

A Practical Guide to Adverse Possession in Victoria

1. WHAT IS ADVERSE POSSESSION?

Adverse possession is the process whereby title to another person's real property is acquired without compensation by holding the property in a manner that conflicts with the true owner's rights for a specified period of time¹. If the adverse possessor acquires title, the rights of the true owner are extinguished. Adverse possession will, as a general rule, extinguish the title of the true owner to everything above and below the surface².

Initially, for there to be adverse possession, a person had to be in possession of land contrary to the interest of the rightful owner. In particular, in the case of *Leigh v Jack* [1879] 3 Ed D 264, the court held that acts committed upon land, which do not interfere with and are consistent with the purpose to which the owner intends to devote it, do not amount to dispossession.

This decision in *Leigh v Jack* stood for over 100 years but was not followed in the case of *Buckingham County Council v Moran* [1989] 2 All ER 225. In this decision, the court held that there was no special rule that an owner of land who intends to use the land for a particular purpose at some future date could not lose his or her title by adverse possession, even if the possessor's acts did not substantially interfere with the owner's plan for future use of the land.

2. WHAT ARE THE REQUIREMENTS?

There are three main requirements which are as follows:

2.1 Actual Possession

An applicant will need to prove actual possession.

Actual possession must be open and peaceful and not secret or by force. It must not be with the consent of the owner. It means a visible and effectual dominion or control by a person who intends to act as an owner³.

The rightful owner's knowledge of the adverse possession is irrelevant.

An adverse possessor who abandons possession prior to the expiry of the limitation period loses his entitlement to make a claim for adverse possession. However, if adverse possession is abandoned after the expiry of the limitation period, the true owner's title has been extinguished.

2.2 Intention

The onus of proof of possession lies with the party seeking to possess the land. What constitutes intention?

- (a) The use of the land for mere personal convenience will not constitute the relevant intention.
- (b) The fencing of land and the payment of rates suggests the intention to possess.
- (c) There does not need to be a conscious intention to exclude the true owner. "What is required is an intention to exercise exclusive control. And on that basis an intention to control the land, the adverse possessor actually believing himself or herself to be the true owner, is quite sufficient."⁴
- (d) If the objective intention of the possessor is clear, there is no need for inquiry into the possessor's subjective purpose. If, however the objective acts of the possessor are either unclear or ambiguous, the subjective purpose may become a crucial determinant.
- (e) Possession cannot be pursuant to a licence, lease or other grant from the true owner. A claimant's willingness to accept a licence or lease from the true owner is inconsistent with the intention to possess the land.

2.3 Time limitation

In Victoria, in order to adversely possess another party's land, you must be in possession of the land for a minimum of 15 years.

Section 8 of the Limitation of Actions Act 1958 provides no action shall be brought by any person to recover any land after the expiration of fifteen years from the date on which the right of action accrued to him.

Roads and reserves - Where the area claimed is known to Land Registry records as a road, reserve or easement, evidence of 30 years of non-use will need to be supplied.

Where the area claimed includes a road, reserve or easement, evidence of 30 years of non-use will need to be supplied, if the title is to issue free from the encumbrance.

If the land is a road, evidence is required from the Council that it has not been declared or proclaimed as a public highway, nor has it vested in any body or entity pursuant to statute⁵.

If the encumbrance is an easement, the applicant will need to prove that the easement has not been used for 30 years, in order to allow its removal.

3. WHAT ACTS AMOUNT TO ADVERSE POSSESSION?

There are a range of acts which may evidence possession either singularly or cumulatively. These acts include (but are not limited to) the following:

- Enclosure / Fencing

Enclosure is cogent evidence of adverse possession and of dispossession of the true owner⁶.

Enclosure is the strongest possible evidence of adverse possession⁷.

It is noted that "enclosure of an area of land by fencing is clearly a method by which a person can demonstrate that he or she intends to dispossess and has taken possession of the land."⁸

- Occupation by residence / building on the property;

This would usually involve constructing a house on the property or moving into an existing property.

