 in the case of land referred to in subsection (1),

(ii) before the date of assent to the Crown Lands (Amendment) Act 1977 in the case of land referred to in subsection (2), or

(iii) before the date of commencement of Schedule 4 (11) to the Crown Lands (Miscellaneous Provisions) Amendment Act 1982 in the case of land referred to in subsection (3), or

(b) which the Crown was debarred from recovering by the operation of the Crown Suits Act 1769 or the Limitation Act 1969:

(i) at the date of assent to the Crown Lands (Amendment) Act 1931 in the case of land referred to in subsection (1),

(ii) at the date of assent to the Crown Lands (Amendment) Act 1977 in the case of land referred to in subsection (2), or

(iii) at the date of commencement of Schedule 4 (11) to the Crown Lands (Miscellaneous Provisions) Amendment Act 1982 in the case of land referred to in subsection (3).

A full reading of this section shows that adverse possession against the Crown is possible, and Hallmann (2007) gives a very good presentation on this legislation with section 170(5) in particular being clarified (chapter 9.46):

Section 170 of the Crown Lands Act 1989 (formerly section 235B of the Crown Lands Consolidation Act 1913) provides that title cannot be established by adverse possession in respect of:

(1) land of the Crown which has been set out as a road, or left between Crown grants for use as a road or driftway (i.e. a travelling stock route or similar way), or dedicated under any Act for a public purpose, or reserved to the Crown in a grant or in a folio of the Register;

(2) land of the Crown reserved under the Crown Lands Act or any other Act for a public purpose (not being land mentioned in (1));

(3) any other Crown land.

The abovementioned provisions do not apply, however, to defeat a claim where the adverse possession of:

- *land referred to in (1) had matured before 2 October 1931,*
- *land referred to in (2) had matured before 31 October 1977,*
- *land referred to in (3) had matured before 19 July 1982.*

Chapter 9.47 continues to complete the picture regarding need for action to occur before the elapse of time:

Prior to 1971, a person out of possession and entitled to recover possession of freehold land, who failed to take action, was barred from recovery after the lapse of 20 years from the time when the right of action first began. The limitation provisions were adopted from a contemporary English Act and took effect from 1 August 1837. Since the commencement of the Limitation Act 1969, the period of 20 years has been reduced to 12 years for the benefit of possessory titles running from 1 January 1971.

The limitation period begins to run when a person goes into adverse possession of land and conversely, at the same time, a right accrues to the true owner to bring an action for recovery of the land.

2.3.1 30.48 m (100 ft) Reservation

With respect to a 100-foot reservation used as part of a grazing property for over 60 years maturing prior to October 1931, advice received from legal services is that possession adverse to the title landowner has to be a barrier to re-occupation. As such the land must be fenced or otherwise used to bar access to the land, grazing itself is not sufficient and where there is no fencing along the waterway, the land may be re-accessed.

2.3.2 Survey of Crown Land at Sedgefield

The survey represented by the Plan of Subdivision of part lot 7300 DP1127501 – Possession adverse to the Crown is required for the purposes of the transfer of title for land granted under section 36 of the Aboriginal Land Rights Act 1983 (ALRA). Figure 17 shows lot 7300 as unidentified land in that the title is a limited folio of the Torrens register. The survey requires lot 7300 to be subdivided to provide for the transfer of the land granted under the ALRA and that the title is delimited.

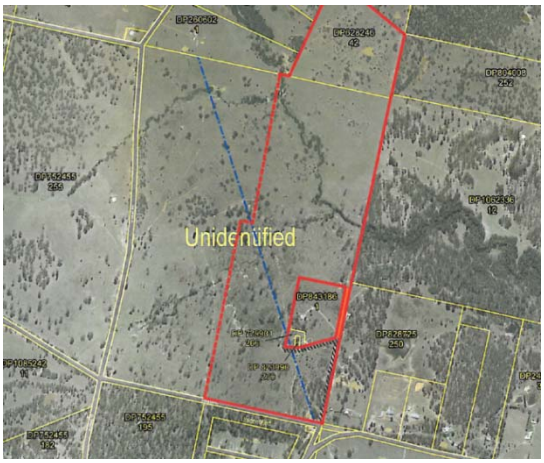


Figure 17: Unsurveyed Crown land.

In the process of survey it was found that existing fencing along the northern boundary common to lots 1 and 4 in DP260602 is located within the subject lot 7300. The very old fence is on the line of the remains of a very much older post and rail fence and commences in the east close to the boundary and diverges westward such that it is about 1.5 m south at the intersection of lots 1 and 4 and then continues to the western extent of lot 1 where it is about 3.7 m south of the boundary. CP(road) R6115$_{\sim 1603}$ dated 1898 (Figure 18) shows the line of an old post and rail fence in a similar position to that now found remaining. The plan was of a road opened under the Crown Lands Act of 1884, the road was through portion 219 Parish of Darlington, County of Durham that was reserved (Commonage) Crown land as depicted in CP247$_{\sim 1557}$ dated about 1863. This plan was not used for titling purposes.

