

High Court of Aus

Victorian Court

Policy considerations

Adverse Possession

What policy lies behind the LAA? Is this policy still relevant today? Should the law distinguish between accidental AP and deliberate AP? Does AP contravene Human Rights?

- Liu (2014) argues that it is unjustifiable to award superior title of a chattel to an occupier who is unaware of the existence of said chattel, especially when it is of a sensitive nature and, as such, should not be regarded as possession on which an adverse possession claim can be based. Liu's position challenges the idea that an occupier of land enjoys paramount claim to everything, irrespective of knowledge of the existence of the items. Here, because [insert factual analysis of problem Q here]. On this basis, it may be suggested that an unjust enrichment approach could be introduced into the common law of finding, where the 'all or nothing' approach produces inequitable results.

Perry v Clissold [1907] AC 73

- High Court of Aus
- Clissold took possession of land and fenced it off, remained there for 10 years.
- Perry compulsorily acquired the land to build a school.
- Clissold sought compensation for the land.
- HCA found he was entitled to compensation and ordered valuation of land.
- Perry appealed on the basis that Clissold had no interest in the land.
- Appeal was unsuccessful.
- A person in possession of land has a perfectly good title against the whole world, except the rightful owner.

Jeffries v Great Western Railway Company (1856) 5 E&B 862

- Possession confers the same rights in respect of goods.

Buckinghamshire County Council v Moran [1989] 2 All ER 225

- UK Court of Appeal
- Moran knew the disputed land belonged to the Council, but thought he could continue using the land until the Council's upcoming road project went ahead.
- Council refused this claim, but made no attempt to enforce ownership during the statutory period.
- Moran fenced off and locked the disputed land, and used it as a garden (his predecessors in title maintained the plot and treated it as a part of their garden).
- Where unequivocal intention to exclude others is demonstrated, AP can be established even when ownership has been acknowledged.
- One need not have an intention to own, only to possess.
- Appropriate level of physical control of the land.

JA Pye (Oxford) v Graham [2003] 1 AC 419

- UK case
- Pye allowed his neighbours the Grahams to use 23 hectares of the land he owned, valued at 10m, under a grazing agreement (short term licence to graze a field).
- Document expressly stated agreement would end on 32 December 1983, and to continue, a new contract would need to be entered into.
- Pye did not enter into a new agreement because he wanted to develop the land, but the Grahams continued to occupy it.
- After 12 years, the Grahams sought to obtain the land under AP.
- Grahams were lawful owners, as Pye has failed to retake possession of his land.

Whittlesea City Council v Abbatangelo [2009] VSCA 188

- Supreme Court of Vic
- The Abbatangelo family made varied use of land which was surrounded by their land on three sides.
- The land legally belonged to the Council.
- They installed a gate and maintained fences on the boundaries of the land without seeking financial contribution from the Council. They also used the land for grazing, shade, shelter, and at times enclosure of the variety of animals they kept. They installed a bathtub, maintained the trees and vegetation, mowed the grass, removed weeds and pests, constructed a cubby house, used the land for sporting and recreational activities.
- Court found that all of these acts, taken separately, may be inadequate, but together were sufficient to make out a claim of adverse possession.
- Acts of possession with respect to only part of the land claimed may in all the circumstances constitute acts of possession with respect to all the claim claimed.
- They dealt with the land in a way an occupying owner would be expected to.
- Short periods of absence not necessarily inconsistent.
- Must intend to 'exclude the world at large' [...] does not need to be a 'conscious intention to exclude true owner' [...] 'an intention to exercise exclusive control' [...] 'the AP believing themselves to be the true owner is quite sufficient'.

Mulcahy v Curramore Pty Ltd [1974] 2 NSWLR 464

- NSW Court of Appeal
- By deed of conveyance, Curramore obtained documentary title to the disputed land.
- Mulcahy contracted to buy from a third party certain other land, and also 'the right title and interest (if any) of the vendor in' the disputed land.
- Mulcahy sought a declaration that he was the owner of the disputed land by reason of adverse possession, or in the alternative, that he had a right of way over portion of it. He sought injunctive relief.
- Two or more successive periods of AP could be aggregated.
- Adverse possession must be open act that is not secret, without consent, is peaceful and adverse to the owner.

Whether aggregating periods of successive AP

In *Mulcahy*, the NSW Court of Appeal held that two or more successive periods of adverse possession could be aggregated. This has subsequently been confirmed by the Victorian Full Court of Appeal in *Shelmerdine v Ringen*, and a single justice in *Roy v Laguna*. This being the case, X and Y will be able to combine their periods of adverse possession to satisfy the requisite 15-year period.

Part-parcel claims (damages in lieu of an injunction)

Jaggard v Sawyer [1995] 1 WLR 269

- UK case
- Defendant constructed a dwelling house in the cul-de-sac, which was in breach of a restrictive covenant.
- Plaintiff sought injunctive relief and failed, the trial judge awarded damages in lieu instead.
- Where (1) the injury to the plaintiff is small, (2) its value is capable of being estimated in money and (3) injunction would be disproportionately oppressive, damages in lieu of an injunction is appropriate.
- The fact that the plaintiff could, at an early stage, have sought interlocutory relief but didn't was relevant.
- The fact the defendant could have sought a declaration of right was also relevant.
- It would weigh against a finding of oppression if the defendant had acted in blatant and calculated disregard of the plaintiff's rights.

Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd [2007] VSCA 311

- Victorian Supreme Court of Appeal
- Break Fast appealed against a decision granting a mandatory injunction requiring it to remove metal cladding attached to parts of the western face of its 12-storey building.
- The metal cladding extends between three and six centimetres into the airspace over the respondent's adjoining property.
- There was evidence that a panel of the cladding fell off Break Fast's building at some point.