- Leasing the property to other parties;
- Use of the property by planting crops or running livestock;

This may include allowing agistment of cattle, maintenance of trees, plants and garden and the employment of a person to maintain, cut or mow lawns.

- Use of the property for functions, displays or exhibitions;
- The payment of rates and taxes;
- The blocking off of attempts by others to use the property;

The absence of one or more of these items does not necessarily prove lack of possession.

4. HOW IS ADVERSE POSSESSION RELEVANT TO CONVEYANCING?

Contracts of Sale often contain a clause which provides:

"The Purchaser hereby admits the identity of the land sold with that described in the particulars of title offered by the Vendor as the title to such land and no objection shall be claimed or allowed by reason of any discrepancies between the actual area, boundaries, measurements or position of the land as occupied and the same as shown or described in the said particulars of Title nor shall the Purchaser be entitled to call upon the Vendor to amend title or to bear or to contribute to the expense of any amendment of Title."

The practical effect of this clause is that a Purchaser may measure the land which he or she is purchasing to determine whether the title boundaries are consistent with the fence boundaries. If the two are consistent, there is no issue. If the two are inconsistent, there are two possible scenarios which are as follows:

4.1 The actual area that is fenced (and which is occupied) is less than the area described in the particulars of title.

The neighbour that is in possession of the additional land may be entitled to make an adverse possession claim, depending on the circumstances.

If the discrepancy is large enough, the purchaser may have a right to end the Contract (prior to settlement). The principle is set out in the case of *Flight v Booth (1834) 1 Bing NC 370* which provides that where the misdescription is material and affects the subject matter of the contract so that it may be supposed that the Purchaser would never have entered into the contract, the contract can be voided by the Purchaser. Subsequent cases have considered what a fundamental misdescription includes, but have not agreed upon an actual percentage (examples include the cases of *Venture v Maladale (1987) V Conv R 54-206*; *Buckley & Parlas v Drk (unreported) Vic SC, 30/4/93*).

The Purchaser should determine how long the land has been fenced in that manner. The fact that a fence has been replaced may not assist if the previous fence was on the same fence line.

4.2 The actual area that is fenced (and which is occupied) is greater than the area described in the particulars of title.

The Purchaser should obtain two documents from the Vendor:

- A Deed of Assignment of Possessory Rights; and
- A Statutory Declaration which sets out the duration of time that the Vendor has been in possession of the land.

The specific details required in both documents are addressed later in this paper.

It is often preferable to include a clause in the Contract which imposes an obligation on the Vendor to provide the Statutory Declaration and relevant Deed at Settlement. After Settlement, it is often more difficult to obtain the Vendor's consent.

Once the documentation is in order and assuming the adverse possession requirements are satisfied, an adverse possession claim may be made.

5. WHAT DOCUMENTS ARE REQUIRED TO SUBMIT A CLAIM?

WHOLE PARCELS OR SUBSTANTIAL PARTS OF LAND

The following documents are required by Land Victoria:

5.1 Application for a vesting order

A copy is attached to this paper in Appendix 1.

5.2 Payment of fee to Land Victoria

Currently the fees are as follows:

- \$840.00 - with a survey;
- \$630.50 - without a survey

5.3 Statutory Declaration attesting to occupation of the land.

The applicant's statutory declaration should contain the following information⁹:

- (a) The value of the land being claimed;
- (b) The basis upon which the value is calculated;
- (c) The postal address of the land claimed;
- (d) The name and address of the municipality of the district in which the land is located;
- (e) The circumstances in which possession commenced;
- (f) Establish that possession was exclusive and continuous, essentially without interruption;
- (g) Describe how the land is used;

- (h) State who occupied or used it and whether their occupation or use was exclusive, continuous and without interruption;
- (i) Show that the land was completely enclosed either by itself or together with other land (by fences, walls or buildings) as shown on the survey plan or by aerial photograph. Alternatively, if the land is only partly enclosed, explain how exclusive possession was demonstrated and maintained;
- (j) Identify the means of access to the land;
- (k) Describe improvements to the land and their related circumstances;
- (l) Advise who pays/paid the rates;
- (m) State that no acknowledgement of ownership in respect of the claimed land (or any part thereof) has been given;
- (n) Identify the land claimed by reference to the plan of survey or aerial photograph as an exhibit;
- (o) If the period of possession is less than 30 years and the registered owner is a natural person, the statutory declaration must in summary:
 - State that the applicant has no knowledge of any circumstances on the part of the owner which might have extended the limitation period for doing so beyond 15 years; and
 - Give details of any dispute with the registered owner or any other party that is claiming an interest in the land.