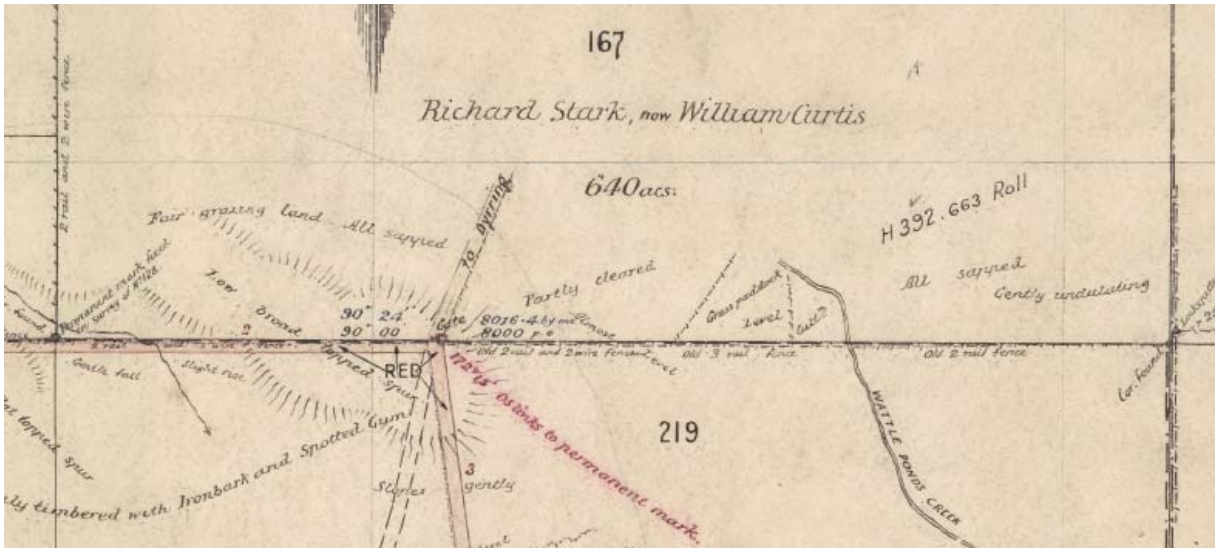


Figure 18: Part of Crown plan R6115.

The evidence of occupation for more than 117 years upon part of the subject land is considered to limit the extent of land available to lot 7300. Section 170 of the Crown Lands Act 1989 refers to limits on acquisition of title by possession against the Crown. On the basis of this and prior legislation and with reference to the highly respected texts of Butt (2010) and Hallmann (2007), the author is of the opinion that the Crown is barred from re-asserting any ownership over land that was adversely possessed where that possession matured prior to that date set down by the Statute of Limitations.

The subject land is Crown reserve and is captured by Sec. 170 (2) and (5)(b)(ii), the date of assent being 31 October 1977. As such the occupation adverse to the Crown must have commenced prior to October 1917. If the occupation can be shown to have been uninterrupted for 60 years, then the Crown's title will have been extinguished for that part of the land.

Section 170 (1) (d) is not applicable in so much as while lot 7300 DP1127501 has since May 2008 been recorded in a folio of the Register as land reserved to the Crown, the land was not part of a folio at the time of dispossession on or prior to 31 October 1977. Folio identifier 7300/1127501 as a limited title is subject to existing rights of occupation as may define the extent of the title.

The boundaries that have been surveyed are to the limit of the Crown's title being the old occupation along the northern boundary of the land. The unsurveyed land north of the occupation has not been surveyed. It should be noted that the landowner for lot 42 in DP628246 is the Local Aboriginal Land Council (LALC) and they will be the owners of the eastern part of the subject land (lot 732), as such there will remain a strip of land between lot 42 and lot 732 that is no longer Crown land. This land may be added to LALC's holdings following a successful possessory application at some future date.

2.4 Closer Settlement

The Closer Settlement legislation was implemented to assist soldiers returning from the World Wars to purchase holdings for farming purposes. In short, alienated lands were resumed by the Crown and set aside for new grants of lands for closer settlement holdings.

2.4.1 Hunter and Goulburn Rivers near Denman

This case was brought to the author's attention in the early 1990s with the aim to resolve a situation where applications were pending for sand extraction within part of the river beds. The problem relates to the apparent overlap of titles to parcels of land abutting the confluence of the Goulburn and Hunter Rivers near Denman.

Figure 19 shows the cadastre by Digital Cadastral Database (DCDB) with respect to recent aerial imagery. When the lands were originally granted in the 1800s, some grants abutted non-tidal rivers and included presumptive title ad medium filum aquae. This presumption is due to the lands having been alienated prior to the general reservation (R52788) of the beds of all rivers and streams in the eastern and central divisions on 3 May 1918.

Figure 19: Aerial image showing cadastre by DCDB.

Under the Closer Settlement Acts, the Crown was able to resume private lands for the purpose of using the land as settlement farms or other settlement tenures. Where the lands were subsequently re-granted, they were subject to a new survey. Additionally, for lands that abutted non-tidal rivers and creeks where the grant was prior to the notification of R52788 the title continued to include the presumptive title rights, however where R52788 had been notified then the Crown retained ownership of the part of the river bed.

In order to achieve a resolution for the problem, it was necessary to compile the records of plans and titles and collate that information with the physical land attributes. Both Crown Lands and LPI were required to investigate the matter. Figures 20-22 are extracts from parish maps showing the portions in relation to the rivers. Field survey work was completed to prepare a sketch plan showing the parcels of land in the positions of the river banks at differing periods of time. Figure 23 is part of the survey showing the bank positions by plan records using field survey to connect the old surveys.

