

Adverse Possession

1. **State the Law:** Documentary title holder, remains subject to the rights of adverse possession (s 42(2)(b) *TLA*). Under s 8 and 18 of the *LAA*, after 15 years from the date on which the right of action accrued to AP, the title of the documentary owner of the land will be extinguished and they will be barred from recovering their land.
 - a. Successive periods of AP can be aggregated (*Mulcahey v Curramore*)
2. **Accrual of right**
 - a. Under s 14(1), this right does not accrue unless there is adverse possession
 - i. Requires factual possession and animus possidendi
 - b. When right accrues depends on nature of interest + when AP started
 - i. Present interest: s 9(1): accrues date of dispossession/discontinuance
 - ii. Future interest:
 1. s 10 (1): the day on which the interest is vested in possession
 2. s 10 (2): has 15 years from APs accrual of right or 6 from their own accrual of right to recover, whoever is longer
 - iii. Landlord: end of the term of lease
 1. Periodic tenancies: end of first year or other period, if revived after first period, accrues on last date of rent payment (s 13(2))
 2. Tenancy at will: deemed to end after 1 year (s 13(1))
3. **Factual Possession:** must have had factual control, single and exclusive possession
 - a. Physical control
 - i. Presence of a fence and its purpose (*Abatangelo; Moran*)
 1. Although is not absolutely necessary (*Abatangelo*)
 - ii. Have they dealt with the land as an owner would have? Maintenance, farming, socialising etc. (*Moran; Pye; Abatangelo*)
 - iii. Who has keys (*Pye*)
 - iv. Vehicular access? (*Pye; Abatangelo*)
 - b. Open and not secret
 - c. Peaceful and not by force
 - d. Adverse and not by consent
4. **Animus Possidendi:** intention on one's own behalf to exclude the world at large so far as is reasonably practicable and so far as the law will allow. Question of fact to be decided on the circumstances of the case and with reference to the nature of the land.
 - a. Personal statements may be relevant (*Abbatangelo*)
 - b. Payment of rates: shows intention to create title in themselves
 - c. Enclosure of the land strong indicator (*Abatangelo; Moran*)
 - d. Intention to possess for the time being to the exclusion of all others (*Moran*)
 - e. Intention of true owner relevant to extent it affects the AP's intention (*Moran*)
 - f. Casual acts of trespass for special benefit or possession? (*Abatangelo*)
 - g. Willingness to pay may not be inconsistent with intention to possess (*Pye*)
5. **Discontinuance:** under s 14(2), if the AP discontinues possession the right of action does not accrue unless the land is again taken into AP. Need a lot of evidence to show (*Whittlesea*).
6. **Aggregation:** successive periods of AP by can be aggregated (*Mulcahey*)
 - a. Abandonment by initial AP followed by AP: unless there is no gap, time restarts
 - b. APs who transfer their interest: can be aggregated, last AP has only interest
 - c. APs who dispossess each other: can be aggregated if no gaps, prior possession
 - i. Prior possession = better right (*Mabo*), cannot raise jus tertii (*Perry*)

7. **Stopping Time:** formal re-entry not enough (s 16 *LAA*), need to resume possession or seek a formal declaration.
 - a. Acknowledgements of true owner's title restarts time (s 24 *LAA*)
 - i. Must be to true owner and signed by AP (s 25)
 - ii. Binds successors in title (cannot argue that time was AP) (s 26)
8. **Remedy:** if AP found not to have extinguished title, true owner entitled trespass remedy
 - a. Equitable damages will only be granted where: (*Jaggard; Break Fast Investments*)
 - i. Injury to true owner's rights are small
 - ii. Value is capable of being estimated in money
 - iii. True owner can be compensated adequately by money payment
 - iv. It would be oppressive to AP to grant an injunction
 1. Judged from date the case is heard

This is a difficult standard to meet (*Break Fast Investments*)
9. **Torrens Land:** holds rights subject to rights of AP (s 42(2)(b) *TLA*), and can register their title after limitation period expired (s 60-62 *TLA*)d

NOTE:

- s 7 *LAA*: Crown land not affected by adverse possession
 - s 8: if subsequently sold, right of action accrues when land is transferred
- s 32: Crown can gain title to land through adverse possession
- 7A: no AP against PTV, Vic Rail, 7AB: water authorities, 7B: councils