5.4 Disinterested Witness Statutory Declarations

A disinterested witness is a person that can provide a statutory declaration in respect to the land claimed, but who does not have an interest in the property.

The disinterested witness declarations should state the witnesses means of knowledge that fences which surround and mark the boundaries of the land

as shown on the plan of survey, have continuously stood in their present position for the past fifteen years and upwards.

The disinterested statutory declaration must:

- Identify the land claimed by reference to the plan of survey or aerial photograph as an exhibit;
- Note how the witness has known the land for at least 15 years;
- Explain how the witness acquired the knowledge (i.e. if they have lived in the area);
- Deal with those parts of the evidence pertaining to occupation, use, enclosure, access and improvements required of the applicant.

5.5 Statutory Declarations from previous owners / Deed of Assignment of Possessory Rights

If the applicant has not been in possession of the land for the full 15 year period, but when combined with previous owners can show that he or she satisfies the limitation period, an adverse possession claim can proceed.

Periods of possession may be aggregated as long as there is no gap in possession (or time begins again)¹⁰.

The statutory declaration from previous owners should contain the information set out in paragraphs 5.3(e) to 5.3(n) in this paper.

The Deed of Assignment of Possessory Rights will need to be stamped at the State Revenue Office. It needs to be drafted carefully so that no stamp duty is payable on the stamping of the deed.

Where an applicant is relying upon previous owners and cannot provide statutory declarations from all previous possessors, practitioners may overcome this difficulty by providing evidence from an additional disinterested witness.

5.6 Rating evidence

Letter from the Council regarding the payment of rates. The letter should;

- Identify the land claimed; and
- Give particulars of the person who, during the last 15 years has been recorded in the municipal records as the rated owner.

5.7 Valuation of land;

A formal valuation is not usually required. A kerbside valuation will suffice.

5.8 Plan of survey, abstract of field records and original surveyors report or aerial photograph.

A survey plan or aerial photographs will usually be required. The survey should be attached to each Statutory Declaration and Deed of Assignment of Possessory Rights.

The surveyor should be properly instructed as the survey is an important document. The surveyor must be prepared to give evidence in court if necessary.

The exceptions where a survey plan is not required are where¹¹:

- (i) the land which is being claimed is wholly enclosed:
- by land to which the applicant has title;
 - by Government roads;
 - by Crown land; or
 - a combination of the above.

or:

- (ii) the application is made:
- by a mortgagee in possession;
 - by a mortgagor seeking to remove an outstanding mortgage that is statute barred; or
 - by one or more co-proprietors against the other co-proprietor.

5.9 Evidence by applicant's solicitor

If the period of possession is less than 30 years, and the true owner is a natural person, a statutory declaration by the applicant's solicitor is required that in summary provides that he or she:

- has made thorough enquiries;
- is satisfied that the applicant has been in adverse possession of the land for at least the last 15 years;
- has no knowledge of any circumstances on the part of the registered proprietor which might have extended the period of limitation beyond 15 years; and
- has given details of any dispute with the registered owner.

Failure to disclose a case or to provide the required documentation may result in the application being refused and any fees paid being forfeited.

STRIPS OR SLIVERS OF LAND

A formal assignment of possessory rights is not required for a small sliver of land which is enclosed with other land owned by the applicant where there is no inconsistency between the chain of possession to the strip or sliver and descent of title to the land owned¹².

In these cases, the proof and items required are:

5.10 Evidence of applicant and prior possessors

Statutory Declarations by the applicant and each prior adverse possessor include the information set out in paragraphs 5.3(a), (b), (e), (g), (i), (m) and (n) in this paper.