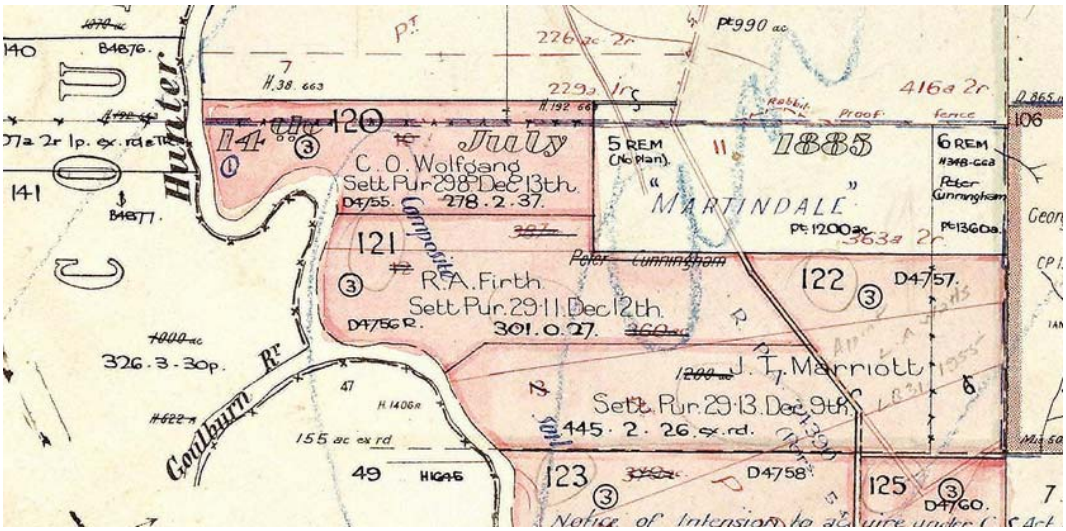


Figure 20: Extract from Parish Map of Althorpe 1921.

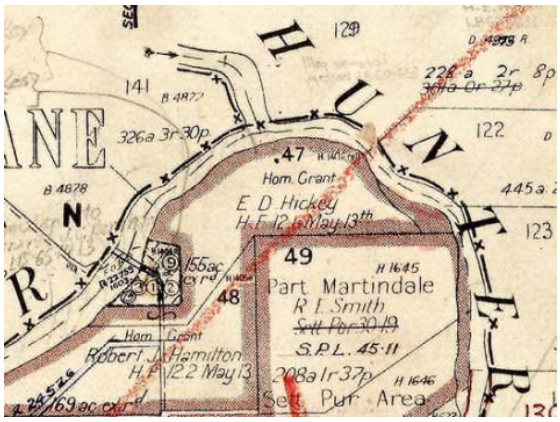


Figure 21: Extract from Parish map of Bureen 1938.

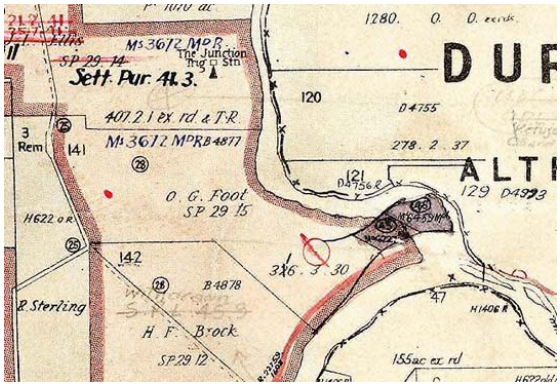


Figure 22: Extract from Parish map of Denman 1937.

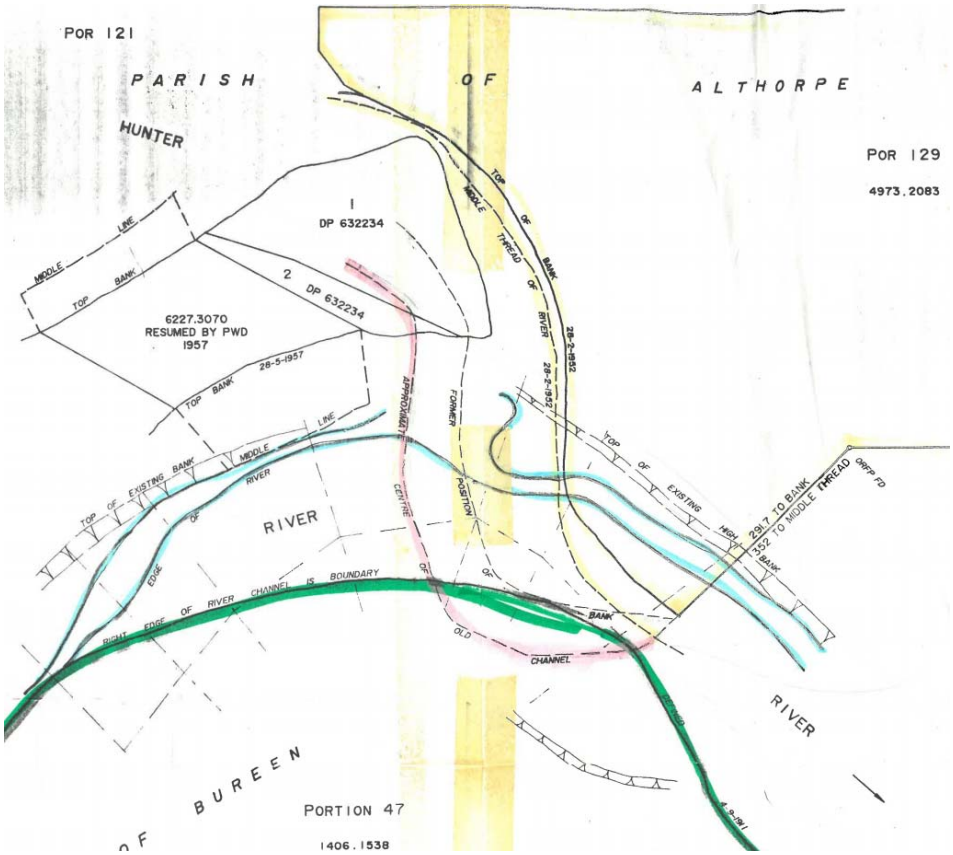


Figure 23: Plan showing river bank positions.

Investigations revealed that portion 121 in the Parish of Althorpe, County of Durham, was part of an area of land that was included in the 'Martindale' settlement purchase area that was notified on 15 November 1929. Under the Closer Settlement Act 1907, land granted was considered perpetual leasehold, i.e. it was effectively freehold land. Portions 121 and 122 were initially surveyed in July 1929 as CPs D4756$_{\sim 2083}$ and D4757$_{\sim 2083}$, then portion 121 was resurveyed 1952 as CP D4973$_{\sim 2083}$ to create a portion 129 with residue part being the remains of portion 121.

Portion 47 in the Parish of Bureen, County of Hunter was a water reserve prior to 1911. Portion 47 was initially surveyed in 1911 as CP H1406$_{\sim 1533}$. Portions 140 and 141 in the Parish of Denman, County of Brisbane were also surveyed in July 1929 as CP B4877$_{\sim 2096}$ and 4878$_{\sim 2096}$. A Closer Settlement farm grant was issued over portion 47 in May 1912. Title to the new grant of portion 47 included the presumption of lands ad medium filum as it was prior to R52788.

In 1929 when the other parcels in the Parish of Althorpe (portion 121, 122 and 129) and Denman (portions 140 and 141) were surveyed for closer settlement purposes, the general reservation of 1923 was in place. As such, the grant of these lands after 1923 excluded any title ad medium filum. In 1929, when those portions were surveyed, the positions of the banks of the Goulburn and Hunter Rivers had been significantly affected by floods. Substantial changes in the positions in the river banks had been recorded by both survey plans and aerial photography. The surveys of the portions failed to recognise the historical flood effects on the positions of the river banks and, furthermore, failed to recognise the existing title to portion 47.

With the aid of historical aerial photographs and plans of early surveys, the processes of title issue and river movement were given some understanding. It was determined that the title surveys for most properties were reliable and in positions that could not be disputed. However, with regard to parts of portions 121 and 129 at least, it was considered that the position of the river adopted as defining its bank may require amendment.

With the advent of modern survey equipment and office systems including Geographic Information Systems (GIS), it is not difficult to correlate surveys with those on record and consequently existing land titles. Of course it goes without saying that the DCDB should not be used for anything more than a rough guide to the cadastral layout. Back in the early 1900s, when these surveys were being prepared, the processes to correlate surveys were to do more field measurement including lands on both sides of the river. It is apparent that mistakes were made both by the field surveyors and by the government agencies responsible for the surveys and titles.

The first survey of portion 47 in 1912 had a virtual 'greenfield' site as the river was within the settlement area and as such any prior boundary the river may have formed was nullified. The surveyor was able to measure the land to the bank as defined by the regulations in place at the time of the survey. The subsequent surveys were on the opposite side of the river. The surveyor may possibly have believed that the river formed an ambulatory boundary and the bank at that time represented the boundary with portion 47 limited by the changed position of the opposite bank. Alternatively, the surveyor may have just surveyed to the bank in the same manner as was done for portion 47 in 1912. As the river position has changed significantly by the processes of floods, LPI had advised that the rivers were considered to be volatile and the doctrine of accretion did not apply. While the river had changed its position, the boundary

remained as it was prior to the changes subsequent to 1912. Accordingly, the titles by surveys as depicted overlap.

It was believed that both Crown Lands and LPI have responsibility for the review even though the lands are now freehold. The reasons being that the Closer Settlement Act was administered by the Department of Lands and then Crown Lands even though the surveys of the parcels were undertaken by private surveyors. LPI, in its operation, is required to issue indefeasible titles. The situation of overlapping titles should not have occurred.

3 WATER BOUNDARIES

3.1 Tidal or Non-Tidal Waters

As already mentioned, the nature of the water boundary fronting land is always the same as it was at the time the land was granted.