The applicant is not required to produce rating evidence.

If the applicant cannot provide statutory declarations from any of the prior adverse possessors, the Registrar may require an increased contribution to the Consolidated Fund or further evidence from disinterested witnesses or a combination of both.

5.11 Surveyor's report

The plan of survey must be accompanied by a report by the surveyor. The report should consider the position, nature and age of the fencing, walls or buildings enclosing the outer boundary or boundaries of the land claimed.

Field records should also be provided.

5.12 Descent of title

The descent of title must be consistent with the chain of possession shown in the other evidence by the applicant.

5.13 Consent of registered proprietor or optional proofs

A consent and acknowledgement by the registered proprietor of the claimed land, stating that the:

- applicant has possessed the land adversely to the title of the registered proprietor and his or her predecessors in title during at least the last 15 years; and
- title of the registered proprietor to the claimed land has been extinguished by the applicant.

Alternatively a statutory declaration by one disinterested witness can be provided which is essentially consistent with the disinterested witness statutory declaration provided for whole parcels of land.

5.14 Evidence by applicant's solicitor

If the period of possession is less than 30 years and the true owner is a natural person, a statutory declaration by the applicant's solicitor must be

produced, which is essentially consistent with the declaration produced by solicitors for whole parcels of land (see paragraph 5.9 in this paper)

6. TORRENS LAND

Section 62 of the Transfer of Land Act 1958 provides that the Registrar may make an order vesting land in an applicant.

The applicant must have filed an application pursuant to section 60 of the Transfer of Land Act 1958 and the Registrar must be satisfied that the applicant has acquired title by possession.

The Registrar will usually be satisfied if the documentation covers the issues set out in section 5 of this paper. However, often requisitions are made by the Registrar which may involve further statutory declarations being prepared by the applicant.

7. GENERAL LAW LAND

General Law Land claims are made under Section 15 of the Transfer of Land Act 1958.

The application must be supported by:

- a survey plan, with an abstract of field records certified by a licensed surveyor (if required);
- search of title;
- Legal Practitioner's Certificate - As legal practitioner, you must satisfy yourself as to the requirements. In particular, the information set out in paragraphs 5.3, 5.4 and 5.5 in this paper would normally be sought.
- Evidence of Possession. This would usually be in the form of Statutory Declarations from the person in possession of the land and Deeds of Assignment of Possession where other parties have been in possession.

8. WHAT OCCURS AFTER THE CLAIM HAS BEEN LODGED?

Section 60 of the Transfer of Land Act 1958 provides that the Registrar at Land Victoria will require that the application is advertised in a newspaper circulating in the City of Melbourne or in the neighbourhood of the land and shall give every person notice who appears to have an interest in the land.

The Applicant will be required to place a copy of the notice in a conspicuous place on the land for a period of not less than 21 days.

After this period, and assuming the Registrar has been provided with proof that the requirements have been satisfied, the application can be granted (unless a caveat has been lodged).

9. ADVERSE POSSESSION OF CROWN LAND / COUNCIL LAND

9.1 Crown Land

No adverse possession against the Crown.

Section 7 of the Limitation of Actions Act 1958 provides that notwithstanding any law in force in Victoria, the right title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any way affected by reason of any possession of such land adverse to the Crown, whether such possession has exceeded sixty years or not.

9.2 Council Land

The introduction of section 7B into the Limitation of Actions Act 1958 in November 2004 exempts council land from claims of adverse possession.

The Act now provides that title to Council Land cannot be adversely possessed, regardless of the period of possession. Council land is defined in section 7B of the Limitation of Actions Act 1958 as land of which a council is a registered proprietor under the Transfer of Land Act 1958. This refers to Torrens Land.

General Law Land owned by a Council is not exempt from an adverse possession claim.

10. CONSOLIDATED FUND CONTRIBUTION

The Consolidated Fund is an indemnity / insurance fund to protect Land Victoria from any claims which are made as a result of adverse possession claims which have been granted by Land Victoria.