3.1.1 Williams River at Clarence Town

The Williams River is a tidal river to a location just upstream of Clarence Town. The Seaham Weir was constructed to dam the waters upstream of the weir to supplement the water storage for the Lower Hunter. As a consequence of this construction, the water level behind the weir rose and tidal influence past the weir ceased. The boundaries of lands along the river from the weir to the prior tidal limit were fixed in their positions immediately preceding the completion of the weir.

3.1.2 Etymalong Creek

Investigations have been undertaken since the 1970s to determine the status of the bed of Ettalong Creek (formerly known as Etymalong Creek). Parish maps show the creek as flowing from Etymalong Swamp.

Figure 24 shows portion 52 in the Parish of Patonga, County of Northumberland and Gosford Local Government Area (LGA); it is shown to be bound on part of the west, north and east by the creek. This portion so created, was alienated by way of sale on 7 February 1873, the grant is recorded as Certificate of Title Vol. 215 Fol. 167. The date of alienation was prior to the notification for the general reservation (R56146) from sale or lease of all beds of rivers and their tributaries within the eastern and central divisions of the state on 11 May 1923. It was also prior to the earlier general reservation (R52788) of 3 May 1918 that did not include the beds of lakes, estuaries and lagoons.

Etymalong Creek is depicted by CP $N33_{\sim 2111}$ that was completed in August 1872 (Figure 25). This plan clearly shows sand as a probable bar to surface water flow to the ocean. Despite the name indicating a creek, it was most likely closed from the sea and as such a lagoon. This is also the same by CP $3434_{\sim 2111}$ being the survey for the Crown reserve east of portion 52. Old files report that the creek had been deemed non-tidal and that the adjoining landholders enjoy presumptive title to the middle thread of the creek.

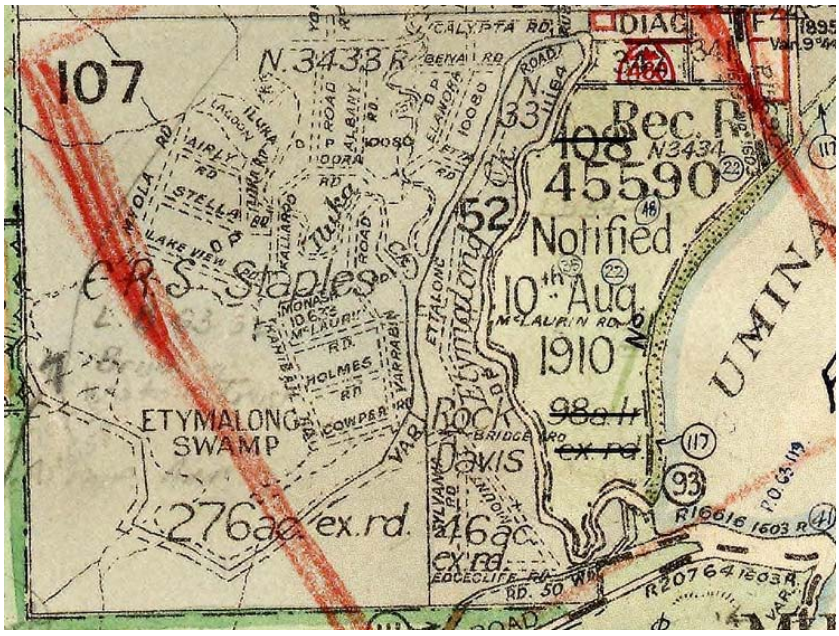


Figure 24: Extract from Parish Map of Patonga, edition 12, 1953.

Figure 25: Part of Crown plan N33.

An application was received for the approval the water boundary as shown on a plan of redefinition of land being a lot within a subdivision of part of portion 52. The proposal was that the title extends to the centreline of the creek. This is contrary to the notation on the current title plan dated January 1991, which stated that the boundary is the MHWM. An earlier subdivision as DP11184 dated August 1919 (Figure 26) has no such notation and shows the creek as the boundary together with an arrow to indicate the direction of flow towards the ocean, this being the convention for non-tidal streams.

With the aid of historic photographs, it is apparent that there is an obvious difference between the position of the present creek and that defined by prior survey. There is no doubt that the creek has moved north and west by considerable amounts. Any change eastward is not as easy to assess due to the sandy beach between the subject property and Broken Bay.

The Doctrine of Accretion and Erosion holds the same for non-tidal streams as it does for the seashore and tidal inlets. At the time of the investigation the main issue was whether the change has been slow, imperceptible and by natural means. Now, however, some 15 years later, the main issue would appear to be whether the creek was in fact a lagoon and as such the extent of all adjoining titles is the bank and no part of the bed attached to those lands.

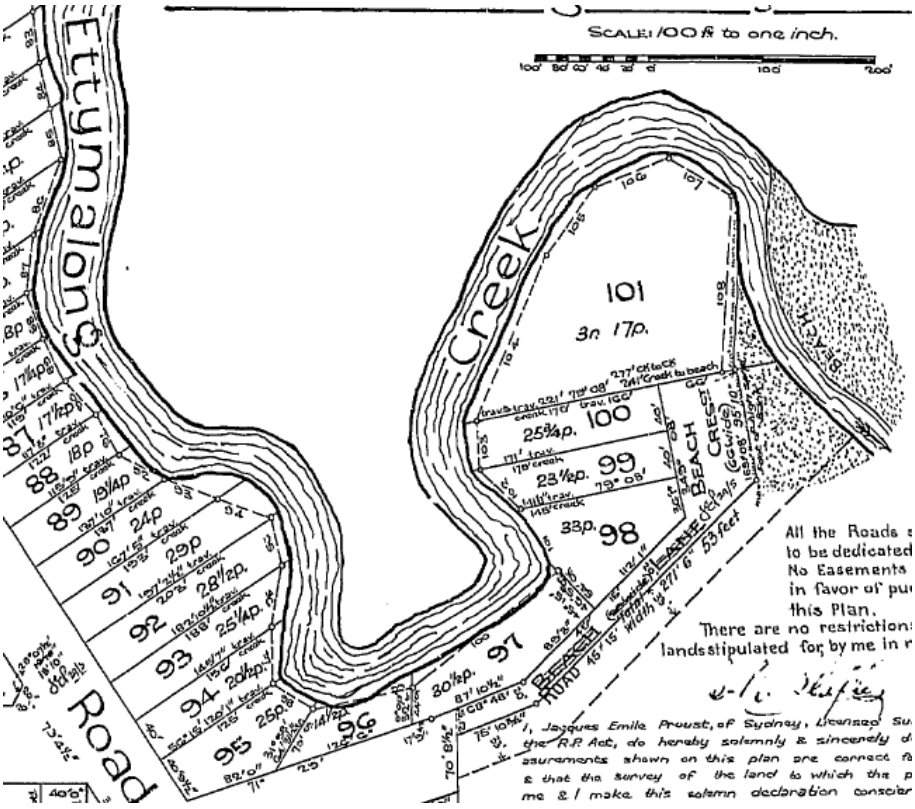


Figure 26: Part of DP11184.

3.2 Gazetted Reservation of Beds of Waters

3.2.1 Reservations of Crown Land

Crown reserves are areas of land set aside for the community for a wide range of public purposes including environmental and heritage protection, recreation, open space, community, business and other purposes. Under the provisions of the various Crown Lands legislations Crown land has been and can be reserved for public purposes. Specifically in relation to the reservation of the beds of waters, including both tidal and non-tidal, a number of general reservations have been notified by publication in the NSW government gazette.

The first of these was the General Reservation of 17 April 1862. In pursuance of the provisions of the Crown Lands Alienation Act 1861, the land specified in the schedule until surveyed was reserved for the preservation of water supply or other purpose. The schedule was in two parts, the first part listing land in a number of localities and the second, headed General, being "*All Islands within the Colony of New South Wales, with the exception of Palmer's, Micalo, and Woodford Islands, in the Clarence River; Rawdon Island, in the Hastings River; and Oxley, Mitchell, Mamboo, Cabbagetree, and Jones' Islands in the Manning River.*"

By the General Reservation on 3 May 1918, Reserve (R52788) from Sale or Lease generally made in pursuance of the provisions of the Crown Lands Consolidation Act 1913, the application of the *ad medium filum aquae* rule in New South Wales was considerably restricted (Lands, 1989). The notification is: "*All the beds of rivers and their tributaries in the Eastern and Central Divisions of the State, inclusive of all shingle, gravel, and sand beds and alluvium thereon; and inclusive of all Crown lands between the banks of such rivers or their*

tributaries, together with all Crown lands between such river banks and alienated or granted land bordering thereon."

Similarly on 11 May 1923, Reserve (R56146) from Sale or Lease generally extended the reservation by R52788 as: "*All the beds of rivers, their tributaries and ana-branches in the Eastern and Central Divisions of the State, inclusive of all shingle, gravel, sand-bed, and alluvium thereon or adjacent thereto, and inclusive of all Crown Land between the banks of such rivers or their tributaries or ana-branches, together with all Crown Lands between such banks and alienated or granted land bordering thereon; also embracing all beds of lakes, estuaries, and lagoons; 100 feet reservation, wherever situated not reserved from sale for a public purpose or held under special lease; also inclusive of all islands or parts of islands in the Divisions referred to, and those situate in harbours, inlets, bays, ports, estuaries, or off the sea coast within territorial limits not alienated, held under special lease, or reserved from sale for a public purpose other than under the reservation from sale under general notice of 17th April, 1862, revoked this day.*"

Lastly, following the commencement of Commonwealth legislation Coastal Waters (State Powers) Act and Coastal Waters (State Titles) Act in 1980 where the coastal waters to the 3 nautical mile limit were vested in the states, on 3 February 2006 under the provisions of the Crown Lands Act 1989, Reserve (R1011268) for the purpose of future public requirements was notified. The notification was: "*All of the land covered by R56146 from sale or lease generally, notified 11 May 1923, together with all foreshore land below the mean high water mark of New South Wales extending to the territorial limit of 3 nautical miles from the low water mark of the coast." Neither R56146 nor any existing reserve for a public purpose that is affected by this notification is revoked by this notification.*" This notification was required to cover the coastal water from the HWM to the territorial limit.

On the basis that the government does not as a rule make retrospective legislation, it has been considered by practitioners of land law that the above reservations did not apply to land that had previously been alienated, i.e. the government has no right to take without lawful resumption land that has already been granted. As such the comment that the *ad medium filum* rule was severely restricted (Lands, 1989) is correct, and the alternative that the rule ceased to exist and all lands previously claimed as presumptive title reverted to the Crown would make no sense. Unfortunately, there is a perception among some that the general notifications do actually mean *all* and not just the unalienated lands (beds) that remain at the time. In the last year or two, a notice was received from a client, a leading international law firm, that the Crown Solicitor's Office (CSO) is now of the view that the wording for these reservations is that the Crown has ownership of all creeks, rivers etc., not just those remaining after the general reservation(s). Unfortunately, the CSO has similarly suffered a knowledge loss due to expert staff not being replaced with staff with similar knowledge but rather staff who can apply their skills more generally.

A specific reserve was notified on 19 April 1880 for Reserve R75 from Sale for Public Purposes. The notification was published as: "*County of Northumberland, Parishes of Wallarah, Morisset, Coorumbung, Awaba and Kahibah, area about 180 acres. The Crown Lands within 100 feet above high water mark along the shores of Lake Macquarie*." Despite this, the parish maps were noted for lands including those that were no longer Crown land. This fact, when recognised, lead to parts of this reserve being invalid and titles to those lands where the invalid reservation had been added were amended.

4 ROADS

Roads in legal terms imply a right of passage along a specified route regardless of whether it is in a defined position, is distinguishable from surrounding land and is actually capable of being traversed. It is the public right to use the land as a way rather than its physical nature that makes the land a road (Ibbotson, 1982). Until the commencement of the Roads Act 1993 there were many different Acts, some with overlaps in application to public roads. The Roads Act was intended to clarify the status of all public roads in the state.

The main issue regarding roads prior to the Roads Act 1993 is the knowledge of ownership or 'road status' and to do this it is necessary to investigate the parish or town map, plan and title records for details to establish whether the land has actually been created as road and if so, the type of road so created. There may also be events subsequent to the creation of a road that have extinguished the road or varied the status from that when created. In addition to the primary sources of Hallmann (2007) and Willis (2010), there are other documents that are highly regarded for the collation of road knowledge: Le Gay Brereton (1933), Ibbotson (1982), Searle (1989), Searle (1996) and Marshall (2006).

In essence, there are two main classes of roads: public and private. These include Crown, Council and private subdivision roads. The following outlines some road types together with a very general description. The abovementioned references provide the complete picture up to the respective date of each publication.

4.1 Reserved Crown Roads

In the conduct of surveying portions it was the practice to leave strips of land between adjoining portions for the purpose of access. The strips were usually shown on the plans as Crown Road and were termed 'Boundary Roads'; they were frequently impractical in the sense that they had no regard to the land and actual, practical access along these roads. These Crown roads have frequently been seen as unnecessary and have formed part of the road closure program.

Early Crown grants contained a reservation that as much land as was required for public ways could be excluded. Later following the expansion of the colony when tracks began to be used to access lands further from Sydney, surveys were prepared to define by measurement the road to be excluded from the relevant grants. Similarly, the grants were constructed to specify the road so excluded.

Roads on Crown land were legally classified as being either 'public' or 'non-public roads'. 'Public roads' were created over Crown land, but 'dedicated' as 'public roads'. The dedication was then gazetted. Since 1 July 1920, once the dedication was gazetted, ownership in the land upon which the 'public road' was created would vest in the relevant local government entity by virtue of the Local Government Act 1919.

'Non-public roads' were also created over Crown land, but these roads were not dedicated. These roads remained in the ownership of the Crown until an application to close the particular road was received and approved by the Minister administering the relevant road legislation (or his/her delegate). 'Non-public roads' were generally known in the land administration and surveying community as 'Crown roads'. Surveyors would use the term 'reserved roads' to depict non-public roads on plans of survey. Thus, prior to 1993, the terms

'non-public roads', 'Crown roads' and 'reserved roads' referred to the same thing, and these terms were used interchangeably by members of the land administration and surveying community.

Generally, survey plans show non-public roads as 'reserved roads'. After the passage of the Roads Act 1993, the term 'Crown road' was defined by this Act and non-public roads became known as 'Crown public roads'. The roads previously known as 'public roads' now became known in the surveying and land administration community as 'Council public roads' (a term which reflected the fact that these roads were owned by local government entities).

4.2 Designed Roads

When a (Crown) grant excluded (reserved) part of the land for road or public way, then that 'public' right of passage exists even though the location of the road may not have been surveyed. These non-surveyed roads are referred to as 'designed' roads and are depicted on parish maps and plans by parallel broken lines separated by the width of the road. This representation can be misleading as the symbol is the same as used for private subdivision roads. Figure 27 is an example of a 'designed' road as shown on a parish map. Figure 28 is an extract from a grant where a road is excluded from the granted land and has no survey information.

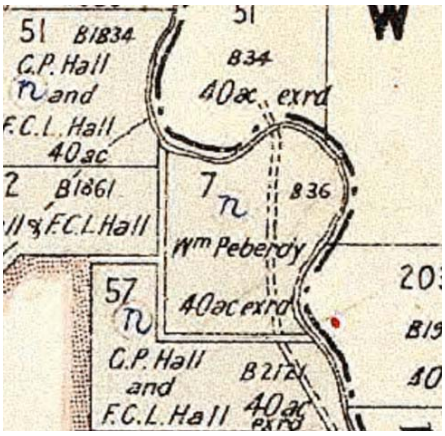


Figure 27: Example of symbol for designed road.

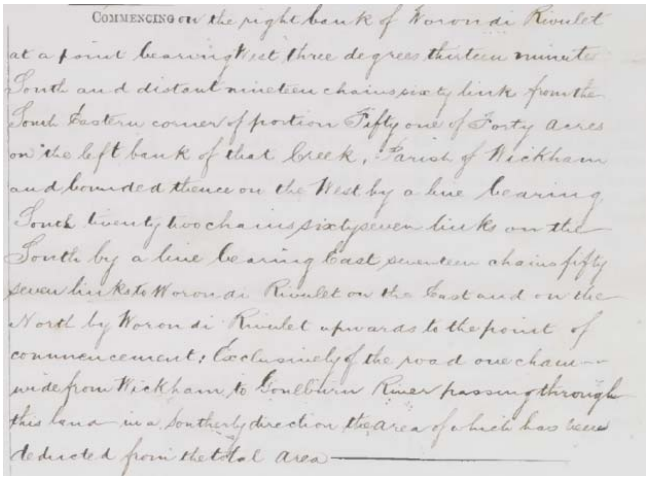

COMMENCING on the right bank of Woron di Rivulet at a point bearing West three degrees thirteen minutes South and distant nineteen chains sixty links from the South Eastern corner of portion Fifty one of Forty acres on the left bank of that Creek, Parish of Wickham and bounded thence on the West by a line bearing South twenty two chains sixty seven links on the South by a line bearing East seventeen chains fifty seven links to Woron di Rivulet on the East and on the North by Woron di Rivulet upwards to the point of commencement; Exclusively of the road one chain wide from Wickham to Goulburn River passing through this land in a Southerly direction the area of which has been deducted from the total area

Figure 28: Extract of grant with an unsurveyed road.

4.3 Act 4 William IV or Confirmed Roads

The first Act to authorise the government to make, alter and improve the roads through private lands in the colony was the Act 4 William IV No. 11, which commenced in August 1833. A 3-step process was required to dedicate such a road as a public road:

1. (Preliminary notification on): Notification of intention to open a line of road.
2. (Confirmation on): After consideration of any objections lodged, notification confirming or altering, the line was gazetted. Construction was then carried out and, if required, compensation was paid.
3. (Proclaimed on): Proclamation that the road was open for public use.

The plan of survey was noted to show each step completed together with reference to the gazette notification for each. These roads were also known as confirmed roads. Where the three steps were not completed, the road was not legal. With the exception of certain arterial roads denoted under the Act as 'public roads' that were maintained at public expense, public ways were called 'parish roads' and were maintained from rates levied on the adjoining owners.

With the further development of the colony, private lands were subdivided and the road network was amplified as required. Private subdivision roads are rarely shown on parish maps and if they are the symbol is parallel broken (dashed) lines separated by the width of the road. From the commencement of the Local Government Act 1919 on 1 January 1920, the common law position regarding the ownership of the land comprising a road changed for public roads excluding Crown roads in that it then vested in the ownership of the council for the area. Private subdivision roads created before this date would then become council public roads; however there are circumstances where debate concerning the transfer to council continues between interested parties. The debate generally relates to the evidence of expenditure of public money for the road.

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REFERENCES

Butt P. (2010) *Land law* (6th edition), Thomson Reuters, Sydney.

DPI-Lands (2013) Office Practice Guidelines, https://sites.google.com/a/crownland.nsw.gov.au/opgs/?pli=1 (accessed Dec 2015).

Hallmann F. (2007) *Legal aspects of boundary surveying as apply in New South Wales* (2nd edition), The Institution of Surveyors NSW, Australia.

Ibbotson R.W. (1982) Roads, *Proceedings of a meeting of the Central Western Group of the Institution of Surveyors NSW Inc.*, Wellington, Australia, 27 Feb 1982.

Lands (1989) Water as a boundary, Department of Lands, Feb 1989.

Le Gay Brereton V. (1933) Public roads in New South Wales, *Australian Surveyor*, 4(8), 453-476.

LPI (2015a) Registrar General's Directions, http://rgdirections.lpi.nsw.gov.au/ (accessed Dec 2015).

LPI (2015b) Spatial Information Exchange – SIX, https://six.nsw.gov.au/wps/portal (accessed Dec 2015).

Marshall I. (2006) Public road or highway. Act 4 William IV No. 11 1833 to 1897. A retrospective, Institution of Surveyors NSW Inc., 27 Aug 2006.

MHL (2006) Department of Natural Resources: Survey of Tidal Limits and Mangrove Limits in NSW Estuaries 1996 to 2005 (Report No MHL1286), NSW Department of Commerce Manly Hydraulic Laboratory, April 2006.

NSW Legislation (2015) Crown Lands Act 1989 No 6, http://www.legislation.nsw.gov.au/maintop/view/inforce/act+6+1989+cd+0+N (accessed Dec 2015).

Searle C. (1989) Summary of case law on Crown roads in New South Wales, Department of Lands, July 1989.

Searle C. (1996) Public roads in New South Wales, Department of Land and Water Conservation, 18 Nov 1996.

Willis R.W. (1982) *Notes on survey investigation* (2nd edition), NSW Registrar General's Department, Sydney.