The Registrar will grant an application, where the applicant can provide satisfactory proof of 30 years of adverse possession, subject to payment of a contribution.

The contribution is usually 0.5% of the value of the land claimed. The Registrar has discretion to waive the contribution, if he or she believes that granting the application would not impose any risk to the Consolidated Fund.

If the applicant can only prove 15 - 30 years of adverse possession, the Registrar will grant the application, however the amount contributed to the fund is likely to be increased to approximately 1% (and not less than \$50).

11. DISRUPTING AN ADVERSE POSSESSION CLAIM

The true owner may stop time running by:

- Ejecting the possessor and re-entering the land;
- Rejecting the possessor's acts of possession, i.e. by the removal or erection of a fence;
- Instituting proceedings to recover the land.

Section 24 of the Limitation of Actions Act 1958 provides that where any right of action has accrued to recover land and:

- (a) the person in possession of the land acknowledges the title of the person to whom the right of action has accrued; or

- (b) in the case of a foreclosure by a mortgagee, the person in possession or the person liable for the mortgage makes any payment in respect thereof, whether of principal or interest;

the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment.

12. LITIGATION / WHAT TO DO IF A CLAIM IS MADE AGAINST YOUR LAND

If a claim is made against your land, you should receive notice from Land Victoria advising you of the adverse possession claim.

Advice should be sought from a solicitor before any action is taken. If you believe the claim does not have merit or the claim is arguable, you should file a caveat with Land Victoria:

- ➔ forbidding the granting of an application for vesting order, pursuant to section 61(1) of the Transfer of Land Act 1958 (for Torrens Land); or
- ➔ forbidding the creation of the folio pursuant to section 26R of the Transfer of Land Act 1958) (for General Law Land).

You have 21 days from the date that Land Victoria gives you notice to lodge a caveat (and it is advisable to discuss with Land Victoria the final date that a caveat can be lodged).

Once lodged, the caveat will remain valid for 30 days. Prior to the 30 day period lapsing, proceedings should be issued if you "have a good case". A copy of the proceedings should be served on Land Victoria.

The caveat will remain valid for 30 days. After this period, the Registrar is free to process the adverse possession claim.

13. APPLICATION FOR AMENDMENT TO BOUNDARIES, AREA OF POSITION - AN ALTERNATIVE TO LODGING A CLAIM FOR ADVERSE POSSESSION

This should not be confused with an adverse possession claim. It is an application for amendment to boundaries and it is used when there is bona fide occupation and essentially very minor differences to the title and the land being claimed.

The Application is prepared pursuant to section 99 of the Transfer of Land Act 1958. The following documents will also be required in order to lodge the Application:

- Form 53;
- Statutory Declaration by the Applicant;
- Plan of Survey, abstract field records and surveyor's report; and
- Two Statutory Declarations by disinterested witnesses.

Disclaimer

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¹ http://en.wikipedia.org/wiki/Adverse_possession

² Wikrama - Nayake, Voumard, *The Sale of Land*, LBC, 10-87

³ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

⁴ *Bayport Industries Pty Ltd v Watson & Anor* (2006) VConvR 54-709

⁵ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

⁶ *George Wimpey & Co Ltd v Sohn* [1967] CH 487, 511A

⁷ *Seddon v Smith* (1877) 36 L.T. 168, 1609

⁸ *Seddon v Smith* (1877) 36 L.T. 168.

⁹ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

¹⁰ *Shelmerdine & Anor v Ringen Pty Ltd & Anor* [1993] 1 VR 315 at 341

¹¹ Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

¹² Land Victoria, Department of Sustainability and Environment, Your guide to application for a vesting order based on title by adverse possession.

Appendix 1

Example of form

**Application for a vesting Order based on title by possession
Section 60(1) Transfer of Land Act 1958**

Lodged by:

Name:

Phone:

Address:

Ref:

Customer Code:

The Applicant applies for an order vesting the land in the Applicant for the estate specified free of encumbrances

Land:

Applicant:

Estate:

Date:

Signed: